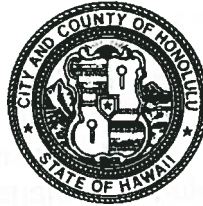


2011/BLOG-142

DEPARTMENT OF ENVIRONMENTAL SERVICES
CITY AND COUNTY OF HONOLULU

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IN REPLY REFER TO:
DIR 11-011

June 28, 2011

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

David K. Tanoue, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

Re: State Special Use Permit No. 2008/SUP-2; State Land Use Commission (LUC) Docket No. SP09-106; In re Department of Environmental Services, City and County of Honolulu: Whether a Supplemental Environmental Impact Statement (SEIS) is Required for the State Special Use Permit Modification for the Waimānalo Gulch Sanitary Landfill Expansion Project, Kapolei, Hawai'i Tax Map Keys (1) 9-2-003: 072 and 073

Dear Mr. Tanoue:

The Department of Planning and Permitting, City and County of Honolulu ("Department of Planning and Permitting") has requested that the Department of Environmental Services ("Department of Environmental Services" or "Applicant"), City and County of Honolulu ("City") discuss whether a Supplemental Environmental Impact Statement ("SEIS") is required for Applicant's request for a time extension to capacity as allowed by the Department of Health, State of Hawai'i ("DOH") for the disposal of municipal solid waste ("MSW") at the Waimānalo Gulch Sanitary Landfill ("WGSL" or "Landfill"). This request was prompted in light of the April 10, 2010, Hawai'i Supreme Court ruling in Unite Here! Local 5, et al., v. City and County of Honolulu, et al., 123 Hawai'i 150, 231 P.3d 423 (2010), regarding the Kuilima Resort development on the North Shore of the Island of O'ahu. That case dealt with the appropriateness of an Environmental Impact Statement ("EIS") prepared in 1985 for the expansion of the Kuilima Resort.

In Unite Here!, the Hawai'i Supreme Court ruled that a SEIS for the proposed expansion of Kuilima Resort should have been required because there was "a substantive change in the timing of the project such that an essentially different action

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was under consideration, HAR § 11-200-26, thereby rendering the original statement . . . no longer . . . valid.” 123 Hawai‘i at 181, 231 P.3d at 454 (quotations omitted).¹ The Court reasoned that the conditions upon which the 1985 EIS were based were over twenty years old so to assume that conditions would not have changed over this period was unreasonable, that new evidence with respect to traffic, monk seals and green sea turtles demonstrated that conditions had indeed changed, and that the environmental impacts of the 1985 EIS were limited in that they were only examined through 2000. 123 Hawai‘i at 452, 231 P.3d at 179.

Notably, the Hawai‘i Supreme Court clarified that its analysis in Unite Here! “does not suggest that supplemental environmental review is required ‘every time new information comes to light after [an] EIS is finalized.’ To the contrary, the conclusion that a SEIS is warranted is based on the particular circumstances **in this case** and on evidence discussed *supra*.” 123 Hawai‘i at 180, 231 P.3d at 453 quoting Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (emphasis in original).

Unlike in Unite Here!, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003: 072 and 073*, dated October 2008 (“2008 FEIS”) does not require a SEIS and is easily distinguishable from the facts in Unite Here!: (1) less than three years have passed since the 2008 FEIS was accepted by the Department of Planning and Permitting, so it is reasonable to assume that conditions may not have changed;

¹ Hawai‘i Administrative Rules (“HAR”) Section 11-200-26 states:

A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter. As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter.

(2) there is no new evidence to demonstrate changed conditions; and (3) the environmental impacts of the Landfill were examined for a period of at least fifteen (15) years, the estimated minimum life of the Landfill. Thus, the WGSL expansion remains the same project today as it was when the 2008 FEIS was approved and there are no changes in timing or otherwise that would have a significant effect on the environment.

Moreover, the 2008 FEIS thoroughly studied the WGSL's current permitted footprint of approximately 200 acres, its operations and the environmental impacts associated with the use of the WGSL to capacity. Neither the permitted area nor the methods of operation have changed, nor is timing an issue as each cell of the lateral expansion area will be developed on an as-needed basis. See 2008 FEIS at Section 4.11. Project Schedule and Cost, pg. 4-53. Furthermore, the Landfill's current footprint has already been approved by the Planning Commission of the City and County of Honolulu ("Planning Commission") and the State of Hawai'i Land Use Commission ("LUC") and is covered by a solid waste permit from the DOH.

Four substantive issues that may have a bearing on the 2008 FEIS are discussed further below.

1. Age of Data

The Department of Planning and Permitting accepted the 2008 FEIS on October 13, 2008. Pursuant to Hawai'i Revised Statutes ("HRS") Section 343-3, the official notice of the acceptance of the 2008 FEIS was published by the State Office of Environmental Quality Control ("OEQC") in the Environmental Bulletin on October 23, 2008, less than three years ago. The 2008 FEIS details the expansion of the then existing 107.5 acres of the WGSL by 92.5 acres in order to fully utilize the site for landfilling purposes. The use of the 92.5 acres was for the construction of new landfill cells and to accommodate related landfill site work, facilities, and infrastructure.²

Data used in preparing the 2008 FEIS was derived from various sources. These sources included published literature, land use plans and controls in effect at the time. A summary of these data sources is listed below:

Environmental Data

- 1972 Detailed Land Classification Island of Oahu
Soils Survey of Islands of Kauai, O`ahu, Hawai`i, Molokai, and Lanai
- 1977 Agricultural Lands of Importance to the State of Hawaii

² 2008 FEIS, Section 4, Project Description.

- 2007 Golder Associates Inc., "Basalt Dikes Influence on Groundwater Flow, Waimanalo Gulch Sanitary Landfill, O`ahu, Hawai`i."
- 2006 Department of Health, Clean Air Branch, "Annual Summary 2006 Hawai`i Air Quality Data"
- 1997 U.S. Geological Survey, "Hazards in Hawaii"

Land Use Controls

- N/D State Land Use District Map
- 1978 Hawaii State Plan (Revised 1986 and 1993)
- N/D Coastal Zone Management
- N/D Oahu General Plan
- 1997 Ewa Development Plan (Revised May 2000)
- N/D Zoning Map
- 2007 Draft Integrated Solid Waste Management Plan Update
- 1990 Atlas of Hawaii

These data sources represent the most-current, adequate, and up-to-date information related to potential environmental impacts associated with the Landfill.

In the preparation of the 2008 FEIS, a number of environmental studies, surveys, and investigations were commissioned to assess site conditions. These studies and dates of completion as cited in the 2008 FEIS are summarized as follows:

Appendix D – Hydrologic Setting and Groundwater Monitoring, Waimānalo Gulch Sanitary Landfill, 2006 (Waste Management, Inc. and Geosyntec Consultants, Inc.)

Appendix E – Botanical Resources Report for Alternative Municipal Refuse Disposal Sites on the Island of O`ahu, 2007 (AECOS Consultants)

Appendix F – Survey of the Avifaunal and Feral Mammals for the Proposed Waimānalo Gulch Landfill Expansion Project, O`ahu, 2007 (Phillip L. Bruner, Ph.D.)

Appendix G – Archaeological Inventory Survey, Waimānalo Gulch Landfill Expansion, 2008 (Cultural Surveys Hawai`i, Inc.)

Appendix H – Cultural Impact Assessment (Draft), Waimānalo Gulch Landfill Expansion, 2008 (Cultural Surveys Hawai`i, Inc.)

Appendix I – Traffic Impact Report, Waimānalo Gulch Sanitary Landfill Expansion, 2007 (Wilson Okamoto Corporation)

Appendix J – Socioeconomic Impact Assessment, Waimānalo Gulch Sanitary Landfill Expansion, 2008 (Including Addenda, Sept. 2008) (SMS Research)

Appendix K – Alternatives Analysis, Waimānalo Gulch Sanitary Landfill Expansion, 2008 (Including Addenda, Sept. 2008) (Pacific Waste Consulting Group)

Appendix L – Invertebrate Survey, Waimānalo Gulch Sanitary Landfill Expansion, 2008 (Steven Lee Montgomery, Ph.D. for AECOS Consultants)

Appendix M – Blasting Effects on Rockfalls and Vibrations, Waimānalo Gulch Sanitary Landfill Expansion, 2008 (Geosyntec Consultants, Inc.)

The studies, surveys and investigations listed above represent the most-current, adequate, and up-to-date information related to potential environmental impacts associated with the Landfill. Based upon this data and analyses, the 2008 FEIS concluded that the expansion of the Landfill "...will have no significant adverse environmental impact" and that "[a]ll anticipated potential impacts will be addressed through the use of mitigation measures and practices as set forth in this EIS document." See 2008 FEIS, Section 14, Significance Criteria.

2. New Information

a. No New Studies for WGSL

No new studies for WGSL have been undertaken since the completion of the 2008 FEIS. As represented above, the data sources, studies, surveys and investigations utilized in the 2008 FEIS represent the most-current information related to potential environmental impacts associated with the Landfill.

b. New Developments:

There have, however, been other developments since the completion of the 2008 FEIS.

i. Interim Shipping of MSW to the United States Mainland.

Notably, the City's plan to conduct interim shipping of MSW to the United States mainland has proven to be an unviable alternative means to dispose of O'ahu's solid waste. No waste was ever shipped to the mainland due to various problems encountered by Hawaiian Waste Systems LLC ("HWS"), the company awarded the contract to ship waste to the mainland. These problems culminated in a ruling by the U.S. District Court, Eastern District of Washington on August 30, 2010, to grant the petition of the Yakama Indian Nation and other environmental groups to enjoin the shipment of waste from Hawai'i to Washington or Oregon ports on the Columbia River and/or to the Roosevelt Landfill in Washington. Consequently, the U.S. Department of Agriculture, Animal and Plant Health Inspection Service ("USDA APHIS") canceled the compliance agreement permits of all Hawaii shippers that might otherwise have enabled the shipment of waste to the mainland. Due to this cancellation by the USDA APHIS, as well as HWS' representations that it was insolvent such that the shipping of MSW was no longer economically viable for HWS, the City and HWS renegotiated the contract to provide for local disposal of the MSW that was originally intended for shipment to the mainland. Specifically, the interim shipping contract was amended into a local processing and disposal contract, with the disposal of MSW within the State of Hawaii only.

ii. Sewage Sludge Diversion

In addition, on July 15, 2010, the City awarded a contract to Hawaiian Earth Recycling ("HER") to process approximately 100,000 tons annually of combined green waste, food waste, and sewage sludge from Kailua Wastewater Treatment Plant ("WWTP"), Wahiawa WWTP, and Hono'uli'uli WWTP. The operation will be based on the In-vessel Conversion process and is intended to divert an additional 58% of the City's sewage sludge away from the Landfill, while creating a marketable soil amendment product. HER is currently working on an environmental impact statement for the project as required by the contract with the City.

iii. Landfill Flooding and Release of Waste into Ocean

In December 2010 and January 2011, heavy rainfall from three large storm events caused WGSL to become inundated with flood waters from upstream of the Landfill. Specifically, on December 19, 2010, the Landfill received 7.89 inches of rain in 13 hours. The storm flooded the active area of the landfill, Cell E6. Following that storm, the City's contractor, Waste Management of Hawaii Inc. ("WMH"), constructed a temporary berm at the southern end of Cell E6 to prevent a catastrophic release of stormwater from Cell E6 to the Kahe Power Plant, brought in additional pumps, fortified

the on-site ditches and reinforced the inlet for the construction drainage system which diverts water from the construction area just above Cell E6.

On December 27, 2010, the Landfill received an additional 3.93 inches of rain in 4 hours. WMH reinforced and enlarged the temporary berm at Cell E6 to prevent the stormwater from Cell E6 from flooding Hawaiian Electric Company's Kahe Power Plant. WMH also reinforced the inlet for the construction area drainage system, placed diversion structures in front of the inlet, and constructed additional berms around the inlet.

On the night of January 12, 2011, the landfill received another 10.68 inches in 24 hours (and 7.63 inches in 6 hours). The stormwater again flooded Cell E6 and caused the sedimentation basin at the bottom of the landfill to overflow. When this happened, stormwater carrying floatable waste, including sterilized medical waste, flowed over the edge of the sedimentation basin and into the storm drainage outlet, which flows out under Farrington highway to the ocean.

None of the above-referenced new developments would alter the 2008 FEIS such that a SEIS would be required. In fact: (a) the 2008 FEIS anticipated the transshipment of waste off-island and alternative technologies to refuse disposal but maintained that even if and when these disposal/recycling alternatives reduce the demand for landfill space, they would never completely eliminate the need for a landfill, 2008 FEIS, p. 1-3, Sections 1.2.4 and 1.2.5; and (b) the 2008 FEIS discussed in detail the Stormwater Management Drainage Control System, including the construction of the Western Bypass Channel intended to "capture the upper watershed's flows and route them around the landfill so that they do not mix with the surface water runoff from the landfill." 2009 FEIS, pgs. 4-37 and 4-38, Section 4.6.1.

Moreover, the Solid Waste Management Permit No. LF-0182-09 (WGSL Solid Waste Permit), issued by the State of Hawaii Department of Health, incorporated the Western Management Drainage Control System and specifically anticipated that during the construction of the Western Drain there would be "periods when there will either be no means to convey Stormwater around the landfill or a storm of sufficient magnitude occurs that causes stormwater to overflow the temporary diversion berm for the temporary stormwater drain into cell E6." WGSL Solid Waste Permit, p. 40 of 61, Section G.1.b.iii.

The flooding and release of waste was a result of a catastrophic series of storm events. Nonetheless, while these events were unprecedented, the potential risk of storms causing stormwater to flood and overflow cell E6 during the construction of the Western Drain was contemplated as evidenced by the WGSL Solid Waste Permit.

Significantly, once the Western Drain was functionally completed on February 15, 2011, the stormwater from subsequent rainfall was effectively captured and diverted around the Landfill. Consequently, none of the above-referenced new developments, including the storm events and the resultant release of waste, alter the FEIS such that a SEIS would be required.

3. Time Frame and Phasing

Unlike the 1985 EIS at issue in Unite Here!, the 2008 FEIS does not provide a time frame by stated years for starting and completing the approximately 92.5 acre expansion of WGSL. Rather, the build out of WGSL will be done on an as-needed basis, as detailed in Section 4.11 of the 2008 FEIS:

“4.11. Project Schedule and Cost

The proposed project is scheduled to begin upon approval of the necessary land use entitlements. Each cell of the lateral expansion area will be developed on an as-needed basis. Construction may therefore be limited to work on one cell at a time, except during periods of transition when one cell is being closed and a new cell is being prepared for use, or multiple cells have interdependent excavation features. Closure of the final cell is anticipated to occur at the end of approximately 15 years, upon the exhaustion of the final cell. Follow-up procedures involving post-closure landscaping, vegetation, and landfill monitoring would occur at that time.”³

In the less than three years since the acceptance of the 2008 FEIS, development of the Landfill is progressing as indicated in the 2008 FEIS with the construction of additional waste cells being done on an as-needed basis.

4. Different Action

The 2008 FEIS studied the environmental impacts associated with expanding the then approximately 107.5 acre Landfill by about 92.5 acres, to the full acreage of the site at approximately 200 acres. After acceptance of the 2008 FEIS, the Department of Environmental Services filed an application (the “Application”) on December 3, 2008, for a new Special Use Permit (“SUP”) to supersede the then-existing SUP (State Special Use Permit No. 86/SUP-5), to allow a 92.5-acre expansion and time extension

³ The remaining capacity of WGSL is an estimate only as rates of disposal fluctuate based upon numerous factors, e.g., the economy, waste diversion programs, such as the implementation of island-wide recycling, possible disaster events, etc.

for the existing operating portion of WGSL. The Department of Environmental Services concurrently sought to withdraw the existing SUP permit for approximately 107.5 acres, File No. 86/SUP-5, and the conditions imposed therein, if and when the new SUP permit was granted. The Department of Planning and Permitting processed the Application, designated as County Special Use Permit File No. 2008/SUP-2 and recommended that the Planning Commission approve the Application with conditions.

The Planning Commission conducted a contested case hearing on the Application on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. On July 31, 2009, the Planning Commission recommended approval of the Application subject to 10 conditions, and further recommended approval of the withdrawal of the prior SUP for WGSL (SUP File No. 86/SUP-5) upon 2008/SUP-2 taking effect, and that all conditions previously placed on the Property under SUP File No. 86/SUP-5 would then be null and void. The decision of the Planning Commission was set forth in its Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 ("2009 Planning Commission Decision"). Notably, the 2009 Planning Commission Decision does not contain any expiration date for the SUP or any deadline for the acceptance of waste at WGSL.

On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications ("2009 LUC Decision"). In doing so, the LUC imposed certain new conditions, one of which (Condition No. 14) imposed a July 31, 2012, deadline to close WGSL to MSW (other than residue from the City's H-POWER waste-to-energy facility).

The Department of Environmental Services is therefore obliged to seek an amendment to the SUP now in effect due to the July 31, 2012, deadline to close WGSL to MSW set forth in Condition No. 14 of the 2009 LUC Decision. Essentially, the current SUP requires WGSL to stop accepting MSW for disposal well before the Landfill will reach its capacity and without an alternative disposal method for certain wastes, including special wastes such as sewage sludge, animal carcasses, treated medical waste, H-POWER residue, and bulky item waste that cannot be disposed of at H-POWER.

Accordingly, no "different action" due to size, scope, location, intensity, use or timing is applicable here. Rather, all relevant facts, circumstances and information concerning the use of an expanded WGSL to capacity were disclosed and evaluated in the 2008 FEIS. Moreover, the Landfill's current footprint has already been approved by the Planning Commission, the LUC and is covered by a solid waste permit from the DOH.

5. Summary Points

- The information presented in the 2008 FEIS is still current.
- The 2008 FEIS was compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives, such that the Department of Planning and Permitting may rely upon said document in making its determination.
- The use of WGS� to capacity does not change individual or cumulative impacts described in the 2008 FEIS; rather, said document extensively studied the potential environmental impacts associated with the use of the approximately 200 acre property for landfilling.
- Construction related to the expansion of the WGS� began upon receipt of the necessary land use entitlements. As set forth in the 2008 FEIS, each cell of the lateral expansion is being developed on an as-needed basis.
- No new evidence has come to light that would constitute a different action for which a SEIS should be prepared.
- The 2008 FEIS is easily distinguishable from the facts in Unite Here! because so little time has lapsed since its acceptance that any presumption that things have changed during this time is not reasonable. Moreover, there is no evidence to demonstrate changed conditions.

Should you or your staff have any questions, please contact the undersigned at 768-3486.

Sincerely,



Timothy E. Steinberger
Director