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KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAI'I

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 WGSL up to July 31,
2012, provided that only ash and residue
from H-POWER shall be allowed at the
WGSL after July 31, 2012."

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S PRE-
CONTESTED CASE STATEMENT

CERTIFICATE OF SERVICE

Contested Case: December 7, 2011

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO'S PRE-CONTESTED CASE STATEMENT

Pursuant to the Stipulation to Amend Briefing Schedule as provided in the Hon-
olulu Planning Commission's Order Regarding Prehearing Conference dated

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CITY & COUNTY OF HONOLU.

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November 29, 2011, Intervenors Ko Olina Community Association (“KOCA”) and Maile Shimabukuro (together “Intervenors”) submit this Pre-Contested Case Statement.

I. INTRODUCTION

For more than 22 years, the residents of the Leeward Coast have borne the burden of storing the municipal solid waste—treated sewage, medical waste, discarded food, animal carcasses, household garbage and all the rest—collected from the entire island of Oahu. The waste sits in a canyon above the only road in or out of the Leeward Coast and across the street from a resort and residential area where thousands of kamaiana and visitors live, work and play.

Time after time, the City and County of Honolulu (the “City”) has assured the community and the Land Use Commission that the Landfill will close by a specific date. These closure dates have come and gone. The Landfill remains open.

To hold the Honolulu Department of Environmental Services (the “ENV”) accountable, the Land Use Commission imposed Condition 14 in its October 22, 2009 Decision (the “2009 Decision”). Under Condition 14, the Landfill must stop accepting municipal waste after July 31, 2012. The Landfill will remain open to ash and residue from H-POWER.

Rather than meet this latest deadline, the ENV has asked this Commission simply to delete Condition 14. The ENV does not want an extension of time. The ENV wants to keep the Landfill open until the ENV cannot cram any more waste into Waimanalo Gulch.

It is time for this Commission to hold the ENV to its target dates and deadlines. The Leeward Coast has been subjected to more environmental injustices than any other community. The Leeward Coast has the power plant, the military chemical munitions on the reefs, and the Landfill, which recently released unknown amounts of medical waste into the waters. Declaration of Maile Shimabukuro (“**Shimabukuro Decl.**”) ¶¶ 12–13; Ex. K14 at 215:215:3–16 (statement by Commissioner Chock in 9/24/09 LUC Tr.). It is time for the Leeward Coast to be relieved of the hazards that the Landfill poses to the community’s health, safety, and welfare. Condition 14 must stand.

II. HISTORY OF THE LANDFILL

Condition 14 follows a long line of missed deadlines. The Landfill received a special use permit (“SUP”) in 1987 to operate on 60.5 acres. Ex. K69 (04/20/87 LUC Decision). In its decision approving the SUP, the Land Use Commission noted that the Landfill was proposed to “serve the Leeward Communities for disposing raw refuse and [was] projected to have an eight year life.” *Id.* at 4 (¶ 15).

But the Landfill grew before it was even opened. In 1989, the Landfill began its operations. Ex. K2 at 5. That same year, the site was expanded by an additional 26 acres. Ex. K70 at 5 (¶ 18), 9 (10/31/89 LUC Decision).

As the Landfill finally approached capacity, the ENV proposed that the site be expanded by 60 acres and extended “for another fifteen years.” Ex. K85 at 96:18–20 (statement by ENV Director Doyle in 3/27/03 LUC Tr.); *id.* at 117:12 (statement by Todd Apo in 3/27/03 LUC Tr.). The community objected. In addition to citing health and safety concerns, the community identified a promise by Mayor Frank Fasi that

the Landfill would only be used until the original acreage was filled. Declaration of Cynthia Rezentes (“Rezentes Decl.”) ¶ 8. Mayor Fasi himself confirmed the representation. *Id.* ¶ 9. A bargain was ultimately struck between the City and the community: The ENV would reduce its request to a five-year capacity extension, and in exchange, the community would drop its objections. Ex. K85 at 96:18–22 (statement by ENV Director Doyle); Rezentes Decl. ¶ 13.

The community held up its end of the bargain. In the 2003 proceedings, the community made no request for intervention. No contested case hearing was held. Without serious community opposition, the ENV sought and received a twenty-one acre expansion of the Landfill and a “five-year extension because that’s the time that [the ENV] believe[d] it[] [was] going to take in order for [the ENV] to establish a new landfill.” Ex. K85 at 95:6–8 (statement by ENV Director Doyle). The ENV “made the *commitment* to be out of [Waimanalo Gulch] within five years.” *Id.* at 128:4 (statement by ENV Director Doyle in 3/27/03 LUC Tr.) (emphasis added); *see also id.* at 125:3–11 (statement by ENV Director Doyle affirming the commitment “without a doubt that the landfill will close”). As ENV Director Doyle explained, “The city has *committed* and the Planning Commission has *certified* that *we will be out of that site, that’s a condition, we will be out of that site in five years.*” *Id.* at 145:21–24 (3/27/03 LUC Tr.) (emphasis added).

The community relied on the ENV’s commitment and the Land Use Commission’s condition of closure. Businesses were started and homes were purchased in the area with the understanding that the Landfill would close by 2008. Declaration

of Beverly Munson ¶ 5, 21. The community trusted the ENV to keep its word. *Id.* ¶ 21. Indeed, during his campaign in 2004, Mufi Hanneman likewise promised the community that the Landfill would close if he was elected. Declaration of Maeda Timson (“Timson Decl.”) ¶ 9.

The City did not stick to its promise for long. In 2007, the ENV requested to extend the closure deadline to May 1, 2010. The Land Use Commission gave the ENV until November 1, 2009 to close the Landfill. K155 at 18 (¶ 1) (3/14/08 LUC Decision).

As the 2009 deadline approached, the ENV sought another expansion of the Landfill. On December 3, 2008, the ENV filed an application for a new special use permit to utilize an additional 93 acres, for a total of 200 acres. The Land Use Commission approved the permit on the condition that “[m]unicipal solid waste shall be allowed at the WGSL up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSL after July 31, 2012.” K15 at 8 (¶ 14) (2009 Decision).

And here we go again. With the closure deadline approaching, the ENV has asked to keep the Landfill open indefinitely. Neither the standards of review nor the evidence before the Commission support the ENV’s request.

III. STATEMENT OF THE CASE

Condition 14 provides that “[m]unicipal solid waste shall be allowed at the WGSL up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSL after July 31, 2012.” Ex. K15 at 8 (¶ 14). Condition 14 was imposed in 2009 to enforce at least part of the ENV’s broken promises and

obligations, to safeguard the public's health, safety, and welfare, and to encourage the ENV diligently to pursue alternative landfill sites and technologies. These justifications have become stronger with the passage of time. To modify Condition 14, the ENV must show that it has exercised reasonable diligence in identifying and developing alternative landfill sites and technologies. The ENV cannot make this showing and, as such, the Application should be denied. In the alternative, the Application should be denied because a supplemental environmental impact statement is required in light of the recent discharges of waste from the Landfill.

A. The Land Use Commission Had Several Reasons for Imposing Condition 14.

The Land Use Commission had several reasons for imposing Condition 14. Those reasons remain valid today.

1. Condition 14 holds the ENV accountable for its promises and obligations.

When it comes to the Landfill, the City cannot be moved to action without a deadline. Ex. K14 at 205:10–11 (statement by Commissioner Lezy in 9/24/09 LUC Tr.); Ex. K72 at 12 (statement by Commissioner Gaynor in 7/31/09 HPC Tr.). Condition 14 is an indispensable element of the SUP. It is a means of holding the ENV accountable for its broken promises and unfulfilled obligations to close the Landfill. Ex. K14 at 216:21–23, 220:16–17 (statement by Commissioner Wong in 9/24/09 LUC Tr.); *cf. id.* at 146:21–23, 204:14–21 (statement by Commissioner Lezy); Ex. K72 at 5 (statement by Commissioner Dawson); K14 at 203:16–21, 205:15–19 (statement by Commissioner Lezy). Upholding Condition 14 serves to hold the City accountable.

2. *Condition 14 limit's the community's exposure to the dangers that the Landfill poses to public health and safety.*

The Landfill is dangerous. When the ENV previously appeared before this Commission and the Land Use Commission in 2008 and 2009, the Landfill already had a long record of regulatory violations, administrative penalties, and community complaints. Shimabukuro Decl. ¶¶ 8–10; Declaration of Ken Williams (“**Williams Decl.**”) ¶¶ 33–35. The citations included failures to properly construct or operate the cells, liners, leachate system, and gas collection system. Williams Decl. ¶ 34. Many of the violations stemmed from repeated deviations from design and operational plans, which increased the risk of harm to public health and safety. Declaration of Dwight Miller (“**Miller Decl.**”) ¶¶ 5, 10.

With these issues in view, the Land Use Commission extended the permit in 2009, but it was “a difficult decision that [the] Commission had to wrestle with.” Ex. K77 at 172:12–13 (statement by Chairman Devens in 2/2/11 LUC Tr.). “The very fears that the community raised before [the] Commission [in 2009] were [subsequently] realized.” *Id.* at 13–14. After heavy rainfall events in December 2010, the Landfill’s operator, Waste Management of Hawaii, Inc. (“**Waste Management**”), purposefully discharged into State waters near Ko Olina substantial amounts of storm water contaminated with leachate, Ex. K52 (1/4/11 DOH Investigation Report), in violation of regulatory requirements and the SUP. Ex. K123 (Finding of Violation and Order at 5–7); Williams Decl. ¶¶ 36–37.

The Hawai‘i Department of Health directed the ENV to issue a press release advising the public of the discharge. Williams Decl. ¶ 37. The ENV refused to issue

the warning. The ENV refused to warn the public that it had discharged contaminated water into the ocean. *Id.*

On January 12, 2011, the Department of Health “demanded the posting of signs warning of contaminated water discharges from WGSL, given the predicted rainfall.” Ex. K55 at 4 (1/12/11 Letter from Director Steinberger). The ENV’s Director Timothy Steinberger again refused to issue a warning. Mr. Steinberger sent a long e-mail full of technical reasons why signs were not required. The e-mail was sent on January 12 at 9:45 p.m. *Id.* at 1.

At that very moment, the rain was pouring at the Landfill. Between 9:00 p.m. and 10:00 p.m., the Landfill received nearly three inches of rain. Williams Decl. ¶ 42. As the Department of Health had predicted, the heavy rains caused the Landfill to discharge contaminated water. The heavy rains also dislodged unknown quantities of municipal solid waste from the Landfill and sent the waste down the mountainside and into coastal waters off Ko Olina. Williams Decl. ¶¶ 43–44; Ex. K77 at 154:23–24 (statement by Joseph Whelan in 2/2/11 LUC Tr.: “We don’t have any way of knowing how much waste actually left the site.”). The waste—which included medical waste and sewage sludge—washed up all along the shores of the Leeward Coast and east as far as Nimitz Beach. Williams Decl. ¶¶ 43–44.

By the morning of January 13, 2011, Ko Olina’s Lagoons were littered with syringes, vials of blood, and other debris from the Landfill. *Id.* ¶ 44. Residents and visitors could not walk on the sand, fish off the shore, or swim in the water. Declara-

tion of Duke Hospodar (“Hospodar Decl.”) ¶ 21; Timson Decl. ¶¶ 11, 18. The medical waste was everywhere. Hospodar Decl. ¶ 26; Timson Decl. ¶¶ 13–15.

The discharges violated federal law, and the United States Environmental Protection Agency (the “EPA”) issued yet another regulatory citation to the City and Waste Management. Ex. K123 (11/29/11 EPA Finding of Violation and Order). The EPA found that the City and Waste Management failed to properly manage leachate and that the discharges contained substances attributable to domestic, industrial, or other controllable sources of pollutants. *Id.* at 5–6.

Waste Management has said that the December and January discharges were “unavoidable.” Ex. K77 at 167:4–6 (Joseph Whelan). This is simply not true. Most obviously, if the Landfill had been closed as scheduled in 1997, 2003, 2008, or 2009, the December 2010 and January 2011 discharges would have never happened.

More subtly, the discharges directly flow from a failure to follow best management practices. One such practice is that storm water systems should be operational before waste is placed in active fill areas. Miller Decl. ¶ 13.c. But Waste Management did just the opposite. It began filling Cell E6—the cell that released the waste during the January spill—before the storm water system was operational. Williams Decl. ¶ 35. The permanent storm water diversion system’s construction had not been completed and the temporary diversion ditches and inlets above the active cells were not maintained or were not sized appropriately for the storm events. Miller Decl. ¶ 10.j; *see also* Ex. K77 at 169:24–170:7 (Chairman Devens in 2/2/11 LUC Tr.: “I have a real hard time believing that this was unavoidable. [¶]

What it sounds like to me is that you folks went ahead with this construction, did not take any proper preventative measures and just hoped it wasn't going to rain. And when it did you folks were caught with your pants down.”). Waste Management’s “assurances” that no spill will happen again are poor comfort.

3. *Condition 14 safeguards the economic benefits Ko Olina provides to the community, the City, and the State.*

Hawaii’s economy runs on tourism. Ko Olina is a major economic engine that generates substantial benefits for the surrounding community, the City, and the State of Hawai‘i. Hospodar Decl. ¶ 28. The Landfill is wholly inconsistent with the surrounding area. It does not belong next to a resort. *Id.* ¶ 7.

The area where Ko Olina sits was always intended to be a resort, even before the Landfill was permitted. Williams Decl. at ¶ 9; Ex. K132 at 3, 7 (Ewa Development Plan). By the time Ko Olina was developed, the Landfill was supposed to be closed. Williams Decl. ¶ 10; Ex. K69 at 7 (¶ 28) (4/20/87 LUC Decision).

Today, Ko Olina is a premier resort destination, attracting and creating numerous building opportunities for entities such as Walt Disney Resorts, JW Marriott, and others. Williams Decl. ¶ 10. The Ko Olina Resort currently generates \$520 million in direct spending annually and provides 2,800 jobs locally, and future developments at Ko Olina will almost double those economic benefits. *Id.* ¶¶ 54–55. In addition, construction period impacts for the proposed developments will include over \$3.7 billion in direct spending, creating 26,700 jobs, with indirect and induced economic impacts of an addition \$2 billion and 16,900 jobs. *Id.* at ¶ 56. At a total of \$5.7 billion and 43,000 jobs, the economic impact of Ko Olina is approximately equal

to Honolulu's rail project. *Id.* ¶ 56. Existing development at Ko Olina generates \$20.3 million in tax revenue to the City and \$40.4 million to the State annually. *Id.* ¶ 57. At full build-out, Ko Olina will generate \$55.5 million in annual tax revenues to the City and \$71.5 million to the State. *Id.* ¶ 58.

The Landfill causes substantial adverse impacts to the Ko Olina Resort and the surrounding area, including noise, odors, windblown litter, heavy truck traffic, blasting tremors, and blighted views. *Id.* ¶ 29. Those are the chronic problems. The January spill was a disaster.

After the January 2011 discharge, the beaches were closed, cleaned, and reopened. Hospodar Decl. ¶ 21. But the long-term damage was done. The event was international news, and several thousand lagoon patrons, including hotel guests, were turned away by the ten-day Department of Health closure. *Id.* ¶ 25. As a result of the highly-publicized discharge, some visitors will not return to Hawaii's beaches or Ko Olina's Lagoons, where a substantial amount of the waste washed ashore. *Id.*; *see also* Williams Decl. ¶ 50.

A landfill would not be approved today to be built across the street from a residential area and tourist destination that provides substantial benefits to the community, the City, and the State. Williams Decl. ¶ 59. Indeed, one of the "General Policies" in the Proposed Ewa Development is that an area (Makaiwa Gulch) adjacent to Ko Olina Resort should not be sited a new landfill because the Resort "plays an important role in job creation for Ewa." Ex. K24 at 4-27.

The Ko Olina Resort's operations generate millions of dollars for the economy, thousands of jobs for local workers, and millions of dollars in tax revenues. Williams Decl. ¶ 69. All of those benefits to the surrounding community, the City, and the State are cast in doubt by the Landfill's shadow. *Id.*

B. The ENV Has Not Exercised Reasonable Diligence in Pursuing Alternatives to the Landfill.

The Land Use Commission has stated, and the ENV agrees, that in order to modify Condition 14 the ENV must show, among other things, that it has exercised reasonable diligence in selecting and identifying a new landfill site, in accordance with Land Use Commission's Condition 4. Ex. K17 at 9; Ex. K94 at 6 (¶¶ 4-5); Application to Modify, attached June 28, 2011 Letter at 1-2. In addition, the ENV must also show that it has made a concerted effort to use alternative technologies to provide a comprehensive waste stream management that includes, *inter alia*, plasma arc and plasma gasification, as appropriate, and to seek beneficial reuse of stabilized dewatered sewage sludge, in accordance with the Land Use Commission's Condition 5. Ex. K15 at 6.

After nearly a decade, the ENV has made little, if any, progress in finding a new landfill site or alternative technologies for waste disposal. There are lots of reasons for the stagnation. For one thing, the City's waste-stream management is several years behind the practices followed in other municipalities. Whereas some cities had biosolids recycling and curbside recycling programs since the 1970s, the City started its programs respectively in 2006 and 2007. Miller Decl. ¶¶ 51.1, 52.a. The City still

does not operate a food waste collection program or a program to make beneficial use of the ash from H-POWER. *Id.* ¶¶ 51.b, 51.d.

For another thing, the City has not made a good faith effort to develop alternative technologies. Ex. K83 at 94:2–25, 139:12–17, 152:6–13 (statement by Commissioner Lezy in 3/6/08 LUC Tr.); Ex. K14 154:16–25 (statement by Chairman Plitz in 9/24/09 LUC Tr.); Ex. K72 at 11–12 (statements by Commissioners Gaynor and Dawson in 7/31/09 HPC Tr.). In 2003 before the Land Use Commission, the ENV claimed it was working towards employing alternative technologies, such as plasma gasification, that would address waste stream components that could not be taken to H-POWER. Ex. K85 at 97:14–20, 129:5–130:3 (statement by ENV Director Doyle). The ENV has said that these are mere “demonstration” technologies, but it has been eight years since the 2003 Land Use Commission proceeding and the ENV has not successfully “demonstrated” any new alternative technologies. Williams Decl. ¶ 65. The City issued an RFP for alternative technologies in 2007, but did not initially receive proposals for the new technologies, so it decided to cancel the RFP “for the sake of time.” Ex. K83 at 105:2–20 (statement by ENV Director Takamura in 3/6/08 LUC Tr.). After much delay, the City tried shipping waste off-island, *see* Ex. K11 at 54:21–55:7 (statement by Todd Apo in 7/8/09 LUC Tr.), but when the project ran into a roadblock the City gave up on it, *see* Ex. K35 at 2 (7/18/11 Status Report).

The biggest reason we do not have a new Landfill is the City is not trying to find one. After saying that it would identify and develop a new landfill in 2003 and that

the existing Landfill could not be selected as the new landfill, the very next year the City chose to select the old Landfill as the “new” landfill. From 2004 to 2009, the City made no additional efforts to select and develop a new landfill. In 2009, after being directed to exercise reasonable diligence to find and develop a new site, the ENV decided to wait over a year to begin the site selection process in October 2010, but that plan fell through, as the start date was pushed back to November 2010 and then to January 2011. Williams Decl. ¶ 62. The current site selection committee was supposed to provide its recommendation in August 2011, and then in October 2011. *Id.* ¶ 63.

It is now December and the site selection committee has still not made its recommendation, which is unfortunately unsurprising given the many flaws in the current site selection process. The deficiencies include an incomplete list of criteria, poor or illogical scoring of criteria, improper use of “deciles,” and organizational problems which will skew the results. Miller Decl. ¶ 6. The site selection process also deviates significantly from the siting process contemplated in the City’s own Updated Solid Waste Management Plan. *Id.*

It is hard to believe that the City is really trying to find a new site. The site selection committee is supposedly looking for one, albeit through a flawed methodology. Meanwhile, the ENV is asking for an indefinite extension of the life of the Landfill. It just doesn’t add up.

C. A Supplemental Environmental Impact Statement Is Required.

The events of December 2010 and January 2011 show that the design, construction, and maintenance assumptions supporting the 2008 Final Environmental

Impact Statement (the “2008 FEIS”) were incorrect and insufficient. Miller Decl. ¶ 16. In addition, Waste Management has deviated from the cell construction plans contemplated by the FEIS. For these reasons, a supplemental environmental impact statement is required. *Id.* ¶¶ 16, 18.

“A supplemental statement shall be warranted . . . where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.” Haw. Admin. R. 11-200-27. The 2008 FEIS was premised on the notions that “[s]urface water at the site is limited by the existing dry and arid conditions of the site,” Ex. K5 at 5-11, and that “the average rainfall at the WGS� is approximately 15 inches per year.” *Id.* at 5-1. According to the 2008 FEIS, under the stormwater management system in place “[a]fter heavy rainfall events, overland surface water flows occur at Waimānalo Gulch and are directed to surface water drainage systems constructed at the landfill.” *Id.* at 5-11. Based on these assumptions and the drainage controls in place, the FEIS concluded that “[w]ith the mitigation measures proposed, the potential for adverse impacts associated with flooding are not anticipated.” *Id.* at 5-38. The December and January 2011 spills show that the mitigating measures originally planned were not adequate and environmental impacts have increased. Miller Decl. ¶ 18. Therefore, a supplemental environmental impact statement is warranted. *Id.*

Furthermore, a supplemental environmental impact statement is required where a particular action changes substantively in “size,” such that the change “may have a significant effect.” See Haw. Admin. R. § 11-200-26; see also *id.* § 11-

200-27. In this case, the cell that flooded and released waste, Cell E-6, was not constructed to the limits shown in the engineering report and FEIS, which appears to have directly contributed to the storm water damage to the lining systems of Areas E-4 and E-6 during storm events. *Id.* ¶ 10.g. Cell E-6 was the primary cell affected by the heavy rainfall in December 2010 and January 2011. The change in the limit of the Cell E-6 lining system created a low point in the lining system, channeling the stormwater toward the vulnerable low point at the junction of Cells E-4 and E-6. *Id.* It also allowed areas above the western upper edge of the E-6 lining system to drain onto the lining system, which ultimately undermined the edges of the system and damaged the geomembrane and clay liner. *Id.* Because Cell E-6 does not conform to the limits shown in the 2008 FEIS and the non-conformity likely affects the environmental impact, a supplemental environmental impact statement is further warranted. *Id.*

As the “approving agency” asked to delete Condition 14, *see* Haw. Admin. R. § 11-200-27, the Commission should require the preparation of a supplemental environmental impact statement and deny the Application.

IV. CONCLUSION

The residents and businesses of the Leeward Coast have been subjected to the Landfill for too long. The ENV is accountable for its promises and obligations to the surrounding community.

The ENV is also accountable for its promises and obligations to the Land Use Commission. Condition 14 seeks to mend those broken promises and to protect the community from the hazards the Landfill has created for public health, safety, and

welfare. The ENV can only buy more time if it exercises reasonable diligence in selecting and developing alternative sites and technologies. The ENV has done neither. Ko Olina and the Leeward community should not have to pay for the ENV's consistent failures.

The Application should be denied.

DATED: Honolulu, Hawai'i, December 14, 2011.

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CERTIFICATE OF SERVICE

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

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