

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

May 6, 2016

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Committee of the Whole, having met on April 15, 2016, makes reference to County Communication 15-6, from Councilmember Mike White, relating to litigation matters.

By correspondence dated April 4, 2016, the Department of the Corporation Counsel transmitted a proposed resolution entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON & WILLIAMS LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT." The purpose of the proposed resolution is to authorize \$350,000 in additional compensation for special counsel Hunton & Williams LLP for the appeal in this case, for a total compensation not to exceed \$3,400,000.

Your Committee notes the First Amended Complaint in the case alleges violations of the Federal Water Pollution Control Act, also known as the "Clean Water Act," and other laws, arising out of the County's operation of injection wells at the Lahaina Wastewater Reclamation Facility, and seeks injunctive relief, penalties, and attorney's fees and costs. The case was designated Civil 12-00198 SOM-BMK before the United States District Court, District of Hawaii.

Your Committee notes Section 3-6(6), Revised Charter of the County of Maui (1983), as amended, authorizes the Council to retain or employ, by a vote of two-thirds of its entire membership, special counsel for any special matter presenting a real necessity for such employment. Charter Section 3-6(6) also requires that the compensation, if any, to be paid for the services be specified. The Council previously approved the

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employment of special counsel by Resolution 12-127, and increased compensation limits by Resolutions 14-52, 14-99, 14-137, 15-35, 15-74, 15-101, and 16-3.

Your Committee also notes it received a number of written testimonies either opposing an increase in special counsel compensation or saying the money should be put toward facility improvements rather than toward the appeal.

While constrained in its ability to discuss litigation strategy in the open meeting while the case is on appeal, your Committee noted a desire to provide an explanation of the case, including its complexity and importance.

Noting the case has been active for more than four years, a Deputy Corporation Counsel provided background on the Lahaina injection wells and an overview of the case.

The Deputy noted that prior to construction of the Lahaina Wastewater Reclamation Facility, there was an ocean outfall, or a pipeline, in Lahaina used to discharge untreated wastewater into the ocean. In the 1970s, the facility was constructed using Federal Clean Water Act funding. The facility was first developed with several goals: to cease using the outfall, treat the wastewater, and start to develop land-based uses for treated recycled water. The remaining goal was to dispose of any remaining recycled water in an environmentally sound manner.

The Deputy said that in the 1980s and 1990s, when sugar cane and pineapple were still viable crops in West Maui, the County intended that the recycled water be used for irrigation. When cultivation of those crops in West Maui ceased in the 1990s, that avenue for large-scale reuse of the water vanished. Resorts started to proliferate along the coast of West Maui, and today the resorts and the Kaanapali golf courses are the primary customers for the recycled water.

The Deputy further said the need for the recycled water is seasonal and dependent on the weather. The injection wells are a mandatory

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backup for disposal of any unneeded recycled water, pursuant to applicable permits. All of the water at the facility is treated to the R-1 water quality standard, which is the highest recycled water quality in the State and is just below what would be acceptable for drinking water, called R-0. The facility has underground injection control permits issued by the State Department of Health and the United States Environmental Protection Agency. Authority for those permits is pursuant to the Safe Drinking Water Act, the Federal law that protects public drinking water supplies.

According to the Deputy, the County must consider how and when to develop new distribution lines and associated costs. There are capital costs and operational costs involved, including energy consumption used to pump water to distant locations. At some point the benefits of using recycled water at distant points may be outweighed by the environmental and financial costs associated with constructing the lines and storage tanks, and using fuel to pump the water to those distant locations.

The Deputy noted that in April 2012, four groups joined together to sue the County, alleging that the County needed a National Pollutant Discharge Elimination System permit to dispose of the unused recycled water into the facility's disposal wells, and claiming that this disposal water harmed the coastal water and marine life. The University of Hawaii and other organizations conducted testing at the facility using fluorescent dye put into the wells. Some of that dye was detected offshore three months later. The researchers continued looking for the dye and concluded that the majority of the dye showed up approximately eight months after it was put into the wells and the entire travel time was four years or longer. Hydrogeological modeling of the recycled water flow shows that after it goes into the wells at the Lahaina facility it mixes with groundwater and gradually makes its way, as does all water on the island, to the ocean, over approximately a two-mile stretch of coastline.

The Deputy explained this research showed that the wells were operating as they were designed to, using the earth's natural processes to further filter the recycled water. In an effort to address the plaintiffs' concerns, in 2012, the Department of Environmental Management

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applied for an NPDES permit for the facility with the State Department of Health. That permit application remains under consideration almost four years later. From the County's point of view, the Clean Water Act does not apply to disposal of treated recycled water into groundwater that eventually makes its way to the ocean over the course of months or years. The Department of Health has never required an NPDES permit for the facility or any similar well in the State. The Deputy advised the Clean Water Act is not designed to regulate groundwater, which is the territory of the Safe Drinking Water Act.

The Deputy said United States District Court Judge Susan Mollway developed a new theory of legal liability under the Clean Water Act in this case.

Your Committee notes the Clean Water Act regulates the discharge of "any pollutant to navigable waters from a point source."

The statute defines "point source" as "any discernible, confined and discrete conveyance, including . . . any . . . conduit . . . , from which pollutants are or may be discharged." In a novel interpretation, Judge Mollway found groundwater to be a "conduit" and, therefore, ruled the County cannot operate the Lahaina facility's injection wells without an NPDES permit.

The Deputy noted the County believes Judge Mollway's "conduit theory" is an impermissible extension of the Clean Water Act to areas it was never intended to regulate.

The Deputy further explained that in November 2015, the County and the plaintiff groups settled the penalty phase of the lawsuit. The settlement was to allow the County to appeal Judge Mollway's liability rulings and the ruling that the County had fair notice that the Clean Water Act applied to the disposal of recycled water into groundwater, despite never having been told by State or Federal regulators that this was so. If the County is unsuccessful in its appeal, under the settlement terms it will need to construct one or more projects, totaling \$2.5 million, aimed at increasing recycled water use in West Maui.

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Your Committee notes the Department provided copies of the County's Opening Brief filed in the appeal on March 21, 2016. The Department also provided copies of two amicus curiae (friends of the court) briefs filed on March 28, 2016.

The County's Opening Brief states:

The district court impermissibly expands NPDES permitting in two ways. It requires a permit for the County's disposal into groundwater—a non-navigable water. It also requires a permit for a non-point source discharge simply because groundwater containing the County's wastewater eventually reaches the ocean.

The Deputy noted that, assuming there are no unexpected issues, this increase in compensation for special counsel should be sufficient to cover the County through oral arguments, which the Department anticipates will be set sometime in 2017, and the end of the appeal.

Based on the information received and the recommendation of the Department, your Committee voted 8-0 to recommend adoption of the proposed resolution. Committee Chair Guzman, Vice-Chair Crivello, and members Baisa, Carroll, Cochran, Couch, Victorino, and White voted "aye." Committee member Hokama was excused.

Your Committee of the Whole RECOMMENDS that Resolution _____, attached hereto, entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON & WILLIAMS LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT," be ADOPTED.

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This report is submitted in accordance with Rule 8 of the Rules of the Council.



DON S. GUZMAN, Chair

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Resolution

No. _____

AUTHORIZING AN INCREASE IN FUNDING RELATED TO
THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON & WILLIAMS LLP,
IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHEREAS, by Resolution No. 12-127, the Council authorized the employment of special counsel HUNTON & WILLIAMS LLP ("special counsel") to represent the County of Maui in matters relating to Hawaii Wildlife Fund, et al. v. County of Maui; and

WHEREAS, by Resolution Nos. 14-52, 14-99, 14-137, 15-35, 15-74, 15-101, and 16-3, the Council authorized increases in total compensation for trial preparation, motions, appeal and, if necessary, trial, for a total compensation of \$3,050,000; and

WHEREAS, on November 17, 2015, the United States District Court, District of Hawaii, entered judgment in Civil No. 12-00198 SOM-BMK; and

WHEREAS, on December 14, 2015, the County filed a Notice of Appeal of Hawaii District Court Civil No. 12-00198 SOM-BMK, in the United States Court of Appeals for the Ninth Circuit and was assigned Docket No. 15-17447; and

WHEREAS, the Corporation Counsel has requested authorization to raise the compensation limit for the employment of special counsel by an additional \$350,000 for appeal, for a total compensation not exceeding \$3,400,000; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That the Council hereby approves and authorizes an increase in compensation for the employment of special counsel by \$350,000, for a total compensation not exceeding \$3,400,000; and

2. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, and the Director of Finance.

APPROVED AS TO FORM
AND LEGALITY:



RICHELLE M. THOMSON
Deputy Corporation Counsel
County of Maui