EARTHJUSTICE

October 3, 2019

Via hand delivery

The Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: No. 18-260, *County of Maui v. Hawai'i Wildlife Fund, et al.*

Dear Mr. Harris,

I am counsel of record for Respondents in *County of Maui v. Hawai'i Wildlife Fund, et al.*, Case No. 18-260, which is scheduled for argument on November 6, 2019. We write to apprise the Court of a development that may affect the case.

On September 20, 2019, the Maui County Council adopted a resolution approving settlement of the case. On September 25, 2019, the Chair of the Council directed the County's Corporation Counsel to execute a settlement agreement consistent with the Council's resolution and to file papers with this Court to resolve the case. A copy of the Council Chair's September 25, 2019 letter, which includes the Council's resolution authorizing settlement, is attached.

As noted on page 5 of the Council Chair's letter, the Corporation Counsel has raised questions whether the Council has the authority to settle the case. We have contacted Petitioner's counsel to ascertain how they intend to respond to the Council's direction and to discuss notifying the Court of these developments, but they have not provided a definitive response.

In light of the imminence of argument in this case and press reports about the Council's action, we felt that it was incumbent on us to notify the Court of these events. Thank you for your attention to this matter.

Regards,

David Lane Henkin
Counsel of Record for Respondents

Attachment
cc: Elbert Lin, Counsel of Record for Petitioner

MID-PACIFIC 850 RICHARDS STREET, SUITE 400 HONOLULU, HI 96813
T: 808.599.2436 F: 808.521.6841 MPOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

September 25, 2019

MEMO TO: Moana M. Lutey
Corporation Counsel

F R O M: Kelly T. King
Council Chair

Kelly T. King

SUBJECT: **RESOLUTION 19-158, ENTITLED "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT CASE 18-260"** (PAF 19-173)

Please find attached a copy of Resolution 19-158, entitled "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT CASE 18-260," adopted on September 20, 2019.

On behalf of your client, the Maui County Council, may I please request the Department of the Corporation Counsel promptly:

1. Execute a settlement agreement consistent with Resolution 19-158; and

2. Take other necessary action, including filing papers with the United States Supreme Court and, as needed, other actions, to resolve the case consistent with Resolution 19-158.

Especially in the context of its legislative history, as set forth below, the resolution makes clear the Council has exercised its authority under the Charter to direct the Corporation Counsel to settle the case on the County's behalf.

May I respectfully suggest you note the following history:

1. At the Council meeting of **April 24, 2019**, the Council considered my resolution, entitled "REQUIRING SETTLEMENT OFFERS IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, RELATING TO THE CLEAN WATER ACT, TO BE TRANSMITTED TO THE COUNCIL FOR APPROVAL OR DISAPPROVAL," which was transmitted by County Communication 19-378. The resolution was approved as to form and legality by the Department of the Corporation Counsel.

   The resolution, if adopted, would trigger a two-step process under Section 3.16.020, Maui County Code. First, the Corporation Counsel and the Special Counsel would be directed to transmit all settlement offers to the Council. Second, the Council would then be able to adopt a resolution to approve or disapprove any settlement offer on the County's behalf.

   At the meeting, you advised the Council the first step in the process was not necessary because the Department of the Corporation Counsel would voluntarily transmit all settlement offers to the Council, as reported on page 1 of Governance, Ethics, and Transparency ("GET") Committee Report 19-112.

   Following your statement, the Council referred County Communication 19-378 to the GET Committee to allow for deliberations in response to any subsequent settlement offers.

2. On **May 2, 2019**, the Department of the Corporation Counsel wrote to the GET Committee with the following statement:

   > This memo is to provide notification to the GET Committee that a settlement proposal/revision has been received by this office in the above-identified matter.
   >
   > The terms of the proposal are consistent with the prior settlement authority approved by the County Council pursuant to Resolution 15-75 and Resolution 15-107...

The document did not attach or otherwise describe the new settlement proposal, but rather attached the existing 2015 partial settlement agreement.

3. I responded with correspondence dated **May 2, 2019**, regarding the Department of the Corporation Counsel's professional obligation to promptly submit settlement offers to its client.

4. On **May 10, 2019**, the Department of the Corporation Counsel transmitted to the Council's GET Committee a resolution, entitled "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET NO. 18-260," attaching settlement offers. The resolution was approved as to form and legality by the Department of the Corporation Counsel.

5. On **May 13, 2019**, the Department of the Corporation Counsel answered general questions regarding settlement procedures and stated: "This office is able to inform the Council that it has received a settlement demand within three days."

6. At its all-day meeting of **May 20, 2019**, the GET Committee considered the resolution transmitted on May 10, 2019.

   Testifiers and Committee members raised concerns about terminology in the resolution that appeared to restrict the Council's ability to act on the County's behalf to approve the case's settlement, which would be inconsistent with the resolution's purpose. The questioned terminology said the settlement agreement would include "such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel," which some said inappropriately allowed the Corporation Counsel to usurp the Council's authority.

   With guidance from the Department of the Corporation Counsel, the Committee conducted a line-by-line review of the settlement terms included in the proposed resolution. The Department of the Corporation Counsel raised concerns as to the merits of some terms, but never questioned the Council's authority.

Throughout its lengthy deliberations, the Committee understood that the pending question was whether the Council should settle the case under the proposed terms, not whether the Council had the authority to settle the case.

7. At its reconvened meeting of **May 23, 2019**, the GET Committee reviewed a revised proposed resolution, transmitted by the Department of the Corporation Counsel earlier in the day, which deleted the terminology that had caused concern. The resolution was approved as to form and legality by the Department of the Corporation Counsel.

   A Deputy Corporation Counsel advised that the language was from "a standard clause" in resolutions authorizing settlement and was not intended to restrict the Council's authority. I thanked the Deputy for submitting the revised proposed resolution, and the Committee then voted 8-0 to accept the new resolution language.

   The Committee met in executive session for nearly four hours. The purpose of the executive session was, in part, to review "a proposal that the Mayor's Office is going to present," according to a statement by the Department of the Corporation Counsel as reflected in the meeting minutes for the open session portion of the meeting.

8. On **August 16, 2019**, *The Maui News* published an opinion piece by Mayor Michael P. Victorino urging the Council to not settle the case. He expressly acknowledged the Council's authority to settle the case and raised arguments as to why the Council should not exercise the authority. "Despite rhetoric aimed at persuading our lawmakers to withdraw from the Supreme Court, Maui County's appeal is not to 'gut' the Clean Water Act," he wrote.

9. At its meeting of **September 3, 2019**, the GET Committee received public testimony from dozens of people, including County employees. All of the testifiers expressed their views on whether the Council should settle the case. The meeting convened at 9:03 a.m. and was recessed at 8:38 p.m. No one from the Department of the Corporation Counsel or any other County department questioned the Council's authority.

10. At its reconvened meeting of **September 6, 2019**, the GET Committee voted to recommend adoption of a further revised resolution, entitled "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT CASE 18-260." The meeting included participation by the Department of the Corporation Counsel and the Managing Director, serving as Acting Mayor. The reconvened meeting commenced at 1:31 p.m. and adjourned at 9:20 p.m. No one from the Department of the Corporation Counsel or any other County department questioned the Council's authority.

11. By correspondence dated **September 11, 2019**, the GET Committee requested the Corporation Counsel's review and approval of a resolution consistent with the Committee's recommendations.

12. By correspondence dated **September 12, 2019**, the Department of the Corporation Counsel transmitted a revised proposed resolution, entitled "AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT CASE 18-260." The correspondence did not include any advice that the Council lacked authority. The resolution was approved as to form and legality by the Department of the Corporation Counsel.

13. On **September 13, 2019**, Committee Report 19-112, recommending adoption of the resolution, was listed on the September 20, 2019 Council meeting agenda. The Committee Report expressly noted that "the settlement [was] within the Council's exclusive authority."

14. At the Council meeting of **September 20, 2019**, five months after deliberations commenced, the Department of the Corporation Counsel for the first time questioned the Council's authority to settle the case.

    The Council considered the concerns raised by the Department of the Corporation Counsel, but did not find them persuasive, and subsequently adopted Resolution 19-158.

> No specific Charter provisions were cited as restricting the Council's authority. If there are no pertinent Charter provisions, I would note Section 2-2, Revised Charter of the County of Maui (1983), as amended, which states: "All powers of the county shall be carried into execution as provided by this charter, or, if the charter makes no provisions, as provided by ordinance or resolution of the county council." Resolution 19-158 provides for the County's settlement of the case.

With oral argument set for November 6, 2019 at the United States Supreme Court, I would suggest time is of the essence. Therefore, I would appreciate receiving a status report on the case's settlement by **October 1, 2019**. To ensure efficient processing, please include the relevant PAF number in the subject line of your response.

Thank you for your prompt attention to this matter.

paf:dmr:19-173n

cc: Edward S. Kushi, Jr., First Deputy Corporation Counsel
David Henkin, Esq., Earthjustice, Counsel for Plaintiffs
Elbert Lin, Esq., Hunton Andrews Kurth, Special Counsel for the County of Maui

Resolution

No. 19-158

AUTHORIZING SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT CASE 18-260

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court ("District Court") on April 16, 2012, Civil 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, District Court granted Plaintiffs' motions for partial summary judgment; and

WHEREAS, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement"); and

WHEREAS, the 2015 Settlement Agreement was lodged with District Court on September 24, 2015, and following Federal government review pursuant to 40 C.F.R. §135.5, District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015; and

WHEREAS, pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed District Court's decision to the Ninth Circuit Court of Appeals 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

WHEREAS, the County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition 18-260; and

Resolution No. 19-158

WHEREAS, in accordance with Section 3.16.020(F), Maui County Code, the Department of the Corporation Counsel may transmit to Council settlement offers involving claims not specified by the Council pursuant to Section 3.16.020(D), Maui County Code; and

WHEREAS, the Department of the Corporation Counsel has received from Plaintiffs' counsel and transmitted to the Council's Governance, Ethics, and Transparency Committee, "Confidential Settlement Communication – FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019), attached hereto as Exhibits "A" and "B" ("Plaintiffs' 2019 Settlement Proposals"); and

WHEREAS, in open session on September 6, 2019, at the reconvened September 3, 2019, meeting of the Governance, Ethics, and Transparency Committee, the Committee revised the terms of paragraph four of Exhibit "B" to read as follows:

"As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit—which could be 'an equivalent control document' (see Hawaii Administrative Rules §11-55-01)—for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells."; and

WHEREAS, having reviewed the facts, circumstances, ramifications, and consequences regarding the case and pending appeal before the U.S. Supreme Court, and being advised in the premises, the County Council wishes to authorize the settlement; now, therefore,

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

1. That it hereby approves settlement of the case under the terms set forth in the Plaintiffs' 2019 Settlement Proposals, as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;

3. That it hereby authorizes the Director of Finance to satisfy said settlement of the case; and

4. That certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY

Department of the Corporation Counsel
County of Maui

get:misc:026areso01

EARTHJUSTICE

April 26, 2019

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408[1]

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
Moana.Lutey@co.maui.hi.us
Edward.Kushi@co.maui.hi.us
Richelle.Thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

For more than a decade, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "the Community Groups"), represented by Earthjustice, have sought to work with the County of Maui to address the harm to the nearshore marine environment associated with use of the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). We have never expressed or shown any interest in having the County spend money on litigation or pay Clean Water Act penalties to the federal treasury. On the contrary, the Community Groups have consistently sought to encourage the County to invest its taxpayer dollars to find solutions, including investments in infrastructure to increase re-use of treated wastewater from the LWRF to meet the irrigation needs of West Maui agriculture, golf courses and commercial landscaping.

Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

[1] Please note that, in the spirit of public transparency, our preference and request is to have this settlement offer be made public and not be sealed for purposes of County deliberations. We cite Federal Rule of Evidence 408 here solely for the purpose of ensuring that this good faith settlement offer will not be used against us in any court proceedings.

MID-PACIFIC 850 RICHARDS STREET, SUITE 400 HONOLULU, HI 96813
T: 808.599.2436 F 808 521 6841 MPOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

EXHIBIT "A"

wastewater, to increase the beneficial reuse of that treated wastewater, and to ensure that any wastewater that is injected does not harm the marine environment. As long as the County is making good faith efforts to achieve these goals, we provide assurances that the Community Groups will not bring additional litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells. We also provide assurances that the Community Groups will not bring litigation against businesses and other consumers of recycled water from the LWRF who are irrigating responsibly, so as not to cause pollution of waters of the United States. We are, after all, deeply committed to increasing beneficial reuse of recycled water from the LWRF.

Specifically, we offer to settle the above-captioned case as follows:

1. The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for all proceedings before the Supreme Court.

2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County (1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells (Settlement ¶ 8); (2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of $2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui (Settlement ¶¶ 9-12);[2] and (3) would pay a $100,000 penalty to the U.S. Treasury (Settlement ¶ 13).[3]

---

[2] We understand that, as part of the current budgeting process, the County may include far more than $2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

[3] As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

3. Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and Ninth Circuit Court of Appeals. *See* Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Dec. 29, 2015); Order, *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447 (9th Cir. Apr. 25, 2018). As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.

4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.

5. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.

6. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. The parties also recognize the scientific studies showing the specific impacts of the LWRF injection wells on the nearshore marine environment and commit to addressing those impacts as stated above.

7. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

We hope that the foregoing settlement will not only resolve the pending litigation, but will promote a more cooperative relationship between the County and the Community Groups, allowing us to move forward and work together on behalf of the people of Maui to address the challenges posed by the LWRF injection wells.

We appreciate your prompt attention to this time-sensitive matter. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) should you wish to discuss any aspect of this settlement offer.

Respectfully,

David L. Henkin
Isaac H. Moriwake
Attorneys for the Community Groups

DLH/tt

EARTHJUSTICE

April 26, 2019 (with May 9, 2019 edits)

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRE 408[1]

By Electronic Mail Only

Moana Lutey
Edward Kushi
Richelle Thomson
Department of the Corporation Counsel
County of Maui
Moana.Lutey@co.maui.hi.us
Edward.Kushi@co.maui.hi.us
Richelle.Thomson@co.maui.hi.us

Re: *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 18-260 (U.S. S. Ct.)

Counsel,

For more than a decade, Maui community groups Hawai'i Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation and West Maui Preservation Association (collectively, "the Community Groups"), represented by Earthjustice, have sought to work with the County of Maui to address the harm to the nearshore marine environment associated with use of the injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). We have never expressed or shown any interest in having the County spend money on litigation or pay Clean Water Act penalties to the federal treasury. On the contrary, the Community Groups have consistently sought to encourage the County to invest its taxpayer dollars to find solutions, including investments in infrastructure to increase re-use of treated wastewater from the LWRF to meet the irrigation needs of West Maui agriculture, golf courses and commercial landscaping.

Now that the County has a new Mayor and a new Council, we are hopeful that we can work productively together. We provide this offer in the interest of bringing to a close the litigation over the LWRF injection wells, which is now pending before the United States Supreme Court and, with the national attention such a case attracts, threatens the County of Maui's reputation as a champion of environmental quality and stewardship. We offer to work cooperatively and in good faith with the County to reduce reliance on the injection wells to dispose of treated

[1] Please note that, in the spirit of public transparency, our preference and request is to have this settlement offer be made public and not be sealed for purposes of County deliberations. We cite Federal Rule of Evidence 408 here solely for the purpose of ensuring that this good faith settlement offer will not be used against us in any court proceedings.

EXHIBIT "B"

wastewater, to increase the beneficial reuse of that treated wastewater, and to ensure that any wastewater that is injected does not harm the marine environment. As long as the County is making good faith efforts to achieve these goals, we provide assurances that the Community Groups will not bring additional litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells. We also provide assurances that the Community Groups will not bring litigation against businesses and other consumers of recycled water from the LWRF who are irrigating responsibly, so as not to cause pollution of waters of the United States. We are, after all, deeply committed to increasing beneficial reuse of recycled water from the LWRF.

Specifically, we offer to settle the above-captioned case as follows:

1. The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for all proceedings before the Supreme Court.

2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County (1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells (Settlement ¶ 8); (2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of $2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui (Settlement ¶¶ 9-12);[2] and (3) would pay a $100,000 penalty to the U.S. Treasury (Settlement ¶ 13).[3]

---

[2] We understand that, as part of the current budgeting process, the County may include far more than $2.5 million in next year's budget to fund projects to divert treated wastewater from the LWRF injection wells for reuse. If the County does that, it should readily be able to satisfy this settlement provision.

[3] As mentioned, we have no desire to have the County pay penalties to the U.S. Treasury. The parties were required to include this relatively modest penalty in the settlement in order to secure approval from the Environmental Protection Agency, which reviews all settlements in Clean Water Act citizen suits pursuant to 33 U.S.C. § 1365(c)(3).

3. Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and Ninth Circuit Court of Appeals. *See* Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, *Hawai'i Wildlife Fund, et al. v. County of Maui*, Civ. No. 12-000198 SOM BMK (D. Haw. Dec. 29, 2015); Order, *Hawai'i Wildlife Fund, et al. v. County of Maui*, No. 15-17447 (9th Cir. Apr. 25, 2018). As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.

4. As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells.

5. As long as the County makes good faith efforts to reduce its reliance on injection wells to dispose of treated wastewater at its other wastewater treatment facilities, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for its injection wells where legally required, the Community Groups will not bring litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of those injection wells.

6. The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.

7. The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. In settling this case, the County makes no admission regarding whether the LWRF injection wells have an adverse effect on the nearshore marine environment.

8. The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

We hope that the foregoing settlement will not only resolve the pending litigation, but will promote a more cooperative relationship between the County and the Community Groups, allowing us to move forward and work together on behalf of the people of Maui to address the challenges posed by the LWRF injection wells.

We appreciate your prompt attention to this time-sensitive matter. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) should you wish to discuss any aspect of this settlement offer.

Respectfully,

David L. Henkin
Isaac H. Moriwake
Attorneys for the Community Groups

DLH/tt

COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that RESOLUTION NO. 19-158 was adopted by the Council of the County of Maui, State of Hawaii, on the 20th day of September, 2019, by the following vote:

MEMBERS	Kelly T. KING Chair	Keani N. W. RAWLINS-FERNANDEZ Vice-Chair	G. Riki HOKAMA	Natalie A. KAMA	Alice L. LEE	Michael J. MOLINA	Tamara A. M. PALTIN	Shane M. SINENCI	Yuki Lei K. SUGIMURA
ROLL CALL	Aye	Aye	No	No	No	Aye	Aye	Aye	No

M. Clark

DEPUTY COUNTY CLERK

No. 18-260

IN THE SUPREME COURT OF THE UNITED STATES

COUNTY OF MAUI

Petitioner,

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB - MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

PROOF OF SERVICE

I, David L. Henkin, counsel for Respondents Hawai'i Wildlife Fund, Sierra Club – Maui Group, Surfrider Foundation and West Maui Preservation Association, hereby certify that on this 3rd day of October, 2019, I caused one copy of the October 3, 2019 letter from David L. Henkin to the Honorable Scott S. Harris, Clerk of Court, to be served by Federal Express, priority overnight delivery on the following counsel:

HUNTON ANDREWS KURTH LLP
ELBERT LIN
Counsel of Record
951 East Byrd Street,
East Tower
Richmond, Virginia 23219
Phone: (804) 788-7202
Counsel for Petitioner

I further certify that all parties required to be served have been served.

David L. Henkin
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Phone: (808) 599-2436
dhenkin@earthjustice.org
Counsel for Respondents