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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 SERVICES, CITY AND COUNTY OF HONOLULU	)	DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; CERTIFICATE OF SERVICE
	)	
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."	)	
	)	

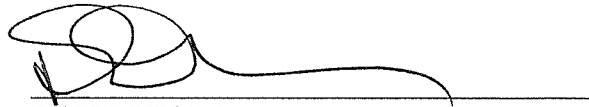
**DEPARTMENT OF ENVIRONMENTAL SERVICES,  
CITY AND COUNTY OF HONOLULU'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

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, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid 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	)	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
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."	)	
_____	)	

**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 or fact, conclusions of law, and decision and order:

## FINDINGS OF FACT

### PROCEDURAL MATTERS

1. The Waimanalo Gulch Sanitary Landfill (“WGSL” or the “landfill”) is located at 92-460 Farrington Highway, Honouliuli, Ewa, Oahu. See 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, included as Exhibit “A2.”

2. On June 28, 2011, Applicant filed an 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 (“Application”), with the City and County of Honolulu, Department of Planning and Permitting (“DPP”) pursuant to the Rules of the Planning Commission, City and County of Honolulu (“RPC”), sections 2-18 and 2-49, and the Rules of the State of Hawaii, Land Use Commission, section 15-15-70. See Application. The Application specifically seeks the deletion of Condition No. 14 of SUP No. 2008/SUP-2 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.

See Application.

3. On September 4, 2011, a notice of the Planning Commission’s public hearing to consider ENV’s Application set for October 5, 2011, was published in the *Honolulu Star-Bulletin*.

4. On September 9, 2011, DPP transmitted its report to the Planning Commission, recommending approval of the Application. See DPP Recommendation.

5. On September 19, 2011, Ko Olina Community Association (“KOCA”) and Maile Shimabukuro (collectively, “Intervenors”) filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties. On September 23, 2011, Applicant filed a Memorandum in Opposition to Intervenors’ Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties. On September 30, 2011, Intervenors filed a Reply Memorandum to Applicant’s Memorandum in Opposition to Intervenors’ Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties.

6. On September 19, 2011, Schnitzer Steel Hawaii Corps. (“Intervenor Schnitzer”) filed a Petition to Intervene.

7. At the public hearing on October 5, 2011, at the Mission Memorial Auditorium, 550 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony. The Planning Commission heard and granted Intervenor Schnitzer’s Petition to Intervene. The Planning Commission heard and denied Intervenors’ Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties but granted Intervenors’ Motion to Intervene as joint intervenors. Thereafter, the Planning Commission closed the public hearing on the Application.

8. On October 26, 2011, Applicant filed its List of Witnesses, consisting of five (5) potential witnesses. Intervenors filed their List of Witnesses, consisting of 31 potential witnesses. Intervenor Schnitzer filed its List of Witnesses, consisting of one (1) potential witness.

9. On November 7, 2011, Intervenors filed a Motion to Dismiss.

10. On November 9, 2011, the Planning Commission filed its Order Regarding Prehearing Conference.

11. On November 14, 2011, Applicant filed its Memorandum in Opposition to Intervenor Schnitzer's Motion to Dismiss. Intervenor Schnitzer also filed its Memorandum in Opposition to Intervenor Schnitzer's Motion to Dismiss.

12. On November 29, 2011, the Parties filed their Stipulation to Amend Briefing Schedule as Provided in the Planning Commission of the City and County of Honolulu's Order Regarding Prehearing Conference Dated November 9, 2011.

13. On December 7, 2011, the Planning Commission conducted a hearing at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii ("Mission Memorial Hearings Room"), on Intervenor Schnitzer's Motion to Dismiss. The Planning Commission heard and denied Intervenor Schnitzer's Motion to Dismiss. Thereafter, the Planning Commission commenced the contested case hearing on the Application and the parties presented their opening statements.

14. On January 11, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. The Applicant began its case-in-chief and presented its first witness: Timothy Steinberger, Director of the Department of Environmental Services. See Tr. 01/11/12, 11:10-11. Intervenor Schnitzer offered, and the Planning Commission received into the record, Exhibits "K1" to "K161." Id. at 15:12-14. Schnitzer moved to admit the court reporter's transcript of the October 5, 2011 public hearing so as to allow the public testimony to be made a part of the record. Id. at 15:18-22. The Planning Commission granted Schnitzer's request. Id., at 15:23.

15. On January 25, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. Applicant offered, and the Planning Commission received into the record, Exhibits "A1" to "A33." Id., at 6:13-20. The

Applicant presented its second and final witness in its case-in-chief, Steven Y.K. Chang, Branch Chief, State of Hawaii, Department of Health, Solid and Hazardous Waste Branch. Id., at 6:21. Applicant offered no further witnesses and concluded its case-in-chief, but reserved the right to call rebuttal witnesses. Id. at 71:23-25, 72:1. Schnitzer presented its first and only witness, Larry Snodgrass, and concluded its case-in-chief. Id. at 86:20. Id. at 72: 4-5. Intervenor offered, and the Planning Commission received into the record, Exhibit “K163.” Tr. 1/25/12, 6:10-12. Intervenor offered, and the Planning Commission received into the record, Exhibits “K164,” “K165,” and “K168.” Id. at 38:14-19, 55:11-15.

16. On February 8, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. Intervenor began their case-in-chief and presented the following four witnesses: Ken Williams; Beverly Munson; Cynthia Rezentes; and Duke Hospodar. Tr. 02/08/11, 14:4-5, 56:13-14, 72:18-19, 82:15-16. ENV offered, and the Planning Commission received into the record, Exhibits “A34” and “A35.” Id. at 29:25 - 30:2, 56:6-8.

17. On March 7, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. Intervenor presented their fifth and sixth witnesses: Shad Kane, and Dwight Miller. The Planning Commission accepted Mr. Miller as an expert in solid waste management. Tr. 03/07/12, 5:20-21, 17:22-23, 18 – 19:8. KOCA offered, and the Planning Commission received into the record, Exhibits “K170,” “K171,” and “K173” to “K179.” Id. at 152:20 – 153:4, 153:13, 155:4-5, 122:19-23.

18. On April 4, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. The Parties agreed to take the remaining witnesses out of order due to scheduling difficulties. Intervenor Schnitzer first

presented Tom Zelenka as a rebuttal witness. Tr. 04/04/12, 7:19-20. Applicant then presented Janice Marsters as its first rebuttal witness. Id. at 30:4-5. Applicant offered and the Planning Commission received into the record, Exhibit “A36.” See Tr. 4/4/12, 33:4-16. Intervenors presented their seventh and eighth witnesses: Maile Shimabukuro and Maeda Timson. Intervenors then rested their case. Id. at 123:18-19, 133:5-6. Applicant presented its second rebuttal witness, Gary Gill, Deputy Director, State of Hawaii, Department of Health, Environmental Management Division. Id. at 143:17. Intervenors offered, and the Planning Commission received into the record, Exhibits “K215,” “K217,” “K218” and “K223.” Id. at 101:15-19, 83:14-19, 143:4-10.

19. On April 11, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. Applicant presented its third and fourth rebuttal witnesses: Hari Sharma, who was qualified as an expert in landfill design and permitting, and Timothy Steinberger. Tr. 04/11/12, 6:14-15, 69:4-5. Applicant offered, and the Planning Commission received into the record, Exhibits “A37” to “A50.” Id. at 13:1-9, 15:21-25, 25:1-7, 36:10 – 37:20, 105:11-15, 138:1-5. Intervenor offered, and the Planning Commission received into the record, Exhibits “K189,” “K190,” “K193,” “K195,” “K196,” “K198,” “K230,” “K247,” and “K251.” Id. at 19-24. Applicant rested its case. Id. at 4/11/12, 212:17-22.

20. On April 23, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room. Intervenors presented two rebuttal witnesses: Dwight Miller and Eddie Belluomini. Intervenors then rested their case. Tr. 04/23/12, 4:4-5, 35:15. Tr. 4/23/12, 48:24. Intervenors offered, and the Planning Commission received into the record, Exhibits “K255,” “K257,” “K192,” “K220,” “K256,” and “K258.” Id. at 12:13-17, 15:16-21. Id. at 80:21-25. The parties presented their closing arguments.



21. The Planning Commission scheduled decision-making for the Application on May 25, 2012, at the Mission Memorial Hearings Room. On April 24, 2012, Intervenors filed its Eighth Amended Exhibit List.

22. On April 27, 2012, Intervenors filed an *Ex Parte* Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence After the Hearing Closed (“Motion to Reopen the Contested Case Hearing”). Intervenors seeks to offer Exhibits “K259” and “K260” into the record.

23. On May 1, 2012, Applicant filed a Memorandum in Opposition to Intervenors’ Motion to Reopen the Contested Case Hearing.

#### **EXHIBITS**

24. The Applicant offered, and the Planning Commission received into the record, Exhibit “A1” to “A42,” without objection, “A43” to “A46,” over objection of Intervenors, and “A47” to “A50,” without objection.

25. Schnitzer offered, and the Planning Commission received into the record, Exhibits “S1” to “S4.” Intervenor Schnitzer also requested that the court reporter’s transcript of the October 5, 2011 public hearing so as to allow the public testimony to be made a part of the record. Tr. 12/10/11, 15:18-22. The Planning Commission granted Schnitzer’s request. *Id.* at 15:23.

26. Intervenors offered, and the Planning Commission received into the record, Exhibits “K1” to “K169,” over objection of Applicant and Intervenor Schnitzer, “K170” to “K171,” “K173” to “K176,” “K178” to “K179,” “K189” to “K196,” “K198,” “K208,” “K215,” “K217” to “K218,” “K222” to “K223,” “K226” to “K227,” “K220,” “K230,” “K247,” “K251,” “K255” to “K258,” without objection.

27. In its Motion to Reopen the Contested Case Hearing, Intervenors have also offered Exhibits “K259” and “K260” into the record. These exhibits have not been received into the record by the Planning Commission.

**APPLICATION FOR MODIFICATION OF SPECIAL USE PERMIT**

28. Pursuant to Condition No. 14 of 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 (“2009 LUC Order”), with respect to SUP No. 2008/SUP-2, WGS� may not accept municipal solid waste (“MSW”) for disposal after July 31, 2012, but may continue to accept ash and residue from H-POWER until it reaches capacity. See Application and Exhibit “A19.”

29. A modification of SUP No. 2008/SUP-2 is being sought for the continued use of WGS� to dispose of MSW beyond July 31, 2012. The modification will delete the MSW restriction contained in Condition No. 14 of the 2009 LUC Order and allow WGS� to accept MSW until it reaches capacity.

**RELEVENT HISTORY**

30. On March 13, 2003, the Planning Commission granted ENV’s application to expand the landfill by only 21 acres (“2003 Planning Commission Decision”). See Exhibit “A7.” At that time, ENV anticipated that the Landfill with the expanded 21 acres would reach capacity in 5 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. Id. at p. 5.

31. On June 9, 2003, the LUC issued its 2003 LUC Decision. See Exhibit “A8.” The LUC Decision also required the City Council to select a new site for a landfill, with the assistance of the Blue Ribbon Site Selection Committee, by June 1, 2004. Id. at 7-9.

32. The City Council received an extension of the June 1, 2004 deadline from the LUC, and on December 1, 2004, selected the further expansion of Waimanalo Gulch site as the City and County of Honolulu’s (“City’s”) future landfill site. The City Council determined that the Waimanalo Gulch site would satisfy O‘ahu’s need for a landfill to manage its solid waste for the foreseeable future. The City Council concluded that (1) the Waimanalo Gulch site had at least 15 years of capacity left, (2) the Waimanalo Gulch site was the most economical site for which all costs and revenues are known factors, (3) other sites would have required large amounts of money to acquire land and develop the site and infrastructure, (4) an operating contract was already in existence, and (5) the Landfill operator was committed to addressing community concerns. Resolution No. 04-348, CD1, FD1 (December 1, 2004). See Exhibit “A11.”

33. To implement the City Council’s decision to expand WGSL, ENV needed to complete an Final Environmental Impact Statement (“FEIS”). The FEIS would address expansion of WGSL by approximately 92.5 acres - to the full acreage of WGSL at approximately 200 acres – and was a necessary step before ENV sought a new SUP for the entire site. See Exhibit “A1” at pgs. 2-21. See also Exhibit “A15.”

34. To have time to prepare the FEIS, ENV requested an extension of the deadline for accepting waste at the existing landfill. On January 16, 2008, the Planning Commission granted ENV’s application to amend the 2003 Planning Commission Decision, by extending the deadline to accept waste at WGSL from May 1, 2008, to May 1, 2010, or until WGSL reached its

permitted capacity, whichever occurred first (the “2008 Planning Commission Decision”). See Exhibit “A14.”

35. The LUC adopted the recommendation contained in the 2008 Planning Commission Decision, but shortened the waste acceptance deadline from May 1, 2010, to November 1, 2009, and required ENV to report to the LUC every six months on the actions taken to mitigate further use of WGSL. See Exhibit “A16” at p. 18.

36. On December 3, 2008, ENV filed an application for a new SUP to supersede the existing SUP (State Special Use Permit No. 86/SUP-5), that would authorize ENV to use an additional 92.5-acres of WGSL and operate WGSL to capacity. See Exhibit “A18” ¶ 5, pg. 2.

37. The State of Hawaii, Department of Land and Natural Resources, State Historic Preservation Division (“SHPD”) reviewed the 2008 Application to expand WGSL and Applicant’s proposed mitigation and determined that there was no effect to historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD to David Tanoue, Director of DPP, dated April 2, 2009. See Tr. 4/11/12, 103:18-25, 104:1-8, Exhibit “A48.”

38. No native Hawaiian customary and traditional rights or practices at the Property were identified. See Exhibit “A18.”

39. On July 31, 2009, the Planning Commission recommended approval of ENV’s application subject to 10 conditions and set forth this approval in its Findings of Fact, Conclusions of Law, and Decision and Order, dated August 4, 2009 (“2009 PC Decision”). The Planning Commission issued its 2009 PC Decision after careful consideration of all the evidence presented at the contested case hearing; the credibility of the witnesses testifying at the hearing; the proposed findings of fact, conclusions of law, and decisions and orders submitted by the

parties and their respective responses thereto; and the written arguments of the parties. See Exhibit “A18” at pg. 1.

40. In its 2009 PC Decision, the Planning Commission found:
- It would take more than seven years to identify and develop a new landfill site (other than WGSL).
  - On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property [200.62-acre property, identified by Tax Map Key Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, Oahu, Hawaii] as the site for the City’s landfill.
  - The proposed expansion of the landfill within the Property was needed because WGSL is a critical part of the City’s overall integrated solid waste management efforts.
  - Continued availability of WGSL is required as a permit condition to operate HPOWER, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.
  - Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.
  - WGSL is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by HPOWER.
  - WGSL is a critical portion of the City’s overall Integrated Solid Waste Management Plan (“ISWMP”), which looks at all of the factors that make up solid waste management, including reuse and recycling, the HPOWER facility, and landfilling for material that cannot be recycled or burned for energy.
  - Other items that cannot be recycled or burned at HPOWER are deposited at WGSL, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels.

Id. at pgs. 8, 18-19.

41. The 2009 Planning Commission did not impose an expiration date for the SUP or any deadline for the acceptance of waste at WGSL. Instead, the Planning Commission concluded 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.” See Exhibit “A17” at pg. 2.

42. Commissioner Komatsubara noted that ENV had “demonstrated that we [people of the City and County of Honolulu] need a landfill . . . we need a landfill on this island for us to move forward...it would not be in the community’s best interest if we were to close this landfill before we find another landfill.” Id. at pg. 3. Commissioner Komatsubara further explained as follows:

In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of the Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you’re not going to close this landfill until you find another site. I don’t think it’s in the interest of our community not to have a landfill.

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So what this proposal does is, it says look, [Applicant] can keep [WGSL] open until your [*sic*] full, until you’ve reached the capacity, but you have an obligation starting from next year [2010] to start looking for a new site. Now whether you take it seriously or not, that’s up to you because we have the power to call you in, and you have the obligation now to report every year on what you’re doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not...the applicant is not in good faith moving forward with reasonable diligence to find a new site.

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...I think going down the old path of just putting a [closure] date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further...I’d rather not say it’s a certain date only to know that when we reach that date we’re going to extend it further until we find the new site. I’d rather focus on an effort to find a new site and have [Applicant] come in every year and explain to us where you are in your effort to find a new site. That’s what this [order] does.

Id. at pg. 4.

43. Consistent with Commissioner Komatsubara’s comments, the Planning Commission imposed several conditions to monitor the City’s progress toward finding a new landfill site. Certain of those conditions, which the City has never contested, are:

- On or before November 1, 2010, begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�.
- Continue 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, and shall continue efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.
- Provide annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGS�'s operations, and Applicant's compliance with conditions imposed herein.
- Notify the Planning Commission of termination of the use of the Property as a landfill.

See Exhibit "A18," pgs. 25-26.

44. The City has complied and continues to comply with not only the letter, but the spirit of the Planning Commission's conditions.

45. 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"). See Exhibit "A19." Disregarding the Planning Commission's reasoned analysis and the underlying facts, the 2009 LUC Decision granted ENV's Application subject to the added condition that is now at issue:

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.

Id. at pgs. 4, 8-9.

46. ENV timely appealed the LUC imposed July 31, 2011 deadline for the Landfill to accept MSW, and that appeal is pending currently before the Hawaii Supreme Court.

### **PURPOSE AND NEED**

47. WGS� is the only permitted public MSW facility on the island of Oahu. Thus, WGS� is the only landfill option for disposal of MSW for the general public and the only permitted repository for the ash produced by H-POWER. Tr. 1/25/12, 58:22-25, 59:1-9.

48. The continued availability of WGS� to dispose of MSW is needed because there will always be material that cannot be combusted, recycled, reused or shipped. See Tr. 1/25/12, 4:14, Tr. 4/11/12, 117:13-25, 118:1-25, 119:1-25, 120:1-25, 121:1-25, 122:1-5. Exhibit "A18."

49. The continued availability of WGS� to dispose of MSW is needed because WGS� is required as a permit condition to operate H-POWER. Written Testimony of Timothy E. Steinberger, pg. 29.

50. The continued availability of WGS� to dispose of MSW is needed for cleanup in the event of a natural disaster. Tr. 1/25/12, 12:8-14, Tr. 4/4/12, 150:10-15.

51. Therefore, WGS� is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. Tr. 4/4/12, 149:24-25, 150:1-25, Tr. 1/25/12, 12:15-19, 65:14-20.

52. WGS� is a critical portion of the City's overall ISWMP, which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Written Testimony of Timothy E. Steinberger, pgs. 2 and 4.

53. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on O'ahu. Of the 1,214,904 tons, the landfill received only 163,736 tons of MSW and 179,946 tons of ash and residue from HPOWER. The amount of MSW deposited at WGS� reflects a steady decrease from 2009. In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. In comparison, ash and residue has remained fairly constant. The 2010 disposal rate represents a total diversion of MSW from the Landfill of 71.7%. See Exhibit "A27," see also Exhibit "A29."



54. Other items that cannot be recycled or burned at H-POWER are deposited at WGSL, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, medical sharps, ASR, contaminated soil that is below certain toxicity levels. Tr. 1/25/12, 4:14, Tr. 4/11/12, 117:13-25, 118:1-25, 119:1-25, 120:1-25, 121:1-25, 122:1-5; Tr. 1/25/12, 10:6-25, 11:1-25, 12:1-14.

55. The City is actively reducing waste volumes that are directed to the landfill. H-POWER capacity will increase with its expansion so that it can receive an additional 300,000 tons per year of MSW by 2013. Written Testimony of Timothy E. Steinberger, p. 18. The expanded H-POWER facility will be able to burn items that the current facility cannot, and which therefore have been sent to the landfill. Id. at 19.

56. The City continues to increase its recycling efforts and has accomplished island wide expansion – 160,000 residences – as of May 2010. Id. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 20-21

57. The City is entered into a contract for a Green Waste, Food Waste and Wastewater Bio-solids, In-Vessel Conversion Facility to process some 100,000 tons per year of these wastes to beneficial use such as biofuels, energy or compost materials. The vendor expects to be fully operational in early 2013. Id. at 20.

58. The City has a facility at the Sand Island Wastewater Treatment Plant digests, dewateres, and heat-dries approximately 20,000 tons per year of sewage sludge and turns the bio-solids that might otherwise be sent to a landfill into pellets that can be used as a fertilizer or soil amendment material. Id. at 23. The City also intends to evaluate alternate technologies for the treatment and minimization of sewage sludge. Id. at 23-24.

59. 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 (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL. Testimony of Timothy E. Steinberger, p. 30. There will be few cities that can match that rate of landfill diversion. See Exhibit "A29."

60. It will take at least seven years from site selection for a new landfill site to be operational. Tr. 4/4/12, 56:1-25, 57:1-25, 58:1-17; Tr. 4/11/12, 41:2-25, 42:1-6; Tr. 4/11/12, 73:19-25, 74:1-5; Tr. 4/11/12, 122:6-25, 123:1-12.

61. Despite progress made to divert waste from the landfill via recycling, burning waste for energy, and reuse, a landfill is still needed on Oahu. Tr. 1/25/12, 4:14, Tr. 4/11/12, 117:13-25, 118:1-25, 119:1-25, 120:1-25, 121:1-25, 122:1-5; Tr. 3/7/12, 99:22-25, 100:1; Tr. 4/4/12, 149:10-23; 1/25/12, 12:7-14.

62. Closing WGSL to MSW without alternative disposal options will endanger public health. Tr. 4/4/12, 149:2-25, 150:1-25, 151:1-4; Tr. 1/25/12, 12:15-19.

### **COMPLIANCE WITH CONDITIONS**

63. The City has complied with the conditions imposed by the 2009 LUC Order.

### **LANDFILL SITING**

64. Condition No. 1 of the 2009 PC Decision (Condition No. 4 of the 2009 LUC Decision) requires the City, on or before November 1, 2010, to **begin** to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. See Exhibit "A18" at pg. 25. As part of preparing the updated Integrated Solid Waste Management Plan ("ISWMP"), the 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. Thus, the Mayor's

Landfill Site Selection Committee (“Site Selection Committee”) was formed. See Written Testimony of Timothy E. Steinberger (“Steinberger Testimony”), p. 11, Tr. 01-11-12, 54:24, 55:6.

65. The Mayor chose 12 members to serve on the Landfill Advisory Committee based upon numerous criteria including technical expertise and experience, community involvement, and availability to serve. The members are: David Arakawa, Thomas Arizumi, John Goody, Joe Lapilio, Tesha H. Malama, Janice Marsters, Richard Poirier, Chuck Prentiss, and George West (Bruce Anderson, David Cooper, and John DeSoto were originally appointed, but have stepped down). Steinberger Testimony, at pgs. 11-12

66. The Mayor tasked the Site Selection Committee to provide the City advisory recommendations concerning the selection of a future site for a landfill to replace or supplement WGSL 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. Id. at pgs. 12, Tr. 4/4/12, 35:1-8.

67. The Committee would not select one site, but would rank numerous sites according to criteria that it determines most appropriate for landfill sites to accommodate all three waste streams (MSW, ash and residue, and C&D debris). Steinberger Testimony, at p. 12.

68. ENV contracted with R.M. Towill Corporation (RMTC) in June 2011 to assist the Committee with this process, specifically to research and provide the information required or requested by the Committee members. Id.

69. To date, the Landfill Advisory Committee has held meetings on January 20, February 10, March 10 and 31, May 12, June 19, July 21, 2011, March 16, 2012, and April 20, 2012. See Exhibits “A31,” “A47,” and “K258.”

70. Over the course of multiple meetings, the Committee has discussed numerous criteria for a new landfill, including, but not limited to the following:

- Location relative to identified disamenities
- Location relative to HPOWER
- Effect of precipitation on landfill operations
- Landfill development operation and closure costs
- Displacement costs
- Precipitation
- Ground water contamination
- Design issues
- Access issues
- Proximity to other land uses (residences, institutions etc.)
- Traffic impacts on residential neighborhoods
- Infrastructure availability
- “Those criteria impacting people that live here 365 days a year”
- Feasibility and cost issues
- Infrastructure, engineering and sustainability issues
- Wind direction issues related to closeness to other activities
- Impact on agricultural lands

Steinberger Testimony, at pgs. 12-13, see also Exhibit “A31.”

71. The Committee began by working with potential landfill sites identified by the City in previous studies. Tr. 4.4.12, 52:13-16; 78:1-4. However, at the sixth meeting, the Committee requested that RMTC research and provide information on and analyses of additional sites to ensure a thorough vetting of appropriate sites on Oahu. Specifically, they tasked RMTC to research and include for consideration sites that are above or cross the no-pass or underground injection control (UIC) line. The City previously did not consider these sites because of its policy not to site landfills above the no-pass or UIC line to protect the island’s drinking water sources. The Committee also asked RMTC to review the Board of Water Supply capture zone maps and identify if there were any 100 acre or larger parcels that could be included on the list of potential landfill sites, even if the sites were above the no-pass or UIC line. Steinberger Testimony, at pgs. 13-14, see also Tr. 4/4/12, 40:1-25, 41:1-14.

72. The Committee also developed exclusionary criteria or factors for sites above the no-pass or UIC line based on the following information:

- State Land Use Districts (Conservation, Agricultural, and Urban; there are no Rural Districts on O‘ahu);
- Groundwater Resources (Board of Water Supply and Others);
- Land Ownership (Federal, State, City, and Private);
- U.S. Fish & Wildlife Service (USFWS) Critical Habitats;
- State Natural Area Reserve System (NARS);
- Impaired Water Bodies (per Department of Health and U. S. Environmental Protection Agency);
- Agricultural Land Ratings (Land Study Bureau (LSB) and Agricultural Lands of Importance to the State of Hawai‘i (ALISH));
- Commission on Water Resource Management (CWRM) Well Data; and
- Criteria protecting airports and airfields with a 10,000 linear foot buffer.

Steinberger Testimony, at pg. 14, see also Tr. 4/4/12, 42:1-25, 43:1-25, 44:1-25, 45:1-25.

73. Upon applying the above exclusionary criteria, RMTC presented the Committee with two additional sites for consideration: (1) the Kahe Point Power Generating Station owned by Hawaiian Electric Company; and (2) the Makaiwa Hills subdivision owned by the James Campbell Trust Estate, which is part of a much larger parcel of land already under development. In addition, the second site was found to border the USFWS designated critical habitat of the *Isodendron pyriformum* (critically imperiled Hawaiian shrub). RMTC noted that both sites should be considered as “non-sites” due to either existing or pending land uses. Id.

74. After discussion of these results, the Committee asked RMTC to undertake another review of potential sites, including the following land areas:

- Parcels that are 90 acres or more, but less than 100 acres in size;
- Land that is owned by the State of Hawai‘i, including agricultural district land, conservation district land, and land that is within a critical habitat; and,
- Land that is outside of well capture zones and well buffer zones, but within the no-pass or UIC line.

Id. at 14-15, see also Exhibit “A31.”

75. The Committee reasoned that it is important that RMTC conduct this additional review because the Committee sought to understand the availability of sites only slightly smaller than 100 acres. Certain Committee members also expressed that this further consideration will provide for more comprehensive review of potential sites. This additional request delayed final application of the criteria and its recommendations. Id.

76. The City's effort to identify and develop has been performed with reasonable diligence.

77. Even after Committee has made its recommendation, ENV will need more than seven years to complete the tasks necessary to start operations at a new site(s). These tasks include, but are not limited to: (1) the preparation and processing of an EIS in full compliance with HRS Chapter 343 and related administrative rules for O'ahu's next landfill site or sites (*e.g.*, conducting site surveys and investigations, analyzing alternatives including alternative sites and technologies, obtaining public and governmental agency input, analyzing direct, secondary, and cumulative impacts, developing appropriate mitigation measures, and ensuring the opportunity for public participation and comments); (2) the acquisition of landfill sites, which may require an appraisal of the land value, a determination by the City regarding the funding source for the acquisition, and approval for the expenditure of public funds by the Honolulu City Council; and (3) detailed engineering studies, construction and bid documents, and other approvals. Written Testimony of Timothy E. Steinberger, pgs. 15-16.

78. The detailed engineering studies are needed to support the landfill design. These studies will include, but are not limited to: land surveys; geotechnical soils and structural investigations; hydrology and hydrogeological investigations. The completion of these studies is required so that the landfill construction drawings can incorporate civil design requirements,

such as the provision of drainage, access roadways, and infrastructure, to support the use of the site. Coordination with governmental agencies, utilities, and adjoining landowners, consistent with mitigation measures identified in the EIS, will also be required to minimize disturbance to nearby property owners and utilities. The length of time required for the completion of detailed engineering studies, construction drawings and bid documents, and the processing of procurements for the design and construction contractors (which could include the selection of a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as a SUP or district boundary amendment, depending on where the site(s) is located, and other necessary approvals, is estimated to be between one and three years. That is before the City even breaks ground on a new site. Id. at 16.

#### **WASTE DIVERSION**

79. Condition No. 2 of the 2009 PC Order (Condition No. 5 of the LUC Order) requires ENV to continue its efforts to use alternative technologies to provide a comprehensive waste stream management program. See Exhibit “A18” at p. 25, “A19” at p. 6.

80. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on O‘ahu. Of the 1,214,904 tons, the landfill received only 163,736 tons of MSW and 179,946 tons of ash and residue from HPOWER. The amount of MSW deposited at WGSL reflects a steady decrease from 2009. In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. In comparison, ash and residue has remained fairly constant. The 2010 disposal rate represents a total diversion of MSW from the Landfill of 71.7%. See Exhibit “A27,” see also Exhibit “A29.”

81. As the decreasing MSW tonnage to WGSL shows, ENV is continuing its effort to significantly reduce solid waste disposal at WGSL by expanding HPOWER and our waste to

materials recycling programs and developing alternative disposal options for materials presently being landfilled. Collectively, these actions have and will divert significant amounts of waste away from WGS�. In addition, new technology solutions continue to be evaluated. However, there still are no new technologies with proven reliability and performance that would completely eliminate the need for a landfill. Written Testimony of Timothy E. Steinberger, pg. 17.

82. The existing HPOWER facility began operations in 1990 and successfully diverts approximately 600,000 tons per year of MSW from WGS�. HPOWER reduces our dependence on fossil fuels. One ton of trash produces saleable energy the equivalent of one barrel of oil. Moreover, the facility converts more than 1600 tons of waste per day into electricity sufficient to power more than 60,000 homes. On an islandwide basis, HPOWER produces approximately 7% of O'ahu's electricity. Id. at 18.

83. In addition, almost 100% of the ferrous and nonferrous metal in the MSW processed at HPOWER is recovered for recycling. Approximately 18,000 tons of ferrous metals (e.g., tin cans) and 2,500 tons of non-ferrous metals (e.g., aluminum cans) are recycled annually. Id.

84. The City is adding a third boiler at HPOWER, which will increase the capacity of the facility to 900,000 tons per year. The amount of waste diverted from the landfill and recycled to energy will increase substantially. The third boiler is scheduled to begin operations in January 2013. Id.

85. The continued operation of the HPOWER facility, however, is dependent upon continued operation of the WGS� for disposal of ash and residue. Also, 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. Id.

86. As of 2010, material recycling programs account for a 29.7% landfill diversion rate, which means that approximately 448,000 tons per year is diverted out of the total waste stream of 1.5 million tons per year. The City is continuing to increase the 29.7% diversion rate by expanding and improving programs. See Exhibit “A30,” see also Exhibit “A28.”

87. The City's bulky item collection service is designed to provide residents with once-a-month pickup service of old appliances, furniture, etc. Recyclable items such as white goods, freon containing appliances, tires, and used auto batteries and propane tanks are segregated and delivered to the respective recycling facilities. The remainder of bulky item collection is disposed of at the landfill. Written Testimony of Timothy E. Steinberger, pg. 19.

88. Residents also may self-haul their bulky items to City disposal sites, including three transfer stations and six convenience centers. Recyclable materials are segregated in separate bins or storage areas for delivery to recycling facilities. Material that cannot be recycled is hauled to the landfill. Id.

89. The anticipated HPOWER expansion is a mass burn boiler that will accept and convert much of the bulky waste such as furniture, mattresses and carpet that presently go to landfill, to energy and recycled metals. Id.

90. The City presently provides Green Waste Recycling to approximately 100,000 residences and as of May 2010 expanded to over 150,000 residences as part of the new island-wide automated curbside recycling program. Oahu's capture rate for green waste is 77%, which indicates a high level of participation at a high recovery level, either 85% participation at 90% recovery level or vice versa. (Capture rates are measured by the proportional amount of

recyclable material collected relative to the total amount available in the specific waste stream. Capture rates do not denote the participation rate.) It is unlikely that this capture rate can get any higher. The City believes that the automated collection has encouraged more participation, further diverting materials from landfill. Residents also may self-haul green waste to City convenience centers or directly to the composting facility. All of the green waste is delivered to a private vendor that is contracted by the City to produce mulch and other products from the waste. Id. at 19-20.

91. All but incidental food waste and green waste is diverted from WGS. Tr. 4/11/12, 114:5-25, 115:1-25, 116:1-20.

92. From a self-sustainability standpoint, green waste is one of the few recyclable materials that is all reused here on this Island. Most other recyclable materials are shipped to the mainland or to Asia. Written Testimony of Timothy E. Steinberger, p. 20.

93. The City has entered into a contract for a Green Waste, Food Waste and Wastewater Bio-solids, In-Vessel Conversion Facility to process some 100,000 tons per year of these wastes to beneficial use such as biofuels, energy or compost materials. The vendor expects to be fully operational in early 2013. Id.

94. Curbside Recycling for Residential Mixed Recyclables continues to increase with island wide expansion - 160,000 residences - as of May 2010. Id.

95. During fiscal year 2011, the curbside collection system recovered 18,000 tons of mixed recyclables and 53,000 tons of green waste for a total of 71,000 tons recycled. This contributes to a full 6% to the overall reduction of MSW going to the Landfill. Id.

96. The City has increased the number of community recycling bins by an additional 25 since the start of a new contract in March 2008. Id.

97. The Community Recycling Bin Program began in 1990 and grew from an initial 20 participating schools to approximately 100 locations as of March 2009. Id. at 21..

98. Additional HI-5 only bins are provided to support collection events and campaigns. Id.

99. The City continues to promote condominium recycling through a program that reimburses condominium properties for costs associated with the start up of a recycling program. Id.

100. Most multi-family dwellings contract with private hauling companies to collect their refuse and would likewise need to establish their own recycling programs. Multi-family recycling is voluntary. Id.

101. Commercial recycling is taking place at commercial businesses through private recyclers. Id.

102. The City enacted ordinances that support this recycling effort:

- Cardboard. Commercial and government generators are partially banned from landfill disposal. Only 10% of a truckload can be composed of cardboard.
- Green waste. Commercial and government generators are partially banned from landfill disposal. Only 10% of a truckload can be composed of green waste.
- Tires, auto batteries, white goods and scrap metals. Banned from all disposal sites.
- Glass containers. Glass recycling is required for bars and restaurants.
- Paper Recycling. All office buildings of a certain size must conduct recycling of paper goods.
- Food Waste Recycling. All hotels, restaurants, grocery stores, food courts, food manufacturer processors and hospitals meeting a certain size are required to recycle food waste.

- City agencies are required to purchase recycled paper products and to recycle newspaper, cardboard, office paper, aluminum, glass, and plastics.

Id. at 21-22.

103. ENV coordinates numerous events year-round to educate the public about waste management and recycling. Public Education and Outreach Programs include (a) the City's www.opala.org website, which provides comprehensive and up-to-date information about the City's refuse and recycling programs and services; and (b) tours of City facilities and recycling businesses, whereby the public has an opportunity to get an up-close look at waste processing and recycling operations and go behind the scenes at businesses that have instituted model recycling programs. Id.

104. The residual solids and semi-solids separated during the treatment of wastewater at wastewater treatment plants ("WWTPs") are commonly referred to as sewage sludge or biosolids. These materials have been landfilled, but ENV has been working to divert much of this waste stream from WGSL. The Synagro facility at the Sand Island WWTP digests, dewater, and heat-dries approximately 20,000 tons per year of sewage sludge. The end product is a pellet that can be used as a fertilizer or soil amendment material. For the approximately 15,000 tons per year of biosolids from all other WWTPs on O'ahu that presently go to the WGSL, ENV intends to divert these biosolids from the landfill to the anticipated In-vessel Conversion Facility to be completed in 2013 for processing with Green and Food Waste or to HPOWER. Id. at 22-23.

105. ENV completed a report, "Alternative Technologies for the Treatment and Minimization of Sewage Sludge," that identifies potential sludge processing technologies that could be implemented to provide waste mitigation or improve operational performance at the

City's WWTPs. See Exhibit "A33." The report discusses a wide range of technologies for different stages in the sludge treatment process and thus technologies cannot be directly compared outside their specific treatment and processing function. Accordingly, the report is a list of appropriate technologies for further consideration as part of the ongoing island-wide solids planning effort; it is not a decision making document that recommends a best solution.

Additional factors that will need to be considered as part of any evaluation and selection process include:

- An assessment of a particular alternative technology specific to the WWTP(s) with respect to the facilities already existing there.
- Capital and operation and maintenance costs specific to the WWTP(s) under consideration.
- Implementation timeline for planning, design, permitting, procurement, construction and startup.
- Compatibility of technology with overall Island-wide Solids Master Plan
- New development and increased future capacity needs
- Planned upgrades at the existing WWTPs (i.e., upgrade to secondary treatment)

Written Testimony of Timothy E. Steinberger, pgs. 23-24.

106. The report points out that the technology and process selection for implementation at any of the WWTPs will need to be evaluated from an island-wide perspective due to the issues of combining/transporting solids between WWTPs as well as the identified end-user needs and beneficial use limitations. Other key elements that should be considered in evaluating these technologies and processes for the Island-wide Master Plan include eligibility and redundancy planning in the event that a WWTP treatment unit (i.e., centrifuge or digester) or solids outlet (i.e., landfill or composting facility) is temporarily out of service. Id. at 24.

107. Despite the City's successes in diverting sewage sludge from the landfill, 15,000 to 20,000 tons per year of sewage sludge is still being landfilled, and as of July 31, 2011, there is nowhere else to dispose of that sewage sludge. Id.

## LANDFILL DESIGN AND OPERATIONS

108. In landfill design and permit reports, the important elements that must be outlined are the boundaries for the waste, the height of the waste, and the containment system for the waste (i.e., the kind of landfill lining system). The designation in the design drawings of the different cells that will contain the waste are not distinctly outlined but are identified by geographical location, much like streets are identified. Tr. 4/11/12, 18:1-25, 19:1-21. Therefore, the numbering does not dictate the sequence of construction. The actual site conditions and location determine the sequence of construction. *Id.* at 23:7-25, 24:1-25.

109. For effective design and permitting, the sequence of construction of the cells in the landfill is not outlined because the need for certain cells depends on variable factors like waste stream, how much waste is generated, the type of waste received. Therefore, while the boundary, height and containment system are prescribed in landfill design and permitting documents, how the cell is built, the size of the cell, and the order of the construction of the cells are not constrained. On the contrary, if these latter aspects are prescribed, it may result in harm to human health and the environment because the landfill designer and operator would not have the flexibility to ensure the proper location for waste disposal. *Id.* at 19:1-21, 25:9-25.

110. This flexibility in constructing the cells of a landfill is not unique to WGSL but is common practice in landfill design. *Id.* at 21:9-19.

111. The construction of cells E-5 and E-6 was not a digression from what was contained in the engineering report and FEIS because the size, sequence, and actual construction (whole or in parts) was not dictated by these reports. *Id.* at 25:9-25, 26:1-20.

112. The size and sequence of construction of cells E-5 and E-6 did not increase the risk of public health hazards and did not contribute to the release of MSW that resulted from the

December 2010 and January 2011 rain storms. On the contrary, the size and sequence of construction of cells E-5 and E-6 were more protective of public health because by building only a portion of the cell, the portion that is to be used, the liner is protected from long term exposure to the elements, rain and sun, and the integrity of the liner is maintained. Id. at 26:1-25, 27:1-7.

113. In December 2010 and January 2011, WGS� was hit by a series of heavy rains that resulted in the flooding of areas within WGS�, including the active cell where MSW was being disposed. At this time, Waste Management of Hawaii (“WMH”) was in the process of completing construction of the Western Surface Water Drainage System that was intended to divert stormwater around the Landfill. Unfortunately, the torrential rains in December 2010 and January 2011 occurred before the Western Surface Water Drainage System was completed. Consequently, the active cell was inundated with stormwater and the force and quantity of stormwater breached the cell, causing a release of MSW, including treated medical waste, into the stormwater and into the ocean. The City has been cooperating with Federal and State investigations concerning the release of MSW. Written Testimony of Timothy E. Steinberger, p. 26.

114. WMH contends that flooding of the cell and the resultant release of MSW was not due to any operational error on the part of WMH but was due to the sheer force and magnitude of the storms. WMH asserts that at all times it was acting in compliance with the WGS� permit, which allowed for the simultaneous construction of the cell and Western Surface Water Drainage System. WMH asserts that it exercised best management practices in responding to the storms because it believes its actions avoided the flooding of the neighboring Kahe Power Plant owned by Hawaiian Electric Company. Id.

115. WMH and the City worked with the U.S. Environmental Protection Agency (“EPA”) and the State of Hawaii, Department of Health (“DOH”) in the aftermath of the storms, entering into an Administrative Order on Consent with EPA that outlined the remedial actions needed to address the MSW release and steps needed to reopen the Landfill. The EPA recently issued a Notice of Violation (“NOV”) concerning the MSW release. EPA did not impose any penalties as part of the NOV and continues to monitor the WGSL operations closely. Id. at pgs. 26-27.

116. In September 2011, WMH notified the City, EPA, and DOH that it identified significant irregularities with the landfill gas data that had purportedly been collected and recorded by its landfill gas technician at WGSL. Further investigation by WMH revealed that a rogue WMH employee had fabricated some wellhead gas parameter measurements instead of collecting the data through verifiable measurements. The employee failed to collect actual data from mid-2010 until August 2011. Id. at 27.

117. As a result of WMH’s initial investigation, WMH hired an environmental consultant to perform a detailed assessment of (1) the current status of the wellfield and gas collection and control system to determine whether the fabricated data has concealed adverse changes in the wellfield, and (2) the past status of the wellfield based on verifiable data. Based upon the detailed assessment, WMH concluded that the wellfield and gas collection control system is performing within the expected range of monitored parameters at the facility and that there is no evidence that the wellfield has undergone any adverse changes in the last two years. Id.

118. Despite these events, the DOH, Solid and Hazardous Waste Branch, the branch that regulates the solid waste operations at WGSL, is not intending to take enforcement action



relating to operations at the WGS�. The DOH, Solid and Hazardous Waste Branch is currently satisfied with the operations at WGS�. Tr. 1/25/12, 59:19-25, 60:1-25, 61:1-12. The DOH, Solid and Hazardous Waste Branch is concerned about the imposition of the July 31, 2012 deadline for MSW at the point in time when there are no disposal options for certain types of waste which may potentially threaten human health or the environment. Tr. 1/25/12, 12:15-19.

119. Despite pending enforcement and alleged EPA violations, Gary Gill, the Deputy Director of the DOH, Environmental Management Division, the individual heading the agency responsible for regulating WGS�, still insists that Oahu needs a landfill, that WGS� is the only landfill for MSW and ash, and that shutting down the landfill before other options are available will endanger public health. Tr. 4/4/12, 149:2-25, 150:1-25, 151:1-4.

#### **PROPOSED FINDINGS OF FACT OR CONDITIONS**

Any proposed findings of fact or conditions submitted by the Applicant or Intervenors that are not expressly ruled upon by the Planning Commission by adoption herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

#### **LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

#### **CONCLUSIONS OF LAW**

The Planning Commission hereby concludes as follows:

1. The Planning Commission has jurisdiction to hold public hearings and make recommendations on all proposals to adopt or amend the general plan, development plans, and

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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4. All remaining conditions of SUP No. 2008/SUP-2 shall remain in full force and effect.

Dated at Honolulu, Hawaii, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

PLANNING COMMISSION  
CITY AND COUNTY OF HONOLULU

By \_\_\_\_\_  
GAIL PINGREE, Chair

By \_\_\_\_\_ (recused)  
KA'IULANI K. SODARO, Vice Chair

By \_\_\_\_\_  
BEADIE K. DAWSON, Member

By \_\_\_\_\_  
CORD D. ANDERSON, Member

By \_\_\_\_\_ (recused)  
KARIN HOLMA, Member

By \_\_\_\_\_ (recused)  
RODNEY KIM, Member

By \_\_\_\_\_  
JAMES C. PACOPAC, Member

By \_\_\_\_\_  
ARTHUR B. TOLENTINO, Member

By \_\_\_\_\_  
DANIEL S. M. YOUNG, Member

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 ) CERTIFICATE OF SERVICE  
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." )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER was duly served by either hand-delivery or U. S. Mail, postage prepaid, by certified mail, return receipt requested, to the following on the date below, addressed as follows:

	<u>Mail</u>	<u>Delivery</u>
DEPARTMENT OF PLANNING AND PERMITTING City and County of Honolulu 650 South King Street, 7th Floor Honolulu, Hawai'i 96813		X

Mail

Delivery

IAN L. SANDISON  
DEAN H. ROBB  
TIM LUI-KWAN  
Carlsmith Ball LLP  
American Savings Bank Tower  
1001 Bishop Street, Suite 2200  
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