

CADES SCHUTTE LLP

CALVERT G. CHIPCHASE 7757-0
CHRISTOPHER T. GOODIN 8562-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4212
Telephone: (808) 521-9200
Facsimile: (808) 521-9210
E-mail: cchipchase@cades.com
cgoodin@cades.com

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DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLU

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

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

FILE NO. 2008/SUP-2

**INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER**

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

EXHIBIT A

CERTIFICATE OF SERVICE

Contested Case Beginning:
December 7, 2011

KOCA 33

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION
AND MAILE SHIMABUKURO'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**


Pursuant to Honolulu Planning Commission Rule § 2-74, Intervenor Ko Olina Community Association and Maile Shimabukuro (together, "KOCA") submit the attached proposed Findings of Fact, Conclusions of Law and Decision and Order.

To aid the Planning Commission in verifying citations, KOCA has included Exhibit A, which contains parenthetical quotations to portions of the record. The paragraph references in Exhibit A correspond with the paragraphs of the proposed Findings of Fact, Conclusions of Law, and Decision and Order.

KOCA submits its proposed Findings of Fact, Conclusions of Law, and Decision and Order subject to and without waiving its objections to the Planning Commission's exercise of jurisdiction over this matter and with the express reservation of KOCA's right to appeal the Planning Commission's decision denying KOCA's motion to dismiss filed November 7, 2011.

DATED: Honolulu, Hawai'i, May 2, 2012.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

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FILE NO. 2008/SUP-2

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

The Honolulu Planning Commission (“**Planning Commission**” or “**HPC**”) held a contested case hearing on the Honolulu Department of Environmental Services’ (“**ENV**”) Application to delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 over the course of eight hearing days. Pursuant to Planning Commission Rule § 2-77(a) and based on the record in this matter, including the evidence and arguments presented at the contested case hearing; the credibility of the witnesses testifying at the hearing; the respective proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties; the parties’

respective responses thereto; and the other written submissions and arguments of the parties, the Planning Commission hereby makes the following findings of fact (“FOF”), conclusions of law (“COL”), and decision and order.

Where appropriate, findings of fact shall operate as conclusions of law and conclusions of law shall operate as findings of fact. Pursuant to Planning Commission Rule § 2-77(b), “[a]ny proposed findings of fact or conditions submitted by the petitioner or other parties that are not expressly ruled upon by the planning commission, or rejected by clearly contrary findings of fact, are deemed to be denied.”

I. FINDINGS OF FACT

A. Procedural History

(a) *The ENV Filed an Application with the Department of Planning and Permitting.*

1. On June 28, 2011, the ENV filed with the City and County of Honolulu Department of Planning and Permitting (“DPP”) a Planning Division Master Application Form “for modification of condition 14 of SUP FILE No. 2008/SUP-2” (“**Application**”). Ex. K161 at 1 (Application).

2. The Application seeks to “modify the LUC’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 [(the “**Land Use Commission’s 2009 Order**”)], by deleting the July 31, 2012, deadline to cease disposal of municipal solid waste [(“MSW”)] at [the Waimanalo Gulch Sanitary

Landfill (“**Landfill**” or “**WGSL**”)], as set forth in Condition No. 14 of said Order.” Ex. K161 at 3 (6/28/11 Steinberger letter).

3. With Condition 14 deleted, the ENV “seeks to use the WGSL until it reaches its permitted capacity” Ex. K161 at 3 (6/28/11 Steinberger letter).

4. The ENV asserts that “[t]he basis for [the] Application is that the current permitted area of the Landfill, approximately 200 acres, has a useful life well beyond July 31, 2012.” Ex. K161 at 4 (6/28/11 Steinberger letter).

5. The ENV alleges that it is “in the public interest to use WGSL . . . to capacity.” Ex. K161 at 4 (6/28/11 Steinberger letter). The ENV further alleges that, “[i]f the Landfill is forced to cease accepting MSW for disposal on July 31, 2012,” the “inability to dispose of various wastes will potentially create serious health and safety issues.” Ex. K161 at 4 (6/28/11 Steinberger letter).

6. On September 9, 2011, the DPP Director sent the Planning Commission a report and recommendation for approval of the Application. 9/9/11 Memorandum from David K. Tanoue to Chair Pingree and Members of the Planning Commission. See Planning Commission Rule § 2-41(d).

(b) *KOCA and Schnitzer Steel Hawaii Corporation Intervened.*

7. On October 5, 2011, the Planning Commission held a public hearing on the Application.

8. The Planning Commission heard testimony in favor of the Application from Raymond Young of DPP; Lee Mansfield of Hawaii American Water; Edwin Arellano of Hawaii Bio-Waste; Matt McKinney of 1-800-GotJunk; Kris Gourlay of

Rolloffs Hawaii; and John Tsukada of Island Commodities. 10/5/11 Tr. at 5:3, 19:6, 20:6, 25:13, 28:8, 31:17.

9. The Planning Commission heard testimony in opposition to the Application from Councilmember Tom Berg of the Honolulu City Council; Patty Teruya of Nanakuli-Maili Neighborhood Board No. 36; Celeste Lacuesto; and Evelyn Souza. 10/5/11 Tr. at 15:4, 22:21, 29:4, 30:11.

10. The Planning Commission granted Schnitzer Steel Hawaii Corporation's ("Schnitzer") petition to intervene, granted Ko Olina Community Association ("Association") and Maile Shimabukuro's ("Senator Shimabukuro" and together with the Association, "KOCA") motion to intervene and denied KOCA's alternative motion for continued recognition as party intervenors. 10/5/11 Tr. at 35:5–23, 42:9–43:3.

11. Accordingly, pursuant to Planning Commission Rule § 2-56(c), the Application was "processed as a contested case."

(c) The Planning Commission Held a Prehearing Conference.

12. On October 14, 2011, the Planning Commission held a prehearing conference with the parties and the Chair of the Planning Commission.

13. On November 9, 2011, the Planning Commission entered an order regarding the prehearing conference. The order stated in relevant part that "[t]he deadline for filing and serving written direct testimony and exchanging exhibits shall be November 30, 2011" and that "[a]t the contested case hearing, all written direct

testimony shall be preceded by an oral summary of no more than 10 minutes.”
11/9/11 order regarding prehearing conference at 2–3 (¶ 10).

(d) *KOCA Moved to Dismiss the Application for Lack of Jurisdiction.*

14. On November 7, 2011, KOCA moved to dismiss the Application for lack of jurisdiction. KOCA asserted that the Planning Commission did not have jurisdiction to decide the Application because (1) the Land Use Commission’s 2009 Order is on appeal to the Hawai’i Supreme Court and (2) the Land Use Commission has original and exclusive jurisdiction to consider modifications of its own conditions.

15. On November 14, 2011, the ENV and Schnitzer filed memoranda in opposition to the motion.

(e) *The Parties Stipulated to Amend the Briefing Schedule on November 29, 2011.*

16. On November 29, 2011, the parties stipulated to amend the briefing schedule set forth in the order regarding the prehearing conference. The parties agreed that “[t]he deadline for filing and serving written testimony and exchanging exhibits shall be December 13, 2011.”

(f) *The Planning Commission Denied the Motion to Dismiss on December 7, 2011.*

17. On December 7, 2011, the Planning Commission held a hearing on KOCA’s motion to dismiss.

18. After hearing argument from the parties, the Planning Commission went into executive session.

19. Following the executive session, the Planning Commission denied the motion to dismiss.

20. Thereafter, the parties made opening statements.

(g) Written Direct Testimony.

21. On December 13, 2011, the parties filed written direct testimony.

22. The ENV filed the written direct testimony of ENV Director Timothy E. Steinberger (“**Director Steinberger**”) and State of Hawai‘i Department of Health (“**DOH**”) Solid and Hazardous Waste Branch Chief Steven Y.K. Chang (“**Branch Chief Chang**”).

23. Schnitzer filed the written direct testimony of Schnitzer General Manager Larry Snodgrass. Mr. Snodgrass did not sign his written direct testimony.

24. KOCA filed the written direct testimony of Ken Williams (“**Mr. Williams**”), General Manager of the Association; Senator Shimabukuro; Beverly Munson (“**Ms. Munson**”), Ko Olina resident; Paul Duke Hospodar (“**Mr. Hospodar**”), Ko Olina Security Director, Resort Operations Director, resident and AOA board member; Cynthia K.L. Rezendes (“**Ms. Rezendes**”), Waianae resident, Nanakuli-Maili Neighborhood Board No. 36 member, and 2003 Blue Ribbon Landfill Site Selection Committee member; Maeda Timson (“**Ms. Timson**”), Kapolei resident and Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34 member; Shad Kane (“**Mr. Kane**”), Native Hawaiian cultural practitioner and 2003 Blue Ribbon Landfill member; and Dwight Miller (“**Mr. Miller**”), P.E.

(h) The Parties Filed Pre-Contested Case Hearing Statements.

25. On December 14, 2011, the ENV, Schnitzer, and KOCA filed pre-contested case hearing statements.

(i) *The Planning Commission Issued a Subpoena to Waste Management.*

26. At the request of KOCA, on January 6, 2012, the Planning Commission issued a subpoena duces tecum to Waste Management of Hawaii, Inc. (“**Waste Management**”), which operates the Landfill. Ex. K164 (subpoena duces tecum).

27. The subpoena directed the production of, among other things, “all documents containing or evidencing fabricated readings; all investigation reports related to the fabricated readings; all assessment documents related to the fabricated readings; . . . and all documents related to remedial actions taken to address the fabricated readings.” Ex. K164 (subpoena duces tecum at 2).

28. On January 20, 2012, Waste Management filed a response and objections to the subpoena.

29. On February 8, 2012, the Planning Commission heard argument on Waste Management’s objections.

30. An internal investigation report prepared for Waste Management references interviews with employees. Ex. K160 at 1 (9/28/11 landfill gas report: “Based on interviews conducted during the investigation, it appears that the failure to collect data and the fabrication of replacement data began in mid-2010 and continued until August 2011 when the failure was investigated and identified.”).

31. Waste Management did not produce any notes or other records of employee interviews. Nevertheless, Waste Management represented that it had produced all responsive documents and that it had no additional documents to produce relat-

ed to its internal investigation regarding fabricated gas well head readings. 2/8/12 Tr. 9:17–13:21.

32. Based on these representations, the Planning Commission did not order a further production by Waste Management.

(j) *The January 11, 2012 Hearing.*

33. On January 11, 2012, the ENV called Director Steinberger to testify.

34. The Planning Commission received into evidence without objection the October 5, 2011 transcript of proceedings and, over the partial objection of the ENV, KOCA's Exhibits K1–K162. 1/11/12 Tr. at 15:12–17:23, 96:2–4.

(k) *January 25, 2012 Hearing.*

35. On January 25, 2012, the ENV called Branch Chief Chang to testify. Schnitzer called Mr. Snodgrass to testify.

36. The ENV rested, subject to its right to call rebuttal witnesses. Schnitzer rested without reserving the right to call rebuttal witnesses. 1/25/12 Tr. at 71:17–72:1, 86:20.

37. The ENV indicated that it intended to call two rebuttal witnesses. 1/25/12 Tr. at 87:12–16.

38. KOCA objected to the rebuttal witnesses on the ground that it had not even presented oral testimony, which indicated that the ENV's witnesses should be called on direct. 1/25/12 Tr. at 87:17–24, 88:24–89:10. The Commission overruled KOCA's objection. 1/25/12 Tr. at 89:16–17.

39. Without objection, the Planning Commission received into evidence the ENV's Exhibits A1–A33 and KOCA's Exhibits K163–K169. 1/25/12 Tr. at 6:10–20; 37:14–20, 51:8–13, 55:12–16, 85:22–86:3.

(l) February 8, 2012 Hearing

40. On February 8, 2012, KOCA called Mr. Williams, Ms. Munson, Ms. Rezendes, and Mr. Hospodar to testify.

41. Without objection, the Planning Commission received into evidence the ENV's Exhibits A34 and A35. 2/8/12 Tr. at 29:25–30:2, 56:6–9.

(m) March 7, 2012 Hearing

42. On March 7, 2012, KOCA called Mr. Kane and Mr. Miller to testify.

43. Without objection, the Planning Commission admitted Mr. Miller as an expert witness in “solid waste management, including landfill siting and design and comprehensive solid waste management.” 3/7/12 Tr. at 17:25–19:25.

44. Without objection, the Planning Commission received into evidence KOCA's Exhibits K170, K171, K173, K174, K175, K176, K178, and K179. 3/7/12 Tr. at 152:19–155:5, 122:17–123:1.

45. At the conclusion of the March 7, 2012 hearing, the ENV renewed its right to call rebuttal witnesses. The ENV identified four rebuttal witnesses: Director Steinberger, Hari Sharma (“**Dr. Sharma**”), Ph. D. and DOH Deputy Director Gary Gill (“**Deputy Director Gill**”). 3/7/12 Tr. at 218:7–15.

46. KOCA renewed its objection to those rebuttal witnesses on the ground that Director Steinberger had already been called and that Dr. Sharma and Deputy Director Gill should have been direct witnesses. 3/7/12 Tr. at 218:18–219:1.

47. The Planning Commission overruled KOCA's objection. 3/7/12 Tr. at 219:6–7.

48. Schnitzer also announced that it would be calling an unnamed rebuttal witness on the "H-POWER issue." 3/7/12 at 219:8–13.

(n) April 4, 2012 Hearing.

49. On April 4, 2012, Schnitzer called Tom Zalenka, vice president of environmental affairs for Schnitzer, as a rebuttal witness.

50. The ENV called Janice Marsters ("**Ms. Marsters**"), current Landfill Site Selection Committee ("**SSC**") member, and Deputy Director Gill as rebuttal witnesses.

51. KOCA called Senator Shimabukuro and Ms. Timson to testify.

52. KOCA rested subject to its right to call rebuttal witnesses. 4/4/12 Tr. at 143:11–13.

53. Without objection, the Planning Commission received in evidence the ENV's Exhibit A36 and KOCA's Exhibits K191, K194, K208, K215, K217, K218, K222, K223, K226, and K227. 4/4/12 Tr. at 15:18–22, 18:24–19:18, 24:4–16, 33:4–16, 83:14–19, 101:14–19, 122:20–123:3, 143:4–10, 168:22–169:11.

(o) *April 11, 2012 Hearing.*

54. On April 11, 2012, the ENV called Dr. Sharma and Director Steinberger as rebuttal witnesses.

55. Without objection, the Planning Commission qualified Dr. Sharma as an expert in landfill design and permitting. 4/11/12 Tr. at 9:11–20.

56. The Planning Commission received into evidence the ENV's Exhibits A37–A50. 4/11/12 Tr. at 13:1–9, 15:21–16:1, 25:1–7, 36:10–37:20, 43:11–44:13, 105:11–16, 138:1–5. KOCA objected to the admission of Exhibits A43–A46. The Planning Commission overruled KOCA's objections. 4/4/12 Tr. at 36:15–17, 37:7–12.

57. Without objection, the Planning Commission also received into evidence KOCA's Exhibits K189, K190, K193, K195, K196, K198, K230, K247, and K251. 4/11/12 Tr. at 191:19–21.

(p) *April 23, 2012 Hearing.*

58. On April 23, 2012, KOCA called Mr. Miller and Eddie Belloumini of Ko Olina Resort Operations (“**Mr. Belloumini**”) as rebuttal witnesses.

59. Without objection, the Planning Commission received into evidence Exhibits K192, K220, K255, K256, K257, and K258. 4/23/12 Tr. at 12:13–17, 15:16–21, 47:19–48:23.

60. Thereafter, the Planning Commission closed the hearing. 4/23/12 Tr. at 49:16–21.

61. The Planning Commission heard closing arguments from the parties. 4/23/12 Tr. at 49:22–80:7.

(q) *KOCA's Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence to Correct an Error that Was Discovered After the Hearing Closed.*

62. At the April 23, 2012 contested case hearing, without objection, the Planning Commission received into evidence Exhibit K258, which included photographs of the landfill SSC's scores and a map of the ranked sites from the SSC meeting held on April 20, 2012. 4/23/12 Tr. at 48:4–23.

63. On April 25, 2012, the SSC's prime consultant, R.M. Towill Corporation, and its subconsultant, SMS Research ("SMS"), disclosed that SMS had made an error in ranking the sites.

64. Because of the error, SMS provided new scores for the sites, a new ranking list and a new map of the ranked sites.

65. Based on this new list, the scores and map entered into evidence as Exhibit K258 were no longer accurate.

66. On April 27, 2012, KOCA filed a motion pursuant to Planning Commission Rule § 2-71(f) to reopen the contested case hearing for the limited purpose of admitting additional documentary evidence to correct an error that was discovered after the hearing closed.

67. The motion attached proposed Exhibit K259, which explained the error, and proposed Exhibit K260, which was composed of the corrected list of sites and a new map of the sites to correct Exhibit K258.

68. On May 1, 2012, the ENV opposed the motion.

69. The Planning Commission granted the motion and admitted Exhibits K259 and K260.

B. Substantive Findings

(a) History of the Landfill.

70. The ENV is the owner of the Landfill. Ex. K70 at 5 (¶16) (10/31/89 LUC Order).

71. The Landfill is located with the State Land Use Agricultural District. Ex. K12 at 9 (¶ 42) (8/4/09 HPC order).

72. Because a landfill is not an agricultural use, Ex. K155 at 17 (¶ 7) (3/14/08 LUC order), the ENV requires an SUP pursuant to Hawai'i Revised Statutes (HRS) § 205-6 to conduct landfill operations.

73. Accordingly, the Planning Commission and the Land Use Commission have permitting responsibility and oversight for the Landfill. 4/11/12 Tr. at 185:15–18 (Steinberger).

74. 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 and a capacity of 6.65 million cubic yards.” Ex. K69 4 (¶ 15) (4/20/87 LUC Decision). The “projected full-life” of the landfill was “approximately eight years.” Ex. K69 7 (¶ 29) (4/20/87 LUC Decision).

75. The Landfill began operations in 1989. Ex. K93 at 2 (9/08 ENV status report).

76. That same year, the site was expanded by an additional 26 acres. Ex. K70 at 5 (¶ 18), 9 (10/31/89 LUC order).

77. As the Landfill 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 (3/27/03 Tr.: Doyle).

78. 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. Rezentes Written Direct Testimony at 3–4 (¶¶ 8–10).

79. “After numerous lengthy meetings within the community, in June or July of 2002[,] [former acting ENV Director Frank Doyle (“**Former Acting Director Doyle**”)] stated to the community that, if the community allowed some expansion of the Landfill, the ENV would commit to close the Waimanalo Gulch Sanitary Landfill in 2008.” Rezentes Written Direct Testimony at 4 (¶ 12).

80. “In exchange, the community tended to back off, and the process went through the Planning Commission and the Land Use Commission.” Rezentes Written Direct Testimony at 4 (¶ 13); *see also* 2/8/12 Tr. at 16:1–4 (Williams: “Based on those sincere promises[,] the community stood down in reliance that the City would hold to its word and close the landfill.”).

81. In the 2003 proceedings before the Land Use Commission, Former Acting Director Doyle, who has served as the Chief of the Division of Refuse for 32 years, explained the compromise that the ENV had made with the community as follows: “[W]e had originally thought that we would have this landfill operate for another 15 years [to 2008]. And then as part of our discussions with the community and in trying to take a look at their concerns it was reduced to a five-year operation.” Ex. K85 at 96:18–22 (3/27/03 Tr.: Doyle); *see also* 1/11/12 Tr. at 32:3–7 (Steinberger: “Q. So in fact, it was a compromise with the community that drove the five-year deadline and not the solid waste management permit; isn’t that right? A. By this testimony, I would assume that was correct at the time.”); Ex. K85 at 117:11–13 (3/27/03 Tr.: Todd Apo: “We do appreciate the city’s efforts in working with the community. They obviously were looking at 60 acres for 15 years, have reduced that to 15 acres for five years.”); Ex. K220 at 177:1–9 (7/1/09 Tr.: Doyle).

82. In the 2003 proceedings, Former Acting Director Doyle repeatedly expressed the ENV’s “commitment” to close the Landfill in 2008:

a. “COMMISSIONER COPA: Do you honestly think that we will have a site, another site picked for a landfill? **And if so do you think that you could commit that without a doubt that this landfill will close?** MR. DOYLE: **We have made that commitment, yes.**” Ex. K85 at 125:7–11 (3/27/03 Tr.) (emphasis added).

b. “MR. DOYLE: Right. At the time that we made the selection, we selected Waimanalo Gulch to be expanded. Now, based on our commitment to be

out of that area within five years there still are other alternatives.” Ex. K85 at 128:2–5 (3/27/03 Tr.).

c. “MR. DOYLE: The City has committed and 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. [¶] Everything that we are going to be doing over that time period, this time period before you is to be out of that site. That’s the city’s commitment.” Ex. K85 at 145:21–146:2 (3/27/03 Tr.).

83. In the 2003 proceedings before the Land Use Commission, the community made no request for intervention, and no contested case hearing was held. *See* Ex. K2 (6/9/03 LUC Order).

84. At the conclusion of the 2003 proceedings, the Land Use Commission directed the Honolulu City Council to select a new site by June 1, 2004, and to close the Landfill by May 1, 2008. Ex. K2 at 7 (¶ 1), 9 (¶ 12), 10 (¶ 15) (6/9/03 LUC Order).

85. Businesses were started and homes were purchased in the area with the understanding that the Landfill would close in 2008. Munson Written Direct Testimony at 3 (¶ 5), 9 (¶ 21); 2/8/12 Tr. at 15:11–15 (Williams); Williams Written Direct Testimony at 13 (¶ 29.j).

86. In 2003, the ENV convened a site selection committee, which identified several potential sites for a new landfill, none of which included the WGSL. 1/11/12 Tr. at 50:17–21 (Steinberger); Ex. K58 at 5 (12/1/03 SSC report).

87. This recommendation was consistent with the ENV's representations to the Land Use Commission that the committee would not be able to select the existing Landfill as the "new" landfill: "CHAIRPERSON ING: . . . This proposed Blue Ribbon committee, could the come out with a recommendation that this Waimanalo Gulch landfill be expanded? MR. DOYLE: No." Ex. K85 at 177:22–25 (3/27/03 Tr.: Doyle).

88. In 2004, the City Council did not follow the committee's recommendation and instead passed a resolution to select the existing Waimanalo Gulch Sanitary Landfill as the "new" landfill. 1/11/12 Tr. at 52:6–15 (Steinberger).

89. No new landfill was developed.

90. In 2007, the ENV filed an "application to amend Condition Number 10 of the Planning Commission's Findings of Fact, Conclusions, and Decision dated March 13, 2003, by extending the deadline to accept solid waste at the Landfill from May 1, 2008, to May 1, 2010, to extend the closure deadline to May 1, 2010, or until the WGS� reaches its permitted capacity, whichever occurs first." Ex. K155 at 1–2 (3/14/08 LUC order).

91. On March 14, 2008, the Land Use Commission amended the condition to extend the closure deadline to November 1, 2009. Ex. K155 at 18 (¶ 12) (3/14/08 LUC order: "The 200-acre Property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan by November 1, 2009, or until the approved area reaches its permitted capacity, whichever occurs first.").

92. 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. Ex. K12 at 2 (¶ 5) (8/4/09 HPC order).

93. The Land Use Commission approved the permit on the condition that “[m]unicipal 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.” K15 at 8 (¶ 14) (2009 Decision). This is Condition 14.

94. Condition 14 regulates the kind of waste that may be deposited in the Landfill after a specific date. 4/23/12 Tr. at 28:5–8 (Miller). Condition 14 does not mandate closure of the Landfill. 1/11/12 Tr. at 61:9–12 (Steinberger); K15 at 8 (¶ 14) (2009 Decision).

95. The Landfill’s Solid Waste Management Permit states that the Landfill “may accept MSW and ash for disposal until the date specified in the associated Special Use Permit or until the landfill/monofill reaches its permitted capacity, whichever comes first.” Ex. A4 (6/4/10 solid waste management permit).

96. “MSW” or “municipal solid waste” is defined as “garbage, refuse, and other residential or commercial discarded materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations; sludge from waste treatment plants and water supply treatment plants; and residues from air pollution control facilities and community activities. This term does not include solid or dissolved materials in domestic sewage or other substances in water sources, such as silt, dissolved or suspended solids

in industrial wastewater effluents, dissolved materials in irrigation return flows, or other common water pollutants,” HRS § 342G-1; *see also* Hawai‘i Administrative Rule (HAR) § 11-58.1-03.

97. Condition 14 mandates that after July 31, 2012, the Landfill will stop accepting MSW. K15 at 8 (¶ 14) (2009 Decision).

98. Condition 14 further contemplates that after July 31, 2012, the Landfill may become an “ash monofill.” 1/11/12 Tr. at 61:19–24 (Steinberger); K15 at 8 (¶ 14) (2009 Decision).

99. Director Steinberger testified that “to develop a[n] [ash] monofill within an existing site is not that difficult of an accomplishment.” 1/11/12 Tr. at 61:22–24 (Steinberger).

100. Condition 4 of the Land Use Commission’s 2009 Order directs the ENV to find a new landfill site for MSW. Specifically, Condition 4 states, “On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL.” Ex. K15 at 6 (10/22/09 LUC order). Condition 4 further states, “The Applicant’s effort to identify and develop such site shall be performed with reasonable diligence” Ex. K15 at 6 (10/22/09 LUC order).

101. Conditions 4 and 14 operate together: Condition 14 requires the ENV to stop accepting MSW at the Landfill, and Condition 4 requires the ENV to find a new site for MSW.

102. The ENV has not sought the deletion or other modification of Condition 4.

(b) *The Leeward Community Opposes the Continued Operation of the Landfill.*

103. The Landfill is located across the street from Ko Olina Resort. 2/8/12 Tr. at 57:5–8 (Munson). The Resort is “a 642-acre resort master planned community with a combination of resort, residential, commercial, and recreational uses.” Williams Written Direct Testimony at 2 (¶ 5).

104. Before the Landfill was permitted, the area where Ko Olina Resort sits was intended to be a resort. Williams Written Direct Testimony at 2–3 (¶¶ 7–9); Ex. K132 at 3, 7 (Ewa Development Plan: “[The area now know as Ko Olina] shall be developed as a resort destination area providing scenic, recreational and open space elements with an integration of residential and commercial uses into the overall design of the resort.”).

105. By the time Ko Olina was developed, the Landfill was supposed to be closed. Williams Written Direct Testimony 9 (¶ 3); Ex. K69 at 7 (¶ 28) (4/20/87 LUC order).

106. Ko Olina is home to thousands of residents and dozens of business. 2/8/12 Tr. at 47:11–48:22 (Williams). Ko Olina includes hotels, timeshares, residential projects, commercial businesses, including retail centers and shops, a golf course, and a marina. These amenities cater to residents and to visitors from around the world and contribute to the tourist industry. 2/8/12 at 14:214–15:3, 47:15–22, 48:23–49:1 (Williams).

107. Ko Olina is an economic engine for the west side of Oahu and the State of Hawai‘i. Ko Olina generates “\$520 million in direct spending annually, 2,800 jobs

locally, indirect and induced benefits of \$280 million and 1,500 additional jobs, \$60.7 dollars in annual taxes to the City and State.” 2/8/12 Tr. at 21:8–14 (Williams).

108. “At full build-out the economic benefits will balloon to \$1.4 billion in total economic activities, 8,000 jobs, \$138 million in taxes to the City and the State, plus a \$194 million one time tax—in one-time taxes from construction period spending.” 2/8/12 Tr. at 21:15–20 (Williams).

109. Construction period impacts will generate “\$3.7 billion in direct spending, two billion in indirect and induced economic benefits, and 26,700 jobs. This is a total of a one-time economic benefit of \$5.7 billion, about equal to what we'd be spending on the rail.” 2/8/12 Tr. at 21:21–22:1 (Williams).

110. These benefits are jeopardized by the continued operation of the Landfill. 2/8/12 Tr. at 15:15–17 (Williams); Hospodar Written Direct Testimony at 11–12 (¶ 25) (explaining that Ko Olina’s business reputation was likely harmed by the January 2011 release of waste from the Landfill).

111. Ko Olina’s residents, workers, and visitors suffer from the odors, noise, dust, blasting, visual blight, truck traffic, and flying litter from the landfill. Williams Written Direct Testimony at 9 (¶ 29).

112. As Ms. Munson explained, the odor from the Landfill has at times been so bad that, if you walk outside, “your throat would actually clench up and your eyes would water.” 2/8/12 Tr. at 58:21–24 (Munson).

113. Ms. Munson also testified that her lanai is covered with dirt every day from the Landfill. 2/8/12 Tr. at 59:19–60:8 (Munson).

114. Exhibit K128 is a petition signed by the property owners and residents of Ko Olina urging the “Honolulu decision[-]makers” to close the Landfill in July 2012 and to designate a new landfill to be located outside of District One.

115. Senator Shimabukuro testified that her constituents and her fellow legislators, State Representative Jo Jordan and U.S. Representative Colleen Hanabusa, have consistently voiced their opposition to the Landfill. 4/4/12 Tr. at 124:25–126:10 (Shimabukuro); Ex. K44 8/12/11 letter from Representative Jordan); Ex. K46 (8/13/11 letter from Congresswoman Hanabusa).

116. Councilmember Tom Berg, who represented District 1, which includes the Waianae Coast, Kapolei, and Ewa, testified in opposition to the Landfill. 10/5/11 Tr. at 15:11–22.

117. The Makakilo/Kapolei/Honokai Hale, Waianae Coast, and Nanakuli-Maili Neighborhood Boards have consistently voted to close the Landfill. 10/5/11 Tr. at 23:6–7, 24:1–6, 24:23–25:2 (Patty Teruya, Chair of the Nanakuli-Maili Neighborhood Board); 4/4/12 Tr. at 131:12–14 (Shimabukuro); 3/7/12 Tr. at 134:22–135:1 (Timson); Ex. K47 (8/17/11 letter from George S. Yamamoto, Chair of the Makakilo/Kapolei/Honokai Neighborhood Board).

118. The Leeward coast has a larger share other environmental burdens, including “the military bases, Kahe Power Plant, H-POWER, [and] Honouliuli Waste Treatment Plant.” 3/7/12 Tr. at 127:9–20 (Shimabukuro).

119. The Planning Commission did not hear testimony from any member of the Leeward community in support of the Landfill.

(c) *The Landfill Has Posed Danger to Health and Safety.*

120. Branch Chief Chang testified that of the 13 landfills in the State, 9 to 11 of which accept MSW, the WGSL probably has more regulatory violations than any other landfill in the past five years. 1/25/12 Tr. at 15:25–16:13, 39:24–40:3 (Chang).

121. Consistent with Branch Chief Chang’s conclusion, Mr. Miller testified that he has “not worked on a site that has had anywhere near violations of this size.” 3/7/12 Tr. at 133:24–134:1 (Miller); *see also* 3/7/12 Tr. at 20:10–21, 33:33–35:15.

122. Since 2006, the DOH has found the following violations at the Landfill:

a. On January 31, 2006, DOH issued a notice of violation (“NOV”) to Waste Management and the City and County of Honolulu (the “City”), containing eighteen counts. Ex. K59 (1/31/06 NOV). These counts included exceeding permitted fill grades, failure to maintain records and record location of asbestos disposal at the Landfill, and failure to submit annual surface water management plan.

b. On October 25, 2006, DOH sent a warning letter to Waste Management and the ENV, identifying five potential violations. Ex. K101 (10/25/06 warning letter). These potential violations included exceeding permitted fill grades and failure to monitor leachate levels. Ex. K101 at 2 (10/25/06 warning letter). Additionally, Waste Management was required to resubmit its stormwater management system design to ensure compliance with applicable regulations and the SUP. Ex. K101 at 2 (10/25/06 warning letter).

c. On May 3, 2007, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations. Ex. K125 (5/3/07 warning letter). These potential violations included exceeding permitted fill grades, failure to monitor leachate levels, and inadequate soil cover. Ex. K125 at 2 (5/3/07 warning letter).

d. On September 5, 2008, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations. Ex. K82 (9/5/08 warning letter). These potential violations included unauthorized storage of materials and the failure to submit written notification of the exceedence and verification of methane gas monitoring results. Ex. K82 at 2 (9/5/08 warning letter).

e. On May 13, 2010, DOH issued an NOV to Waste Management and the City, containing three counts. Ex. K66 (5/13/10 NOV); 1/25/12 Tr. at 17:6–34:1 (Chang: discussing the NOVs and warning letters). These counts included the failure to construct the final cover and West Berm in accordance with design specifications, failure to notify the DOH of noncompliance, and failure to submit interim status reports on the construction. Ex. K66 (5/13/10 NOV)

123. Since 2006, the DOH has assessed close to \$2 million in fines against the Landfill. Ex. K59 (1/31/06 NOV); Ex. K66 (5/13/10 NOV).

124. In 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. Steinberger Written Direct Testimony at 27 (¶ 82). The failure to monitor gas readings was a threat to public health and safety. 3/7/12 Tr. at 131:23–132:10 (Miller); 1/11/12 Tr. at 91:1–

92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).

125. In addition to the foregoing, the DOH currently has a pending enforcement case against the Landfill. 4/4/12 Tr. at 156:20–22 (Gill: “There is a pending enforcement case which I can’t speak to in any detail regarding the handling of storm water runoff from the landfill.”); 4/4/12 Tr. at 157:10–12 (Gill: “There is . . . , to be clear, potential enforcement action regarding the events around the flood event at the landfill.”).

126. Since 2006, the United States Environmental Protection Agency (“**EPA**”) has issued the following NOV’s against the ENV and Waste Management:

a. On April 5, 2006, the EPA issued a NOV for violations of the Clean Air Act. Ex. K60 (4/5/06 NOV).

b. On November 29, 2011, the EPA issued a NOV for violations of the Clean Water Act concerning the release of leachate and waste into the ocean in December 2010 and January 2011. Ex. K123 (letter at 1; 11/29/11 NOV at 4–5).

127. Taken together, “[t]hese violations and deviations, as well as employee malfeasance with regards to landfill monitoring, have had great consequences and increased the risk of harm to health and safety, public health and safety.” 3/7/12 Tr. at 28:12–16 (Miller).

(d) *The December 2010 and January 2011 Floods from the Landfill.*

128. In December 2010 and January 2011, the Landfill experienced by heavy rains. Ex. K97 at 3 (1/11/11 DOH inspection report). On December 23, 2010, the DOH Clean Water Branch documented the unauthorized pumping of leachate from Cell E6 into State waters. Ex. K52 (12/23/10 DOH investigation report).

129. According to the report, on December 19, 2010, after receiving heavy rains, there was a “failure in the Landfill’s [temporary] storm water bypass system,” such that the active “E6 cell was inundated with storm water.” Ex. K52 at 1 (12/23/10 DOH investigation report).

130. On December 19 and 23, the Waste Management “intermittently pumped storm water which [had] accumulated in the Landfill’s E6 cell into the Landfill’s storm water drainage system.” Ex. K52 at 1 (12/23/10 DOH investigation report).

131. “The Landfill’s storm water drainage system discharges to the Pacific Ocean at a shoreline outfall of the Ko Olina resort.” Ex. K52 at 1 (12/23/10 DOH investigation report).

132. The storm water pumped out of active Cell E6 and into the ocean was “clearly in contact with and passed through solid waste” in the cell, rendering it “Landfill leachate.” Ex. K52 at 2–3 (12/23/10 DOH investigation report); Ex. K97 (1/11/11 DOH inspection report at 2).

133. Based on the December 19 and 23 leachate releases, the DOH ordered the ENV to issue a press release regarding the possible release of contaminated storm water and leachate into state waters.

134. The ENV refused to issue the press release on the ground that the storm water was not leachate. Ex. K55 at 3 (1/12/11 Steinberger e-mail).

135. On January 12, 2011, the DOH “demanded” that the ENV post “signs warning of contaminated water discharges from WGS�, given the predicted rainfall.” Ex. K55 at 4 (1/12/11 Steinberger e-mail).

136. Director Steinberger refused to post warning signs on the ground that signs were not required because the Landfill does not qualify as a “wastewater treatment, use or disposal system” as defined by Hawai‘i regulations. Ex. K55 at 4–5 (1/12/11 Steinberger e-mail).

137. On January 12, 2012, the Landfill received heavy rains. Ex. K56 at 1 (1/12/11 and 1/13/11 station summaries from Palehua Hawaii).

138. As a result of the heavy rains, the Landfill’s temporary drainage system failed again, which allowed storm water to flow “like a waterfall” into Cell E6. Ex. K97 (1/11/11 DOH inspection report at 5).

139. The water dislodged unknown quantities of MSW, sewage sludge, leachate, and medical solid waste from Cell E6 into coastal waters. Williams Written Direct Testimony at 18 (¶ 43); Ex. K52 at 2 (12/23/10 DOH investigation report: “Contents of the E6 cell include municipal solid waste such as general refuse, medical waste, as well as intermediate cover material.”).

140. The medical solid waste included sharps, chemotherapy wastes, and pathological wastes. K73 at 2 (1/27/11 Honolulu Civil Beat article); Williams Written Direct Testimony at 18 (¶ 43).

141. By the morning of January 13, 2011, significant quantities of medical waste and other Landfill debris were washing up in the Ko Olina lagoons. Williams Written Direct Testimony at 18 (¶ 44).

142. The waste spread to beaches up the Leeward coast as far as Pokai bay, Shimabukuro Written Direct Testimony at 7 (¶ 10.e), and east as far as Nimitz Beach, Williams Written Direct Testimony at 18 (¶ 44).

143. No one from the ENV or Waste Management called Ko Olina's operations to warn them about the flood. 2/8/12 Tr. at 94:12–19 (Hospodar).

144. For ten days, Ko Olina expended substantial time and resources to clean up the MSW that had washed up on Ko Olina's beaches. Williams Written Direct Testimony at 22 (¶ 48); Hospodar Written Direct Testimony at 7–11 (¶ 21); 4/23/12 Tr. at 42:9–16 (Belluomini).

145. The ENV and Waste Management did not provide any assistance in cleaning up Ko Olina's lagoons. 2/8/12 Tr. at 85:22–86:8, 94:24–95:2 (Hospodar); 4/23/12 Tr. at 42:4–6 (Belluomini).

146. Neither the ENV nor Waste Management offered to reimburse Ko Olina for the more than \$20,000 in clean-up costs. 2/8/12 Tr. at 95:19–96:5 (Hospodar).

147. Waste Management charged Ko Olina to redeposit the collected waste at the Landfill. 2/8/12 Tr. at 88:24–89:1 (Hospodar); 4/23/12 Tr. at 69:6–8 (Belluomini).

148. Waste Management sent a few temporary workers out for one day to clean one area by the outfall after giving them 30 minutes of hazardous waste training

and puncture-resistant gloves. Ex. K133a (1/14/11 KHON 2 video); 4/23/12 Tr. at 41:13–15 (Belluomini).

149. After the one day, the workers never came back to assist with the cleanup, even though the waste continued to wash ashore in the area. Ex. K133b (1/14/11 KHON 2 video); 4/23/12 Tr. at 41:13–15 (Belluomini); 2/8/12 Tr. at 94:24–95:2 (Hospodar).

150. According to Deputy Director Gill, “the reason that the flood took place is” the western diversion “channel had not been completed at the time that the big rains came.” 4/4/12 Tr. Supp. at 8:7–13 (Gill); *see also* 4/11/12 Tr. at 65:11–16, 67:1–4 (Sharma); 3/7/12 Tr. at 29:1–6, 39:12–21 (Miller).

151. Deputy Director Gill publicly stated, “The Landfill has been expanded a number of times and the water diversion system has not kept up with expansions.” Ex. K208 at 1 (1/22/11 article: Gill).

152. The industry standard is to have necessary drainage systems completed before filling cells at a landfill. 3/7/12 Tr. at 39:25–40:4, 126:13–20, 128:14–129:13, 172:19–173:3 (Miller); 4/11/12 Tr. at 31:24–32:10 (Sharma).

153. As Dr. Sharma explained, “[b]efore you place the waste, the diversion should be completed.” 4/11/12 Tr. at 32:9–10 (Sharma).

154. The Landfill’s design plans contemplated that the diversion channel would be in place before Cell E6 was filled. 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 4/11/12 Tr. at 74:10–15 (Steinberger).

155. The ENV claimed that permitting and processing delays pushed the ENV and Waste Management into a situation where there was no safely useable space for the waste. 4/11/12 Tr. at 145:6–12 (Steinberger); 4/11/12 Tr. at 47:22–24, 67:5–9 (Sharma).

156. Because of these delays, the ENV stated that Waste Management had to begin filling Cell E6 before the western diversion channel was in place. 4/11/12 Tr. at 33:12–21 (Sharma); 75:13–18 (Steinberger). No one from Waste Management appeared to testify.

157. Director Steinberger identified two such delays. First, there was a challenge to the Environmental Impact Statement (“EIS”) for the Landfill. 4/11/12 Tr. at 74:19–23, 145:16–19 (Steinberger).

158. Director Steinberger conceded that a challenge to the EIS was not unexpected. 4/11/12 Tr. at 145:22–23 (Steinberger).

159. Second, intervenors opposed the expansion of the Landfill in 2009. 4/11/12 Tr. at 74:23–25 (Steinberger).

160. However, the ENV knew it would have to go through the SUP approval process and should have anticipated intervention in the approval proceedings. 4/11/12 Tr. at 145:24–146:14, 149:3–5 (Steinberger); Ex. K2 (6/5/03 LUC order); Ex. K155 (3/14/08 LUC order); Ex. K155 at 3 (¶¶ 5–8) (6/5/03 LUC order); Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle).

161. Thus, inadequate planning by the ENV and Waste Management that caused the Landfill to run out of safely useable space before the diversion channel had been completed. 3/7/12 Tr. at 186:4–21 (Miller).

162. This inadequate planning forced the ENV and Waste Management to deviate from the Landfill's design plans and the industry standard and to fill Cell E6 before the diversion channel was in place. 4/11/12 Tr. at 66:7–9 (Sharma: "And [the diversion channel] was intend to be [in place prior to the storm]."); 4/11/12 Tr. at 66:15–17 (Sharma: "[W]e were going to construct them both sequentially, not place the waste before the diversion channel is completed."); 3/7/12 Tr. at 129:25–130:4 (Miller: "Q. So if you had been advising the operator and the City, would you have said that it was reasonable to go forward with filling the cell before the diversion system had been completed? A. No, I would not.").

(e) *The City's Current Waste Stream.*

163. The ENV and private business engage in various efforts to divert MSW and certain other wastes from the Landfill. In 2010, the last year for which waste totals are available, the ENV diverted 34.4% of the total MSW from the Landfill to H-POWER. Ex. A27 (Oahu MSW waste stream chart). In 2010, the ENV also diverted 36.9% of the total MSW from the Landfill through general material recycling. Ex. A27 (Oahu MSW waste stream chart).

164. Despite these efforts, in 2010, the Landfill still accepted 163,736 tons of MSW. Ex. A27 (Oahu MSW waste stream table).

165. The volume of MSW at the Landfill is due in part to the fact that the City is behind other municipalities with respect to its recycling efforts. As Deputy Director Gill explained in an interview that was accepted into the record without objection, “[W]e’re doing about half as well as we need to [with respect to landfill diversion], and not only as a city, but as a state” 4/4/12 Tr. Supp. at 12:5–6 (Gill).

166. Mr. Miller similarly testified that “the City’s current use of alternative disposal technologies is inconsistent with current state of the practice with respect to its recycling efforts, biosolids management and medical waste management, essentially not looking at these as a resource that they are, as opposed to as a waste product.” 3/7/12 Tr. at 21:24–22:5 (Miller).

167. Particular areas for improvement are the sewage sludge and biosolids programs.

168. “Sewage sludge” refers to the raw sludge from wastewater prior to processing in a treatment system where the biosolids are extracted. 4/11/12 Tr. at 77:19–22 (Steinberger).

169. The ENV takes “15,000 to 20,000 tons per year of sewage sludge” to the Landfill. Steinberger Written Direct Testimony at 24 (¶ 74).

170. Branch Chief Chang acknowledged that sewage sludge can be burned and that other municipalities do burn sewage sludge. 1/25/12 Tr. at 54:3, 54:11–13 (Chang); *see also* 1/11/12 Tr. at 68:17 (Steinberger: “Sewage sludge can be incinerat-

ed.”). However, the ENV does not burn sewage sludge. 1/11/12 Tr. at 68:13–15 (Steinberger).

171. “Biosolids” are what can be extracted from the sludge and left after exiting a treatment system. 4/11/12 Tr. at 77:22–24 (Steinberger). Class A biosolids may be used as a “growth enhancer,” similar to fertilizer. 4/11/12 Tr. at 78:3–4, 79:12–16 (Steinberger). Class B biosolids have restricted uses, such as spreading over forage crops for cattle. 4/11/12 Tr. at 78:4, 80:16–19 (Steinberger).

172. While other municipalities began biosolids programs in the 1970s and 1980s, the ENV did not establish a biosolids program for Honolulu until 2006. Ex. K189 at 1 (Los Angeles biosolids webpage); Ex. K190 at 2 (King County biosolids webpage); Ex. K148 at 10 (Parametrix alternatives memorandum); 3/7/12 Tr. at 139:11–140:4 (Miller). Approximately, thirty-five percent of the island’s sewage sludge is reused as biosolids. 1/11/12 Tr. at 68:13–15 (Steinberger).

173. The City’s current alternative sewage sludge and biosolids management is limited to a single digester or “egg” at the Synagro facility on Sand Island. 4/11/12 Tr. at 179:4-9 (Steinberger). This facility can only handle approximately 20,000 tons per year of sewage sludge. Steinberger Written Direct Testimony at 23 (¶ 71).

174. The ENV has conducted studies on sewage sludge management. Those studies recommended incineration at H-POWER and a second digester at the Synagro facility. 4/11/12 Tr. at 178:6-7, 178:20-179:3 (Steinberger). Director Steinberger testified that the Honolulu City Council did not consider funding for the second digester to be a priority. 4/11/12 Tr. at 180:3-5 (Steinberger).

175. “About 65 percent of the island's generated sewage sludge goes to the [L]andfill.” 1/11/12 Tr. at 68:13-15 (Steinberger). Landfilling 65% of the sewage sludge is inconsistent with best practices and with the national standard. 3/7/12 Tr. at 22:18-20, 96:4-7, 98:17-22, 139:11-140:4 (Miller).

176. Another area for improvement is food waste recycling. The ENV currently has no food waste collection program. Ex. K195 at 2, 4 (12/09 food waste article); Ex. K148 at 4 (Parametrix alternatives memorandum). Although the ENV has entered into a contract for an In-Vessel Conversion Facility, which will be able to process green waste, food waste, and biosolids, the facility is not expected to be operational until early 2013. Steinberger Written Direct Testimony at 20 (¶58).

177. Another area for improvement is the disposal of medical waste. While the prevailing trend is to burn medical waste, Ex. K247 at 613 (Sharma, Geoenvironmental Engineering). The ENV continues to take medical waste to the Landfill. In fact, the Landfill's operator, Waste Management, has a facility on the U.S. mainland that burns medical waste. Ex. K192 (Waste Management medical waste webpage).

178. San Francisco is a national leader in landfill waste diversion with a rate of 78%. 1/11/12 Tr. at 79:2-5, 142:12-17 (Steinberger); 4/11/12 Tr. at 164:1-4 (Steinberger).

179. The ENV has a waste diversion rate of 72% to 73%, with approximately 34% being diverted through H-POWER. 4/11/12 Tr. at 192:22-25 (Steinberger); Ex. A26 (Oahu waste stream table).

180. Unlike the City, San Francisco accomplishes its diversion rate without a waste-to-energy facility. 4/11/12 Tr. at 164:5–7 (Steinberger); 3/7/12 Tr. at 136:1–3 (Miller). San Francisco achieves its high diversion rate through recycling and reducing the waste stream. 3/7/12 Tr. at 136:5–8 (Miller); Ex. K196 (San Francisco waste management webpage).

181. If the ENV improved its recycling efforts to be in line with San Francisco's, and with the addition of the third H-POWER boiler, it could probably achieve a diversion rate in the upper ninetieth percentile. 3/7/12 Tr. at 136:19–137:2 (Miller).

182. However, because the ENV is presently behind other municipalities in its landfill alternative efforts, the ENV will need to landfill MSW for a period beyond July 31, 2012.

(f) The City Is Adding Sufficient Capacity at H-POWER.

183. The existing H-POWER facility requires pre-preparation of waste so that it can be accommodated in the burn unit. 1/11/12 Tr. at 65:14–17 (Steinberger). All non-burnable materials need to be separated out. 1/11/12 Tr. at 65:18–21 (Steinberger). The raw MSW comes through a tipping floor and goes through a processing unit that develops "RDF," or refuse-derived fuel. 1/11/12 Tr. at 65:22–66:1 (Steinberger). The RDF goes into a holding barn and the material, the residue, and any recyclable material is separated. 1/11/12 Tr. at 66:1–4 (Steinberger). This pre-preparation requires worker handling of the waste. 1/11/12 Tr. at 66:18–22 (Steinberger).

184. Worker handling of the waste has been proffered as the reason the ENV and Covanta, the H-POWER operator, have hesitated to take sewage sludge and medical waste in the past. 4/11/12 Tr. at 170:22–171:10 (Steinberger).

185. No one from Covanta testified in these proceedings.

186. In addition to sewage sludge, MSW includes other putrescible waste, such as green waste, food waste, and biosolids. 3/7/12 Tr. at 100:16–17; 102:9–12 (Miller).

187. Putrescible waste is of one of the greatest concerns because it decomposes and causes odors that burden the community. 3/7/12 Tr. at 23:5-7 (Miller: noting that putrescible waste includes “the biosolids, the food waste, the green waste, [and] incidental green waste”); 3/7/12 Tr. at 98:11-14 (Miller: discussing wastes that are “non-putrescible, and what I mean by that -- they don't rot, they don't break down and decompose and cause the odors that have been a problem at the landfill”); 3/7/12 Tr. at 102:9-12 (Miller: “I would also say, again, the items of greatest concern are the food waste, are the -- the green waste, those items that decompose that cause the odors and so forth.”).

188. Currently, all putrescible waste that is not burned or recycled is taken to the Landfill. 1/11/12 Tr. at 68:11-15 (Steinberger); 4/11/12 Tr. at 114:9-14, 123:20-24 (Steinberger).

189. A third H-POWER boiler will be operational by October or November 2012. 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger).

190. The third boiler will have the capacity to take 300,000 tons of MSW a year. Steinberger Written Direct Testimony at 18 (§§ 47, 50); 4/11/12 Tr. at 84:22–24 (Steinberger).

191. With the third boiler, the ENV has said it will achieve a Landfill diversion rate of 90%. Ex. K251 at 1–2 (5/5/11 ENV press release).

192. As noted, in 2010, the last year for which waste totals are available, the Landfill accepted 163,736 tons of MSW. Ex. A26 (Oahu waste stream table).

193. Therefore, the third boiler will add more capacity than is needed to dispose of all of O‘ahu’s remaining landfilled MSW.

194. The third boiler is known as a “mass burn unit.” 1/11/12 Tr. at 65:9–10 (Steinberger). A mass burn unit can accept larger pieces of material and requires less pre-preparation of waste. 1/11/12 Tr. at 66:8–10 (Steinberger). With less pre-preparation, there is less worker interaction with the waste. 1/11/12 Tr. at 66:18–21 (Steinberger).

195. In particular, with the third boiler, the ENV will have the capacity to burn the 15,000 to 20,000 tons of sewage sludge presently disposed of at the Landfill. Steinberger Written Direct Testimony at 23 (§ 71).

196. As Branch Chief Chang acknowledged, sewage sludge can be burned and other municipalities do burn sewage sludge. 1/25/12 Tr. at 54:3, 54:11–13 (Chang).

197. Director Steinberger confirmed that the ENV had instituted a change order to be able to burn sewage sludge. 4/11/12 Tr. at 90:9–10, 90:20–21 (Steinberger).

198. Director Steinberger also confirmed that with the third boiler operational, the ENV could stop sending sewage sludge to the Landfill by fall 2012. 4/11/12 Tr. at 90:3–20, 174:1–6, 203:25 (Steinberger).

199. The third boiler will also have the capacity to burn the 10,000 tons of medical waste that currently goes to the Landfill. 1/11/12 Tr. at 75:13–18 (Steinberger); 4/11/12 Tr. at 163:12–16 (Steinberger).

200. Branch Chief Chang confirmed that DOH does not prohibit the burning of medical waste, including sharps. 1/25/12 Tr. at 43:20–24, 44:2–4 (Chang).

201. Director Steinberger confirmed that with the third boiler operational, the ENV could stop sending medical waste to the Landfill by fall 2012. 1/11/12 Tr. 75:19–22 (Steinberger); 4/11/12 Tr. 171:16–172:10, 196:20–24 (Steinberger); *cf.* 3/7/12 Tr. at 209:12–25 (Miller).

202. Food waste can be disposed at H-POWER. 1/11/12 Tr. at 71:7–10 (Steinberger); 4/11/12 Tr. at 114:25–115:5, 123:23–24 (Steinberger).

203. Green waste that is not composted can be disposed of at H-POWER.

204. With the added capacity provided by the third H-POWER boiler, the ENV will not need to landfill putrescible waste or any combustible MSW after the third boiler becomes operational. As Mr. Miller explained, with alternative diversion there is no need to have a general purpose MSW landfill on O‘ahu. 3/7/12 Tr. at 22:24–23:7 (Miller).

205. Steinberger agreed: “If it’s just solely MSW, I would say [Mr. Miller is] probably correct.” 4/11/12 Tr. at 106:12–22 (Steinberger).

206. The items remaining that will not be able to be accepted at H-POWER after the third boiler becomes operational are “probably a small percentage” of the MSW. 1/11/12 Tr. at 77:7–13 (Steinberger).

207. Much of this small percentage “can go to . . . [the] PVT [C&D landfill],” including resins and chemical debris and petroleum contaminated soil. 1/11/12 Tr. at 47:19–22, 145:4–146:1 (Steinberger); 1/25/12 Tr. at 12:2–3, 44:12–14 (Chang).

208. After the third boiler is operational, the only time sewage sludge and other putrescible waste or any combustible MSW would need to go the Landfill is (1) during times when H-POWER is down for maintenance and cannot accept waste or (2) when there are wastes reasonably related to a public emergency, such as disaster debris, that cannot be disposed of at H-POWER. 4/11/12 Tr. at 118:9–15, 125:15–126:4, 189:13–17, 201:20–202:1 (Steinberger); 3/7/12 Tr. at 24:23–23:7 (Miller).

209. The Landfill could be permitted by the DOH to accept waste for those specific contingencies. 1/25/12 at 54:20–24, 55:4–9 (Chang).

210. With respect to H-POWER downtime in particular, “[t]he bypass waste, which is what that is, the waste that cannot be processed because of down time and so forth, should be minimal.” 3/7/12 Tr. at 100:10–12 (Miller).

211. H-POWER is generally burning twenty-four hours a day, seven days a week. Ex. K220 at 220:23–223:1 (7/1/09 Tr.: Doyle); 4/23/12 Tr. at 23:27 (Miller).

212. Only one H-POWER boiler is generally taken offline at a time and total shutdowns are typically not required. Ex. K220 at 223:6–9 (7/1/09 Tr.: Doyle); *cf.* 3/7/12 Tr. at 101:4–8 (Miller).

213. Unexpected shutdowns at waste-to-energy facilities are rare. 3/7/12 Tr. at 101:12–14 (Miller).

214. H-POWER has to be reliable and predicable because, with the addition of the third boiler, it will be providing eight percent of Oahu's power. Ex. K251 at 1–2 (5/5/11 ENV press release).

215. Because putrescible waste decomposes, ending the acceptance of putrescible waste at the Landfill would likely eliminate more than 90% of the odor issues. 3/7/12 Tr. 206:6–10 (Miller: "If all of the putrescible waste no longer goes in there, so all that stuff that can decompose, if it's no longer in there, that would significantly -- I would say probably more than 90 percent remove the odor issues at the landfill.").

216. Because the third boiler will be operational in October or November 2012, the ENV will not need a general purpose MSW landfill beyond January 1, 2013. After January 1, 2013, all sewage sludge and all other putrescible waste, such as food waste and green waste, all treated medical waste, and all combustible general MSW can be burned or disposed of through alternative means.

217. In addition to the third boiler at H-POWER, the ENV will have the ability to recycle biosolids through its In-Vessel Conversion Facility, which is scheduled to be operational in 2013. 4/11/12 Tr. at 79:2–3, 87:25–88:2, 176:11–13 (Steinberger).

218. The facility will be able to take 15,000 to 20,000 tons of sewage sludge annually. 4/11/12 Tr. at 177:3–10 (Steinberger).

219. In addition to the In-Vessel Conversion Facility, the ENV is also seeking to construct a second “egg” digester at its Sand Island facility. 4/11/12 Tr. at 179:10–11 (Steinberger).

220. The second digester would provide redundancy for the existing facility and “take the over-capacity off the current digester.” 4/11/12 Tr. at 179:6–9 (Steinberger).

221. Eventually, these facilities will provide alternatives to incineration that might allow the City to achieve a higher and better use of sewage sludge, green waste, and food waste through recycling or reuse. 3/7/12 Tr. at 140:14–141:12, 176:22–177:1, 210:14–22 (Miller).

222. According to Director Steinberger, “ultimately, all of the biosolids that are produced on Oahu will go into some type of beneficial reuse as a class A biosolid.” 4/11/12 Tr. at 79:3–6 (Steinberger). The “product will be distributed as a [plant] growth enhancer.” 4/11/12 Tr. at 81:19–20 (Steinberger).

223. Until the ENV achieves that goal, burning at H-POWER sewage sludge, any biosolids that are not beneficially reused, green waste, and food waste is a better use of those resources than landfilling them. 3/7/12 Tr. at 176:22-177:1 (Miller).

(g) *The Time Required to Site and Develop a New Landfill.*

224. It took the ENV “about two-and-a-half years” to identify, permit, and have the Landfill operational. Ex. K220 at 244:16–19 (7/1/09 Tr.: Doyle).

225. On October 22, 2009, the Land Use Commission ordered the ENV to find a new landfill site for MSW. Ex. K15 at 6 (10/22/09 LUC order).

226. The Land Use Commission directed that “[o]n or before November 1, 2010, the [ENV] shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL.” Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

227. The ENV was directed to proceed with “reasonable diligence.” Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

228. Mr. Miller testified that it should take should take three to five years select and develop a new landfill. It should take 18 months to two years for design, design review and development of a landfill. 3/7/12 Tr. at 199:24–200:1 (Miller). The EIS process should take a year to a year and a half. 3/7/12 Tr. at 201:1–24 (Miller). Adding land acquisition to the process, it would probably take a total of three to five years. *See* 3/7/12 Tr. at 202:14–203:6 (Miller).

229. Mr. Miller’s estimate is consistent with the timeline set out by Former Acting Director Doyle. Former Acting Director Doyle stated before the Land Use Commission: “We have asked for a five-year extension because that's the time that we believe it's going to take in order for us to establish a new landfill.” Ex. K85 at 95:6–8 (3/27/03 Tr.: Doyle). Former Acting Director Doyle added: “We think the time that is necessary for us to get us there is at least three, probably four years just to get ourselves up and operational on that landfill site.” K85 at 100:23–25 (Doyle) (emphasis added).

230. The ENV did not offer any testimony by a witness qualified as an expert in landfill site selection.

231. The ENV did not offer testimony by a witness who had been responsible for successfully siting a landfill.

232. The ENV did offer testimony from Director Steinberger, Ms. Marsters, and Dr. Sharma.

233. Director Steinberger stated that to develop a new site would take “at best seven years” from site identification to operations. 4/11/12 Tr. at 122:25 (Steinberger).

234. Director Steinberger was not offered or qualified as an expert in site selection. The ENV provided no evidence that Director Steinberger ever successfully sited a new landfill.

235. Ms. Marsters testified that she believes that to develop a landfill it would take “somewhere in excess of five to seven years” from site selection to the functioning landfill. 4/4/12 Tr. at 56:17–18 (Marsters).

236. Assuming that Ms. Marsters meant that the entire process could take five years, the low end of her estimate is consistent with Mr. Miller’s estimate. In any event, Ms. Marsters was not offered as an expert in landfill siting or development, and she has never sited or developed a landfill. 4/4/12 Tr. at 61:16–25 (Marsters).

237. Dr. Sharma testified that “in the '80s you could site and build a landfill very quickly,” but that “after mid '90s and in 2000 and onward, it has been a long, drawn process” based on new regulations enacted in 1993. 4/11/12 Tr. at 51:22–52:

12.

238. However, Dr. Sharma acknowledged that the regulations were in place when Former Acting Director Doyle provided his 5-year estimate to the Land Use Commission on March 27, 2003. 4/11/12 Tr. at 52:15–18 (Sharma).

239. Dr. Sharma also testified that “in ‘80s and ‘90s there were many new landfills were being sited, not the expansion of existing landfills, but completely new, and [Dr. Sharma] was involved in some of them.” 4/11/12 Tr. at 41:17–20 (Sharma). Dr. Sharma further testified that “[t]hey took about seven to ten years, depending upon the complexity.” 4/11/12 Tr. at 41:21–22 (Sharma).

240. Dr. Sharma’s expertise is in design. 4/11/12 Tr. at 9:11–20 (Sharma).

241. He has never sited a landfill, and he testified that he was not qualified to give expert testimony on landfill siting. 4/11/12 Tr. at 41:10–15, 5:22–23 (Sharma).

242. Based on the evidence, no more than five years is needed to site and develop a landfill if the ENV proceeds with reasonable diligence.

243. Under no circumstances should it take the ENV beyond January 1, 2017—seven years from the date by which the ENV was ordered to begin site selection efforts—to site and develop a new landfill.

244. The landfill site selection process is not finished. Ex. K259 (4/25/12 landfill site selection information update) (“The Committee will meet very shortly to review the final ranking released today.”). No deadline has been set by the ENV to complete the process. Ex. K259 (4/25/12 landfill site selection information update).

245. Under the ENV’s estimate, even assuming that a site is selected by the end of this year, the site would not be developed until January 1, 2020, at the earli-

est. The total time to develop the site would be approximately 10 years after the ENV was directed by the Land Use Commission to start siting and developing a new site by November 1, 2010. Ex. K155 at 18 (¶ 12) (3/14/08 LUC Order). Taking 10 years to develop a site is not reasonably diligent.

246. No credible evidence supports the ENV's timeline.

(h) The City's Current Site Selection Efforts.

247. The Land Use Commission's 2009 Order directed the ENV to select and develop a "new" site that would either "replace or supplement" the existing Landfill. Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

248. This directive removes the option of selecting WGS� as the "new" site. 1/11/12 Tr. at 53:20–54:1 (Steinberger).

249. The site selection and development process was to begin on November 1, 2010. Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

250. The current SSC did not start meeting until January 2011. 4/4/12 Tr. at 54:14–16 (Marsters).

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

252. The site selection process has not followed the City's Integrated Solid Waste Management Plan ("**Solid Waste Plan**"), which Steinberger referred to as the City's "framework" for waste management. 1/11/12 Tr. at 26:21–27:1 (Steinberger); *see also* 3/7/12 Tr. at 25:2–20 (Miller); 4/4/12 Tr. at 73:9–13 (Marsters).

253. For example, the SSC has not excluded sites west of Makakilo, even though the plan directs that the “site evaluations will preclude areas west of Makakilo” K144 at 11-4 (10/08 integrated solid waste management plan update); 4/4/12 Tr. at 76:3–6, 76:16–18, 76:19–21, 77:21–24 (Marsters).

254. A number of the sites that the SSC may recommend are west of Makakilo. Ex. K258 (4/20/12 SSC meeting photographs).

255. Further, the site selection process has not followed the detailed site selection procedures set out in the Solid Waste Plan. Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update). For instance, the ENV did not direct SCC to consider mitigation factors and obtain input from potentially affected neighborhoods before developing rankings. 4/4/12 Tr. at 113:11–14, 116:10–21 (Marsters); Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update); Ex. K147 at 3 (Parametrix site selection memorandum).

256. For instance, the ENV did not direct SCC to consider mitigation factors and obtain input from potentially affected neighborhoods before developing rankings. 4/4/12 Tr. at 113:11–14, 116:10–21 (Marsters); Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update); Ex. K147 at 3 (Parametrix site selection memorandum).

257. As Mr. Miller explained, the site selection process has other errors, such as the use of deciles and failing to correct implicit weighting, which leads to double counting of criteria. Ex. K147 at 3–4 (Parametrix site selection memorandum); 3/7/12 Tr. at 94:9–12 (Miller).

258. More fundamentally, the site selection process did not move linearly from a broad consideration of sites to a narrow list of sites. 3/7/12 Tr. at 23:8–13, 24:2–23 (Miller); Ex. K147 at 4 (Parametrix site selection memorandum).

259. The consultant had the SSC start with the same list of approximately 40 sites, some of which were no longer viable options. 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

260. The SSC was using those same sites through the sixth of seven scheduled meetings, which were supposed to be concluded by July 2011. Ex. K26 at 2 (1/20/11 SSC description of service); 4/4/12 Tr. at 66:25–67:2, 83:1–4, 84:17–20 (Marsters).

261. The SSC had to repeatedly “[r]emove screens that [it] had not either previously discussed or authorized.” 4/4/12 Tr. at 104:24–105:4 (Marsters). Specifically, the SSC broadened the search criteria or removed screens at the following four points in the process:

a. In the sixth meeting in July 2011, the SSC directed the consultant to include sites above or which cross the no-pass line and underground injection control (“UIC”) line. Ex. K218 at 2 (7/19/11 SSC group memory); 4/4/12 Tr. at 84:3–16 (Marsters); 4/4/12 Tr. at 84:17–23 (Marsters); Ex. K26 at 2 (1/20/11 SSC description of service).

b. In the seventh meeting in November 2011, the SSC’s consultant made a presentation regarding potential sites within the UIC and no-pass lines. Ex. K152 at 1 (11/8/11 SSC group memory). However, the consultant applied a number of exclusionary criteria, meaning that sites with such criteria would not be

considered. 4/4/12 Tr. at 87:13–15 (Marsters); Ex. K144 at 11-6 (10/08 integrated solid waste management plan update). After application of the criteria, only two sites above the UIC and no-pass line remained, both of which were non-sites that could not be used. 4/4/12 Tr. at 88:1–17 (Marsters); Ex. K152 at 2 (11/8/11 SSC group memory). One exclusionary criterion screened out lands owned by the State. 4/4/12 Tr. at 89:6–10 (Marsters). The SSC had not previously directed the consultant exclude lands owned by the state and the SSC directed the consultant to include such lands. 4/4/12 Tr. at 89:11–17, 90:9–12 (Marsters); Ex. K152 at 2 (11/8/11 SSC group memory). In addition, the consultant had screened out parcels less than 100 acres, and the SSC asked the consultant to include parcels between 90 and 100 acres. Ex. K153 at 9 (11/8/11 SSC handout); 4/4/12 Tr. 90:17–21 (Marsters).

c. In the eighth meeting in February 2012, after dropping certain screens, the consultant identified a total of 464 sites. Ex. K170 at 2 (2/1/12 SSC group memory). But the consultant applied nine screening factors to the 464 sites. 4/4/12 Tr. at 93:10–13 (Marsters); Ex. K170 at 2 (2/1/12 SSC group memory). After applying the screening factors, only six sites remained. 4/4/12 Tr. at 93:18–21 (Marsters); Ex. K170 at 3 (2/1/12 SSC group memory). The SSC eliminated four of those sites, so only two sites remained. Ex. K170 at 3 (2/1/12 SSC group memory). One of the exclusionary criteria applied by the consultant screened out Class C agricultural lands. Ex. K170 at 2 (2/1/12 SSC group memory). The SSC had not previously directed the consultant to exclude Class C agricultural lands. The SSC asked the consultant to include Class C agricultural land. 4/4/12 Tr. at 96:12–22

(Marsters); Ex. K170 at 3, 5 (2/1/12 SSC group memory). Another exclusionary criterion applied by the consultant screened out any parcel that contained a structure as noted on aerial maps. 4/4/12 Tr. at 96:23–97:3 (Marsters); Ex. K170 at 3–4 (2/1/12 SSC group memory). The SSC had not previously asked the consultant to exclude parcels with a structure. The SCC directed the consultant to include parcels with structures. 4/4/12 Tr. at 97:4–18 (Marsters); Ex. K170 at 3, 5 (2/1/12 SSC group memory). Finally, in addition to dropping those exclusionary criteria, the SSC asked the consultant to reevaluate sites that were large enough so that, even with those portions affected by accepted exclusionary factors, there still could be enough area to develop a landfill. 4/4/12 Tr. at 98:7–99:21 (Marsters); Ex. K170 at 5 (2/1/12 SSC group memory).

d. In the ninth meeting in March 2012, after dropping the exclusionary criteria for class C agricultural land and structures, the consultant identified a total of seven sites. Ex. A47 (3/16/12 SSC group memory at 2). However, the consultant added an exclusionary criterion for parcels upgradient of parcels in or planned for residential use. 4/4/12 Tr. at 102:23–103:2 (Marsters); Ex. A47 (3/16/12 SSC group memory at 2). The SSC had not previously directed the consultant to include the upgradient screen. The SSC directed the consultant to eliminate the screen. 4/4/12 Tr. at 103:3–10 (Marsters); Ex. A47 (3/16/12 SSC group memory at 3). The SSC also directed the consultant to add federal lands to the pool of potentially suitable sites. Ex. A47 (3/16/12 SSC group memory at 4).

262. Ms. Marsters explained: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.” 4/4/12 Tr. at 104:20–23 (Marsters).

263. It is now ten months after the SSC process was supposed to end. Ex. K26 at 2 (1/20/11 SSC description of service); 4/4/12 Tr. at 66:25–67:2 (Marsters).

264. The SSC ranked sites in April 2012. Ex. K258 (4/20/12 SSC meeting photographs). The SSC has yet to send a report to the Mayor.

265. Subsequently, SMS, a subconsultant, disclosed that it had made an error in ranking the sites. Ex. K259 (4/25/12 landfill site selection information update).

266. SMS provided new scores for the sites, a new ranking list and a new map of the ranked sites. Ex. K260 (SSC corrected list of sites and map).

267. A meeting to review the corrected ranking has not been scheduled.

268. The length of time that has passed and since the ENV was ordered to find a new site and the flaws in the process were not reasonable.

269. Based on the findings of fact set forth above, the Planning Commission finds that the ENV has not exercised reasonable diligence in siting and developing a new landfill pursuant to Condition 4 of the Land Use Commission’s 2009 Order.

(i) Closure of the Landfill.

270. One of the ENV’s stated goals is “the elimination of landfilling materials other than ash in the near future.” Ex. K230 at 9 (3/12 sewage sludge report).

271. Under the Land Use Commission’s 2009 Order, the ENV had the option to select and develop a site that would either “replace or supplement” the Landfill. Ex.

K15 at 6 (¶ 4) (10/22/09 LUC order); 4/4/12 Tr. at 68:25–69:3 (Marsters). The order further provided that even after July 2012 the Landfill would still be able to accept H-POWER ash and residue. Ex. K15 at 8 (10/22/09 LUC order).

272. As Director Steinberger explained, “to develop a[n] [ash] monofill within an existing site is not that difficult of an accomplishment.” 1/11/12 Tr. at 61:22–24 (Steinberger).

273. Nevertheless, the ENV prefers to have one landfill site. Accordingly, the ENV directed the SSC to identify a site that could accept all forms of waste, even though the Landfill could have accepted ash and residue past July 2012. 4/4/12 Tr. at 72:13–24 (Marsters); Ex. K27 at 2 (1/20/11 SSC group memory).

274. The directive to find one site introduced additional considerations and made the site selection process more difficult, because the SSC had to evaluate the added capacity needed for the ash and residue and the location of potential sites relative to H-POWER. 4/4/12 Tr. at 72:25–73:4, 111:17–25 (Marsters); 1/11/12 Tr. at 61:13–18 (Steinberger).

275. Having chosen to find a replacement site for the Landfill, the Planning Commission finds that once the new site opens, the ENV will no longer need the Landfill.

276. It is in the best interest of the community and consistent with the standards set by HRS § 205-6 to close the WGSL to landfill operations when the ENV develops a new landfill site.

277. It is in the best interest of mitigating the impacts of the WGSL, including but not limited to the impact on native Hawaiian traditional practices, Ex. A48 (4/2/09 letter to David K. Tanoue from the State Historic Preservation Division), to close the WGSL to landfill operations when the ENV develops a new landfill site.

II. CONCLUSIONS OF LAW

1. Under HRS § 205-6(a), the Planning Commission and Land Use Commission “may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified.”

2. The ENV’s current SUP contains, among others, the following conditions:

a. Condition 4: “On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant’s effort to identify and develop such site shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/5UP-2 (SP09403) and shall determine whether modification or revocation of 2008/SUP-2 (SP09-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission. K15 at 6 (¶ 4) (2009 Decision).

b. Condition 6: “The Applicant shall provide, without any prior notice, annual reports to the Planning Commission and the Land Use Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations, and Applicant's compliance with the conditions imposed herein. The annual reports also shall address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission and Land Use Commission on June 1 of each year subsequent to the date of this Decision and Order.” K15 at 7 (¶ 6) (2009 Decision).

c. Condition 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.” K15 at 8 (¶ 14) (2009 Decision).

3. The ENV seeks to modify the Land Use Commission's 2009 Order by deleting Condition 14, which would allow the Landfill to accept all permitted waste until it reaches capacity.

4. The Land Use Commission imposed Condition 14.

5. Under HAR § 15-15-94(c), “[f]or good cause shown, the [Land Use Commission] may act to modify or delete any of the conditions imposed or modify the commission's order.”

6. This Commission has the authority to impose additional conditions on the SUP under the Land Use Commission's 2009 Order, which provides: “The Planning Commission may at any time impose additional conditions when it becomes appar-

ent that a modification is necessary and appropriate.” Ex. K15 at 8 (¶ 11) (10/22/09 LUC order).

7. Based on the findings of fact set forth above, the Planning Commission concludes that the ENV has not met its burden to show good cause to delete Condition 14 and keep the Landfill open to all forms of waste open until it reaches capacity.

8. Based on the findings of fact set forth above, the Planning Commission concludes that there is good cause to modify Condition 14.

9. Specifically, the Landfill should be allowed to continue as a general-purpose MSW landfill until January 1, 2013. After January 1, 2013, the Landfill shall be closed to all sewage sludge and all other putrescible waste, such as food waste and green waste, all treated medical waste, and all combustible general MSW, except during times when H-POWER is down for maintenance and cannot accept waste or when there are wastes reasonably related to a public emergency, such as disaster debris, that cannot be disposed of at H-POWER.

10. From January 2, 2013 to November 1, 2017, non-putrescible waste, including but not limited to automobile-shredder residue, ash and residue from H-POWER, and construction and demolition debris waste, may be accepted at the Landfill.

11. By November 1, 2017, the ENV shall have developed and opened a new landfill site or have certified that a landfill is no longer part of the City’s solid waste management plan.

12. Based on the findings of fact set forth above, the Planning Commission concludes that it is necessary and appropriate to order that the Landfill shall close to all forms of waste on November 2, 2017 or when a new MSW landfill opens on O'ahu, whichever first occurs.

13. Based on the findings of fact set forth above, the Planning Commission concludes that it is necessary and appropriate to order that the ENV to file an notice of intent to close approved closure plan for WGSL with the Planning Commission one year prior to the closing of the Landfill to all forms of waste on November 2, 2017 or when a new MSW landfill opens on O'ahu, whichever first occurs.

14. Based on the findings set forth above, and because the ENV's efforts to site and develop a new landfill have not been reasonably diligent, the Planning Commission concludes that there is good cause to modify Condition 6 of the Land Use Commission's 2009 Order and Condition 3 of the Planning Commission's 2009 order as follows:

a. Starting on September 1, 2012, and continuing ever six months until there is a new landfill, the ENV must report to the Planning Commission in writing and in person.

b. The reports must describe the ENV's progress toward opening a new site and whether the ENV has complied with all other SUP conditions.

c. The ENV shall provide the public with notice of each such report.

d. Each written report shall be posted on the ENV's website.

15. The ENV shall also provide prior notice of each report to all neighborhood boards on Oahu and to Schnitzer and KOCA.

16. Based on the findings of fact set forth above, the Planning Commission concludes that it is necessary and appropriate to order that, if the Landfill releases waste or leachate, the ENV must immediately notify the surrounding community, including the Makakilo/Kapolei/Honokai Hale, Waianae Coast and Nanakuli-Maili Neighborhood Boards, Schnitzer, and KOCA, and must take remedial actions to clean up the waste and to keep the waste from spreading. Such remedial actions shall include, but shall not be limited to, placing booms at the Landfill's shoreline outfall to prevent waste from spreading into the ocean.

III. 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 GRANT IN PART AND DENY IN PART the ENV's Application as follows:

1. The ENV's Application to modify the SUP by deleting Condition 14 is DENIED.

2. The ENV's Application for an extension of time to accept MSW at the Landfill is GRANTED IN PART and Condition 14 is modified to read as follows:

MSW, as well as ash and residue from H-POWER, shall be allowed at the WGS� up to January 1, 2013. After January 1, 2013, all sewage sludge and all other putrescible waste, such as food waste and green waste, all treated medical waste, and all combustible general MSW shall not be accepted at the WGS�. From January 2, 2013, to November 1, 2017, the wastes that may be accepted at the WGS� shall be as follows: (1) ash and residue from H-

POWER; (2) non-putrescible waste, including but not limited to automobile-shredder residue and construction and demolition debris waste; (3) if H-POWER is not in operation such that it cannot accept waste, general MSW; and (4) if there is an emergency declared by the Governor of the State of Hawai'i pursuant to law, including but not limited to HRS ch. 128, waste reasonably related to the emergency, including but not limited to disaster debris.

3. The Planning Commission imposes the following additional condition:

The Landfill shall stop accepting all forms of waste on November 2, 2017 or when a new MSW landfill opens on O'ahu, whichever first occurs.

4. The Planning Commission imposes the following additional condition:

The ENV shall file with the Planning Commission an approved closure plan one year prior to closing to all forms of waste on November 2, 2017 or when a new MSW landfill opens on O'ahu, whichever first occurs.

5. The Planning Commission modifies Condition 4 in the Land Use Commission's 2009 Order to state:

Condition 4: On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant's effort to identify and develop such site shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu.

6. The Planning Commission modifies Condition 6 in the Land Use Commission's 2009 Order and Condition 3 in the Planning Commission's 2009 Order to state:

The Applicant shall provide bi-annual reports to the Planning Commission and the Land Use Commission regarding the status of the efforts to identify and develop a new landfill site on Oahu, the WGSL's operations and Applicant's compliance with the conditions imposed herein. The bi-annual reports also shall address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The bi-annual reports shall be submitted to the Planning Commission and Land Use Commission on September 1 and March 1 of each year. Each report shall be posted on the ENV's website on the same day the report is submitted to the Planning Commission and the Land Use Commission.

Within 30 days of submitting each report, the Applicant shall provide a summary of the report in person to the Planning Commission. Prior to appearing before the Planning Commission, the Applicant shall provide the public with at least six days' notice of the hearing by posting the hearing date, time, location and subject matter on the ENV's website. The Applicant shall also provide at least six days' notice of the hearing to all neighborhood boards on Oahu and to Intervenor Schnitzer Steel Hawaii Corp., Ko Olina Community Association, and Senator Maile Shimabukuro.

7. The Planning Commission imposes the following additional condition:

If the Landfill releases waste or leachate, the ENV must immediately notify the surrounding community, including the Makakilo/Kapolei/Honokai Hale, Waianae Coast and Nanakuli-Maili Neighborhood Boards, Intervenor Schnitzer Steel Hawaii Corp., Ko Olina Community Association, and Senator Maile Shimabukuro, and take remedial actions to clean up the waste and to keep the waste from spreading. Such remedial actions shall include, but shall not be limited to, placing booms at the Landfill's shoreline outfall to prevent waste from spreading into the ocean.

DATED: Honolulu, Hawai'i, _____, 2012.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By _____
GAYLE PINGREE, Chair

By _____
KA'TULANI K. SODARO, Vice Chair

By _____
RODNEY KIM, Member

By _____
JAMES C. PACOPAC, Member

By _____
BEADIE K. DAWSON, Member

By _____
KARIN HOLMA, Member

By _____
ARTHUR B. TOLENTINO, Member

By _____
CORD D. ANDERSON, Member

By _____
DANIEL S.M. YOUNG, Member

In re Application of the Department of Environmental Services, City and County of Honolulu, File No. 2008/SUP-2: Findings of Fact, Conclusions of Law, Decision and Order

EXHIBIT A

72. Ex. K155 at 17 (¶ 7) (3/14/08 LUC order: “Due to the presence of the WGSL, agricultural uses at the Property are not feasible.”).

73. 4/11/12 Tr. at 185:15–18 (Steinberger: “Q. So even though this body and ultimately the Land Use Commission has ultimate oversight over ag land -- I mean, that’s why we’re here. Right? A. Yes.”).

81. Ex. K220 at 177:1–9 (7/1/09 Tr.: Doyle: “Q. And, once again, what is your current position with the city? A. I am Chief Division of Refuse. Q. And that's in what department? A. Environmental Services. Q. And how long have you been employed in that position? A. Approximately 26 years roughly -- uh , 32 years, actually. Q. As the chief of refuse? A. As the chief of refuse.”).

84. Ex. K2 at 7 (¶ 1) (6/9/03 LUC order: “The Blue Ribbon Site Selection Committee shall make its recommendation for a new landfill site to the City Council by December 1, 2003. The City Council shall select a new site by June 1, 2004. If a new site is not selected by June 1, 2004, this Special Use Permit shall immediately expire.”); Ex. K2 at 9 (¶ 12) (6/9/03 LUC order: “Within 5 years from the date of this Special Use Permit Amendment approval or date of the Solid Waste Management Permit approval for this expansion, whichever occurs later but not beyond May 1, 2008, the 200-acre property shall be restricted from accepting any additional solid waste material and be closed in accordance with an approved closure plan.”); Ex. K2 at 10 (¶ 15) (6/9/03 LUC order: “The City and County of Honolulu shall select a new landfill site.”).

85. Munson Written Direct Testimony at 3 (¶ 5: “When we purchased our Ko Olina home in 2003, the Landfill was scheduled to be closed in 2008. As the closure date drew near, the City requested an extension, claiming it needed more time to prepare another site for waste disposal. At that time, the City claimed that it takes seven years to identify and prepare a new landfill site. We are now at the end of that "seven-year need," and are no closer to any alternative to the Landfill than we were when the City received its first extension in 2003.”); Munson Written Direct Testimony at 9 (¶ 21: “When we purchased our home, we were hesitant and concerned about the Landfill’s proximity to our future residence. However, the 2008 closure date reassured us that living next to the Landfill was a temporary situation. Since moving into our current home, we have become aware of violations and poor health/safety and environmental protection practices, and a pattern of doing nothing more than preparing for the next extension request.”).

2/8/12 Tr. at 15:11–15 (Williams: “ENV made promises to close the landfill and should be held to its promises to the community; not just Ko Olina, but the entire leeward area. The community relied on these promises.”).

88. 1/11/12 Tr. at 52:6–15 (Steinberger: “Q. I understand. Just so the record is clear and I’m not testifying -- the City Council didn’t follow the recommendations of the blue ribbon site selection committee? A. And I would say that the City Council does what the City Council does, of course. Q. But is that a yes, I’m right? A. Well, I’m going to have to say that since it wasn’t in that list of sites that came over in the report, that that would be correct.”).

94. 4/23/12 Tr. at 28:5-8 (Miller: "Q. This condition is regulating the kind of waste that may be accepted at the gulch after a certain date, isn't it? A. It is, yes.").

106. 2/8/12 Tr. at 47:11-48:22 (Williams: "If we look just in terms of the number of businesses at Ko Olina, ballpark, what are we talking about? A. You know, I should have a number for you, but we have a hotel, a time share, a marina, a golf course, shops totalling about maybe six -- so that's ten. We have shops within the hotels themselves, like a Chuck's Steak House and other smaller businesses, jewelry shops and whatnot. So a couple dozen, at least, not to mention, you know, property owners who also treat it as a business, even though it's vacant. So many. Q. Are these all big businesses? Are we talking about mom and pops, local businesses, too? A. It runs the gamut. You'll have international, like the Disney Corporation just opened Aulani, all the way down to Ko Olina Barbecue, run by a family who have a few chains of plate lunch places, so everything in between. Q. All of these businesses collectively, about how many people do they employ? Ko Olina Resorts in total, how many people work there? A. The estimate is about 2,800. Q. What will it be at full build-out? A. Full build-out, I think I had said earlier, through the economic study, of course, its forecast is 8,000, 8,000 jobs, direct jobs. Q. And Ko Olina is not just a business park. I mean, people live there; right? A. That's correct. Q. How many people call Ko Olina home? A. Let's see. Residential units, we have probably 1,100. We have another resort community. That's another 300; units, that is. And then you have -- you also have time share owners, which can run up pretty quickly based on their weekly intervals. So thousands.").

2/8/12 at 14:214-15:3 (Williams: "On behalf of KOCA, I represent all Ko Olina Resort property owners, hotels, time shares, residential projects and commercial businesses, including retail centers and shops, the golf course and marina."); 2/8/12 Tr. at 47:15-22 (Williams: "but we have a hotel, a time share, a marina, a golf course, shops totalling about maybe six -- so that's ten. We have shops within the hotels themselves, like a Chuck's Steak House and other smaller businesses, jewelry shops and whatnot. So a couple dozen, at least, not to mention, you know, property owners who also treat it as a business, even though it's vacant. So many."); 2/8/12 Tr. at 48:23-49:1 (Williams: Q. So with the time shares and the hotel resorts, no doubt Ko Olina is a visitor destination; right? A. That's correct.").

110. Hospodar Written Direct Testimony at 11-12 (¶ 25: "With residents and long-time lagoon patrons stating that they would not dare go back to Ko Olina beaches and other affected areas, I can only imagine how tourists will view the January event. The event was international news, and several thousand lagoon patrons, which included hotel guests, were turned away by the 10-day, Department of Health closure.").

116. 10/5/11 Tr. at 15:11-22 (Councilmember Tom Berg: "As the city councilman whose jurisdiction houses this landfill, our neighborhood boards including Nanakuli and Waianae have taken a formal stand to unite against the proposal to extend the landfill by another 15 years. [¶] I urge you to stop enabling this reckless behavior that condones the broken treaties and is an affront to the economic engine of businesses thriving in West Oahu with the stipulation this

landfill was to go away. ¶ Families and economic development ventures have invested their hard-earned dollars into the vicinity of the landfill with the promise the landfill will have found its terminus years ago. . . . Right here, probably in this room another treaty will be broken and not honored. Please do what is just and right and stop turning our coastline on the Leeward Coast into an ashtray for the rest of the island.”).

117. 10/5/11 Tr. at 23:6–7, 24:1–6, 24:23–25:2 (Patty Teruya, Chair of Nanakuli-Maili Neighborhood Board No. 36: “So on behalf of the Nanakuli-Maili neighborhood board, in the August meeting we went through this. We had the deputy director from environment come [sic] to us or request us another 15 years. And you could see the emotions of the community and the board. ¶ The board unanimously voted this down. . . . We should look at other technologies. I mean, you just cannot continue to say we have the capacity in the mountain, that they have to keep going higher and higher and higher. I think it’s enough for us and for the West Oahu.”).

4/4/12 Tr. at 131:12–14 (Shimabukuro: “So I know that the Waianae Neighborhood Board, I believe, did take a vote against it.”).

4/4/12 Tr. at 134:22–135:1 (Timson: “First of all, the neighborhood board. During my 15-year tenure, there were several occasions where the board consistently voted to close or stop the Waimanalo Gulch landfill. We never wavered.”).

Ex. K47 (8/17/11 letter from George S. Yamamoto, Chair of the Makakilo/Kapolei/Honokai Neighborhood Board: “At its July 27, 2011 meeting, Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34 voted in opposition to the amendment of Special Use Permit No. 2008/SUP-2 which would delete the July 31, 2012 deadline to cease disposal of municipal solid waste at the Waimanalo Gulch Sanitary Landfill.”).

120. 1/25/12 Tr. at 15:25–16:13 (Chang: “Q. How many landfills are there in the state of Hawaii, public and private? A. Active landfills or -- Q. Active landfills. A. I believe last count we had 13. Q. And of those 13 landfills, how many are permitted to accept municipal solid waste? A. All but two. Q. So we have 11 that are permitted to accept municipal solid waste? A. Yes. I’m trying to count off the top of my head. I’m coming up with nine rights now. Sorry. Q. Between nine and 11? A. Right.”); 1/25/12 Tr. at 39:24–40:3 (Steven Chang: “Q. Looking at those other landfills, are you aware of any that have had as many findings of violation as Waimanalo Gulch Sanitary Landfill in that same five-year period? A. In the last five years, probably not.”).

124. Steinberger Written Direct Testimony at 27 (¶ 82) (“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 WGS�. 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.”).

3/7/12 Tr. at 131:23–132:10 (Miller: “I think one of the ones that was probably most -- somewhat most egregious to me was then ultimately the falsification of the monitoring records that was done at the site. That came to light after we had done our study, but I looked at the process on that, as well, and those are some real concerns. This is a public facility with -- you know, the public is counting on the City to protect the public health and safety and the environment, and that really calls it into question when, you know, one of the operations people was not doing -- actually, to the point of illegally doing those activities.”).

126.b. Ex. K123 (letter at 1: “EPA’s on-going review of operations at Waimanalo Gulch Sanitary Landfill (‘WGSL’) has revealed violations of the Clean Water Act and the National Pollutant Discharge Elimination System permit regulating storm water discharges from WGSL.”); Ex. K123 (11/29/11 NOV at 4–5: “21. Respondents have failed to comply with the requirements of the Hawaii Industrial Activities General Permit, the Notice of Coverage, and its SWPCP in that, on at least three occasions associated with storm events in December, 2010 and January, 2011, Respondents • Failed to prevent run-off of surface water that had contacted waste, • Failed to control erosion to prevent loss of cover or washout of refuse slopes, • Failed to properly manage leachate, and • Failed to adequately retain and remove silt from surface water before it was discharged from the site. 22. Discharges from WGSL associated with these storm events have failed to comply with effluent

limitations established in the Notice of Coverage and water quality standards established in HAR, Section 11-54-4. This noncompliance includes, but is not necessarily limited to, effluent limitations for iron, zinc and pH. This noncompliance also includes, but is not necessarily limited to, water quality standards requiring protection of recreational uses of Hawaii's waters, and prohibiting the presence of substances attributable to domestic, industrial or other controllable sources of pollutants. 23. As to certain constituents, Respondents have failed to analyze effluent samples associated with these discharges consistent with the requirements of HAR, Section 11-55 Appendix A, Standard Condition 14(d). The constituents at issue include, but are not necessarily limited to BOD5 and chromium. As to one sample, dated January 13, 2011, Respondents failure to properly maintain the sample temperature invalidated the analysis of the constituents in the sample and, as such, failed to comply with the requirements of HAR, Section 11-55 Appendix A, Standard Condition 14." (spacing altered)).

130. Ex. K52 at 2 ("J. Lottig [of Waste Management] stated that the E6 cell is lower than the surrounding grade which effectively makes it a bowl-like structure. J. Lottig stated that there is a single 36" pipe which runs under the E6 cell which was designed to act as a storm water bypass system for the E6 cell. The pipe is designed to transport storm water from the watershed and gulch above the Landfill to the Landfill's storm water drainage system, J. Lottig indicated that the single subsurface pipe was designed so that the storm water running down Waimanalo Gulch would bypass the active cells including the E6 cell and not come into contact

with municipal solid waste before ultimately discharging into the Pacific ocean. J. Lottig indicated that the subsurface drainage pipe was designed to prevent storm water from flowing into the E6 cell, and contacting active work areas. . . . J. Lottig stated that on Sunday, December 19, 2010, the subsurface drainage pipe that conveyed storm water under the E6 cell had become plugged and that the storm water flowing down Waimanalo Gulch had run into the E6 cell from the North.”).

132. Ex. K97 (1/11/11 DOH inspection report at 2: “MSW Cell E-6 was noted with two large water ponds and exposed trash from the recent December 19, 2010 storm. . . . The [DOH Solid and Hazardous Waste Branch] inspector told Justin Lottig [of Waste Management] that the liquid being pumped from the ponds was considered leachate because it had come into contact with trash and trash was visible on top of the water and western slope of the cell. He said that approximately 20 to 25 feet of liquid had been pumped from Cell E6 to the sedimentation basin.”); *cf.* Ex. K52 at 1 (12/23/12 DOH investigation report: a Waste management representative “indicated that storm water that was pumped may have contacted solid waste”).

134. Ex. K55 (1/12/11 Steinberger e-mail at 2: “[O]n December 23,2010, Joanna Seto from the CWB contacted ENV and instructed ENV to issue a press release stating that there had been a release of storm water that is potentially contaminated with leachate into the Ko Olina coastal area. She said that this reporting requirement was similar to the requirement to issue a press release when there is a sewer spill. Ms. Seto did not explain the basis for, her conclusion that the

storm water was potentially contaminated with leachate, and also mistakenly equated this event with a wastewater discharge. ENV therefore declined, explaining that the storm water was not leachate under the law, that draining the storm water flows was an established practice with which DOH was familiar, and that there was no basis for requiring the press release. At approximately 9:41 p.m. that night, DOH issued its own press release advising that WGSL had "discharged a large quantity of storm water potentially contaminated with landfill waste to the Pacific Ocean.").

138. Ex. K97 (1/11/11 DOH inspection report at 5: "According to WMH, the temporary 48-inch drain inlet for the 36-inch subsurface drainage line located above MSW Cell E-6 was plugged with debris and the Western surface drainage system has not been completed. Jesse Frey was asked on the condition of the 36-inch drainage pipe above MSW Cell E-6 and he stated that the drainage pipe inlet grating must be covered with at least eight (8) foot of soil.").

145. 2/8/12 Tr. at 85:22–86:8 (Hospodar: "To be at the front lines of this clean-up and hear -- I believe it was Ken Williams who called me one day and said he heard on the news that the calvary [sic] was coming, that, you know, the people who were responsible for this breach were gonna send help. For ten days we got no help. My managers did report that there was some, I guess you could say, temporary help type of individuals sent to the breach site, but other than that, for ten days we were left alone, hoping that someone would come down and at least give us some assistance."); 2/8/12 Tr. at 94:24–95:2 (Hospodar: "Q. Other than the reference you

made to noticing some temporary workers, did you receive any help in that clean-up effort from the City? A. Zero help.”).

146. See 2/8/12 Tr. at 95:19–96:5 (Hospodar: “Q. What was the overall cost? A. I’m going to guess. I was thinking it was around -- on our side, about \$28,000, about 28,000 for the ten days. Q. Does that include the sand? A. That doesn’t include the replenishing of the sand. The replenishing of the sand, because we’re waiting on a Corps of Engineers permit, we couldn’t do that at that time. So we’re waiting on that permit to get the sand back in. Q. So it’s not complete yet? A. No. It’s not complete, ma’am, no.”).

150. 4/4/12 Tr. Supp. at 8:7–17 (Gill: “[B]asically, the reason that the flood took place is the diversion of all that water that was supposed to -- it’s not supposed to go over the landfill. It’s supposed to be channeled off to the side. And that channel had not been completed at the time that the big rains came, and so basically a torrent of water came down from the mountains, over the top of the landfill, eroded what had been put in the landfill, floated plastics out, down the storm drain and out into the ocean.”).

4/11/12 Tr. at 65:11–16 (Sharma: “If we had a diversion channel built, this thing would not have happened. Design required the diversion channel, required the pipes and the structures. If they were built at that time, this thing would not have happened.”); 4/11/12 Tr. at 67:1–4 (Sharma: “Design-wise, it was supposed to be the way it was -- if it was built and constructed like that, the issue would not have come up. We would not have had this problem.”).

3/7/12 Tr. at 29:1–6 (Miller: “One of the things I found interesting is not having these major storm water facilities in place prior to construction of the landfill cell liners, as well as particularly prior to using those landfill cells, and this directly led to the discharges of medical waste.”); 3/7/12 Tr. at 39:12–21 (Miller: “I think, as I made in my statement, that I would add to that conclusion that the lack of diligence in completing drainage improvements prior to starting operation -- well, first off, prior to completing construction and construction that was not to the original design intent for the cell, as well as not completing the drain improvements prior to the construction of the cell and operation of the cell, specifically, that led to the catastrophic release of the medical waste.”).

152. 3/7/12 Tr. at 39:25–40:4 (Miller: “I mean, that’s just essentially due care in your operation and construction of a site, to have your drainage improvements completed prior to construction of your cell and operation of your cell.”); 3/7/12 Tr. at 126:13–20 (Miller: “A good example of that really is the bypass channel, bypass system. As I noted before, typically I would have recommended that be in line and on line prior to the cell being constructed or completed at least and definitely before it was filled. It’s just good practice. It’s a good way to reduce your risk at the site. So that’s typically what I would see in a site like that.”); 3/7/12 Tr. at 128:14–129:5 (Miller: “So a canyon fill such as this, where we are controlling water that’s coming in from a point source -- I mean, it’s from the canyon, a fairly narrow canyon, fairly easy -- I’ll put it this way, an easy area to collect that water from, I mean, and get it into a bypass. I would have that in place. I mean, that is so fundamental, and the

industry standard, typically, is to have that in place, have that bypass in place prior to putting this -- what is a multi-million dollar investment in the ground and then starting to operate that, because you want to protect your investment. You want to protect the investment, as well as what that investment is protecting, which is groundwater, surface water, public health and safety that's down slope of it. So I guess that would be the standard that I would say out there."); 3/7/12 Tr. at 172:19–173:3 (Miller: "What I'm saying, again, is that -- and what I've noted a couple of times is that those facilities that are designed and constructed to protect the integrity of the landfill, to reduce or eliminate the run-on of surface water onto the site, those need to be in place and operational, in my mind, prior to -- I would say prior to construction of the landfill -- but in some cases, you know, that's a risk taken by the operator/owner -- but definitely prior to filling.").

154. 4/11/12 Tr. at 66:7–9 (Sharma: "And [the diversion channel] was intend to be [in place prior to the storm]."); 4/11/12 Tr. at 66:15–17 (Sharma: "[W]e were going to construct them both sequentially, not place the waste before the diversion channel is completed.").

4/11/12 Tr. at 74:10–15 (Steinberger: "[Q.] Dr. Sharma testified that his understanding was that the intention was to build the western drainage diversion system prior to opening the cell for collection of waste. Was that your understanding, as well? A. Yes, it was.").

155. 4/11/12 Tr. at 145:6–12 (Steinberger: "Q. I think you explained that, you know, permitting and processing delays forced the City or Waste Management into

a situation where there was no other available space for the waste and so it had to go into the cell even though the diversion channel was not in place. A. Yes.”).

4/11/12 Tr. at 47:22–24 (Sharma: “Q. . . . So there was not space where you could safely place waste? A. Yes.”); 4/11/12 Tr. at 67:5–9 (Sharma: “Q. So there was no other space to put this waste? A. There were spaces, but there were no other space where you could safely put that amount of waste.”).

157. 4/11/12 Tr. at 74:19–23 (Steinberger: “Well, the process began actually prior to 2009, and I have to say this is before I was with the City, and that started with the EIS. And as I understand, the EIS, after it was completed, was contested, which took time”); 4/11/12 Tr. at 145:16–19 (Steinberger: “Q. You talked about a couple of the parts of the process that resulted in that delay, and one was a challenge to the EIS. A. Yes.”).

159. 4/11/12 Tr. at 74:23–25 (Steinberger: “[A]nd then, of course, it came to the Planning Commission, of which there were intervenors involved, which also created delays.”).

160. 4/11/12 Tr. at 145:24–146:14 (Steinberger: “Q. And another part of it was that you needed to get approval from the state Land Use Commission? A. That is correct. Q. So, I mean, you know this is ag land; right? A. Yes. . . . Q. . . . So you knew you were going to have to go through that [SUP] process; right? A. Yes. That’s part of the permitting process.”); 4/11/12 Tr. at 149:3–5 (Steinberger: “Q. The City went through the SUP process in 2003? A. That’s correct.”).

Ex. K85 at 125:7–11 (3/27/03 Tr.: “COMMISSIONER COPA: Do you honestly think that we will have a site, another site picked for a landfill? And if so do you think that you could commit that without a doubt that this landfill will close? MR. DOYLE: WE have made that commitment, yes.”); Ex. K85 at 128:2–5 (3/27/03 Tr.: “MR. DOYLE: Right. At the time that we made the selection, we selected Waimanalo Gulch to be expanded. now, based on our commitment to be out of that area within five years there still are other alternatives.”); Ex. K85 at 145:21–146:2 (3/27/03 Tr.: “MR. DOYLE. No that’s not the case. The City has committed and 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. [¶] Everything that we are going to be doing over that time period, this time period before you is to be out of that site. That’s the city’s commitment.”).

161. 3/7/12 Tr. at 186:4–21 (Miller: “Q. What failures or what errors do you see would have led to a situation where there’s no other place to put the landfill except a cell that does not have a diversion system in place? A. Well -- and one thing I was going to add at that time was I see that as an incidence of poor planning. I mean, essentially, the reason why you have five- to ten-year capital planning at a landfill is so that you know how your waste is coming in, you know the volumes that are coming in, when you need to bring on new parts of your landfill; so when do I need to build a new cell. Typically, you want to bring a new cell in and all the infrastructure that supports it three to six months ahead of needing it, so that

you're not necessarily forced into needing it the day that it comes on line, and also so that you're able to work it around different seasonal events and so forth.”).

170. 1/11/12 Tr. at 68:13-15 (Steinberger: “About 65 percent of the island's generated sewage sludge goes to the landfill. The rest of it is reused.”).

172. Ex. K189 at 1 (Los Angeles biosolids webpage: “Beginning in 1989, the City started an extensive beneficial reuse program and has continued to beneficially reuse all the biosolids produced at [Hyperion Treatment Plant] and [Terminal Island Water Reclamation Plant] since that time.”).

Ex. K190 at 2 (King County biosolids webpage: “King County has been partnering with various organizations and farm groups since 1973 to responsibly recycle its biosolids in ways that improve the soil and enhance plant growth.”).

Ex. K148 at 10 (Parametrix alternatives memorandum: “The City failed to develop a biosolids management program until 2006 . . .”).

3/7/12 Tr. at 139:11–140:4 (Miller: “Q. Let’s focus on a couple of other ways that you mentioned, biosolids and food wastes. Compared to the industry standard, how far behind in recycling biosolids is Honolulu? A. I would say that it’s pretty far behind. As I noted before, there’s a high level of recycling of and reuse of biosolids happening -- in fact, in the state of Washington, and I believe Oregon and California, as well, there is a landfill ban for biosolids, sludges to landfills. Essentially, they have to be beneficially used. This has been the case for quite a long time. [¶] In fact, the largest producer of biosolids in the state of Washington, which is King County, which operates the entire sewer system -- or almost all the

sewer system for the city of Seattle and all the suburbs -- all of that has been recycled and reused for the last 25 years in agriculture applications.”).

176. Ex. K195 at 2 (12/09 food waste article: “In San Fernando, Crown Disposal (a sister company to Community Recycling) started collecting residential organics in 2002, along with trash and recyclables. . . . The City of Los Angeles launched a residential food waste collection pilot program in September 2008. Food scraps and food soiled paper are placed into existing green yard trimmings bins.”); Ex. K195 at 2 (12/09 food waste article: “Cedar Rapids began allowing residents to place vegetative food waste in their yard trimmings carts in 1999.”).

Ex. K148 at 4 (Parametrix alternatives memorandum: “The City does not currently operate a food waste collection program. . . . [T]he City has fallen behind the current state of practice by failing to develop and operationalize a food waste collection program earlier.”).

177. Ex. K247 at 613 (Sharma, Geoenvironmental Engineering: “The current trend for disposal of medical wastes is through incineration, because, as with most wastes, it greatly reduces volume, and it assures the description and sterilization of infectious pathogens.”).

179. 4/11/12 Tr. at 192:22–25 (Steinberger: “Q. So Honolulu, as you’ve represented in your prior testimony, has approximately about a 73 percent diversion from the landfill? A. 72, 73 percent.”).

Ex. A26 (Oahu waste stream table: indicating that, of the 1,214,904 tons of MSW for 2010, 418,095 tons were diverted to H-POWER).

180. 4/11/12 Tr. at 164:5–7 (Steinberger: “Q. And they accomplished that without any waste-to-energy facility? A. That is true.”).

3/7/12 Tr. at 136:1–3 (“Q. Does San Francisco have a waste-to-energy facility? A. No, they don’t.”).

3/7/12 Tr. at 136:5–8 (Miller: “Q. How are they able to achieve an 80 percent diversion rate without a waste-to-energy facility? A. By essentially recycling and reducing their waste stream.”).

Ex. K196 at 1–2 (San Francisco waste management webpage: “• Adopted goals of 75 percent landfill diversion by 2010 and zero waste by 2020; . . . • Reduced landfill disposal to its lowest level in 29 years; • Established the first and largest urban food scraps composting collection in the U.S. . . . ; • Pioneered commingled recycling collection (paper, bottles, and cans together) among private homes, apartments, businesses, and city government locations on the same route; • Constructed state-of-the-art facilities for the efficient processing and transferring of recyclable materials, construction and demolition debris, and compostable organics”).

181. 3/7/12 Tr. at 136:19–137:2 (Miller: “Q. What would San Francisco be able to achieve if they had waste-to-energy on the same scale as we do here in Honolulu? A. Well, first off, they wouldn’t need to have it at this scale, because they’re not generating that much waste anymore, I mean, after it’s gone through all these other diversions. But at the same time, they would probably be able to achieve that up into the, in fact, upper 90s.”).

188. 1/11/12 Tr. at 68:11-15 (Steinberger: "Q. So sewage sludge currently goes to the landfill? A. About 65 percent of the island's generated sewage sludge goes to the landfill. The rest of it is reused."); 4/11/12 Tr. at 114:9-14 (Steinberger: "Q. Does green waste and food waste go to the landfill currently? A. All of the green waste that you put in your green bin goes to be composted, and so that material is not allowed -- we don't allow large, large quantities. Sometimes you get small bags in"); 4/11/12 Tr. at 123:20-24 (Steinberger: "Basically, most of your household waste that is food waste is now going to H-POWER. So you know, it's only during those times when H-POWER was down or when H-POWER is at daily capacity would it be diverted to the landfill.")

189. 4/11/12 Tr. at 176:7-10 (Steinberger: "Right now, they're expecting to start first fire at the end of this month, shake down through August, September, and then [the third boiler] should be fully functional by October, November."); 4/11/12 Tr. at 211:12-15 (Steinberger: "Q. You mentioned the third boiler is going to be completed by late fall, I believe? A. We should be completely operational by -- we better be completely operational by November.").

190. 4/11/12 Tr. at 84:22-24 (Steinberger: "We're about to complete this year the H-POWER expansion. So we're now going to be able to handle an additional 300,000 tons annually of municipal solid waste.").

191. Ex. K251 at 1-2 (5/5/11 ENV press release: "In response, the City implemented a number of initiatives: . . . expanding the facility in line with both the population growth and the types of waste handled allowing the City to divert 90

percent of all municipal solid waste from the landfill through the combination of recycling and energy recovery. . . . When complete in mid-2012, H-POWER will be capable of . . . diverting nearly 90 percent of our non-recyclable household opala from the landfill.”).

195. Steinberger Written Direct Testimony at 23 (¶ 71: discussing “[t]he approximately 15,000 tons per year of biosolids from all other WWTPs on O’ahu that presently go to the WGSL”).

198. 4/11/12 Tr. at 90:3–20 (Steinberger: “Q. Currently, is H-POWER able to burn biosolids? A. In its current position, boilers one and two, no, it could not. Q. Once the third boiler comes up, will H-POWER be able to burn biosolids? A. Once the third boiler comes up, we are making provisions for it to accept biosolids. Q. Once the third boiler comes up, approximately when would H-POWER be able to burn biosolids? A. It would probably be in the late fall. Q. Of 2013? A. No. Of 2012. Q. Late fall of 2012, H-POWER would be able to burn biosolids? A. That’s what they’re showing on schedule right now.”); 4/11/12 Tr. at 174:1–6 (Steinberger: “Q. All right. But it can be burned? A. It can be burned. Q. So if the City’s priority is let’s get biosolids out of the landfill, when the third boiler is on line, you will have the ability to do that? A. We’ll have the ability to do that.”).

199. 1/11/12 Tr. at 75:13–18 (Steinberger: “Q. So [the Integrated Solid Waste Management Plan] identifies as medical waste 10,000 tons - A. Yes. Q. -- of medical waste annually going into the landfill; right? A. Yes.”).

4/11/12 Tr. at 163:12–16 (Steinberger: “Q. So Mr. Steinberger, after looking at that, your prior testimony, does that refresh your recollection that we generate about 10,000 tons of medical waste annually? A. Yes. I believe that was from a document that you showed me.”).

201. 1/11/12 Tr. at 75:19–22 (Steinberger: “Q. That medical waste [going to the landfill] could be burned, too, couldn’t it? A. The medical waste could be burned, it could be combusted.”).

4/11/12 Tr. at 171:16–172:10 (Steinberger: “Q. Well, sitting here today, can you tell me once the third boiler is operational -- let’s just peg it off that date -- why Honolulu couldn’t do what according to Dr. Sharma is mostly done with medical waste? A. When the third boiler becomes operational? Q. Yeah. Why couldn’t we? A. Well, again, I’d have to sit down and talk to Covanta and see whether or not there’s any reason why the new boiler, which is of a different technology, cannot handle the medical waste. Q. But just you, sitting here today, do you know of any reason? A. No, not given what I know about the third boiler and the way that it operates.”); 4/11/12 Tr. at 196:20–24 (Steinberger: “Q. . . . [O]nce the third boiler is up and running, will H-POWER be able to burn medical waste? A. The configuration is such that there should not be a restriction against it.”).

3/7/12 Tr. at 209:12–25 (Miller: “A. My understanding is that -- let me put it this way: Other facilities that are that type, that are more of a mass-burn type, not a pre-processing type, can take medical waste. I’m not sure if they have worked that into their operations plan here with this plant since they’re not quite on line

yet. BY MR. PACOPAC: Q. It can be? It can be; right? A. It can be, yeah. In fact, a lot of plants like medical waste because it is very high energy value. I mean, it's a great fuel. When you're operating a plant like that, you're thinking fuel. You're thinking fuel, so, you know, that's a big piece of it.”).

202. 1/11/12 Tr. at 71:7–10 (Steinberger: “Right now, the food waste is going into the gray bin, and some of you may even put it down your garbage disposal. But right now in the gray bin, obviously, it's going to H-POWER.”).

204. 3/7/12 Tr. at 23:1–7 (Miller: “[B]y the application of alternative methods, no need beyond 2013 to have a general purpose MSW landfill here on the island. You have a waste incinerator with expansion coming on and so there really is not a need for a general purpose -- when I state general purpose, what I'm really referring to is one that is receiving putrescible waste, so the biosolids, the food waste, the green waste, incidental green waste and so forth into it.”).

206. 1/11/12 Tr. at 77:7–13 (“And so I guess just looking at these specific items, though, it would seem to me that they would comprise a relatively small percentage of MSW. Would you agree with that? A. I would say it's probably a small percentage. But again, I would have to see the breakdown sheet.”).

207. 1/11/12 Tr. at 145:4–146:1 (Steinberger: “Q. Mr. Chipchase had asked questions regarding the special wastes that are identified on that list. I wanted to essentially go over some of this with you today to clarify. I know that your testimony was that currently most of these wastes -- or all of these wastes are going to the landfill, but the department -- ENV, as I understand it -- has ENV taken

additional steps to try to divert these wastes, as well, or to seek to -- A. First off, let me clarify. We don't -- we're not the only facility that takes all of these wastes. Q. Okay. A. These are wastes that can come to the landfill. Actually, some of this material may be associated with demolition waste, such as oil-contaminated soils, and as long as it passes what we call a paint filter test, it can go to either Waimanalo Gulch or PVT. So even things such as resins or chemical debris, if it's associated with debris from construction, that can also be taken to PVT. So there is some overlap as far as the permit goes.”).

208. 4/11/12 Tr. at 118:9–15 (Steinberger: “Q. Even after July 31st, 2012, say when the third boiler is up and running, will there still be a need for a landfill for MSW after that? A. Whenever the H-POWER facility goes down for maintenance, at that time the waste is then diverted to a permitted location, and that permitted location is the landfill.”); 4/11/12 Tr. at 125:15–126:4 (Steinberger: “The current plan for dealing with the disaster debris -- and I think it's really certainly come to the top of everybody's mind these days since the Fukushima event -- is that you identify large open areas of land and you quickly move your debris to those areas, and you'd like to separate it out into green waste, burnable waste and then just waste that is, for lack of a better term, just waste. [¶] The green waste you would like to be able to take over to the recyclers and the burnable waste you'd like to be able to take over to H-POWER, and then that which is left that you have no use -- that has no value to it as far as recycling or for combustion would then go to the landfill.”); 4/11/12 Tr. at 189:13–17 (Steinberger: “If H-POWER is down and you

decided that your whole program is the incineration of biosolids at H-POWER, then what? Then you would have to take it up to the landfill.”); 4/11/12 Tr. at 201:20–202:1 (Steinberger: “Currently, there is also a need for a landfill for what we talked about earlier, disaster debris; is that correct? A. That is correct. A. That is correct. Q. And other emergency contingencies; is that correct? A. That is correct.”).

3/7/12 Tr. at 24:23–23:7 (Miller: “[B]y the application of alternative methods, there’s no need beyond 2013 to have a general purpose MSW landfill here on the island. You have a waste incinerator with expansion coming on and so there really is not a need for a general purpose -- when I state general purpose, what I’m really referring to is one that is receiving putrescible waste, so the biosolids, the food waste, the green waste, incidental green waste and so forth into it.”).

209. 1/25/12 at 54:20–24 (Chang: “Q. To address emergencies, we could have a landfill that’s permitted to accept municipal solid waste only in the case of declared emergencies; right? A. Yes.”); 1/25/12 at 55:4–9 (“Q. And the same things with planned shutdowns; if we have scheduled shutdowns or even unexpected shutdowns of H-POWER, we could have a landfill permitted to accept municipal solid waste in those events; right? A. Yes.”).

211. Ex. K220 at 220:23–223:1 (7/1/09 Tr.: Doyle: “We are burning [at H-POWER] 24/7. The only time we are not operating is when we go down for our scheduled maintenance, and sometimes when we have to go down because of an unusual repair.”).

212. Ex. K220 at 223:6–9 (7/1/09 Tr.: Doyle: “We try to go down one boiler at a time, so that we are always burning on one side. There are some times, though that we have to, maybe, do some work on our electrical systems, which requires us to shut down both boilers.”).

3/7/12 Tr. at 101:4–14 (Miller: “There should be consideration made that only one boiler at a time has to come off line, so that it’s not a total shutdown of the plant. Typically, at a waste-to-energy facility it is not a total shutdown of the plant that’s required.”).

214. Ex. K251 at 2 (5/5/11 ENV press release: “In May 1990, the City and County of Honolulu placed into service the Honolulu Program of Waste to Energy Recovery or H-POWER. For the past 20 years, H-POWER reliably met the City’s municipal solid waste disposal needs and provided an economic return to the City.”); Ex. K251 at 2 (5/5/11 ENV press release: “When complete in mid-2012, H-POWER will be capable of powering 75,000 Oahu homes, contributing eight percent of Oahu’s power using a renewable source . . .”).

221. 3/7/12 Tr. at 176:22-177:1 (Miller: “[Y]ou have a hierarchy of disposal. It’s waste reduction and reuse. It’s recycling and composting. Then it’s incineration. Then it’s land filling. Essentially, you want to do as much of the recycling and composting prior to incineration.”).

223. 3/7/12 Tr. at 176:22-177:1 (Miller: “[Y]ou have a hierarchy of disposal. It’s waste reduction and reuse. It’s recycling and composting. Then it’s incineration.

Then it's land filling. Essentially, you want to do as much of the recycling and composting prior to incineration.”).

228. 3/7/12 Tr. at 199:24–200:1 (Miller: “In a climate like Hawaii, it should take 18 months to two years, and that’s design, design review and development.”).

3/7/12 Tr. at 201:1–24 (Miller: “Q. From then until the end of construction -- A. So we’ve done the EIS. Q. No, we haven’t done the EIS. A. We haven’t done the EIS yet. Okay. Yeah. You do those as a separate piece. So you know, environmental review on something like this, pretty extensive. I mean, because you want to make sure this is the right place and you’re doing everything right. So typically you’re looking at for that environmental review, but then all of the kind of background documentation, that can be a couple of million dollars. And then going into preliminary design to support the solid waste permit, as well -- you know, which is both the characterization of the site, as well as going on into design, that’s probably another couple million dollars. Q. I’m looking at time, not the costs. A. Oh. Timing? Q. Yes. A. Okay. So those pieces, that kind of comes back to this idea that EIS and the support for that and then the field studies and all that, probably back that number I gave to you back up by another year, year and a half.”).

3/7/12 Tr. at 202:14–203:6 (Miller: “Q. I guess you have to add in the land acquisition, also, in the process. A. Yeah. And, you know, those are different pieces to it. Although seven years is a long time. Q. That’s what we were trying to get to, whether you think seven years is the normal time. A. I would say not. And quite honestly, if you’re putting out a number of seven years, it’s somewhat of a self-

fulfilling prophecy. If you're saying, Oh, God, it's going to take us seven years, that's how long it's going to take you. If you put out and you push a schedule that says, We're going to do this in three to five years and this is how it's laid out and we're conservative, you know, particularly in public review period, potential appeals, those types of things -- and when you start looking at appeals, yes, those are the pieces that can really push it out there.”).

238. 4/11/12 Tr. at 52:15-18 (Sharma: “Q. These regulations you're talking about, they were in place when Mr. Doyle was testifying on March 27th, 2003? A. Yes, they were.”).

241. 4/11/12 Tr. at 41:10–15 (Sharma: “[T]he siting is not my expertise. In landfill business, the operations is one expertise, construction is another expertise, design is expertise, siting is expertise. So you cannot be expert in all those areas. I am landfill expert.”); 4/11/12 Tr. at 51:22–23 (Sharma: “As I've said earlier, the siting is not my area of expertise”).

248. 1/11/12 Tr. at 53:20–54:1 (Steinberger: “Q. So it sort of removes the wiggle room the City had on the -- thought it had on the prior order; right? A. I guess if you can define wiggle room -- Q. Well, removes the option of reflecting Waimanalo Gulch as the new site. A. I guess you could say that.”).

251. 2/8/12 Tr. at 23:14–20 (Williams: “I find it very odd that no one from Ko Olina or Kapolei, for that matter, were asked to participate in the landfill selection process. Ko Olina bears the daily brunt of the impacts of Waimanalo Gulch landfill

and it stands to reason that representation on this committee should have been mandatory, but we weren't even considered.”).

4/4/12 Tr. at 139:3–12 (Timson: “The current committee, they have no one on that committee from Ko Olina or Kapolei, no -- none of us. Because we weren't smart enough. We didn't have that experience, is what they said to me when I asked them several times why we not on that committee. Because I can tell you the history and you don't want me, because I'm the mouth, send somebody else. We are not represented. So how qualified can this committee be? They're not intimately affected by this? We are.”).

252. 1/11/12 Tr. at 26:21–27:1 (Steinberger: (“Q. I guess what I'm trying to understand is this triangle set out in the integrated solid waste management plan, does that set up the City's framework for waste management? A. I would say yes, it sets up our framework and our guidance.”).

3/7/12 Tr. at 25:2–20 (Miller: “What's interesting is that the 2008 update to the solid waste management plan provided a fairly good outline for the siting process. What I found interesting is that that process has not been followed under the current landfill siting process, and I think it's really unfortunate that the City hasn't taken advantage of this good work that they did, quite honestly, during the update to the solid waste management plan, which was only completed here in the last couple of years and then moving that forward, and also provided kind of a reasonable diligence from taking from that solid waste management plan -- and that's the idea; to take it from a comprehensive solid waste management plan down

to a facility siting process. So that's really the steps that would have been taken to go immediately into a siting process back in 2008, 2009, as opposed to waiting until the current time to really get that process moving.”).

4/4/12 Tr. at 73:9–13 (Marsters: “Q. I understand. Not being an expert but having perused it, do you understand that the Solid Waste Management Plan provides the City’s framework for waste management? A. I do.”).

253. 4/4/12 Tr. at 76:3–6 (Marsters: “Q. Were you given this as a principle [of no sites west of Makakilo] for the site selection process? And when I say you, I mean the committee. A. To my recollection, we were not.”); 4/4/12 Tr. at 76:16–18 (Marsters: “I gather, based on your earlier testimony, you weren’t presented with this principle either. A. That’s correct.”); 4/4/21 Tr. at 76:19–21 (“Q. And, in fact, the committee has evaluated sites west of Makakilo? A. That’s correct.”); 4/4/12 Tr. at 77:21–24 (Marsters: “So on the initial list, there were areas west of Makakilo that the City gave you for consideration? A. Yes.”).

255. 4/4/12 Tr. at 113:11–14 (Marsters: Q. After this tenth meeting and the publication of the report, is that the end of the role of the committee in the site selection process? A. As I understand it.”); 4/4/12 Tr. at 116:10–21 (Marsters: “Q. Is the committee considering mitigation factors before it makes its recommendation? A. No. Q. Is the committee -- if we then look down further on the flow chart, is the committee doing the neighborhood notification and public meetings before it makes its recommendation? A. Of course not. Q. So that this last sort of loop and a half of

the process outlined here is not something the committee will be engaged in? A. That's correct.”).

Ex. K147 at 3 (Parametrix site selection memorandum: “The facility siting strategy described in the 2008 SWMP includes a step to try and avoid or reduce potential impacts (see Figure 11-1 and pages 11-9 to 11-10). The approach described in the SWMP provides clarity by explicitly separating the initial, or gross, effect and what the net effect would be following reasonable mitigation. There is no explanation why this approach was not applied in the current siting study.”).

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what the net effect would be following reasonable mitigation. There is no explanation why this approach was not applied in the current siting study.”).

257. Ex. K147 at 3–4 (Parametrix site selection memorandum: “[Using deciles] is not found in site selection literature and in my experience is unprecedented. There are two fundamental flaws with this technique. First, this measurement makes no attempt to consider a potential effect or condition and simply assumes an equal, linear relationship across whatever range of values is measured. . . . Second, the scores returned by deciles can vary greatly depending on the outlying values or clustering. . . . It is much more straightforward and quite feasible to simply consider the potential for a specific effect or condition and score that directly. These types of criteria and measurements were described in the 2008 SWMP (see pages 11-7 to 11-9), but there is no explanation in the 2011 siting study why this approach was not followed during the current siting process.”); Ex. K147 at 3–4 (Parametrix site selection memorandum: “Implicit weighting occurs when the features being evaluated are correlated so that some conditions are counted multiple times, effectively receiving greater weight, while other conditions remain counted only once and their weight is effectively reduced. This method skews the results and obscures what is actually being measured. For example, consider criterion 16 (location relative to wetlands and Natural Area Reserve System [NARS] land) and criterion 17 (location relative to listed threatened and endangered species). Both are certainly important considerations, and they are also likely to be related, i.e., it is more likely to find listed species in wetlands and NARS lands. In the mathematical

logic of the siting study, however, they are separate. The net effect is to double count what is essentially one factor—potential effects on important habitat and species.”).

3/7/12 Tr. at 94:9–12 (Miller: “This arbitrary decile ranking is not the proper way to do it. I’ve never seen that before in a siting effort; nothing that we’ve done or other projects that we’ve looked at.”).

258. 3/7/12 Tr. at 23:8–13, 24:2–8 (Miller: “Secondly, regarding the landfill process, I conclude that the City’s current site selection process is flawed in the areas of process, measurement and weighting. The process fails to move from the broader approach to looking at many sites to kind of a narrowed site.”); 3/7/12 Tr. at 24:2–23 (Miller: “So, in fact, you have fewer sites that you’re looking at, but you’re able to look at them in more detail. It’s a very diligent way to look at going from many sites -- essentially all of the land, which obviously not all of the land is available for siting the landfill, down to a narrower number. So that when you get down to the end, you’ve done a process that is very rigorous, very public, so that people have had an opportunity to weigh in on sites, and then effectively have an environmental review process that is robust from the standpoint that you’ve looked at many alternatives, you have evaluated those alternatives, and the alternatives that you’ve ultimately come up with through the commission and through your council has gone through a rigorous siting process, as well as the environmental review process. So ultimately at the end of the funnel is the site and a couple of other sites that were reviewed in the environmental process that truly have had the

rigor needed both from an environmental as well as a social and economic review standpoint.”).

Ex. K147 at 4 (Parametrix site selection memorandum: “The process usually followed for siting public facilities can be visualized as a funnel, beginning with broad consideration of a large number of sites with generally available information, then narrowing the number of sites and increasing the level of detail being studied. This process efficiently excludes less suited sites early in the process and then focuses greater and greater effort on the best prospects (Saaty, 2008; Kiker et al., 2005; Chang et al., 2007). In most cases, the last and most detailed level of study is the environmental impact statement (EIS). [¶] The 2008 SWMP loosely describes this type of process (see Figure 11-1), with design and mitigation applied to a narrowed range of sites, followed by neighborhood notification and meetings, and then further review of scoring before the sites are recommended for evaluation in an EIS.”).

259. 4/4/12 Tr. at 39:13–20 (Marsters: “[T]here was a group of sites that’s been bandied around as potential landfill sites for a long time, and that was the initial sites that we were given -- or the initial set of sites we were given. It was about 40. And then there were two additional sites that the City, I understand -- since that previous site selection committee had been looking at, that we were asked to look at.”); 4/4/12 Tr. at 77:25–78:20 (Marsters: “Q. To make sure I understand this list -- this is the same list the City has previously considered for landfill site selection? A. That’s my understanding. Q. But right off the bat, because this is an old list that

has been kicking around for some time, right off the bat there were some sites that were no longer viable landfill sites; right? A. I presume so. I believe there's been some development of some of these sites and so forth. Q. In fact, I think we can see that on the list. If you look down at item six and seven, for example, do you see the notation next to them -- A. Yes. Q. -- Ewe No. 1 developed, Ewe No. 2 developed? A. Yes. Q. So initially, starting with the old list, even some of those sites weren't going to work for a new landfill? A. Yes.”).

260. Ex. K26 at 2 (1/20/11 SSC description of service: “It is expected that there will be approximately 7 meetings to allow the Committee sufficient time to review and consider all of the information that will be provided. These meetings are expected to span a period of approximately 6 months with meetings planned to occur once every 3 to 4 weeks.”).

4/4/12 Tr. at 66:25–67:2 (Marsters: “Q. . . . [A]s originally scheduled, the site selection process was supposed to take about seven meetings and last about six months? A. That's correct.”); 4/4/12 Tr. at 83:1–4 (Marsters: “Q. So then with that site rejected, you're back to the original 40 plus sites, less what had already been developed, as of meeting number five? A. Yes.”); 4/4/12 Tr. at 84:17–21 (Marsters: “Q. Under the original schedule, July 2011 was supposed to be the end of the site selection process. A. That's correct.”).

261.a. Ex. K218 at 2 (7/19/11 SSC group memory: “The Committee asked the consultants to include those sites that are above or which crosses the no-pass line and UIC line in their analysis of sites.”).

4/4/12 Tr. at 84:3–16 (Marsters: “Q. Ms. Marsters, earlier when you discussing with Dana the expansion of the committee’s consideration from that original 40 plus or minus sites -- A. Yes. Q. -- to include sites that were at or above the UIC and no-pass lines -- A. Yes. Q. -- that happened at this meeting number six; right? A. Yes. Q. So meeting number six occurred in July 2011; right? A. That’s correct.”).

4/4/12 Tr. at 84:17–23 (Marsters: “Q. Under the original schedule, July 2011 was supposed to be the end of the site selection process. A. That’s correct. Q. But instead, the committee expanded the consideration to include additional sites? A. That’s correct.”).

Ex. K26 at 2 (1/20/11 SSC description of service: “It is expected that there will be approximately 7 meetings to allow the Committee sufficient time to review and consider all of the information that will be provided. These meetings are expected to span a period of approximately 6 months with meetings planned to occur once every 3 to 4 weeks. All meetings are planned to take place during the day.”).

261.b. 4/4/12 Tr. at 87:13–15 (Marsters: “Q. But it also applied various screening criteria to the sites that it found; right? A. That’s correct.”).

Ex. K144 at 11-6 (10/08 integrated solid waste management plan: explaining that applying exclusionary criteria will “eliminate these sites from further consideration”).

4/4/12 Tr. at 88:1–5 (Marsters: “[Q.] After expanding the search to include sites above the UIC and no-pass lines, but the application of additional screening factors, you ended up with two sites? A. Yes.”); 4/4/12 Tr. at 88:6–16 (Marsters: “Q. I want to make sure that I have my terminology correct. When we say an exclusionary factor or an exclusionary criteria or screening, that means the site won’t be considered if it hits on that factor or criteria? A. We are -- we would be excluding them from further -- from applying the criteria and ranking. Q. So you’d be screening them out and they wouldn’t even make it to the criteria and ranking process? A. That’s correct.”); 4/4/12 Tr. at 88:17–21 (Marsters: “Q. . . . And these two sites that were returned based on these screens were essentially non-sites, because they couldn’t be used as a landfill; right? A. That’s what the consultant reported, yes.”).

Ex. K152 at 2 (11/8/11 SSC group memory: “After the application of the criteria or factors, two sites emerged.”).

4/4/12 Tr. at 89:6–10 (Marsters: “[Q.] Talking about these screenings or these exclusionary criteria, one of them that the consultant had applied was lands owned by the State of Hawaii; right? A. Yes.”).

4/4/12 Tr. at 89:11–17 (Marsters: “Q. Was that a screen that the committee had asked R.M. Towill to apply? A. Not to my recollection, but we did have a discussion about land ownership and what impact the site being owned by the federal or state government would have on the length of time that it would take to acquire the land.”); 4/4/12 Tr. at 90:9–12 (Marsters: “Q. So these are lands that

had been screened out and you say to the consultant, No, go back and include these state-owned lands? A. That's correct.”).

Ex. K152 at 2 (11/8/11 SSC group memory: After discussion of the results the Committee asked the consultants to undertake another review of the sites for the following land areas: . . . 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 . . .”).

Ex. K153 at 9 (11/8/11 SSC handout: “TMK parcels of 100 acres or less were eliminated from assessment”).

4/4/12 Tr. 90:17-21 (Marsters: “But again, in this meeting, this November 2011 meeting, you asked the consultant to go back and look at sites that were at least 90 acres in size? A. Yes. That is what the committee did.”).

261.c. Ex. K170 (2/1/12 SSC group memory: “The Consultants next presented the results of research requested by the Committee. The research resulted in the identification of 464 potential landfill sites within the UIC line and No Pass Zone that were either 100 acres or more, or 90 to 100 acres in size.”).

4/4/12 Tr. at 93:10–13 (Marsters: “Q. But the consultant applied a number of screening factors to those 464 potential sites; right? A. Yes.”).

Ex. K170 at 2 (2/1/12 SSC group memory: “Tables were next presented to the Committee showing how Screening Factors were applied to the sites to filter out those features that were present on a site that might make it unsuitable for use (see attachment).”).

4/4/12 Tr. at 93:18–21 (Marsters: “Q. So after applying these screening factors, that 464 sites was reduced to a total possibility of six sites; right? A. Yes.”).

Ex. K170 at 3 (2/1/12 SSC group memory: “The Committee’s review resulted in a list of only two sites for further consideration.”).

Ex. K170 at 2 (2/1/12 SSC group memory: “The Screening Factors applied to the sites were the same as previously used by the Consultants for the Committee and included the following . . . Valued agricultural lands . . . Land Study Bureau (LSB): A, B or C.”).

4/4/12 Tr. at 96:12–22 (Marsters: “Q. Had the committee asked the consultant to exclude lands that were only rated C, meaning subprime lands? A. They had not differentiated, I believe, between the categories of ag land. Q. Fair enough. So now in this time, in this meeting number eight, in February 2012, the committee asked the consultant to go back and now drop the screening for lands that were rated class C? A. That’s correct.”).

Ex. K170 at 2 (2/1/12 SSC group memory: “Land Study Bureau (LSB): A, B or C (The Committee requested that sites with just “C” lands be added back in for the next pass).”; Ex. K170 at 3 (2/1/12 SSC group memory: “Q: Why are we excluding sites based only on class “C” agricultural lands? A: The Committee asked the Consultant to add back sites with just class “C” lands as the disqualifier (The Committee also removed this in their reevaluation of the sites).”); Ex. K170 at 5 (2/1/12 SSC group memory: “Reevaluate all sites that were removed from study solely because of the Class C Agricultural designation.”); Ex. K170 at 5 (2/1/12 SSC

group memory: “The Consultants were also asked to take a second look at the inventory to make sure that other sites were not disqualified solely because they were identified as Class C Agricultural Land or might include structures.”).

4/4/12 Tr. at 96:23–97:3 (Marsters: “Q. One of the other screens was for any parcel that had a structure on it. A. Yes. Q. And that was determined just based on aerial maps; right? A. I believe so.”).

Ex. K170 at 3–4 (2/1/12 SSC group memory: “The Screening Factors applied to the sites were the same as previously used by the Consultants for the Committee and included the following: . . . Parcel contains at least one structure as noted on aerial maps.”).

4/4/12 Tr. at 97:4–18 (Marsters: “Q. Had the committee asked the consultant to exclude any parcel that had any type of structure on it? A. We had not. I believe I previously noted that I felt that the consultant may have done that because the previous site selection committee excluded anything that had -- they used the word development. So when we heard from the consultant that they had done that, it was our committee’s desire that that not be used as screening criteria. Q. Right. So in fact, in this group meeting number eight, in February 2012, you asked the consultant to go back and drop that screen? A. Exactly.”).

Ex. K170 at 3 (2/1/12 SSC group memory: “Q: Why were structures on the land included as a filter? Would like to see this removed as a filter. A: Will remove as a filter. (The Committee removed this as a filter when they relooked at sites as noted above).”); Ex. K170 at 5 (2/1/12 SSC group memory: “The Consultants were

also asked to take a second look at the inventory to make sure that other sites were not disqualified solely because they were identified as Class C Agricultural Land or might include structures.”); Ex. K170 at 5 (2/1/12 SSC group memory: “Reevaluate all sites that were disqualified because they had a structure.”).

4/4/12 Tr. at 98:7–99:21 (Marsters: “Q. Right. And one more area that you wanted the consultant to go back and try again was with respect to acreage. And you talked about that at the beginning of our little colloquy on this, where if only two acres in a site happened to be conservation but the rest of it was suitable, shouldn’t we also consider that possible site. A. Yes. We asked them if they looked at that or if the sites were -- and maybe, you know, just automatically dropped because some portion of them -- and they didn’t know what portion -- would be screened out by the screening criteria. Q. Then initially through this meeting eight, those sites had, in fact, been dropped if any portion of them met any of the exclusionary criteria? A. That was my understanding. Q. So if I could have you look at page 15 of Exhibit K170, it’s a list of some of the sites that the consultant’s search returned. A. Yes. Uh-huh. Q. So just picking one, if we look at the second site on this list, parcel identifier number 231 -- do you see that? A. Yes. Q. It’s reported to be 720 acres in size. A. Yes. Q. But initially through this meeting it had been screened out because it had some portion of it that was conservation, some portion that was critical habitat and some portion that was valued agricultural lands, but the committee didn’t know how much of that 720 acres fell in any one of those categories; correct? A. That’s correct. Q. So now you wanted the consultant to go

back and look at that parcel again and see if some portion of the 720 acres might be suitable for a 90-acre landfill? A. That's correct.”).

Ex. K170 at 5 (2/1/12 SSC group memory: “Consultant's Homework . . . Determine how much land area falls under the disqualifying factor and if the remaining contiguous land area is 100 acres or greater; please include it the final list of potential sites.”).

261.d. Ex. A47 (3/16/12 SSC group memory at 2: “When the consultant reran the sites with the Committee's instruction to relook at parcels that were eliminated only because they had one or more structures as noted on an aerial map, one more potential site was identified. The list of potential sites after this review went from six to seven.”).

4/4/12 Tr. at 102:23–103:2 (Marsters: “Q. Yeah. That's right. It had happened in the past, and this time the exclusionary criteria was for potential sites that were upgradient of parcels in or planned for residential use; right? A. That's correct.”).

Ex. A47 (3/16/12 SSC group memory at 2: “Q: Why did you remove sites upgradient from existing residential areas due to drainage concerns? These are engineering issues and can be addressed and should not be removed from consideration. A: If the potential landfill site was above an existing residential area and the drainage would have to go through the area then it was removed.”).

4/4/12 Tr. at 103:3–10 (Marsters: “Q. Is that a screen that the committee had asked the consultant to apply? A. It is not. Q. So then at this meeting, the

committee asked the consultant to go back and take another look at sites that had been screened out because of that criteria? A. That's correct.”).

Ex. A47 (3/16/12 SSC group memory at 3: “The Committee discussed this matter and requested that the Consultant add back in the sites that were removed because they shared a border with residential developed areas. Some of the reasons for this were to recognize (1) that the exclusion did not necessarily follow the Committee's process; and (2) that a landfill can be properly engineered above such sites. The Consultant agreed to reevaluate and include the sites for consideration and weighting.”).

Ex. A47 (3/16/12 SSC group memory at 4: “The request is that only federal Lands outside the UIC line be looked at.”).

273. 4/4/12 Tr. at 72:13–24 (Marsters: “Q. So early on in the discussion, the committee asked, Can we look at multiple sites, are we looking at sites that don't have to accept all waste streams, and the consultant, R.M. Towill, said, No, look at a site that can select -- or can accommodate all waste streams; right? A. That's correct. Q. So including ash and residue and C and D waste creates additional considerations for the committee; right? One is, for ash and residue, hauling distance from H-POWER? A. Yes.”).

Ex. K27 at 2 (1/20/11 SSC group memory: “Q: Are we talking about the identification of just one site or is there the potential to look at multiple sites depending on the waste stream? A: The Committee can make comments on appropriate sites for waste streams however the Committee's task is to rank the

sites from the best to the least satisfactory and not pick one; the further charge to the Committee at this point is to rank sites that can accommodate all waste streams including Municipal Solid Waste (MSW), ash and residue, and construction and demolition (C&D) debris, in part because of economies of scale and costs associated with multiple EISs and operators, etc.”).

274. 4/4/12 Tr. at 72:25–73:4 (Marsters: “Q. And because of the volume associated with this additional waste, both the ash and residue and the C and D waste, capacity is another consideration for the committee? A. Yes.”); 4/4/12 Tr. at 111:17–25 (Marsters: “Q. Location relative to H-POWER is relevant because of the cost of hauling the ash and residue from H-POWER; is that right? A. Yes. I understand that is the concern. Q. So if the committee didn’t need to consider ash or residue because it’s currently allowed at Waimanalo, that wouldn’t have been one of the criteria you looked at in selecting a landfill? A. I would say that would be correct.”).

1/11/12 Tr. at 61:13–18 (Steinberger: “Q. So in adding ash as a requirement to the new site, it makes it more difficult to find a new site to replace the existing one; right? A. As far as the financial constraints with additional cost on trucking, that certainly is a factor, yes.”).

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

FILE NO. 2008/SUP-2

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.”

CERTIFICATE OF SERVICE

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

ROBERT CARSON GODBEY, ESQ.
Corporation Counsel
DANA VIOLA, ESQ.
ROBERT BRIAN BLACK, ESQ.
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai'i 96813

(Hand Delivery)

Attorneys for DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

DEPARTMENT OF ENVIRONMENTAL SERVICES (Certified Mail)
City and County of Honolulu
1000 Uluohia Street, Suite 308
Kapolei, Hawai'i 96707

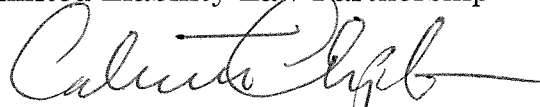
DEPARTMENT OF PLANNING AND PERMITTING (Hand Delivery)
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

IAN L. SANDISON, ESQ. (Hand Delivery)
DEAN H. ROBB, ESQ.
TIM LUI-KWAN, ESQ.
Carlsmith Ball LLP
American Savings Bank Tower
1001 Bishop Street, Suite 2200
Honolulu, Hawai'i 96813

Attorneys for Intervenor
SCHNITZER STEEL HAWAII CORP.

DATED: Honolulu, Hawai'i, May 2, 2012.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO