

COMMITTEE OF THE WHOLE

Council of the County of Maui

MINUTES

January 27, 2015

Council Chamber, 8th Floor

CONVENE: 9:05 a.m.

PRESENT: Councilmember Don S. Guzman, Chair
Councilmember Stacy Crivello, Vice-Chair
Councilmember Robert Carroll
Councilmember Gladys C. Baisa (out 9:15 a.m.)
Councilmember Elle Cochran
Councilmember Don Couch
Councilmember Riki Hokama (in 10:10 a.m.)
Councilmember Michael P. Victorino
Councilmember Mike White (in 9:15 a.m.)

STAFF: Sharon Brooks, Legislative Attorney
Clarita Balala, Committee Secretary

Ella Alcon, Council Aide, Molokai Council Office (via telephone conference bridge)

Denise Fernandez, Council Aide, Lanai Council Office (via telephone conference bridge)

ADMIN.: Kyle Ginoza, Director, Department of Environmental Management
Patrick K. Wong, Acting Corporation Counsel, Department of the Corporation Counsel
Moana M. Lutey, Deputy Corporation Counsel, Department of the Corporation Counsel
Richelle M. Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel

Seated in the gallery:

Eric Nakagawa, Wastewater Reclamation Division Chief, Department of Environmental Management

Brian A. Bilberry, Deputy Corporation Counsel, Department of the Corporation Counsel

Rod Antone, Executive Assistant, Office of the Mayor

OTHERS: Rosemary Robbins

Colleen P. Doyle, Esq., Hunton and Williams LLP

PRESS: Akaku: Maui Community Television, Inc.

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ITEM NO. 1(3): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION AND STATUS: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI; CIVIL 12-00198 SOM BMK) (CC 13-41)

CHAIR GUZMAN: ...*(gavel)*... Good morning. Welcome to the first meeting on the Committee of the Whole. I'm Don Guzman, the Committee Chair. Before we begin, I'd like to make a few announcements. If you have a telephone or cell phone, please put it on the silence mode. I will introduce the Members that are present today. Member Robert Carroll.

COUNCILMEMBER CARROLL: Good morning, Chair.

CHAIR GUZMAN: Member Gladys Baisa.

COUNCILMEMBER BAISA: Good morning, Chair.

CHAIR GUZMAN: Member Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha. Good morning, Chair.

CHAIR GUZMAN: Member Don Couch.

COUNCILMEMBER COUCH: Good morning, Chair.

CHAIR GUZMAN: And Vice-Chair of the Committee, Stacy Crivello.

VICE-CHAIR CRIVELLO: Good morning, Chair.

CHAIR GUZMAN: And Member Michael Victorino.

COUNCILMEMBER VICTORINO: Good morning, Chair.

CHAIR GUZMAN: Good morning. I'd also like to introduce present today is Corporation Counsel Patrick Wong, as well as Special Counsel's Colleen Doyle and Richelle Thomson. For the Staff we have Sharon Brooks, as well as Clarita Balala. And further announcements, if you'd like to testify, please sign up at the entry area and upon testifying you will be limited to today's agenda, as well as you'll have up to three minutes to testify. We're going to go ahead and check in with our neighbor districts if they're in today. Just a side note, we have no connection with the Hana District so we'll proceed with the Lanai Office. Can you please identify yourself?

MS. FERNANDEZ: Good morning, Chair. This is Denise Fernandez on Lanai.

CHAIR GUZMAN: Good morning, Ms. Fernandez. Also, on Molokai?

MS. ALCON: Good morning, Chair. This is Ella Alcon on Molokai.

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CHAIR GUZMAN: Thank you. Good morning, Ms. Alcon. We'll shift to the Chamber. Are there any testifiers that are signed up?

MS. BROOKS: Yes. The first testifier is Rosemary Robbins.

. . .BEGIN PUBLIC TESTIMONY. . .

MS. ROBBINS: Good morning, everybody. We've been all around this issue on today's sole item for our meeting today, and actually, the TV news last night. And very first item in the paper this morning is also on this, "Injection wells ruling opens county up to civil penalties", and those had certainly been predicted including from the...this microphone here from concerned citizens over years. So since that's available I'm adjusting what it was that I had written when I had come down and done my homework at the end of last week. Was at a funeral celebration after such over the weekend and a lot of people had questions and I wasn't there to talk about what is happening in the government that I couldn't fail to bring this up since they've asked. People want to know what is an executive meeting, and so I'm presuming that there is a legal definition for that, but what I could tell them was that when concerned citizens come that there are excluded from that part of these meetings here. But not to worry that there are comfortable chairs and you can have some light on your shoulders if that's what you out there in the lobby. So, they're concerned about that. They also were also concerned about what it means to have a stay and somebody else at that table said oh that means stall. And so, we've got people who are unhappy, uninformed as to the reasons for some of these things. So, just thank you for taking this up again and it's a huge need and has been for all these years, over a quarter of a century. And so loads of work to be done. And I thank all of you who are gonna get to work on that and know that there are people out there that if they understand what you're doing...I'm certainly encouraging them to come and be able to listen to what you say after they get their chance to say and just hear more about it. So, bless you all. Thank you.

CHAIR GUZMAN: Thank you, Ms. Robinson *[sic]*. Members, any questions or follow-ups? Seeing none, thank you very much for your testimony.

MS. ROBBINS: You're welcome.

MS. BROOKS: There are no further testifiers in the Chamber.

CHAIR GUZMAN: Thank you, we'll check in with our District Offices. On Lanai Office, is there anyone wishing to testify?

MS. FERNANDEZ: There is no one waiting to testify on Lanai.

CHAIR GUZMAN: On Molokai Office, is there anyone wishing to testify?

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MS. ALCON: There is no one here on Molokai waiting to testify.

CHAIR GUZMAN: Thank you very much, ladies, and I will check in with our gallery. Is there anyone wishing to testify? Seeing none, looking like there is no one else. So, Members, at this time without any objections, I will close public testimony.

COUNCILMEMBERS: No objections.

CHAIR GUZMAN: Thank you.

. . .END OF PUBLIC TESTIMONY. . .

CHAIR GUZMAN: Members, today's item, COW 1(3), Litigation Matters (Settlement Authorization and Status: Hawaii Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM BMK). The Committee is in receipt of the following: correspondence dated January 18, 2013, from the Department of Corporation Counsel, requesting consideration of the proposed resolution to authorize settlement of Hawaii Wildlife Fund, et al. v. County of Maui, Civil 12-00198 SOM BMK, and transmitting a copy of the complaint. The complaint alleges violations under the Federal Water Pollution Control Act, also known as the Clean Water Act, caused by the discharge of wastewater into the ocean from injection wells operated by the County at the Lahaina Wastewater Reclamation Facility; correspondence number two, correspondence dated January 20, 2015, from the Department of Corporation Counsel, requesting consideration of the proposed resolution entitled AUTHORIZING THE SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. v. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK. The purpose of the proposed resolution is to authorize settlement of the case. The Committee may consider whether to recommend adoption of the proposed resolution with or without reservations...revisions, excuse me. The Committee may also consider other related actions. Members, this is a lawsuit filed almost three years ago by Hawaii Wildlife Fund, Sierra Club Maui Group, Surf Rider Foundation, and West Maui Preservation Association against the County of Maui for alleged violations of the National Clean Water Act in the operation in injection wells at the Lahaina Wastewater Reclamation Facility. The facility is located at 3300 Honoapiilani Highway, in Lahaina. We are here today at the request of the Corporation Counsel to receive an update of the status of the case and to consider a resolution providing settlement authorization to the Corporation Counsel. Today, we're gonna have our Corporation Counsel here as well as some of the...as well as the special counsel. Corporation Counsel does anticipate that an executive session may be necessary to discuss the questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee. Before we enter into executive session, I would like to ask Corporation Counsel to give the public as well as the Members a short summary of the case, the proceedings, and the facts that are public record.

COUNCILMEMBER VICTORINO: Mr. Chair? Mr. Chair, before we get started even with that.

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CHAIR GUZMAN: Mr. Victorino.

COUNCILMEMBER VICTORINO: Thank you, Chair.

CHAIR GUZMAN: Yes.

COUNCILMEMBER VICTORINO: I would like to ask your indulgence because the question has been brought up by a testifier and it has been brought up to you, me, and many others in what an executive session is basically about? What...I guess, what the reason or the rationale for having an executive session? And I'd like to have that question answered now before we get started with everything, because, I think, the public should understand why an executive session is necessitated, okay. So, I'm asking...

CHAIR GUZMAN: Mr. Victorino, at this time, the point of order is we will discuss that during the time that we motion into executive session and then for discussion that could be part of the discussion.

COUNCILMEMBER VICTORINO: Well, before we go into executive session, is that correct?

CHAIR GUZMAN: Yes, we will call to vote for executive session.

COUNCILMEMBER VICTORINO: I want that question put on the record right now, Mr. Chair.

CHAIR GUZMAN: Well, Mr. Victorino, I am the Chair and you're out of order. We will discuss that during the time that the motion is made during the discussion period of that motion.

COUNCILMEMBER VICTORINO: Excuse me, Mr. Chair, there's no order. I was asking a question. Thank you.

CHAIR GUZMAN: Well, at this time, I'm gonna proceed with the Corporation Counsel's explanation and presentation of the case in accordance with public record. Mr. Wong, can you please make sure that if any facts that are not of public record be held in executive session and any strategies and so forth. And the Members will probably be given an opportunity to ask questions. I would ask Corporation Counsel to screen those questions and to refrain from answering those if determined that those should be answered in executive session. So, you may proceed, Mr. Wong.

MR. WONG: Thank you, Chair. Members, I'd like to acknowledge that Ms. Lutey is also present and we have special counsel, Colleen Doyle, at counsel table. Also, in the gallery is Director of Environmental Management, Kyle Ginoza, and Wastewater Division Chief Eric is in the conference room. This is a, Chair, a very complicated case and although a brief summary would be in order, I think, that for the benefit of this body and for the benefit of the viewing public, I may get into some of the details that are confronting this body and our Department. First and foremost, I'd like to note

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whether or not the Members have received our letter dated January 27th, and the documents...six documents that were...can I ask that those documents be distributed at this time?

CHAIR GUZMAN: Staff. Yes. May the record reflect that they are being distributed to the Committee members.

MR. WONG: Chair, these documents that are being distributed, except for Document No. 6, all the documents are public record and is available at the Federal Court by anyone that may want a copy of it. As I've submitted it to the Committee, it is also a record available for the general public by seeking a request of the copy from the Committee itself. So, the first document is the First Amended Complaint. The second is the Order Granting Summary Judgment for Wells 3 and 4. The third is an Order Granting Summary Judgment for Wells 1 and 2. That is the most recent order that was issued last week for which some reference was made to a news conference and this morning's media reports on the Order from Judge Mollway that was issued last week. Document No. 4 is the Case Docket Report. In the Case Docket Report, it contains every filing that the Plaintiffs have done and that we have done from the onset of this case to the present. Document No. 5 is the Trial Scheduling Order, which is an Order of the Court, and I provided that to you so you can see what has occurred in accordance with the Order and what is to come in accordance with the Order. The last is a brief summary that we put together in our Department, highlighting the Lahaina Wastewater Reclamation Facility Timeline to put this lawsuit into context. Essentially, the Plaintiffs' lawsuit against the County of Maui is asking for and has asked for at its core that the County be required to apply for and comply with an NPDES permit. If you look at the amended...First Amended Complaint, on Page 23, of that Complaint, it has claim for relief. It alleges a violation of the Clean Water Act, as the Clean Water Act prohibits discharges without an NPDES permit. That's essentially what's at stake. I'll pause at this moment to see if any of the Councilmembers have any questions at this time.

COUNCILMEMBER VICTORINO: Mr. Chair?

CHAIR GUZMAN: Yes, Mr. Victorino.

COUNCILMEMBER VICTORINO: Just the for the public's understanding what a NPDES permit is? If you would give the actual name of it so that the public understands, Mr. Wong, please.

MR. WONG: The NPDES permit is a National Pollutant Discharge Elimination System permit.

COUNCILMEMBER VICTORINO: Thank you, Mr. Wong. Thank you, Chair.

MR. WONG: Sure.

CHAIR GUZMAN: Thank you.

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MR. WONG: The permit issued by the Department of Health through authority conveyed to it by the EPA.

CHAIR GUZMAN: Members, I will go down the line and so that to give everyone an opportunity to ask questions in this public forum starting with Mr. Victorino, again.

COUNCILMEMBER VICTORINO: Thank you. And then, Chair, that was one of many questions I have, but for now I'm satisfied with that. I'll let others ask questions. Thank you, Chair --

CHAIR GUZMAN: Thank you.

COUNCILMEMBER VICTORINO: --very much.

CHAIR GUZMAN: Chair White?

COUNCILMEMBER WHITE: Thank you. I don't have any questions at this point, but I do...I'm missing one of the documents, number three.

CHAIR GUZMAN: Staff?

COUNCILMEMBER WHITE: I have one, two, four, five, six. I appreciate the Department and you providing these documents. It's very helpful.

CHAIR GUZMAN: Thank you. We'll get back to you, Mr. White. Vice-Chair Crivello?

VICE-CHAIR CRIVELLO: I want to know if what is...do we have a permit at this stage, if it was prior to this allegation that we did not have the Department of Health permit?

MR. WONG: Member Crivello, thank you. Very good question. I don't wanna confuse anyone at this point by answering it this way. The Department of Environmental Management and the County of Maui has had in place from the inception of the injection wells, has had and has been compliant with, the permit called a UIC permit. It's an Underground Injection Control permit, and I've asked the Department to bring our permitting information with us so I can share that with you. This lawsuit was the first time that the topic of an NPDES permit was raised. So, the Department has a current draft that we've been negotiating with the Department of Health on the UIC permit. The UIC permit is issued by the Department of Health under the Safe Drinking Water Branch of the Department of Health. It's regulated by the Department of Health under a different set of laws. The lawsuit alleges a violation of the Clean Water Act, and there's a different branch of the Department of Health that administers that component of it. So up until most recently, the Department did not have, and we did not apply for until several years ago an NPDES permit. So currently, we do have an application pending with the Department of Health for an NPDES permit. And the Department of Health to date has not yet acted upon that application.

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CHAIR GUZMAN: Any further questions?

VICE-CHAIR CRIVELLO: Not at this time.

CHAIR GUZMAN: Okay. Mr. Couch?

COUNCILMEMBER COUCH: Thank you, Mr. Chair. Just for more background information, how long has the County been injecting?

MR. WONG: Off the top of my head...

MS. DOYLE: Thirty...almost 30 years.

MR. WONG: Thirty years.

MS. DOYLE: Yeah.

MR. WONG: Approximately 30 years.

COUNCILMEMBER COUCH: Is that a standard practice throughout the country--the injection wells?

MR. WONG: I can tell you that there are injection wells throughout the State of Hawaii and there are injection wells throughout the country. Whether or not those injection wells require an NPDES permit, I'll suggest to you that this really is a case of first impression. And I don't believe nationwide that all the injection wells are currently or all operators and municipalities that may have an injection well currently have an NPDES permit for the operation of their injection wells.

COUNCILMEMBER COUCH: And the alternative generally is outfall, is that correct?

MR. WONG: Quite frankly the outfall in the County of Maui existed prior to the injection wells being created and implemented. And if you look at our historical information, I know that at the very least at Mala...at Mala Wharf there was a direct outfall. So, an outfall is a pipeline essentially from the Wastewater Treatment Plant into the ocean and essentially a long pipe that allows direct dumping into the ocean. And with an NPDES permit, we could have an outfall directly into the ocean and that permit would simply monitor the effluent at the point that it enters the ocean.

COUNCILMEMBER COUCH: Okay, so that's interesting. Is there anybody in the State that does have outfall still?

MR. WONG: City and County of Honolulu still, to my knowledge, has direct outfalls. Not certain if the other counties also have direct outfalls.

COUNCILMEMBER COUCH: Okay.

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MR. WONG: We do not.

COUNCILMEMBER COUCH: All right. Thank you, Chair. It just was confusing 'cause you can dump directly into the ocean, but if you dump it into the ground, and then it may get into the ocean, it's...something's wrong. So, I'm just confused. Thank you.

CHAIR GUZMAN: Did you want to ask a follow-up question?

COUNCILMEMBER COUCH: No, that's all right.

CHAIR GUZMAN: To get more clarity...okay. Thank you. We'll move on to Ms. Cochran.

COUNCILMEMBER COCHRAN: Thank you, Chair. And, yeah, I think, Mr. Wong, you mentioned that the heart of the matter is about the NPDES permit, but, I think, also is finding ways to utilize the reclaimed water in order to not have to resort to injection wells too. So, I know, we're all in the process of figuring out strategies and plans and how to do that. So, definitely, I think, that would be the best route. Also, I know, the permit is needed and all that, but, I think, if there's just a way to when that happens, that happens, great. But, in the meantime, you know, focus on the reuse of this reclaimed water, which is perfectly good to use and people want it. And, I know, that there is a cost to it as Mr. Ginoza will point out. But I am completely wholeheartedly supportive of that. And, of course, it's directly related into my Committee that I chair. So, that's just a comment I have. Thank you. Thank you, Chair.

CHAIR GUZMAN: Thank you. Ms. Baisa?

COUNCILMEMBER BAISA: Thank you very much Chair. No questions at this time. I am open to listening. I'd like to hear a little bit more about the solutions that are being proposed before I get into questions. Thank you.

CHAIR GUZMAN: Okay, thank you. Mr. Carroll?

COUNCILMEMBER CARROLL: No questions at this time.

CHAIR GUZMAN: Okay, thank you. We'll go one more round. Mr. Victorino?

COUNCILMEMBER VICTORINO: Well, thank you. And, I guess, my question actually, Mr. Chair, will be at the Department at a later point. So, nothing at this time. I really would like to ask the Department a couple of questions, but they're not here at this moment to be. So, I'll wait till they come. Okay, thank you.

CHAIR GUZMAN: Thank you. Mr. White?

COUNCILMEMBER WHITE: Thank you, Chair. I guess, one of the questions I have is that because there are so many injection wells throughout the State of Hawaii and elsewhere in the mainland U.S., to your knowledge, what are...are we the only ones

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that are under the gun so to speak or are there are others that are facing the same kind of challenge?

MR. WONG: Thank you, Member White, for that question. I'll answer it this way. We have the unfortunate benefit, I believe, of being the one and only municipality that is accused of at this point noncompliance with the Clean Water Act. It does not, however, preclude any other challenges for other municipalities and other organizations that currently operate injection wells. But as I sit here before you, I believe, we are the only unfortunate group to be dealing with this topic directly.

COUNCILMEMBER WHITE: So, have you heard anything from any of the organizations that are dealing with this that if they're successful in this challenge that they'll go on to Kihei, onto Kahului, or onto others elsewhere in the State, or around the nation?

MR. WONG: Also a good question, Member White. Quite frankly in anticipation of that, we have, our Department and the Department of Environmental Management has looked at overall operations and are in the process of developing strategy to deal with that in anticipation of prospective claims being lodged against the County for other injection wells that we currently operate. So too are other municipalities and other organizations, I understand, nationwide looking at our circumstance as it impacts and may impact their municipality as it relates to injection wells and the application of the Clean Water Act jurisdiction. So, yes, we are being looked at on a broader basis. Whether or not there's claims that may be lodged against other areas, the conservative side of me says that we should anticipate that that's the circumstance, and prepare for it, and address the concerns before they're raised. And that's what we're doing.

COUNCILMEMBER WHITE: And, to your knowledge, have they, the Plaintiffs, provided any proof of harm to nearshore waters at this point? The reason I ask that is that we have lots of activities that go on, on land, and all of us know that there are bodies of water all over the place under the island and, you know, most of us are aware that those bodies of water make their way to the ocean eventually. So, this is not an unusual set of circumstances, but have they, you know, with that knowledge, have they provided any proof of harm either in this location or is there proof of harm in other locations due to other activities?

MR. WONG: That's a very difficult question to answer at this phase. As I reflect upon it, I also need to measure how our comments are levied or may be levied in the future hearing on damages. Quite frankly, to date, I'm not satisfied that there's any evidence that establishes harm attributed to our injection wells. And the R-1 water that, quite frankly, is sufficient for land application, sufficient for use with all types of irrigation, but it's curious that the land application has or may develop into some argument that it translates into harm to the nearshore. I don't believe that the evidence is sufficient to establish what's necessary in terms of the definition of harm. But I'm trying to be as careful as I can because in August we still have the issue of penalties that the Federal Court will adjudicate or may, we may get to that phase. So, quite frankly, it's, I think, that if you were to compare a direct outfall component where the outfall would immediately impact or come into contact with the ocean point in our injection wells,

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the travel time that is established by the tracer study is there's a significant delay in time. And, I think, it's upwards of, the initial entry point is upwards of eight months. I might be a little generous on the time frames but, you know, it's not a input into the ocean as direct as a ocean outfall would be. So, with that said, I think, that it's hard to discern whether or not, in my view, our use of the injection wells is causing such great harm as contended.

COUNCILMEMBER WHITE: Okay, thank you. And, Chair, the reason I ask that question is that from my perspective anything we apply on land by, it will be an uphill, and using the R-1 water for irrigation, it's eventually going to go down into the water table anyway. So, it's creating more of a delay, but I'm not sure that the final outcome changes significantly. So, it's a very interesting challenge that we face when we were told we can't use an injection well, but we can use an outfall. And I don't think any of us want to go back to an outfall. So, anyway, appreciate you bringing this forward and I appreciate all the work that Corp. Counsel has done on this. Thank you.

CHAIR GUZMAN: Thank you, Mr. White. Members, I just wanted to remind you that feel free to ask the questions. The Corporation Counsel will determine whether the response needs to be in executive session. So, this segment of being more public or transparent I wanted to have prior to we going into executive session to talk about legal strategies, and immunities, and liabilities. So, that being said, Vice-Chair Crivello?

VICE-CHAIR CRIVELLO: Thank you, Chair. I note that it's mentioned where scientific studies were done by the University of Hawaii, as well as the U.S. Geological Survey. I'm wondering if any kind of research or report was conducted by NOAA as well as the U.S. Fish and Wildlife Service, because they also is to restore and maintain the biologic integrity of our navigable waters as well as the aquatic life.

MR. WONG: Thank you, Member Crivello. I do not believe that those organizations have conducted any studies, at least to our knowledge, as it relates to our injection wells and the impact it may have on the nearshore environment. So, the quick answer is I do not believe any such studies are...have been conducted by those organizations.

VICE-CHAIR CRIVELLO: Would that be a consideration or considered 'cause they come from the Federal level and they too are part of the what, I think, the Clean Water Act? And, I guess, on our behalf, is that something that we may or may not want to consider?

MR. WONG: In the context of the ongoing litigation, I don't know that a study by those organizations would impact our position moving forward one way or the other. But I haven't thoroughly considered that and certainly may look at that a little bit closer to determine whether or not we ask those organizations if they would consider performing such a study.

VICE-CHAIR CRIVELLO: Okay, thank you.

MR. WONG: Sure.

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CHAIR GUZMAN: Thank you. Mr. Couch?

COUNCILMEMBER COUCH: I already asked. Thank you.

CHAIR GUZMAN: Ms. Cochran, any further questions?

COUNCILMEMBER COCHRAN: No further questions at this time.

CHAIR GUZMAN: Okay. Ms. Baisa?

COUNCILMEMBER BAISA: None at this time.

CHAIR GUZMAN: Mr. Carroll? Okay. Are there any other questions from the Members? At this time, I will also acknowledge the presence of Kyle Ginoza, Director of Environmental Management Department. Are there any questions for Mr. Ginoza? And as stated earlier, Corp. Counsel shall screen the questions. Seeing none, oh, yeah, Mr. Couch.

COUNCILMEMBER COUCH: And Mr. Wong, I'm sure you'll stop me if or stop Mr. Ginoza from answering.

MR. WONG: Okay, stop. No, I'm just joking.

COUNCILMEMBER COUCH: So, Mr. Ginoza, I recall from several budget sessions we've had that for the...is the Department for the Lahaina Treatment Plant working on mitigating any kind of outfall, not outfall, but any kind of stuff going into the injection wells? I seem to recall we've put money in to clean the water up and then start looking into doing something else with the water. Is that correct?

MR. GINOZA: Yes, so, in preparation for being able to reuse and recycle more water from our treatment plants, a couple of years ago we...well, last year we finished a project to increase the ultraviolet disinfection capacity at our plant. So, that's what Mr. Wong had said that we put R-1 water down the injection wells because the excess R-1 water that we are unable to reuse at this time. Coupled with that is our project to do an elevated storage basically by putting a one million gallon tank at roughly at a 200 foot elevation, it would allow us to provide a pressurized recycled water system for irrigation for properties in the Honokowai and Kaanapali areas. And so that is a project that the Council funded for construction for Capital Improvement. I believe, it was in Fiscal 2014. We were unable to complete that project as I mentioned about three or four months ago to this Council because of issues we've had with acquiring the land required for the elevated storage. And so, you will see that come up again in the upcoming Fiscal '16 Budget for the land acquisition and finishing the design. And we expect construction to commence after that. So, it is something that really for us it started when you put in that Waipuilani project in South Maui, but we have taken the direction of the Council and the Mayor to increase the amount we reuse and that commitment toward extending the infrastructure. So, we are, we are actively trying to

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reuse more water. Fortunately, the foresight of some of our Planning Commission and you folks to put conditions to help allow us to fund that definitely helped in our ability to expand the reuse system. So, we are in the process of it but these types of unforeseen delays have caused some of the projects or that project to be pushed back.

COUNCILMEMBER COUCH: But were any of these started prior to July of 2012, 'cause I'm pretty sure that we were talking about this in my first term, which started in 2011?

MR. GINOZA: It is something that's been talked about really since the '90s to do these reuse type projects. Part of it is just a matter of how much we fund in addition to the replacement programs for the gravity and, I mean, the sewer system. Yes, these projects have been contemplated for years but exactly, I mean, do you have a project in specific or?

COUNCILMEMBER COUCH: Mainly on the West Maui one. I could have sworn we started discussions on the budget and actually put money in the budget for the ultraviolet stuff prior to 2012...to July of 2012, which is the date of the suit.

MR. GINOZA: Yes, so, when I came in, I guess, that was January 2, 2011, one of my initial discussions was with or early on it was with the Environmental Protection Agency to talk about our Underground Injection Control permit, and our ability to provide fully disinfected water into our injection wells. And so, we did reach agreement with them to do that project in two thousand...it was agreed upon in 2011 and, I believe, funded either in 2011, 2012, and that was that retrofitting the existing ultraviolet channels and adding another one. And so, it was to get the full disinfection ability at Lahaina Wastewater Reclamation Facility. So that was really the first project that I was involved in from 2011, when I started was providing capability at the plant at the facility first, and then the next step would be to provide the elevated storage so that it would be available for the users on a 24-hour basis.

COUNCILMEMBER COUCH: Okay, thank you. And, you know, I just want to see if I can clear this up in my mind and we may have to do it in executive session. We have a permit to do the injection from the same agency that would have to give us a permit for the NPDES?

MR. GINOZA: That's correct.

COUNCILMEMBER COUCH: So, they're saying it's okay to inject but it's not. They won't give us a permit to monitor it. All right, I think, that's getting close to.

MR. WONG: Chair, if I may?

CHAIR GUZMAN: Yes, you may.

MR. WONG: I was simply going to suggest that there are two different permits, one that is necessitated by the Clean Water Act and one that is not. And we are currently, the Department, and in conjunction with our Department, are currently dealing with the

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UIC permit in its draft form. And we have engaged in, Kyle and his Department, has engaged the Department in Health in the terms and conditions of the draft UIC permit. And, quite frankly, there are items that are in there that make it look like an NPDES permit, but it's not an NPDES permit. And so, the lawsuit, again, as I started out by saying the claim for relief is that we apply for and we comply with an NPDES permit. So for all intents and purposes if we had an NPDES permit today, and we had a direct outfall, we would be compliant as long as we were complying with the permit. Okay.

COUNCILMEMBER COUCH: All right.

MR. GINOZA: If I may expound on the difference between the UIC and the NPDES is looking at two different branches of either the EPA or the Department of Health, State Department of Health, where the UIC is to protect safe drinking water sources. So, it's under the Safe Drinking Water Branch. The NPDES is a Clean Water Branch or Clean Water Act protection permit. So, that's where two different branches of State government are looking at two different permits.

COUNCILMEMBER COUCH: Yeah, but they're both the EPA, is that correct? It's just two different departments in the EPA, one saying yeah, go ahead. And the other one saying well, we don't think we want to give you a permit.

MR. GINOZA: Well, I wouldn't say that they're saying go ahead. I mean, the UIC permit initial...the initial permit expired in March of 2009. So, in the late summer of 2008, we applied to renew that permit, and because of the concerns circling around the UIC permit, we've been every year getting an administrative extension. And so every roughly August, September, we apply for an extension of our UIC permit. But to date, we have not secured a permit approval of another five or five-year permit. And so that's what we've reviewed the draft of the UIC permit, and we hope to be able to get a full permit for the UIC rather than administrative approvals.

COUNCILMEMBER COUCH: Okay. And just again to clear up, Mr. Wong, we did apply for an NPDES? It's just that they're not processing it? Or they're not...it's stuck in their loop wherever?

MR. WONG: Correct, to the extent that we've, I think, done all that we could. We have applied for it. We haven't received any response from the Department of Health. We have periodically reached out to the Department and to its attorney, inquiring as to the status, and the best response that we've received is that it's still being looked at.

COUNCILMEMBER COUCH: Okay, and we did that before the lawsuit, after the complaint?

MR. WONG: Actually, we did it after the complaint was filed and after our hearing on our Motion to Dismiss --

COUNCILMEMBER COUCH: Okay.

MR. WONG: --before the Court. So, it was November of 2012 is when we applied for it.

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COUNCILMEMBER COUCH: Okay, and that's part of their concern is that we didn't apply for it and now we have. And, I guess, I don't understand what their grounds are but, again, that's the strategy part so I'll stop at that.

MR. WONG: Sure.

COUNCILMEMBER COUCH: Thanks.

CHAIR GUZMAN: Members, any other questions?

COUNCILMEMBER VICTORINO: Chair?

CHAIR GUZMAN: Yes, Mr. Victorino.

COUNCILMEMBER VICTORINO: Thank you. My question would be to you, Mr. Ginoza. First of all, as Mr. Wong has stated that if we had a direct outfall we would be in compliance versus injection wells or more or less. My question to you is what is the normal length of an outfall from land mass to where the outfall actually comes out in the ocean? Do you have any idea? Is there a mile, two miles, half a mile, you know, 'cause I understand Oahu basically has a problem because their outfall is too close to nearshore. But, I mean, I don't want to get into Oahu and ours. Its two different entities at this point.

MR. GINOZA: So, as Mr. Wong had stated we did have primary outfalls --

COUNCILMEMBER VICTORINO: That's correct.

MR. GINOZA: --prior to the Clean Water Act in 1972. So, we built treatment facilities and as part of that analysis in the Environmental Impact Statement, it was looking at should we do an outfall or an injection well. And it was deemed to do an injection or injection wells. As far as the distance of an outfall, really it's dictated by being able to mix, you know, what is coming out of outfall, having a good mixing area, and that's kind of how far you put it out. So, if you look at what Honolulu did they put theirs out two miles out. So, you know, they get good mix in the ocean. And their issue is a little bit different from ours because they have primary treatment, basically very little treatment before they're put in the outfall. And so as part of their consent decree was that they go to secondary treatment. What we have in Lahaina is tertiary treatment, even one step further, and it would be something that we don't know exactly how far we'd have to put the outfall. It would depend on the kind of mixing you'd have at the end of pipe. But if it's similar conditions to Oahu then it would be roughly two miles out that the pipe would run along the...out to where the point of discharge would be.

COUNCILMEMBER VICTORINO: And, I guess, the other question begs to be asked and it's been asked by Mr. Couch and Mr. White, but other municipalities have similar issues or especially island counties, or island nations, 'cause it's not only here, I know, this is a challenge in the Caribbean and other areas that I have been in and done some work

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on this, and you would be surprised what happens there versus what happens here. But that's here nor there. Different rules, different strokes for different folks, you know, and, I guess, that's what it comes down to. But your application right now...first of all has not ever been answered, yes or no, as far as the NPDES, has never been answered, yes or no?

MR. GINOZA: That's correct.

COUNCILMEMBER VICTORINO: And so it just floats in limbo for as many years as we've had it in there?

MR. GINOZA: To date, yes.

COUNCILMEMBER VICTORINO: To date? Yeah, okay. And the other one is just a basic extension...annual extension, excuse me, each and every year so that they allow you to continue until they decide whether they want to give it you for a five-year or ten-year term?

MR. GINOZA: That's correct.

COUNCILMEMBER VICTORINO: And no rationale has been given and maybe we're crossing lines, Mr. Chair, and, you know, Corp. Counsel, you tell me when I cross the line, please. But no rationale has been given to us why this long period of uncertainty?

MR. GINOZA: The rationale is that they want the State to do a water quality survey, which...or study, which I don't know if they've completed yet, but it's not things that they're waiting on the County for. And so they're not penalizing the County for not being able to continue our permit because they're not waiting for us on anything. And it is something that we do both have a Federal Underground Injection Control permit and a State Underground Injection Control permit. And they're quite coupled. And so, they're waiting for some data in order to make that final determination.

COUNCILMEMBER VICTORINO: And when you talk State, you talking Department of Health?

MR. GINOZA: Yes.

COUNCILMEMBER VICTORINO: Okay, just so that people are clear on what Department administers EPA's regulations for this State --

MR. GINOZA: Yes.

COUNCILMEMBER VICTORINO: --because we're under District IX.

MR. GINOZA: Yes.

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COUNCILMEMBER VICTORINO: However, we do not have any representation in the State. It is basically done, enforced by the Department of Health through decrees and whatever from the EPA.

MR. GINOZA: There is representation from Region IX, but that power has been delegated to Department of Health.

COUNCILMEMBER VICTORINO: So, Region IX, I said District IX, I apologize. Region IX has representation in Hawaii?

MR. GINOZA: Well, by representation there are staff members from Federal Environmental Protection Agency, Region IX, that reside and work on Oahu, related to wastewater.

COUNCILMEMBER VICTORINO: Okay, cause I had been told otherwise. But I'm glad for that clarification. Thank you, Mr. Chair. I'll let others to...allow others to ask questions.

CHAIR GUZMAN: Thank you. Ms. Cochran.

COUNCILMEMBER COCHRAN: Thank you, Chair. And, I believe, the complaint started a couple years before a litigation matter was even put out there on the table. It was community residents had queries and they were asking of this County certain questions and when there was no response, that triggered, and no political will of any kind, that's what triggered this, and so now we are. I disclosed I was part of this group and, you know, there was concerns and due to lack of, again, like I said, you know, response. So, we're responding now. I think, I still have my solution is utilize that water so there is no use. I understand after heavy rain events, there's no way we can 100 percent never, ever, ever, ever use it. But, I think, if we could minimize the use big time. And so my question to Mr. Ginoza is Deputy Director Miyamoto was here the other day and he mentioned about scalping from the different pump stations. What is that? And is that to help address perhaps the lack of utilization of the reclaimed water?

MR. GINOZA: You're correct that one of the biggest challenges for us in the reuse of water is the fact that we have, you know, "x" million gallons of treated affluent and yet because we don't have large agricultural customers, it's difficult to get the water to the customers where the plant is. And so in the '90s when kind of the reuse program started off, we had hoped that, you know, the Pioneer Mill and Maui Land and Pine would still be in operation and utilize a blend of ditch water and reuse water. But with the demise of both companies as far as their agricultural operations, that put a strain on our ability to expand the reuse, particularly for agricultural use. So, in our exploration of what to do with treated affluent, one possible solution is to try to utilize recycled water closer to where there might be users. And so one solution that we're currently exploring is the ability of the County to do some treatment more upstream of the regional treatment facility. So, for instance, like in Lahaina, we take treated wastewater from Puamana and through a system of gravity lines and force mains take it all the way to Honokowai. So, one opportunity that we want to explore is say, for

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instance, in the Shaw Street area where by the Aquatic Center, where we have a large park, that's somewhere we might be able to utilize recycled water. So, we're looking at the ability to put a smaller treatment facility and generate recycled water there to be able to use it there rather than send it all the way up to Honokowai. So, that's the idea of the scalping plant, we'd scalp off water, treated R-1 water, to be able to utilize closer to the users. Of course, what that really entails is developing almost like a mini treatment plant kind of more distributed out through the community. And what happens is so you might be able to take if 1 million gallons enters that facility, maybe we have users for say 800,000 gallons, we treat it, and use it for irrigation with R-1 water, and the rest of the effluent would then keep going down the line to the treatment plant. So, with one or two or three of these types of plants, more recycled water could be used closer to, or away from the regional facility, and there would be less demand on the regional facility. So, that's what we're exploring. Unfortunately, there's none in Hawaii that are built, so we've been exploring areas in the mainland where it's much more prevalent and effectively used. So, the mainland has a similar situation where in many places they have a regional plant that may be miles from little communities. And so, communities will send their effluent to a regional plant for miles, and what they found is it's hard to then try to reuse the water so they do a scalping plant in the community, utilize whatever recycled water they can for irrigation, and send what they cannot to the regional plant for some type of disposal. So, we're exploring that model of kind of duplicating treatment capacity in a sense but being able to utilize more recycled water. So, that's something that as we try to explore ways to reuse water, the traditional method of just collecting everything at a regional plant and then sending everything out has proved to be quite expensive and something that we'd like to explore other ways to solve that problem.

COUNCILMEMBER COCHRAN: Okay, well thank you. I appreciate the Department looking at different solutions and possibilities. So, looking forward to more discussion on that. Thank you, Director Ginoza. Thank you, Chair.

CHAIR GUZMAN: Thank you. Is there any other questions for the Department? Seeing none, Mr. Wong, are you requesting to convene a executive session?

MR. WONG: Chair, if the body is satisfied with our overall presentation, and if the Chair is ready for us to go into executive session, quite frankly, I would request that at this moment.

CHAIR GUZMAN: Thank you, Mr. Wong. Prior to...before we enter into...I ask for a motion for the question. Can you explain, if possible, what stage of the Federal Civil proceedings we are at right now? What does the partial summary judgment and how did we get to this point procedurally?

MR. WONG: Sure. Chair, if you look at the documents that have been provided to you, again, the First Amended Complaint is document one. If you look at document number four, that is the Case Docket Report and the Case Docket Report is directly from the Federal District Court, and it has an accurate timeline of the events having occurred before the Federal District Court. And so with the initiation of the Complaint

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actually in April of 2012, moving forward, if you look at that document, it has verbatim entries from the Court. And as of August of 2012, we started our initial settlement conference with the Court and the Plaintiffs. And if you see that we've done at least ten settlement conferences over, even upwards of 12 settlement conferences, with the Plaintiffs and the Court and the Federal Court over time. The most recent of which was about two weeks ago, where we conducted a settlement conference by telephone conference call. And we did in accordance with the rules, actively engage the Plaintiff's counsel in settlement negotiations, a document of which we received, which I intend to present to this body in executive session. The terms of which I'll tell you over the last 12 or so settlement conferences, we've worked on different iterations of the proposed settlement document. The Federal Court awaits our response after this conference today. And some of you may have seen the news report, the Plaintiffs' attorney was referencing today's meeting, and the reason why he was doing that is I kept him informed that we've requested to present to this body our resolution requesting settlement authority. Moving forward, I have a follow-up conference with the Plaintiffs attorney this week. I also will be reporting back to the Federal Court this week. And in terms of what happens next, the scheduling conference statement, excuse me, order which is document number five, if you look on Page 1, it has that the nonjury trial before Judge Mollway is set for August 11, 2015, at 9:00 a.m. There's also a pretrial conference on June 30th, and throughout the document it does have, moving forward, all the required dates to comply with, that we need comply with the Federal Court. Significantly, on Page 3, is a settlement conference to be held on May 4, with Magistrate Barry Kurren, at 10:30. We are required to submit a confidential settlement conference statement to the Court by April 27. My hope is that we provide you with all the options, all of which we will do in executive session. And from that we will develop our response to the Federal Court and our compliance with the Federal Court's Scheduling Conference Order. So, that's the most current information except for getting into the details of Chief Judge Mollway's Order that she issued last week, finding that the Clean Water Act jurisdiction extends to the operations of Injection Well 1 and 2, which is she used essentially the same legal basis as she did in extending jurisdiction of the Clean Water Act to Wells 3 and 4. So, for all intents and purposes all wells operating in the Lahaina Reclamation or the Wastewater Reclamation Facility are subject to Clean Water Act jurisdiction by order of the Federal Court.

CHAIR GUZMAN: Thank you, Mr. Wong.

MR. WONG: Sure.

CHAIR GUZMAN: At this time, the Chair will entertain a motion to convene in executive meeting for the Committee Item 1(3), pursuant to Subsection HRS 92-5(a)(4), of the Hawaii Revised Statutes, to consult with legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee.

VICE-CHAIR CRIVELLO: So moved, Chair.

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COUNCILMEMBER VICTORINO: Second.

CHAIR GUZMAN: Moved by Vice-Chair Crivello, seconded by Mr. Victorino. Discussion. I believe that we need to answer Mr. Victorino's initial question. What is an executive session? And I would have Corporation Counsel explain what executive session is to the Members as well as to the public.

MS. LUTEY: Thank you, Chair. I'm Deputy Corporation Counsel. The executive session is allowed by statute, and really what that does is permit us the opportunity to discuss with you, our clients, certain confidential matters that we really can't discuss in public, especially an ongoing active litigation such as this. So, it would allow us to include discussing things like litigation strategy, our thoughts on the potential liability, conveyance of settlement demands, and so forth. And these are things that are not matters of public record, but we are also bound by the rules of ethics that apply to all attorneys to discuss that confidentially with our client. So, that's the purpose of an executive session.

COUNCILMEMBER VICTORINO: Thank you very much, Mr. Chair. I appreciate that.

CHAIR GUZMAN: Thank you. Any further discussion? Seeing none, all in favor say aye.

COUNCILMEMBERS: Aye.

CHAIR GUZMAN: All opposed, say no. I have eight ayes and one excused, Ms. Baisa.

VOTE:	AYES:	Chair Guzman, Vice-Chair Crivello, and Councilmembers Carroll, Cochran, Couch, Hokama, Victorino, and White.
	NOES:	None.
	EXC.:	Councilmember Baisa.
	ABSENT:	None.
	ABSTAIN:	None.

MOTION CARRIED

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

CHAIR GUZMAN: At this time, I'm going to take a short recess and reconvene the meeting so that we could set up for executive session. So, the time is 10:15. Probably we'll take about five minutes to ten minutes. So, let's say ten minutes...at ten...a ten-minute recess for reset of the Chambers to secure the Chambers. . . .(gavel). . .

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RECESS: 10:15 a.m.

RECONVENE: 12:28 p.m.

CHAIR GUZMAN: . . .*(gavel)*. . . We will reconvene in open session. Members, I will defer this matter and that will conclude our meeting for today. And thank you very much for all your patience and all your hard work to the Administration and to the Staff. Thank you. Have a wonderful afternoon. . . .*(gavel)*. . .

ACTION: DEFER PENDING FURTHER DISCUSSION.

ADJOURN: 12:28 p.m.

APPROVED:



DON S. GUZMAN, CHAIR
Committee of the Whole

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Transcribed by: Delfey Fernandez


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CERTIFICATE

I, Delfey Fernandez, hereby certify that the foregoing represents to the best of my ability, a true and correct transcript of the proceedings. I further certify that I am not in any way concerned with the cause.

DATED this 17th day of February 2015, in Wailuku, Hawaii.


Delfey Fernandez