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KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION

OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

For a New Special Use Permit to
Supersede Existing Special Use Permit
to Allow A 92.5-Acre Expansion and
Time Extension for Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72
And 73

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
RESPONSE TO DEPARTMENT OF
ENVIRONMENTAL SERVICE, CITY
AND COUNTY OF HONOLULU'S
JANUARY 27, 2017 PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

EXHIBITS 1-2

CERTIFICATE OF SERVICE

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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RECEIVED

Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403) which states as follows:

“14. Municipal solid waste shall be allowed at the WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.”

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO’S RESPONSE TO DEPARTMENT OF ENVIRONMENTAL SERVICE, CITY AND COUNTY OF HONOLULU’S JANUARY 27, 2017 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Pursuant to Honolulu Planning Commission Rule § 2-74, Intervenors Ko Olina Community Association (the “Association”) and Maile Shimabukuro (“Ms. Shimabukuro,” and together with the Association, “KOCA”) submit this response to Applicant Honolulu Department of Environmental Services’ (the “ENV”) Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed January 27, 2017 (“ENV’s Findings”).

I. INTRODUCTION

The Decision and Order that the Planning Commission enters in this matter will cover the following four issues: (1) the diversion of waste from the Waimanalo Gulch Sanitary Landfill (the “Landfill” or “WGS�”); (2) the mitigation of the Landfill’s effects on the community; (3) the ENV’s reporting obligations and the enforcement power; and (4) the final closure of the Landfill.

There should be no disagreement among the parties regarding the diversion of waste from the Landfill, the mitigation of the Landfill's effects on the community or the ENV's reporting obligations and the related enforcement right. The ENV admits that it wants "maximum diversion" from the Landfill. *See* 2011AP 1/11/12 Tr. at 157:23–25 (Steinberger); 2011AP 4/11/12 Tr. at 94:7–9 (Steinberger). Consistent with that admission, the ENV proposed in its findings of fact filed on May 2, 2012 that by **January 1, 2014**, the Landfill would close to most municipal solid waste. *See* Ex. 1 at 33 (5/2/12 ENV's proposed findings: "MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGS� up to **January 1, 2014**, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City."). After that date, MSW was only to be allowed at the Landfill under limited circumstances. *See id.* Although the ENV's current proposed findings seek to postpone the closure of the Landfill to most MSW until **December 31, 2026**, the community has already waited three years longer than the ENV promised in 2012. It is past time to hold the ENV to its proposal and close the Landfill to most forms of municipal solid waste. The record supports imposition this condition.¹

¹ By January 1, 2013, the third boiler was expected to be operational. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger). There is no basis for routinely sending combustible waste to the WGS� after that date. The third boiler has the capability to burn all putrescible wastes, including all sewage sludge, medical waste, and food waste. 2011AP 1/11/12 Tr. at 71:7–10, 75:13–22, 90:3–20, 114:25–115:5, 123:23–24, 174:1–6, 203:25 (Steinberger); 2011AP 4/11/12 Tr. at 163:12–16, 171:16–172:10, 196:20–24 (Steinberger).

With respect to reporting requirements and enforcement rights, KOCA proposes retaining certain conditions from the prior order and expanding other conditions. For example, KOCA has proposed notification requirements to the surrounding community in the event that the Landfill releases leachate or waste, as happened in December 2010 and January 2011 to the detrimental impact on the community. It is important that this Commission, the Land Use Commission and the public are better informed so that they may exercise oversight for the protection of the community. ENV should not have any objection to increased transparency and accountability.

With respect to mitigation, KOCA proposes to retain certain conditions from the prior order and expand other conditions. For instance, KOCA has proposed that the ENV implement and maintain a landscaping plan for the Landfill so that it is less of a visual blight on the community. This Commission must consider the adverse effects on surrounding property. As an arm of our City government, the ENV should not have any objection to reducing the impact of the Landfill on the community to the greatest extent possible.

The only issue that could be in dispute is the full closure of the Landfill. On this point, the ENV has repeatedly disregarded its promises and the orders imposed on it to close the Landfill. See KOCA's Proposed Findings of Fact, Conclusions of Law, and Decision and Order ("**KOCA's Findings**") Findings of Fact 240-45 (filed 1/27/17). It is time to stop kicking the can down the road. All parties, **including the ENV**, propose that the Commission order the ENV to "**identify and develop**" a new

landfill with “reasonable diligence.” It is impossible to identify and develop a new landfill with reasonable diligence, as the ENV agrees it will do, if WGSL remains open forever. Consistent with the obligation to develop a new landfill with reasonable diligence, the prior promises and orders and the record in this matter, KOCA proposes a staged approach to the closure of WGSL:

a. From the date of the Commission’s order until **March 1, 2024**, MSW should not be allowed to be deposited at the WGSL unless it cannot be disposed of within the City by means other than landfilling, provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL. This condition is based on the ENV’s findings of fact filed May 2, 2012. *See* Ex. 1 at 33. The record demonstrates that, by March 1, 2024, the ENV should have its new landfill identified and developed if it proceeds with reasonable diligence. *See* 2011AP 3/7/12 Tr. at 17:25–19:25, 199:24–201:24 (Miller). 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle).

b. From March 2, 2024 until March 1, 2027, the WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER; and (2) automobile-shredder residue. This three-year period provides time during which the ENV can

transition sending H-POWER ash and residue and automobile-shredder residue from the WGS� to the new landfill.

c. Following the three-year transition period, the WGS� must close. The ENV has stated that it only wants one landfill to accept all waste streams that require landfilling. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). With a new site developed and operational, the ENV will no longer need the WGS�. At that point, after the community has endured the Landfill’s problems for decades and given the ENV’s broken promises, it will be in the best interests of the community for the WGS� to close.

KOCA responds and objects to the ENV’s Findings in the following paragraphs.

II. UNOBJECTIONABLE FINDINGS OF FACT

In part, KOCA does not object to, and would incorporate the unobjectionable part into its own proposed findings of fact, **Finding of Fact 65** as to filing of KOCA’s Eighth Amended Exhibit List.

III. OBJECTIONS TO THE ENV’S FINDINGS OF FACT

KOCA objects to specific paragraphs in the ENV’s Findings of Fact for the reasons stated below. The objections are organized according to the section headings used in ENV’s Findings.

I. PROCEDURAL MATTERS

A. RELEVANT HISTORY

Finding of Fact 2 states in part, “At that time, ENV anticipated that the landfill, with the expanded 21 acres, would reach capacity in five years, so the Planning Commission recommended that ENV submit an alternative landfill site, or sites, to

the City Council by December 31, 2003, and close WGS� no later than May 1, 2008." The finding is false.

The ENV originally proposed the Landfill be expanded by 60 acres and extended "for another fifteen years." 2011AP Ex. K85 at 96:18–20 (3/27/03 Tr.: Doyle). Based on opposition from the community, however, the ENV committed to a five-year extension followed by the closure of the landfill. In the 2003 special use permit ("SUP") proceedings before the Land Use Commission, Former Acting ENV Director Frank Doyle explained, "[W]e had originally thought that we would have this landfill operate for another 15 years [to 2008]. And then as part of our discussions with the community and in trying to take a look at their concerns it was reduced to a five-year operation." 2011AP Ex. K85 at 96:18–22 (3/27/03 Tr.: Doyle). Director Doyle repeatedly expressed the ENV's "commitment" to close the Landfill in 2008. 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.). Consistent with the compromise made with the ENV, the community made no request for intervention and no adversarial hearing was held. *See* 2011AP Ex. K2 (6/9/03 LUC order). In the 2011 Application Proceedings, Director Steinberger confirmed that "it was a compromise with the community that drove the five-year deadline" 2011AP 1/11/12 Tr. at 32:3–7 (Steinberger).

Finding of Fact 4 states in part that the City Council "selected" the WGS� as the "new" landfill. The statement is false. City Council passed a non-binding resolution to designating the existing site as the "new" landfill. 2011AP 1/11/12 Tr. at 52:6–15 (Steinberger); 2011AP 4/4/12 Tr. at 138:23–139:1 (Timson). The resolution

was not binding on the City. *Wemple v. Dahman*, 103 Hawai'i 385, 396 n.13, 83 P.3d 100, 111 n.13 (2004) ("We also note that County Council Resolution No. 81-252 is a resolution, not an ordinance, and therefore does not have the binding effect of an ordinance . . .").

B. 2008 APPLICATION

Finding of Fact 40 states in part, "[T]he 2009 Planning Commission determined that '[t]he term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of "X" number of years.' 2011_Exhibit 'A17' at 2." This finding is false. The Planning Commission did not make such a finding. The quoted statement was made by a single Commissioner during a hearing in the 2008 Application Proceedings. 2011AP Ex. A17 at 2 (7/31/09 HPC Tr.: Komatsubara).

Finding of Fact 41 is irrelevant. This finding discusses the circumstances in the 2008 Application Proceeding. Circumstances have changed. For example, in the 2011 Application Proceeding, the Commission learned that the Landfill has more regulatory violations than any landfill in the state. These violations include the release of unknown amounts of waste into the environment in 2010 and 2011. The EPA cited Waste Management of Hawaii, Inc. ("**Waste Management**") and the ENV for the releases, and the DOH is considering enforcement action.

Additionally, in the 2011 Application Proceeding, the Commission learned that H-POWER's third boiler will be operational by October or November of 2012 and that the boiler will be able to accept all putrescible wastes, including all sewage sludge, medical waste, and food waste, that were deposited at the Landfill.

Finding of Fact 42 is materially incomplete. In discussing Condition 1 of the Planning Commission's August 4, 2009 Findings of Fact, Conclusions of Law, and Decision and Order, the finding states, "On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�." The finding fails to acknowledge that Condition 1 further states, "The Applicant's effort to identify and develop such sites shall be performed with **reasonable diligence . . .**" 2011AP Ex. A18 at 25 (¶ 1) (emphasis added). Whether the ENV has acted with reasonable diligence is a material issue in the contested case proceeding.

Finding of Fact 44 states in part that the Land Use Commission "[d]isregard[ed] the Planning Commission's reasoned analysis and the underlying facts [in imposing Condition 14]." The finding is false. The Land Use Commission adopted the Planning Commission's findings of fact, conclusions of law, and decision and order, with modifications and subject to an additional condition of closure.

C. 2011 APPLICATION

Finding of Fact 61 states in part that Dwight Miller was accepted "as an expert in solid waste management." The finding is materially incomplete. Mr. Miller was accepted, without objection, as an expert in "solid waste management, including landfill siting and design and comprehensive solid waste management." 2011AP 3/7/12 Tr. at 18:8-10.

Finding of Fact 71 states in part that Schnitzer's Exhibits S1 through S4 were received into the record. The finding is false. None of Schntizer's exhibits were offered or received into evidence.

II. PROPOSAL FOR SPECIAL USE PERMIT

B. SURROUNDING USES

Findings of Fact 95-101 identify the uses surrounding the Landfill, including Ko Olina and Makaiwa Hills development. This finding is materially incomplete because it does not address the distance of Makaiwa Hills from the Landfill. Todd Apo testified that Makaiwa Hills was within 1,500 feet of the Landfill expansion area. 2008AP 7/2/09 Tr. at 262:16-18. Under Revised Ordinances of Honolulu § 21-5.680, "No waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment mixed use or resort district. When it can be determined that potential impacts will be adequately mitigated due to prevailing winds, terrain, technology or similar considerations, this distance may be reduced, provided that at no time shall the distance be less than 500 feet." Given the serious health and safety issues the Landfill has created for the surrounding community over the years, the Landfill's potential impacts have not been adequately mitigated.

Findings of Fact 102 to 103 state that Waste Management responded to complaints regarding the Landfill in 2007, 2008, and 2009, and that in 2009 the General Manager of Ihilani Hotel at Ko Olina testified that he had not submitted any complaints to Waste Management regarding the Landfill in 2009. These findings regarding complaints submitted to the Landfill are materially incomplete and based solely on the 2008 Application proceeding. The evidence in the 2011 Application Proceeding showed that in January 2011 the Landfill's release of waste and leachate into the coastal waters, *see* 2011AP Williams Written Direct Testimony

at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report); that the waste washed up in Ko Olina's lagoons, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 44); and that Waste Management sent workers for only one day to assist in the cleanup efforts, even though waste continued to wash ashore in the area, 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). The evidence from 2011 Application Proceeding also showed that Ko Olina's residents, workers and visitors have expressed concerns regarding the odors, noise, dust, blasting, visual blight, truck traffic and flying litter from the Landfill. 2011AP Williams Written Direct Testimony at 9 (¶ 29).

D. STORM WATER AND LEACHATE

Findings of Fact 115 to 118 address the Landfill's storm water and leachate collection control measures. Finding of Fact 116 falsely states that "[l]eachate does not come into contact with storm water." This finding is based solely on evidence from the 2008 Application Proceeding. The evidence in the 2011 Application Proceeding showed that, in January 2011, due to heavy rains, the Landfill's drainage system failed and allowed storm water to flow "like a waterfall" into Cell E6. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5). The water dislodged unknown quantities of MSW, sewage sludge, leachate and medical solid waste from Cell E6 into coastal waters. 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report). Further, prior to that, on December 23, 2010, the DOH Clean Water Branch documented the unau-

thorized pumping of leachate from Cell E6 into State waters. 2011AP Ex. K52 (12/23/10 DOH investigation report).

E. GAS COLLECTION AND CONTROL SYSTEM AND EPA NOTICE OF VIOLATION

Findings of Fact 119 to 123 discuss the Landfill's gas collection and control system and a Notice of Violation issued by the U.S. Environmental Protection Agency on April 4, 2006. These findings are based solely on the 2008 Application Proceeding and, as a result, they are materially incomplete. The evidence in the 2011 Application Proceeding established that on September 5, 2008, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations, including the failure to submit written notification of the exceedance and verification of methane gas monitoring results. 2011AP Ex. K82 at 2 (9/5/08 warning letter). Further, in 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. 2011AP Steinberger Written Direct Testimony at 27 (¶ 82). The failure to monitor gas readings was a threat to public health and safety. 2011AP 3/7/12 Tr. at 131:23–132:10 (Miller); 2011AP 1/11/12 Tr. at 91:1–92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).

H. LANDFILL SITING

Finding of Fact 131 states in part, “[T]he City allotted funds in the Fiscal Year 2010 budget to conduct a site selection study for a secondary landfill on O’ahu in satisfaction of Condition No. 1 [of the 2009 Planning Commission Decision].” The

finding is misleading. Condition 1 states in part, "On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence" 2011AP Ex. A18 at 25 (¶ 1). There is no evidence that the ENV's obligation to begin to "identify" one or more new landfill sites was met by "appropriating funds to identify" one or more landfill sites. The site identification process began in January 2011 when the ENV's site selection committee first met. 2011AP 4/4/12 Tr. at 54:14-16 (Marsters). Accordingly, the ENV failed to meet the November 1, 2010 deadline in Condition 1 of the Planning Commission's 2009 order.

Findings of Fact 132 to 144 materially misstate the site selection efforts. First, Finding of Fact 136 mentions meetings that occurred on "January 20, February 10, March 10 and 31, May 12, July 19, 2011, March 16, 2012, and April 20, 2012." SSC meetings were also held on November 8, 2011 and February 1, 2012. 2011AP Ex. K152 (11/8/11 SSC group memory); 2011AP Ex. K170 (2/1/12 SSC group memory). To assess Finding of Fact's 144's claim of "reasonable diligence" in identifying and developing a new site, subsequent meetings must be considered. See 2011AP Ex. K15 at 6 (10/22/09 LUC order).

Second, the ENV's consultant repeatedly applied screens to exclude potential sites that were not "previously discussed or authorized" by the SSC. 2011AP 4/4/12 Tr. at 105:1-4 (Marsters).

Finally, SSC member Janice Marsters testified that the SSC was “not happy” with the process. 2011AP 4/4/12 Tr. at 104:20–23 (Marsters: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.”).

Finding of Fact 133 states in part that the landfill site selection committee (“SSC”) was tasked with making “recommendations concerning the selection of a future site for a landfill to replace or supplement WGS� by accepting MSW, ash and residue from facilities such as HPOWER, and construction and demolition debris waste (C&D) for the Island of O’ahu.” This finding is partially false. While the ENV could have developed a supplemental site, the ENV preferred to have one replacement site that can accept all forms of waste. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). For this reason, the ENV directed that “the role of the [SSC] or the purpose of the [SSC] is to come up with a list of sites that could be used as a landfill to replace Waimanalo Gulch.” 2011AP 4/4/12 Tr. at 35:1–4 (Marsters). The directive to find one site made the site selection process more difficult, because the SSC had to evaluate the added capacity needed for the ash and residue and the location of potential sites relative to H-POWER. 2011AP 4/4/12 Tr. at 72:25–73:4, 111:17–25 (Marsters); 2011AP 1/11/12 Tr. at 61:13–18 (Steinberger). Having chosen to find a replacement site for the Landfill, once the new site opens, the ENV will no longer need the Landfill.

Finding of Fact 138 states that the SSC “began by working with potential sites identified by the City in previous studies.” The finding is misleading. The ENV’s consultant directed the SSC to start with the old list of approximately 40 sites, some

of which were no longer viable options. 2011AP 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

Finding of Fact 139 states in part, “The Committee also developed exclusionary criteria or factors for sites above the no-pass or UIC line based on the following information: . . . Land Ownership (Federal, State, City, and Private) . . .” This finding is false. The ENV’s consultant developed the exclusionary criteria or factors. In many instances, the consultant imposed these exclusionary criteria or factors without prior discussion or authorization from the SSC. Because the consultant unilaterally imposed exclusionary criteria, the SSC had to direct “the consultant [to] go back” and “[r]emove screens that [the SSC] had not either previously discussed or authorized.” 2011AP 4/4/12 Tr. at 105:1–4 (Marsters). In the end, the SSC was “not happy” with the process. 2011AP 4/4/12 Tr. at 104:20–23 (Marsters: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.”).

Finding of Fact 144 states, “The City’s effort to identify and develop one or more landfill sites has been performed with reasonable diligence.” The finding is false.

First, as set forth in the objections to Finding of Fact 131, the ENV did not meet the November 1, 2010 deadline to begin to identify and develop one or more new landfill sites. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

Second, the SSC does not include anyone from Ko Olina or Kapolei—two communities heavily affected by the Landfill. 2011AP 2/8/12 Tr. at 23:14–20 (Williams); 2011AP 4/4/12 Tr. at 139:3–12 (Timson).

Third, the site selection process has not followed the City's Integrated Solid Waste Management Plan (“**Solid Waste Plan**”), which Director Steinberger referred to as the City's “framework” for waste management. 2011AP 1/11/12 Tr. at 26:21–27:1 (Steinberger); *see also* 2011AP 3/7/12 Tr. at 25:2–20 (Miller); 2011AP 4/4/12 Tr. at 73:9–13 (Marsters). Importantly, the SSC has not excluded sites west of Makakilo, even though the Solid Waste Plan specifically directs that the “site evaluations will preclude areas west of Makakilo” K144 at 11-4 (10/08 integrated solid waste management plan update); 2011AP 4/4/12 Tr. at 76:3–6, 76:16–18, 76:19–21, 77:21–24 (Marsters). A number of the sites that the SSC may recommend are west of Makakilo. 2011AP Ex. K258 (4/20/12 SSC meeting photographs).

Nor has the site selection process followed the detailed site selection procedures set out in the Solid Waste Plan. 2011AP Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update). For instance, the ENV did not direct the SSC to consider mitigation factors and obtain input from potentially affected neighborhoods before developing rankings. 2011AP 4/4/12 Tr. at 113:11–14, 116:10–21 (Marsters); 2011AP Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update); 2011AP Ex. K147 at 3 (Parametrix site selection memorandum).

Fourth, as Mr. Miller explained, the site selection process has other significant errors, such as the improper use of deciles and the failure to correct implicit

weighting, which has led to double counting of criteria. 2011AP Ex. K147 at 3–4 (Parametrix site selection memorandum); 2011AP 3/7/12 Tr. at 94:9–12 (Miller).

Fifth, the site selection process did not move linearly from a broad consideration of sites to a narrow list of sites. 2011AP 3/7/12 Tr. at 23:8–13, 24:2–23 (Miller); 2011AP Ex. K147 at 4 (Parametrix site selection memorandum). Instead, the consultant directed the SSC to start with the narrow list of old sites, some of which were no longer viable options. 2011AP 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters). The SSC was using this old list of sites through the sixth of seven scheduled meetings. 2011AP Ex. K26 at 2 (1/20/11 SSC description of service); 2011AP 4/4/12 Tr. at 66:25–67:2, 83:1–4, 84:17–20 (Marsters). As discussed above, the SSC had to repeatedly “[r]emove screens that [it] had not either previously discussed or authorized.” 2011AP 4/4/12 Tr. at 104:24–105:4 (Marsters). The SSC broadened the search criteria or removed screens during the sixth, seventh, eighth, and ninth meetings.

Finally, the site selection process has already taken too long. The ENV was ordered to begin site selection efforts by November 1, 2010. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order). It is now February 2017, and there is no evidence that the ENV has selected a site.

Findings of Fact 144 states, “Even after [the] Committee has made its recommendation, the ENV will need more than seven years to complete the tasks necessary to start operations at a new site(s).” (Emphasis added.) For the reasons set forth below in the objection to Finding of Fact 201, this finding is false.

I. WASTE DIVERSION

Finding of Fact 149 is misleading and materially incomplete. First, Finding of Fact 53 states, "In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on O'ahu." This finding is false. The total waste generated on Oahu in Calendar Year 2010 was 1,510,593 tons. 2011AP Ex. A27 (Oahu MSW waste stream). Of the 1,510,593 tons of waste generated, approximately 1,214,904 tons constituted MSW.

Further, Finding of Fact 149 states in part that the figures reflect "a steady decrease since 2009." This statement misleadingly implies that the ENV's waste diversion efforts improved from 2009 to 2010, which in turn led to a reduction in landfilling. In fact, the decrease in landfilling was caused by a reduction in the total MSW generated on O'ahu. MSW generation decreased from Calendar Year 2008 (1,313,253 tons) to Calendar Year 2009 (1,225,902 tons) and Calendar Year 2010 (1,214,904). 2011AP Ex. A27. The reduction in waste generation reflects a slowing economy. 2011AP Ex. K91 at 3 (7/10 ENV status report: "The downward trend [in Landfill disposal] may be attributed to diversion of MSW to the off-island shipping project, the slowing economy, and the expansion of the City's curbside recycling program.").

Finding of Fact 150 states, "However, there still are no new technologies with proven reliability and performance that would completely eliminate the need for a landfill." This finding is materially incomplete. While the need for a Landfill may not be "completely eliminate[d]," H-POWER's third boiler there will provide suffi-

cient capacity to accept all of the waste that presently goes to the Landfill. 2011AP 4/11/12 Tr. at 84:22–24 (Steinberger); 2011AP Ex. A26 (Oahu waste stream table). The wastes that cannot be accepted because of its unique characteristics will “probably [be] a small percentage” of the MSW. 2011AP 1/11/12 Tr. at 77:7–13 (Steinberger).

Finding of Fact 153 states, “The third boiler was scheduled to begin operations in January 2013.” This finding is false. At the April 11, 2012 hearing, Director Steinberger admitted that H-POWER’s third boiler will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger).

Finding of Fact 154 states in part, “DOH requires as a condition of HPOWER’s permit that HPOWER have a disposal alternative—the landfill—as a contingency for routine maintenance, natural disasters, and emergencies.” This finding is false. The actual condition provides that H-POWER must have a place to divert waste in the event that it runs out of storage capacity. See 2011AP 4/11/12 Tr. at 110:24–111:24 (Steinberger: “A. Well, they don’t have a lot of room to store it at H-POWER. The Department of Health is rather restrictive as to how much they will allow you to store. . . . Q. Currently, the Department of Health does not permit -- or through the permit allow for H-POWER to store any large amount of solid waste? A. No. They’re only allowed to store what they can hold on the tipping floor, and typically, the tipping floor can hold up to three days of MSW.”); 2011AP Steinberger Written Direct Testimony at 30 (¶ 89) (“Further, the expanded HPOWER facility will still require the continued availability of WGS� as a permit condition to operate, to

ensure proper disposal of MSW that is diverted from HPOWER due to routine maintenance, unanticipated closures or if the amount of waste exceeds the capacity of the facility.”).

Finding of Fact 159 states, “It is unlikely that [the green waste] capture rate can get any higher.” This finding is false. The ENV does not prohibit green waste disposal at the Landfill. 2011AP 4/11/12 Tr. at 114:14–18 (Steinberger: acknowledging that small amounts of green waste are accepted at the Landfill). If the ENV were to prohibit any green waste disposal at the Landfill, the capture rate for green waste would obviously be higher.

Finding of Fact 160 states, “All but incidental food waste . . . is diverted from WGS�.” This finding is false. The ENV currently has no residential food waste collection program. 2011AP Ex. K195 at 2, 4 (12/09 food waste article); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum). Food waste is landfilled at the WGS�, particularly when H-POWER is at capacity or down. 2011AP 4/11/12 Tr. at 123:20–24 (Steinberger).

Finding of Fact 161 states in part that “green waste is one of the few recyclable materials that is all reused on the Island.” This finding is misleading and unsupported by the record. Only 77% the green waste is recycled. 2011AP Steinberger Written Direct Testimony at 19 (¶ 56). There is no evidence regarding whether the green waste is recycled on O’ahu or elsewhere.

Finding of Fact 172 states in part that “it was reported in December 2011 that 15,000 to 20,000 tons per year of sewage sludge was still being landfilled, and as of

July 31, 2011, there is nowhere else to dispose of that sewage sludge.” This finding is partially misleading. It is true that 15,000 to 20,000 tons per year of sewage sludge is still being landfilled. By October or November 2012, H-POWER’s third boiler will be able to accept all of that sewage sludge. 2011AP 4/11/12 Tr. at 90:3–21, 174:1–6, 176:7–10, 211:12–15 (Steinberger); 2011AP Steinberger Written Direct Testimony at 23 (¶ 71).

J. LANDFILL DESIGN AND OPERATIONS

Finding of Fact 179 states that when the Landfill was hit by heavy rains in December 2010 and January 2011 and Cell E6 was flooded, Waste Management “was in the process of completing construction of the Western Surface Drainage System that was intended to divert stormwater around the landfill.” This finding is misleading and materially incomplete.

First, the drainage system was designed to be in place before Cell E6 was filled with waste. 2011AP 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 2011AP 4/11/12 Tr. at 74:10–15 (Steinberger). Indeed, the industry standard is to have necessary drainage systems completed before filling cells at a landfill. 2011AP 3/7/12 Tr. at 39:25–40:4, 126:13–20, 128:14–129:13, 172:19–173:3 (Miller); 2011AP 4/11/12 Tr. at 31:24–32:10 (Sharma).

Second, the ENV claims that the SUP for the construction of the diversion channel was delayed because of archaeological issues and that the Landfill was running out of capacity in the permitted cells. The supposed permitting and processing delays—a challenge to the Final Environmental Impact Statement for the Landfill

expansion project and opposition in the SUP approval process—were foreseeable. 2011AP 4/11/12 Tr. at 145:22–23 (Steinberger); 2011AP 4/11/12 Tr. at 145:24–146:14, 149:3–5 (Steinberger); 2011AP Ex. K2 (6/5/03 LUC order); 2011AP Ex. K155 at 3 (¶¶ 5–8) (3/14/08 LUC order); 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). Inadequate planning by the ENV and Waste Management caused the Landfill to run out of safely useable space before the diversion channel had been completed. 2011AP 3/7/12 Tr. at 186:4–21 (Miller). This inadequate planning forced the ENV and Waste Management to deviate from the Landfill’s design plans and the industry standard and to fill Cell E6 before the diversion channel was in place. 2011AP 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 2011AP 3/7/12 Tr. at 129:25–130:4 (Miller).

Finding of Fact 181 makes certain representations about Waste Management’s efforts to work with the EPA following the events in December 2010 and January 2011. The record does not support this finding. No one from Waste Management testified before the Commission following the events. No evidence was introduced regarding Waste Management’s efforts to work with the EPA.

Finding of Fact 185 is false and materially incomplete. First, The DOH currently has a pending enforcement case against the Landfill based on the events surrounding the January 2011 flooding. 2011AP 4/4/12 Tr. at 156:20–22 (Gill: “There is a pending enforcement case which I can’t speak to in any detail regarding the handling of storm water runoff from the landfill.”); 2011AP 4/4/12 Tr. at 157:10–

12 (Gill: “There is . . . , to be clear, potential enforcement action regarding the events around the flood event at the landfill.”).

Second, the EPA did not “allege” violations at the Landfill. The EPA “found” violations at the Landfill. 2011AP 1/25/12 Tr. at 35:23–25 (Chang).

Third, while the continued availability of a landfill is necessary for a limited number of wastes, the landfill does need not be the WGSL. On the contrary, the ENV is compelled to develop a new landfill with reasonable diligence. 2011AP Ex. K15 at 6 (10/22/09 LUC order). The ENV has not contested that condition.

Finally, there will be “other options . . . available” for almost all waste when the third boiler at H-POWER is operational, which was expected by October or November 2012. Steinberger Written Direct Testimony at 23 (¶ 71); 2011AP 1/11/12 Tr. at 75:13–22 (Steinberger); 2011AP 4/11/12 Tr. at 90:3–21, 163:12–16, 171:16–172:10, 174:1–6, 176:7–10, 196:20–24, 211:12–15 (Steinberger).

III. PURPOSE AND NEED

Findings of Fact 186 to 190 state in part that the WGSL is necessary. The findings are false. While the continued availability of a landfill is necessary for a limited number of wastes, the landfill does need not be the WGSL. On the contrary, the ENV is compelled to develop a new landfill with reasonable diligence. 2011AP Ex. K12 at 25 (8/4/09 PC order). The ENV has not contested that condition.

Finding of Fact 187’s discussion of the City Council Resolution is erroneous for the same reasons that Finding of Fact 4 is erroneous as explained above.

Finding of Fact 191 is identical to the Finding of Fact 149. For the reasons set forth above in the objection to Finding of Fact 149, Finding of Fact 191 is misleading and materially incomplete.

Finding of Fact 192 states in part that “[o]ther items . . . cannot be recycled or burned at H-POWER.” The finding is partially false and materially incomplete.

First, Finding of Fact 192 does not identify the period to which it applies. There is a material difference between the waste that could be accepted at H-POWER at the time of the contested case hearing in early 2012 and the waste that could be accepted at H-POWER after the third boiler is operational in October or November 2012. The two existing boilers are refuse-derived fuel (“RDF”) units. For these units, the RDF goes into a holding barn where the material, the residue, and any recyclable material is separated. 2011AP 1/11/12 Tr. at 66:1–4 (Steinberger). This pre-preparation requires worker handling of the waste. 2011AP 1/11/12 Tr. at 66:18–22 (Steinberger). Worker handling of the waste has been proffered as the reason the ENV and Covanta, the H-POWER operator, have been reluctant to take sewage sludge and medical waste in the past. 2011AP 4/11/12 Tr. at 170:22–171:10 (Steinberger). The third boiler is a mass burn unit. 2011AP 1/11/12 Tr. at 65:9–10 (Steinberger). As a mass burn unit, the third boiler will be able to accept significantly larger material and will require significantly less pre-preparation of waste. 2011AP 1/11/12 Tr. at 66:8–10 (Steinberger). With less pre-preparation, there will be less worker interaction with the waste. 2011AP 1/11/12 Tr. at 66:18–21 (Steinberger).

Second, Finding of Fact 192 fails to disclose that H-POWER's third boiler will be operational in October or November 2012. 2011AP 4/11/12 Tr. at 176:7-10, 211:12-15 (Steinberger). The third boiler will have the capacity to accept all of the sewage sludge that presently goes to the Landfill. 2011AP Steinberger Written Direct Testimony at 23 (¶ 71); 2011AP 4/11/12 Tr. at 90:3-21, 174:1-6 (Steinberger). The ENV has offered no evidence that the third boiler will be unable to accept small to medium sized animals, as opposed to large animals. With the third boiler operational, the wastes that cannot be burned at H-POWER are "probably a small percentage" of the total MSW, 2011AP 1/11/12 Tr. at 77:7-13 (Steinberger), and some of that waste, including contaminated soil, can alternatively be accepted at the PVT Landfill, 2011AP 1/25/12 Tr. at 12:2-3 (Chang).

Finding of Fact 193 indicates in part that the third boiler at H-POWER will be operational "by 2013." The finding is misleading. During the April 11, 2012 hearing, Director Steinberger admitted that the third boiler, with its 300,000 tons of additional capacity, will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 84:22-24, 176:7-10, 211:12-15 (Steinberger).

Finding of Fact 195 states in part that the City has a digester at Sand Island and that the City is pursuing alternative technologies for sewage sludge. The finding is materially incomplete. In particular, the finding does not acknowledge that the City is far behind other municipalities in non-incinerator diversion, especially with respect to biosolids. 2011AP 4/4/12 Tr. Supp. at 12:5-6 (Gill); 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids

webpage); 2011AP Ex. K148 at 10 (Parametrix alternatives memorandum); 2011AP 3/7/12 Tr. at 22:18–20, 96:4–7, 98:17–22, 139:11–140:4 (Miller). Nor does the finding disclose that although the ENV pursued a second digester at Sand Island, the City Council did not consider the digester to be a priority. 2011AP 4/11/12 Tr. at 179:6–11 (Steinberger).

Finding of Fact 196 states in part, “By 2013, when H-POWER's third boiler is expected to be operational, the City through its various solid waste management programs expects to divert eighty percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL.” This finding is inconsistent with the evidence and is partially false. First, Director Steinberger's Written Direct Testimony states, “By 2012, when HPOWER's third boiler is expected to be fully operational” Further, as discussed above, Director Steinberger testified at the April 11, 2012 hearing that the third boiler will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger).

Second, the ENV has publicly stated that when the third boiler is operational, the landfill diversion will be 90%. 2011AP Ex. K251 at 1–2 (5/5/11 ENV press release).

Finding of Fact 197 admits that further “progress” in waste diversion is needed. This statement is true. But the finding is materially incomplete. The City is far behind other municipalities in non-incinerator diversion, particularly with respect to biosolids and food waste. While other municipalities began biosolids programs in the 1970s and 1980s, the ENV did not establish a biosolids program for Honolulu

until 2006. 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids webpage); 2011AP Ex. K148 at 10 (Parametrix alternatives memorandum); 2011AP 3/7/12 Tr. at 139:11–140:4 (Miller). The current program is extremely limited. See 2011AP Ex. K148 at 7–9 (Parametrix alternatives memorandum). Further, the ENV currently has no food waste collection program. 2011AP Ex. K195 at 2, 4 (12/09 food waste article); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum).

Finding of Fact 201 states, “It will take at least seven years from site selection for a new landfill site to be operational.” The finding is false. There is no credible evidence to support the ENV’s statement that it will take at least seven years from site selection. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). The ENV’s estimates keep increasing. In 2003, the ENV admitted it would only take three to five years to identify and develop a new landfill. 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle).

In 2009, the ENV asserted that it would take seven years to identify and develop a new site. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order).

Now, the ENV claims it will take more than seven years **after** site selection. *E.g.*, 2011AP 4/11/12 Tr. at 122:25 (Steinberger).

Consistent with the ENV’s admission in 2003, Mr. Miller testified that it would take three to five years to identify and develop a landfill. Mr. Miller was the only expert in landfill siting to testify in this proceeding. He explained, “[I]f you’re putting out a number of seven years, it’s somewhat of a self-fulfilling prophecy. If

you're saying, Oh God, it's going to take us seven years, that's how long it's going to take you." 2011AP 3/7/12 Tr. at 202:20–24 (Miller). But if the ENV is willing to “put out” and “push a schedule,” the timetable will be shorter. 2011AP 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV represents that it is “committed” to finding a new site. See 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). If the ENV's representations are true, no more than seven years is necessary to select and develop a new site.

IV. STATE AND COUNTY LAND USE LAW AND REGULATIONS

Findings of Fact 204 to 210 purport to explain the Landfill's compliance with state and county land use law and regulations. The findings are materially incomplete.

First, as explained above, the record shows that the Landfill does not comply with Revised Ordinances of Honolulu § 21-5.680, because the Landfill is located within 1,500 feet of a zoning lot in a country, residential, apartment, apartment mixed use or resort district. Findings of Fact 204 to 210 fail to discuss this provision.

Second, while the findings purport to summarize state regulations, they fail to mention the letter submitted by the State Office of Planning in the 2008 Application Proceeding, which read in part:

A commitment was made by the City and County of Honolulu to the State Land use Commission in 2003 to close the Waimanalo Gulch Landfill by 2008. Because the time limit on this commitment has passed, an immediate and far greater effort is needed to reduce the necessity for landfill space and fulfill this commitment as soon as possible.

In the meantime, the Planning Commission should review the current conditions in 86/SUP-5 and impose those that they deem necessary to mitigate adverse impacts of the landfill on the environment and adjacent communities.

2011AP Ex. K6 at 2 (4/3/09 letter from Office of Planning).

Third, the findings fail to mention the Landfill's violations of the state law. 281. DOH Branch Chief Chang testified that of the 13 landfills in the State, 9 to 11 of which accept MSW, the WGS� probably has more regulatory violations than any other landfill for the period of 2006 to 2011. 2011AP 1/25/12 Tr. at 15:25–16:13, 39:24–40:3 (Chang).

Finding of Fact 204 states that “[t]he continued operation of the landfill and the requested expansion project comply with the guidelines as established by the Planning Commission and the LUC.” This finding is materially incomplete. For the use of the Landfill to comply with the Planning Commission's and the Land Use Commission's guidelines, the Planning Commission should impose condition “necessary to mitigate adverse impacts of the landfill on the environment and the adjacent community,” and to ensure that City “filfill[s] [its] commitment [to close the Landfill] as soon as possible,” as the Office of Planning recommended and based on the evidence in this contested case. The evidence confirms the City's commitment to close the Landfill. The evidence also demonstrates that the Landfill has posed serious problems for public health and safety.

IV. OBJECTIONS TO THE ENV'S CONCLUSIONS OF LAW

Conclusion of Law 4 states that “the Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the

state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection." This conclusion is erroneous in a number of respects.

First, allowing the Landfill to stay open until it reaches capacity would be contrary to the objectives sought to be accomplished by state land use laws and regulations. As noted above, the Landfill has been cited repeatedly for violating state laws. Further, the Landfill has harmed the health and safety of the surrounding community.

Second, the Landfill has a long track record of adversely affecting the surrounding property by releasing waste and leachate and by causing odors, noise, dust, blasting, visual blight, truck traffic, and flying litter.

Third, the ENV has not complied with "governmental approvals and requirements," including the condition that it site and develop a new landfill with "reasonable diligence." The ENV has not contested this condition.

Fourth, "Applicant's representations" include the ENV's many broken promises to close the Landfill. The ENV should be held to its word. The Landfill should close as soon as possible. After the ENV develops a new landfill, it will not need the WGSL.

Until the Landfill can close, it should be restricted as much as possible from accepting wastes that can go elsewhere. With the added capacity provided by the third H-POWER boiler, there is no need to have a general purpose MSW landfill on O'ahu. 2011AP 3/7/12 Tr. at 22:24–23:7 (Miller). There are only certain items that will not be accepted at H-POWER, which the ENV admits are “probably a small percentage” of the MSW. 2011AP 1/11/12 Tr. at 77:7–13 (Steinberger).

After the Landfill stored MSW collected from the entire island of O'ahu for the last 23 years and after the community relied on the ENV's broken promises of closure, there is no reason why the WGS� must or should be filled to capacity.

Conclusion of Law 5 erroneously states that “the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.” The ENV has not met its burden of proving that landfilling should be allowed at the WGS� until it reaches capacity. The ENV promised to close the Landfill long ago. Further, the Landfill has posed serious problems to public health and safety, especially since its expansion.

V. OBJECTIONS TO THE ENV'S DECISION AND ORDER

The conditions that the ENV proposes are inadequate to protect the community and are unsupported by the record.

Condition 2 provides:

The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes HPOWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

Upon identifying a viable alternative technology, the ENV should be required to use that technology to the extent practicable. Accordingly, the condition should further provide, "The Applicant shall use alternative technologies, to the extent reasonably practicable, to divert waste from the Landfill as set out in the ENV's proposed Stipulation to Continue Proceedings Until April 22, 2017 [(the 'Stipulation')]." That Stipulation, a copy of which is attached as Exhibit 2, stated in part:

During the continuation, ENV will work to divert all waste from the landfill that can be disposed of by a method other than by landfilling, except if (1) H-POWER cannot accept the landfill waste or there is an emergency, and (2) there is no reasonably available alternative disposal method for the waste, by the following means:

1. Municipal Solid Waste, specifically:

(a) Residue: ENV will divert residue resulting from the H-POWER waste-to-energy process through H-POWER equipment improvements that will enable H-POWER to better filter residue to capture more of the burnable material and reduce the disposable waste. ENV will also continue to evaluate ways, including boiler optimization, to capture more of the residue at H-POWER.

(b) Bulky waste: As of July 2015, ENV has diverted all bulky waste previously used to dispose of sludge from the landfill.

(c) Unacceptable waste or waste rejected for disposal at H-POWER such as long wires, car parts, cables, and other oversized items: ENV will divert these wastes through H-POWER equipment improvements, such as the addition of a new waste shredder that will further process unacceptable waste so that these wastes may be incinerated at H-POWER. ENV is also investing in additional staff training at the Waimanalo Gulch Sanitary Landfill ("WGSL") to enhance inspections of incoming waste loads such that waste that could be burned at H-POWER will be identified and screened out in the future.

2. Ash (residue from H-POWER waste-to-energy process): ENV will follow the progress of facilities in Pasco County, Florida, and York County, Pennsylvania, that are pioneering ash reuse and will seek the Department of Health's approval of ash reuse projects modeled after these programs.

3. Automotive Shredder Waste ("ASR"), which comprises the majority of the Miscellaneous Special Waste category: The Department of Health has ap-

proved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to enable H-POWER processing.

4. Wastewater Treatment Plant Waste: ENV has diverted all sewage sludge produced by the City and County of Honolulu from the landfill as of July 2015. For sewage sludge from the private wastewater treatment plant, ENV will determine if adding water to the sludge or combining it with loads at the City's wastewater treatment plants will enable processing at H-POWER. For bar screening waste, ENV will institute enhanced odor control protocol or equipment to enable processing at H-POWER.

5. Homeowner Waste: ENV will continue efforts to establish a new refuse convenience center in the Campbell Industrial Park so there is an alternative depository for homeowner waste loads currently going to the landfill.

6. Outdated Food Waste: ENV will evaluate the constituents to determine compatibility with the H-POWER system to enable burning.

7. Treated Medical Waste: As of the end of December 2015, ENV has diverted all treated medical waste except for treated medical sharps.

8. Rendering Waste: Currently, only approximately 1,700 tons of rendering waste is disposed of at the landfill each year, and a single company is responsible for producing this waste stream. ENV intends to work with this company to further evaluate the rendering waste to determine whether it can be diverted from the landfill to H-POWER. In the interim, ENV will require this company to implement enhanced odor control measures for disposal at the landfill.

9. Animal Waste: ENV cannot divert large animal carcasses from the landfill because H-POWER does not have the ability to incinerate these large masses. However, ENV will work with the Department of Health to further characterize this waste, in particular the smaller animal carcasses, with the intent to burn this waste at H-POWER.

10. Petroleum Contaminated Soils and Asbestos-Containing Materials: These waste streams are already going to the PVT landfill instead of WGSL.

Ex. 2 at 2-3 (Stipulation). This Stipulation was signed by the ENV. The ENV offers no reason why these provisions were not included in its Findings.

Condition 3 states:

The Applicant shall provide, without any prior notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations; and Applicant's compliance with the conditions imposed herein. The annual reports shall also address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission on June 1 of each year subsequent to the date of this Decision and Order.

The Planning Commission and Land Use Commission must exercise greater oversight of the site-selection process and the ENV's compliance with other conditions. KOCA's Findings provide for bi-annual reports to the Planning Commission and the Land Use Commission. With these reports, the regulatory bodies will be able to ensure that the ENV diligently develops a new site and complies with the other conditions.

Condition 7 states:

The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate. Minor modifications may be approved by the Director of Planning and Permitting.

This condition is similar to Condition 8 of the Planning Commission's 2009 Decision, except that it adds the second sentence allowing the Department of Planning and Permitting ("DPP") Director to make minor modifications to the permit. The ENV does not provide any legal basis for allowing the DPP Director, rather than the Planning Commission and the Land Use Commission, to modify a special use permit. HRS § 205-6 provides that the Land Use Commission and the Planning Commission have authority to grant permits. The Land Use Commission's Rules expressly contemplate that requests for modification (for parcels in excess of 15 acres) will be reviewed and decided by the Planning Commission and the Land Use

Commission. *See* HAR § 15-15-96.1 (“Modification of special permit”). The Planning Commission’s Rules contemplate the same process. *See* Planning Commission Rules § 2-49 (“Request for modification or deletion of condition”). The Planning Commission’s Rules only contemplate that the DPP Director will make a report with recommendations to the Planning Commission on the request. *See id.* § 2-49(b). Neither the Land Use Commission Rules nor the Planning Commission Rules contain any provision allowing the DPP Director to make “minor” modifications to special use permits.

The first paragraph of the Decision and Order approves the application “for a SUP for existing and proposed expansion of WGS� and for continued operation of WGS�, located at Tax Map Key Nos. 9:2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the DOH is reached.”

Regarding the type of wastes allowed, **Condition 10** states:

Municipal solid waste shall be allowed at WGS� through **December 31, 2026**. Thereafter, only municipal solid waste that cannot be reasonably processed at HPOWER or another facility owned or under contract with the City (“other facility”) shall be allowed at WGS�.

These provisions are objectionable for several reasons. First, Condition 10 is contrary to Condition 1 in the ENV’s Findings filed May 2, 2012, which read:

MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGS� up to **January 1, 2014**, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.

Accordingly, under the ENV’s proposed Condition 1, **by today** the Landfill should have already closed to accepting municipal solid waste “provided HPOWER or other facility is capable of processing the MSW” The ENV provides no explanation

why it has pushed its own proposed deadline to accept MSW from January 1, 2014, to December 31, 2026, for nearly 13 years. No new evidence has been received since the ENV filed its Findings and proposed Condition 1 on May 2, 2012. In essence, the ENV's position in 2017 has become more aggressive and less consistent with the evidence than it was in 2012. The only plausible explanation for the 13-year slip-page is that the ENV has not acted with reasonable diligence in identifying and developing a new landfill.

Second, Condition 10 is also contrary to the Stipulation quoted above, including the ENV's commitment to "work to divert all waste from the landfill that can be disposed of by a method other than by landfilling" Ex. 2 at 2 (Stipulation). The ENV offers no explanation why it should be able to freely accept waste at the Landfill until December 31, 2026, when such waste "can be disposed of by a method other than by landfilling"

Third, there is no reason to allow all forms of MSW to be accepted at the Landfill until December 31, 2026. Director Steinberger admitted the third boiler would be operational by October or November 2012. 2011AP 4/11/12 Tr. at 84:22-24, 176:7-10, 211:12-15 (Steinberger). When the third boiler is operational, the ENV will have the capacity to divert nearly all of the MSW that presently goes to the Landfill, including all sewage sludge, medical waste, and food waste. 2011AP Steinberger Written Direct Testimony at 23 (¶ 71); 2011AP 4/11/12 Tr. at 90:3-21, 174:1-6 (Steinberger). These and other putrescible wastes decompose and create the greatest health and safety concerns for the community. Ending the acceptance of

putrescible waste will eliminate approximately 90% of the odor problems caused by the Landfill. 2011AP 3/7/12 Tr. at 206:6–10 (Miller). The ENV offers no justification for forcing the community to bear the adverse effects of those wastes until 2014.

Condition 11 states:

During periods of scheduled facility maintenance, such as a shut-down of one or more boilers at HPOWER, municipal solid waste that would otherwise be processed at HPOWER or other facility may be disposed of at WGS�.

This condition would conceivably allow the ENV to use the Landfill even after it sites and develops a new landfill “[d]uring periods of scheduled [H-POWER] facility maintenance” Once the ENV sites and develops a new landfill, the WGS� should close as soon as possible.

Condition 12 provides:

If the Director of the Department of Environmental Services reasonably determines that HPOWER or other facility cannot accept the municipal solid waste or there is an emergency, the municipal solid waste may be disposed of at WGS�.

This condition offers no consistent standard when the ENV Director “reasonably determines that “HPOWER or other facility cannot accept the municipal solid waste.” Instead, the ENV Director is given unfettered discretion. Further, the record in this case establishes which wastes can be accepted at H-POWER and other facilities.

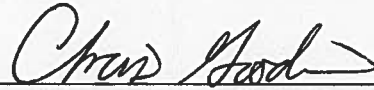
Additionally, this condition would conceivably allow the ENV to use the Landfill even after it sites and develops a new landfill if the ENV Director determines that “there is an emergency.” Once the ENV sites and develops a new landfill, the WGS� should close as soon as possible.

VI. CONCLUSION

In light of the foregoing, ENV's Findings should be rejected, except as noted above in Section II, and KOCA's Findings should be adopted.

DATED: Honolulu, Hawai'i, February 10, 2017.

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DEPT. OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of	)	FILE NO. 2008/SUP-2
)	
DEPARTMENT OF ENVIRONMENTAL	)	DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF	)	SERVICES, CITY AND COUNTY OF
HONOLULU	)	HONOLULU'S PROPOSED FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
To delete Condition No. 14 of Special Use	)	DECISION AND ORDER; CERTIFICATE
Permit No. 2008/SUP-2 (also referred to as	)	OF SERVICE
Land Use Commission Docket No. SP09-403))	
which states as follows:)	
)	
"14. Municipal solid waste shall be allowed at)	
the WGS� up to July 31, 2012, provided that)	
only ash and residue from H-POWER shall be)	
allowed at the WGS� after July 31, 2012.")	

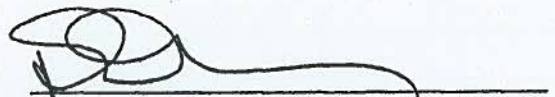
**DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND
COUNTY OF HONOLULU (hereinafter, "Applicant," "ENV," or "City"), by and through its
attorneys, DANA VIOLA and ROBERT BRIAN BLACK, Deputies Corporation Counsel, and

respectfully submits this Proposed Findings of Fact, Conclusions of Law, and Decision and Order, pursuant to the Rules of the Planning Commission, City and County of Honolulu § 2-74.

DATED: Honolulu, Hawaii, May 2, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dana Viola', is written over a horizontal line.

DANA VIOLA
ROBERT BRIAN BLACK
Deputies Corporation Counsel
Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special Use
Permit No. 2008/SUP-2 (also referred to as
Land Use Commission Docket No. SP09-403)
which states as follows:

"14. Municipal solid waste shall be allowed at
the WGS� up to July 31, 2012, provided that
only ash and residue from H-POWER shall be
allowed at the WGS� after July 31, 2012."

FILE NO. 2008/SUP-2

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

This matter came on for a contested case hearing before the Planning Commission, City and County of Honolulu (the "Planning Commission"), on December 7, 2011, January 11, 2012, January 25, 2012, February 8, 2012, March 7, 2012, April 4, 2012, April 11, 2012, and April 23, 2012. Based on the record in this matter, including the evidence adduced at the contested case hearing, the credibility of the witnesses testifying at the hearing, and the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, the Planning Commission hereby makes the following findings of fact, conclusions of law, and decision and order:

zoning ordinances, and to approve special use permits use permits for unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in accordance with the RPC. Section 6-1506(b), Revised Charter of the City and County of Honolulu 1973 (2000 Edition); Hawaii Revised Statutes Section 205-6(a).

2. Hawaii Revised Statutes Section 91-19(5) provides that:

[T]he party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Applicant has the burden of proof to show by a preponderance of the evidence that the Application meets the provisions of Section 2-45 of the RPC.

3. The Applicant has met the provisions of Section 2-45 of the RPC in obtaining SUP No. 2008/SUP-2 and now applies anew for a modification of SUP No. 2008/SUP-2 pursuant to Sections 2-18 and 2-49 of the RPC and the Rules of the State of Hawaii, Land Use Commission, Section 15-15-70.

4. Based on the findings set forth above, the Planning Commission concludes that Applicant has shown good cause to amend SUP No. 2008/SUP-2.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the decision and order of the Planning Commission to APPROVE Applicant's Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying the Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009, by deleting Condition No. 14, subject to the following conditions:

1. MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGSL up to January 1, 2014, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.
2. During periods of HPOWER scheduled maintenance when the facility may shut down one or more of its boilers, MSW, including sewage sludge, that would otherwise be processed at HPOWER or other facilities may be disposed of at WGSL.
3. Under emergency circumstances, as reasonably determined by the Director of the Department of Environmental Services, MSW, including sewage sludge, that would otherwise be processed at HPOWER or other facilities may be disposed of at WGSL.

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Corporation Counsel
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CITY AND COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of	)	FILE NO. 2008/SUP-2
)	
DEPARTMENT OF ENVIRONMENTAL	)	STIPULATION AND ORDER TO
SERVICES, CITY AND COUNTY OF	)	CONTINUE PROCEEDINGS TO APRIL 22,
HONOLULU	)	2017; CERTIFICATE OF SERVICE
)	
For A New Special Use Permit To)	
Supersede Existing Special Use Permit)	
To Allow A 92.5-Acre Expansion And)	
Time Extension For Waimanalo Gulch)	
Sanitary Landfill, Waimanalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
<hr/>		
In the Matter of the Application of)	
)	
DEPARTMENT OF ENVIRONMENTAL)	
SERVICES, CITY AND COUNTY OF)	
HONOLULU)	
)	
To delete Condition No. 14 of Special Use)	
Permit No. 2008/SUP-2 (also referred to as Land)	
Use Commission Docket No. SP09-403) which)	
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the WGS� up to July 31, 2012, provided that)	
only ash and residue from H-POWER shall be)	
allowed at the WGS� after July 31, 2012.")	

**STIPULATION AND ORDER TO
CONTINUE PROCEEDINGS UNTIL APRIL 22, 2017**

Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU ("ENV"), and Intervenors KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO, SCHNITZER STEEL HAWAII CORP., and COLLEEN HANABUSA request that the Commission continue the proceedings to April 22, 2017.

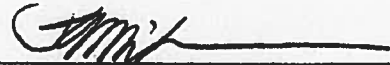
During the continuation, ENV will work to divert all waste from the landfill that can be disposed of by a method other than by landfilling, except if (1) H-POWER cannot accept the landfill waste or there is an emergency, and (2) there is no reasonably available alternative disposal method for the waste, by the following means:

1. Municipal Solid Waste, specifically:
 - (a) Residue: ENV will divert residue resulting from the H-POWER waste-to-energy process through H-POWER equipment improvements that will enable H-POWER to better filter residue to capture more of the burnable material and reduce the disposable waste. ENV will also continue to evaluate ways, including boiler optimization, to capture more of the residue at H-POWER.
 - (b) Bulky waste: As of July 2015, ENV has diverted all bulky waste previously used to dispose of sludge from the landfill.
 - (c) Unacceptable waste or waste rejected for disposal at H-POWER such as long wires, car parts, cables, and other oversized items: ENV will divert these wastes through H-POWER equipment improvements, such as the addition of a new waste shredder that will further process unacceptable waste so that these wastes may be incinerated at H-POWER. ENV is also investing in additional staff training at the Waimanalo Gulch Sanitary Landfill ("WGSL") to enhance inspections of incoming waste loads such that waste that could be burned at H-POWER will be identified and screened out in the future.
2. Ash (residue from H-POWER waste-to-energy process): ENV will follow the progress of facilities in Pasco County, Florida, and York County, Pennsylvania, that are pioneering ash reuse and will seek the Department of Health's approval of ash reuse projects modeled after these programs.

3. **Automotive Shredder Waste ("ASR")**, which comprises the majority of the Miscellaneous Special Waste category: The Department of Health has approved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to enable H-POWER processing.
4. **Wastewater Treatment Plant Waste**: ENV has diverted all sewage sludge produced by the City and County of Honolulu from the landfill as of July 2015. For sewage sludge from the private wastewater treatment plant, ENV will determine if adding water to the sludge or combining it with loads at the City's wastewater treatment plants will enable processing at H-POWER. For bar screening waste, ENV will institute enhanced odor control protocol or equipment to enable processing at H-POWER.
5. **Homeowner Waste**: ENV will continue efforts to establish a new refuse convenience center in the Campbell Industrial Park so there is an alternative depository for homeowner waste loads currently going to the landfill.
6. **Outdated Food Waste**: ENV will evaluate the constituents to determine compatibility with the H-POWER system to enable burning.
7. **Treated Medical Waste**: As of the end of December 2015, ENV has diverted all treated medical waste except for treated medical sharps.
8. **Rendering Waste**: Currently, only approximately 1,700 tons of rendering waste is disposed of at the landfill each year, and a single company is responsible for producing this waste stream. ENV intends to work with this company to further evaluate the rendering waste to determine whether it can be diverted from the landfill to H-POWER. In the interim, ENV will require this company to implement enhanced odor control measures for disposal at the landfill.
9. **Animal Waste**: ENV cannot divert large animal carcasses from the landfill because H-POWER does not have the ability to incinerate these large masses. However, ENV will work with the Department of Health to further characterize this waste, in particular the smaller animal carcasses, with the intent to burn this waste at H-POWER.
10. **Petroleum Contaminated Soils and Asbestos-Containing Materials**: These waste streams are already going to the PVT landfill instead of WGSF.

ENV shall file three reports with the Commission to update the status of the above-referenced objectives. These reports shall be submitted on June 22, 2016, September 22, 2016, and March 22, 2017.


DATED: Honolulu, Hawaii, _____.



KAMILLA C. K. CHAN
Deputy Corporation Counsel
Attorney for Applicant
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU



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KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

RICHARD D. WURDEMAN
Attorney for Intervenor
COLLEEN HANABUSA

APPROVED AND SO ORDERED:

Authorized Representative of the
Honolulu Planning Commission

FILE NO. 2008/SUP-2, In the Matter of the Application of DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU - Stipulation and
Order to Continue Proceedings to April 22, 2017

09-01760/483350

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of the

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

For a New Special Use Permit to
Supersede Existing Special Use Permit
to Allow A 92.5-Acre Expansion and
Time Extension for Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72
And 73

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special
Use Permit No. 2008/SUP-2 (also
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from H-POWER shall be allowed at the
WGS� after July 31, 2012.”

CERTIFICATE OF SERVICE

The undersigned certifies that on this day a copy of the foregoing document was duly served on the following persons by hand delivery:

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COLLEEN HANABUSA

DATED: Honolulu, Hawai'i, February 10, 2017.

CADES SCHUTTE
A Limited Liability Law Partnership



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