



June 9, 2020

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408

Via Electronic Mail Only

Richelle M. Thompson
First Deputy Corporation Counsel
richelle.thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-00198 SOM-KJM (D. Haw.)

Ms. Thompson,

On behalf of plaintiffs Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation and West Maui Preservation Association, we respectfully reject the settlement you proposed in your letter of May 30, 2020.

The basic premise of your proposal—that the Hawai'i Department of Health (DOH) should have the final word on whether the County requires a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit for discharges from the Lahaina injection wells—is fundamentally flawed. As the Hawai'i district court made clear in this case years ago, the federal courts, not DOH, are the ultimate arbiters of whether the County requires an NPDES permit. *See Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 991 (D. Haw. 2014) (“If this court requires a permit, the DOH and the EPA cannot supersede a decision by this court by determining that an NPDES permit is not required”); *see also San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) (“a court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the [Clean Water Act] even though the regulating agency determined that the discharge was not subject to the requirement of a permit”); *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002) (allowing citizen suit despite prior agency determination of no NPDES permit requirement, because “Congress [has] empowered citizens to pursue enforcement of the Clean Water Act when all procedural requirements [are] satisfied”).

As you know, the Hawai'i district court previously concluded that discharges from the Lahaina injection wells are “functionally equivalent to a [direct] discharge into the ocean itself” and, accordingly, require an NPDES permit. *Id.* at 994. We fully expect the Court will reach the same conclusion on remand.

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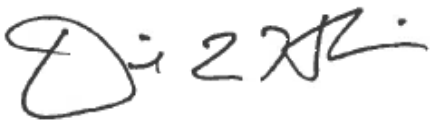
In the interest of sparing the parties the expenditure of limited time and resources on additional litigation with an all-but foregone conclusion, we offer the following settlement counterproposal for the County's consideration:

1. The parties stipulate to entry of judgment that discharges of treated wastewater from the Lahaina injection wells without an NPDES permit violate the Clean Water Act;
2. The parties further stipulate to plaintiffs' entitlement to an award of fees and costs for the proceedings before the U.S. Supreme Court—which resulted in an opinion flatly rejecting as "unreasonable" the County's position that pollutant discharges from the Lahaina injection wells are exempt from NPDES permitting simply because they pass through groundwater before reaching the ocean, *County of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020)—in an amount to be determined through negotiation or motion practice;¹ and
3. The County fulfills the obligations set forth in paragraphs 8 through 13 of the parties' 2015 settlement agreement (Dkt. No. 259).

By promptly settling, the County would avoid incurring additional expenses for outside counsel. Moreover, the County would not have to pay our fees and costs for work on remand in the event that we prevail, which we think is likely.

Please let us know the County's position on this settlement counterproposal.

Regards,



David L. Henkin

DLH/tt

cc: Moana M. Lutey (via electronic mail)

¹ The parties previously settled plaintiffs' claims for fees and costs for the initial round of proceedings in the district court, as well as for proceedings before the 9th Circuit.