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and MAILE SHIMABUKURO

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DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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

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

FILE NO. 2008/SUP-2

**INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
EXCEPTIONS TO PLANNING
COMMISSION'S DECEMBER 6,
2017 PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER**

**DECLARATION OF
CHRISTOPHER T. GOODIN**

EXHIBITS 1 - 5

CERTIFICATE OF SERVICE

Hearing:

Date: March 7, 2018

Time: 1:30 p.m.

Place: Mission Memorial
Hearings Room

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

R6

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

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

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S EXCEPTIONS TO PLANNING COMMISSION'S DECEMBER 6, 2017 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Pursuant to Honolulu Planning Commission Rule § 2-75, Intervenor Ko Olina Community Association (the “**Association**”) and Maile Shimabukuro (“**Ms. Shimabukuro**”) (together, “**KOCA**”) submit these exceptions to the Honolulu Planning Commission’s (the “**Planning Commission**”) (proposed) Findings of Fact, Conclusion of Law, and Decision and Order dated December 6, 2017 (the “**Proposed Decision**”) approving the Application filed December 3, 2008 (the “**2008 Application**”) and the Application filed June 28, 2011 (the “**2011 Application**”) (together, the “**Applications**”) by Applicant Honolulu Department of Environmental Services (the “**ENV**”).

I. INTRODUCTION

It appears that the Planning Commission has prejudged this contested case. During a hearing in August 2016, former Chair Hazama stressed that “we need to get the City’s SUP.” 2011AP 8/15/16 Tr. at 26:3-5. Consistent with that pledge, in April 2017 the Planning Commission entered a decision approving the Applications

without imposing any condition on the waste that may be landfilled. In this way, Commission's decision was more extreme than the decision proposed by the ENV in 2012, which included detailed conditions on the types of waste that could be landfilled. Ex. 2 at 33 (ENV's 2012 Findings).

The State Land Use Commission ("LUC") vacated the decision and sent the contested case back to the Commission with instructions. Without first holding a proceeding to review, consider and address the LUC's instructions, the Planning Commission circulated the Proposed Decision.

The Proposed decision is nearly identical to the decision that was entered in April 2017. Nothing in the decision suggests that the Commission seriously considered the LUC's instructions, KOCA's Motion to Reopen or any other matter that was presented to the Commission after April 2017.

Confirming that the Commission made up its collective mind a long time ago, the Proposed Decision does not include "proposed" in the title of the document, and five Commissioners have already signed the Decision. Equally revealing, the Proposed Decision disposed of the objections from the parties even though the objections were not filed until February 5, 2018 and could not have been considered when the five Commissioners signed the Decision.

Prejudging a case violates due process of law. The constitutional touchstone of due process requires an impartial assessment of the facts and the law before entering a final decision. Due process rights apply in a "contested case" because a contested case "determines the rights, duties or privileges of specific parties." *Mau-*

na Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 390 (2015). As the Hawai'i Supreme Court has explained, "[i]n an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters." *Id.* at 389. Indeed, decisionmakers cannot even give the impression that "the ultimate determination of the merits will move in predestined grooves." *Id.*

An impartial assessment of the facts and the law cannot justify the Proposed Decision, which would allow the Waimanalo Gulch Sanitary Landfill (the "WGSL" or "Landfill") to operate **without a time limit and without restriction on the types of wastes that may be accepted**. For the following reasons, the Applications should be denied unless this and other parts of the Proposed Decision are modified:

- The failure to impose a closure deadline is contrary to the LUC's rules requiring "[t]he county planning commission [to] establish . . . if appropriate, a time limit for the duration of the particular [special] use." HAR § 15-15-95(e).
- The failure to impose a closure deadline is contrary to the Hawai'i Supreme Court's ruling in *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n*, 64 Haw. 265 (1982). There, the Court explained that "unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes

to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.” *Id.* at 272. Following these principles, the court held that “allowance of a special permit for the development of a recreational theme park covering 103 acres of agricultural land, a major commercial undertaking which developers estimate will attract approximately 1.5 million people annually to the Waianae Coast, accordingly frustrates the objectives and effectiveness of Hawaii’s land use scheme.” *Id.*

- The Proposed Decision would sanction the use of a 92.5-acre expansion of the Landfill with no waste acceptance restrictions for an unlimited time. The Landfill is not an agricultural use, which is why a special use permit is required. *See* Hawai‘i Revised Statutes (“HRS”) § 205-2(b); Rev. Ord. of Honolulu Table 21-3 (waste disposal and processing allowed in industrial zone with minor conditional use permit). “We do not believe that the legislature envisioned the special use technique to be used as a method of circumventing district boundary amendment procedures to allow the *ad hoc* infusion of major urban uses into agricultural districts.” *See Neighborhood Bd. No. 24*, 64 Haw. at 272. Absent a temporal limitation, the ENV’s “proposal is not an ‘unusual and reasonable use’ which would qualify for a special permit under HRS § 205-6,” and would “frustrate[] the effectiveness and objectives of Hawaii’s land use scheme.” *See id.*

- The failure to impose a closure deadline is contrary to the representations that City and County of Honolulu (the “City”) repeatedly made to the community and the LUC that the Landfill would be closed. *See* HRS § 205-6(d) (“The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.”); HAR § 15-15-96(a); Ex. 1 (KOCA’s Findings) at 37-41 (reviewing in detail the promises of closure). The ENV has repeatedly disregarded its promises and the orders imposed on it to close the Landfill. *See* Ex. 1 (KOCA’s Findings) at 37-41.
- The failure to impose a closure deadline is contrary to the longstanding condition imposed on ENV that the City “identify and develop” a new landfill with “reasonable diligence.” 2011AP Ex. K12 (Planning Commission’s 2009 Decision) at 25; 2011 AP Ex. K15 (Land Use Commission’s 2009 Decision) at 6. This condition was again imposed in the Proposed Decision insofar as it incorporates the LUC’s prior decision. Proposed Decision at 39. ENV cannot move with “reasonable diligence” to “site and develop” a new landfill and at the same time be allowed to continue operating the Landfill indefinitely. A new landfill is necessary because the old Landfill must close. The evidence shows that the ENV should have a new replacement landfill up and running in no more than seven years from when KOCA submitted its findings, *see* Ex. 1 (KOCA’s Findings) at 67-70 (reviewing evidence of the time required to identify and develop a new landfill).

- The failure to impose a closure deadline, restrict waste and require other conditions is contrary to the evidence showing that the Landfill has harmed “public health, safety and welfare.” Hon. Planning Comm’n R. § 2-46(e) (“The planning commission may attach such conditions to any special use permit as it considers necessary to protect the public health, safety and welfare.”); HAR § 15-15-95(b) (asking whether “[t]he proposed use would not adversely affect surrounding property”); HRS § 205-6(c). The Landfill has racked up more regulatory violations than any other landfill in the State and, as a result of poor planning, has released large amounts of waste and leachate into coastal waters. Ex. 1 (KOCA’s Findings) at 44-56 (reviewing regulatory record and release in December 2010 and January 2011).
- The failure to restrict the waste flowing into the Landfill is contrary to the ENV’s own proposed Findings of Fact, Conclusions of Law and Decision that were submitted in 2012 (“ENV’s 2012 Findings”). The ENV’s 2012 Findings provided that “MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGSF up to **January 1, 2014**, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.” Ex. 2 at 33 (ENV’s 2012 Findings) (emphasis added).

For this matter to be processed as a special use permit and to protect the community’s health, safety and welfare, the Planning Commission must set an appropriate closure deadline and other additional conditions in accordance with

Hawai'i law, HAR § 15-15-95(e), and the substantial evidence in the record. It is time to stop kicking the can down the road. Consistent with the obligation to develop a new landfill with reasonable diligence, the prior promises and orders and the substantial evidence in this matter, KOCA's proposed Condition 3 sets forth a staged approach to the closure of WGS�:

1. From the date of the Planning Commission's order until **March 1, 2024**, MSW should not be allowed to be deposited at the WGS� unless it cannot be disposed of within the City by means other than landfilling, provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGS�, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGS�. This condition is based on the ENV's findings of fact filed May 2, 2012, *see* Ex. 2 at 33, and consistent with the ENV's desire to have "maximum diversion" from the Landfill, *see* 2011AP 1/11/12 Tr. at 157:23–25 (Steinberger); 2011AP 4/11/12 Tr. at 94:7–9 (Steinberger). The substantial evidence demonstrates that, by March 1, 2024, the ENV should have its new landfill identified and developed if it proceeds with reasonable diligence. *See* 2011AP 3/7/12 Tr. at 17:25–19:25, 199:24–201:24 (Miller). 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle).

2. From March 2, 2024 until March 1, 2027, the WGS� shall be closed to use and all waste except (1) ash and residue from H-POWER and (2) automobile-shredder residue. This three-year period provides time during which the ENV can transition sending H-POWER ash and residue and automobile-shredder residue from the WGS� to the new landfill.
3. Following the three-year transition period, the WGS� must close. The ENV has stated that it only wants one landfill to accept all waste streams that require landfilling. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). With a new site developed and operational, the ENV will no longer need the WGS�. At that point, after the community has endured the Landfill’s problems for decades and given the ENV’s broken promises, it will be in the best interests of the community for the WGS� to close.

KOCA respectfully asks that the Planning Commission deny the Applications unless it imposes the closure and other conditions set forth in KOCA’s Findings. *See* Ex. 1 (KOCA’s Findings) at 81-87.¹

Sections II and III below identify the procedural defects in the Proposed Decision. Specifically, Section II explains that the adoption of the Proposed Decision did not comply with Planning Commission Rule § 2-76 because the Commissioners did

¹ The Proposed Decision adopted KOCA’s Conditions 1.c and 5. As explained below, however, despite specifically adopting Condition 1.c. in its oral ruling, the written Decision omitted a critical clause in Condition 1.c. The omission must be corrected.

not make the “attestation” required by the rule. Section III demonstrates that the Proposed Decision does not comply with the LUC’s remand instructions.

The remaining Sections below address the merits. Section IV explains KOCA’s objections to the Proposed Decision’s Findings of Fact. Section V sets forth KOCA’s objections to the Proposed Decision’s Conclusions of Law. Finally, Section VI provides KOCA’s objections to the Proposed Decision’s Conditions and discusses the other Conditions that should be imposed.

II. THE ADOPTION OF THE PROPOSED DECISION DID NOT COMPLY WITH PLANNING COMMISSION RULE § 2-76 OR DUE PROCESS OF LAW

The Planning Commission adopted the Proposed Decision. *See* 2011 AP 12/6/17 Tr. at 6:19-21; Proposed Decision at 39-40 (signatures). The vote to adopt the Proposed Decision violated Planning Commission Rule § 2-76, which states that “[a]ny commissioners who were not present during the entire contested case hearing, **shall before voting attest to the fact** that they have **reviewed** the transcript of the proceedings for the date(s) they were absent and that they have **studied, examined and understand** the record of the hearings.” (Emphasis added.)

The use of the word “attest” is significant. In other places, the Planning Commission’s Rules require mere “statements.” *See* Planning Commission Rules §§ 2-17 (subpoena request for documents “shall state the reasons” for the request), 2-67(b) (motions “shall state the relief sought”). An “attestation” is more than a “statement.” An “attestation” requires an oath or affirmation. Specifically, to “attest” means to “bear witness; testify.” *Black’s Law Dictionary* 153 (10th ed. 2014). “Tes-

timony” is given by a witness “under oath or affirmation.”² *Id.* at 1704. As the Commission’s Rules confirm, when testimony is presented in a “contested case,” the “witnesses shall testify under oath.” *See* Planning Commission Rule § 2-71(b)(1); *accord Mauna Kea*, 136 Hawai‘i at 380 (holding that in a “contested case hearing,” “testimony is taken under oath”).

The Rules require the Commissioners to make an oath because due process demands that decisionmakers have read and understood the record in the case. *See State v. Carroll*, 376 N.E.2d 596, 601 (Ohio Ct. App. 1977) (concluding that agency violated due process where it entered a decision without reading transcript of proceeding before hearing officer). When a member has not attended a hearing in the case, the member satisfies due process only by attesting to having studied, examined and understood the record before rendering a decision. *See Palmer v. Municipality of Anchorage, Police & Fire Ret. Bd.*, 65 P.3d 832, 842 (Alaska 2003) (where certain agency board members were not present for hearings in a case they decided, those members satisfied “state and federal constitution[al] require[ments]” when they “attested that they had reviewed the record and would be able to make an informed decision on [the] claim” (quotations omitted)); *Briggs v. Bd. of Regents of Univ. of State of New York*, 590 N.Y.S.2d 949, 951 (App. Div. 1992) (same conclu-

² “Oath” means “[a] solemn declaration, accompanied by a swearing to God or a revered person or thing, that one’s statement is true and that one will be bound to a promise,” *Black’s Law Dictionary* 1239, and “affirm” means “[t]o solemnly declare rather than swear under oath,” *id.* at 70. Oaths or affirmations are used to ensure that the statements are true because “[t]he legal effect of an oath is to subject the person to penalties of perjury if the testimony is false.” *Id.* at 1239.

sion where replacement member “affirmed” that he had read and considered the transcripts of prior proceedings and the agency made an “informed decision”).

Here, none of the Planning Commissioners “attest[ed] to the fact that they have reviewed the transcript of the proceedings for the date(s) they were absent and that they have studied, examined and understand the record of the hearings” before voting to approve the Proposed Decision. At best, some of the Commissioner’s gave unsworn statements that they had “reviewed” the evidence in this case. *Compare* Proposed Decision at 39-40 (signatures by Chair McMurdo and Members Anderson, Hayashida, W. Chang, and G. Chang) *with* 2011AP 12/6/17 Tr. at 6:2-4 (Chair McMurdo: “We have all received the transcripts, pleadings, submissions and evidence in this matter, and we have all reviewed it.”); 2011AP 3/1/17 Tr. at 19:6-17 (Members Hayashida, W. Chang, and Anderson confirming they “reviewed” the records in the case). At least one member has not provided confirmation (sworn or otherwise) that he reviewed the transcript or record in this case. Having failed to meet the obligations under Rule § 2-76 and due process, the Proposed Decision is void as a matter of law.

III. THE PROPOSED DECISION DOES NOT COMPLY WITH THE LUC’S REMAND INSTRUCTIONS

In its June 6, 2017 order, the LUC remanded this contested case to the Planning Commission for further proceedings with the following instructions:

(2) clarify the basis of the Planning Commission’s proposed additional Condition No. 3, which specifies a December 31, 2022, date within which the Applicant is to identify an alternative site that will be used upon the WGSL reaching its capacity and the implications it has on the closure date of the WGSL to use and the subsequent commencement of operations at the alternative landfill site;

(3) clarify whether the record needs to include updated information on the operation of the WGS�, the landfill site selection process, and the waste diversion efforts of the City and County of Honolulu; [and]

(4) assuming the Planning Commission eventually recommends approval of the matter, clarify the effective date of the Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order

(Paragraph breaks added.)

Regarding instruction (2), the Proposed Decision does not clarify the “basis” for the identification deadline of December 31, 2022. Indeed, the Proposed Decision does not provide any explanation as to why that date was selected or identify the evidence on which the date was based.

Regarding instruction (3), the Proposed Decision does not clarify whether the record needs to include updated information on the operation of the WGS�, the landfill site selection process or the waste diversion efforts of the City. Evidence in this matter closed in April 2012. Nothing in the Proposed Decision identifies evidence regarding the operation of the Landfill, the site selection process or the waste diversion efforts of the City over the last six years or attempts to explain why such evidence would be irrelevant.

KOCA sought to reopen evidence to provide the information that the LUC had requested. KOCA’s Motion to Reopen has not been scheduled for a hearing. In the Proposed Decision, the Planning Commission states that it denied the parties’ motions to reopen because it had “sufficient evidence to render its decision.” Yet the Proposed Decision does not provide any analysis or explanation for this conclusory statement. It was erroneous for the Planning Commission to adopt the Proposed

Decision before hearing and deciding the Motion to Reopen. The Commission will compound that error if it enters the Proposed Decision as its final decision.

Regarding instruction (4), the Proposed Decision fails to clarify the effective date of the decision. Despite the LUC's instruction, nothing in the Proposed Decision addresses its effective date.

For these reasons, the Proposed Decision does not comply with the LUC's remand instructions.

IV. OBJECTIONS TO THE ENV'S FINDINGS OF FACT

KOCA objects to specific paragraphs in the Planning Commission's Proposed Decision's Findings of Fact for the reasons stated below. The objections are organized according to the section headings used in Planning Commission's Proposed Decision.

A. PROCEDURAL MATTERS

1. 2011 APPLICATION

Finding of Fact 17 states in part that Dwight Miller was accepted "as an expert in solid waste management." The finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. Mr. Miller was accepted, without objection, as an expert in "solid waste management, including landfill siting and design and comprehensive solid waste management." 2011AP 3/7/12 Tr. at 18:8-10.

Finding of Fact 27 states in part that Schnitzer Steel Hawaii Corp.'s ("Schnitzer") Exhibits S1 through S4 were received into the record. The finding is false. None of Schntizer's exhibits were offered or received into evidence.

B. PROPOSAL FOR SPECIAL USE PERMIT

1. LANDFILL SITING

Finding of Fact 67 states in part, “[T]he City allotted funds in the Fiscal Year 2010 budget to conduct a site selection study for a secondary landfill on Oahu in satisfaction of Condition No. 1 [of the 2009 Planning Commission Decision].” The finding is misleading and contrary to the reliable, probative and substantial evidence in the record. Condition 1 states in part, “On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant’s effort to identify and develop such sites shall be performed with reasonable diligence” 2011AP Ex. A18 at 25 (¶ 1). There is no evidence that the ENV’s obligation to begin to “identify” one or more new landfill sites was met by “appropriating funds to identify” one or more landfill sites. The site identification process began in January 2011 when the ENV’s site selection committee first met. 2011AP 4/4/12 Tr. at 54:14–16 (Marsters). Accordingly, the ENV failed to meet the November 1, 2010 deadline in Condition 1 of the Planning Commission’s 2009 order.

Findings of Fact 68 to 80 materially misstate the site selection efforts. First, Finding of Fact 136 mentions meetings that occurred on “January 20, February 10, March 10 and 31, May 12, July 19, 2011, March 16, 2012, and April 20, 2012.” Site Selection Committee (“SSC”) meetings were also held on November 8, 2011 and February 1, 2012. 2011AP Ex. K152 (11/8/11 SSC group memory); 2011AP Ex. K170 (2/1/12 SSC group memory). To assess the claim of “reasonable diligence” in identi-

fyng and developing a new site, subsequent meetings must be considered. See 2011AP Ex. K15 at 6 (10/22/09 LUC order).

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

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

Finding of Fact 69 states in part that the landfill SSC was tasked with making "recommendations concerning the selection of a future site for a landfill to replace or supplement WGS� by accepting MSW, ash and residue from facilities such as HPOWER, and construction and demolition debris waste (C&D) for the Island of Oahu." This finding is partially false and contrary to the reliable, probative and substantial evidence in the record. While the ENV could have developed a supplemental site, the ENV preferred to have one replacement site that can accept all forms of waste. 2011AP 4/4/12 Tr. at 72:13-24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). For this reason, the ENV directed that "the role of the [SSC] or the purpose of the [SSC] is to come up with a list of sites that could be used as a landfill to replace Waimanalo Gulch." 2011AP 4/4/12 Tr. at 35:1-4 (Marsters). The directive to find one site made the site selection process more difficult, because the SSC had to evaluate the added capacity needed for the ash and residue and the location of potential sites relative to H-POWER. 2011AP 4/4/12 Tr. at 72:25-73:4,

111:17–25 (Marsters); 2011AP 1/11/12 Tr. at 61:13–18 (Steinberger). Having chosen to find a replacement site for the Landfill, once the new site opens, the ENV will no longer need the Landfill.

Finding of Fact 74 states that the SSC “began by working with potential landfill sites identified by the City in previous studies.” The finding is misleading and contrary to the reliable, probative and substantial evidence in the record. The ENV’s consultant directed the SSC to start with the old list of approximately 40 sites, some of which were no longer viable options. 2011AP 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

Finding of Fact 75 states in part, “The Committee also developed exclusionary criteria or factors for sites above the no-pass or UIC line based on the following information: . . . Land Ownership (Federal, State, City, and Private) . . .” This finding is false and contrary to the reliable, probative and substantial evidence in the record. The ENV’s consultant developed the exclusionary criteria or factors. In many instances, the consultant imposed these exclusionary criteria or factors without prior discussion or authorization from the SSC. Because the consultant unilaterally imposed exclusionary criteria, the SSC had to direct “the consultant [to] go back” and “[r]emove screens that [the SSC] had not either previously discussed or authorized.” 2011AP 4/4/12 Tr. at 105:1–4 (Marsters). In the end, the SSC was “not happy” with the process. 2011AP 4/4/12 Tr. at 104:20–23 (Marsters: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.”).

Finding of Fact 80 states, “The City’s effort to identify and develop one or more landfill sites has been performed with reasonable diligence.” The finding is false and contrary to the reliable, probative and substantial evidence in the record.

First, the ENV did not meet the November 1, 2010 deadline to begin to identify and develop one or more new landfill sites. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order). There is no evidence that the ENV’s obligation to begin to “identify” one or more new landfill sites was met by appropriating funds to identify one or more landfill sites. The site identification process began in January 2011 when the ENV’s site selection committee first met. 2011AP 4/4/12 Tr. at 54:14–16 (Marsters). Accordingly, the ENV failed to meet the November 1, 2010 deadline in Condition 1 of the Planning Commission’s 2009 Decision.

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

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

18, 76:19–21, 77:21–24 (Marsters). A number of the sites that the SSC may recommend are west of Makakilo. 2011AP Ex. K258 (4/20/12 SSC meeting photographs).

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

Fourth, as Mr. Miller explained, the site selection process has other significant errors, such as the improper use of deciles and the failure to correct implicit weighting, which has led to double counting of criteria. 2011AP Ex. K147 at 3–4 (Parametrix site selection memorandum); 2011AP 3/7/12 Tr. at 94:9–12 (Miller).

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

discussed or authorized.” 2011AP 4/4/12 Tr. at 104:24–105:4 (Marsters). The SSC broadened the search criteria or removed screens during the sixth, seventh, eighth, and ninth meetings.

Finally, the site selection process has already taken too long. The ENV was ordered to begin site selection efforts by November 1, 2010. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order). It is now February 2018, and there is no evidence that the ENV has selected a site.

Findings of Fact 81 states, “Even after the City selects a new landfill site or sites, it will take the ENV more than seven years to complete the tasks necessary to start operations at a new site(s).” (Emphasis added.) For the reasons set forth below in the objection to Finding of Fact 133, this finding is false.

2. WASTE DIVERSION

Finding of Fact 85 is misleading and materially incomplete. First, Finding of Fact 85 states, “In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on Oahu.” This finding is false and contrary to the reliable, probative and substantial evidence in the record. The total waste generated on Oahu in Calendar Year 2010 was 1,510,593 tons. 2011AP Ex. A27 (Oahu MSW waste stream). Of the 1,510,593 tons of waste generated, approximately 1,214,904 tons constituted MSW.

Further, Finding of Fact 85 states in part that the figures reflect “a steady decrease from 2009.” This statement misleadingly implies that the ENV’s waste diversion efforts improved from 2009 to 2010, which in turn led to a reduction in landfilling. In fact, the decrease in landfilling was caused by a reduction in the total

MSW generated on O'ahu. MSW generation decreased from Calendar Year 2008 (1,313,253 tons) to Calendar Year 2009 (1,225,902 tons) and Calendar Year 2010 (1,214,904). 2011AP Ex. A27. The reduction in waste generation reflects a slowing economy. 2011AP Ex. K91 at 3 (7/10 ENV status report: "The downward trend [in Landfill disposal] may be attributed to diversion of MSW to the off-island shipping project, the slowing economy, and the expansion of the City's curbside recycling program.").

Finding of Fact 86 states, "However, there still are no new technologies with proven reliability and performance that would completely eliminate the need for a landfill." This finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. While the need for a Landfill may not be "completely eliminate[d]," H-POWER's third boiler there will provide sufficient capacity to accept all of the waste that presently goes to the Landfill. 2011AP 4/11/12 Tr. at 84:22-24 (Steinberger); 2011AP Ex. A26 (Oahu waste stream table). The wastes that cannot be accepted because of its unique characteristics will "probably [be] a small percentage" of the MSW. 2011AP 1/11/12 Tr. at 77:7-13 (Steinberger).

Finding of Fact 89 states, "The third boiler was scheduled to begin operations in January 2013." This finding is false and contrary to the reliable, probative and substantial evidence in the record. At the April 11, 2012 hearing, Director Steinberger admitted that H-POWER's third boiler will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 176:7-10, 211:12-15 (Steinberger).

Finding of Fact 90 states in part, “DOH requires as a condition of HPOWER’s permit that HPOWER have a disposal alternative—the landfill—as a contingency for routine maintenance, natural disasters, and emergencies.” This finding is false and contrary to the reliable, probative and substantial evidence in the record. The actual condition provides that H-POWER must have a place to divert waste in the event that it runs out of storage capacity. *See* 2011AP 4/11/12 Tr. at 110:24–111:24 (Steinberger: “A. Well, they don’t have a lot of room to store it at H-POWER. The Department of Health is rather restrictive as to how much they will allow you to store. . . . Q. Currently, the Department of Health does not permit -- or through the permit allow for H-POWER to store any large amount of solid waste? A. No. They're only allowed to store what they can hold on the tipping floor, and typically, the tipping floor can hold up to three days of MSW.”); 2011AP Steinberger Written Direct Testimony at 30 (¶ 89) (“Further, the expanded HPOWER facility will still require the continued availability of WGSL as a permit condition to operate, to ensure proper disposal of MSW that is diverted from HPOWER due to routine maintenance, unanticipated closures or if the amount of waste exceeds the capacity of the facility.”).

Finding of Fact 95 states, “It is unlikely that this [the green waste] capture rate can get any higher.” This finding is false and contrary to the reliable, probative and substantial evidence in the record. The ENV does not prohibit green waste disposal at the Landfill. 2011AP 4/11/12 Tr. at 114:14–18 (Steinberger: acknowledging that small amounts of green waste are accepted at the Landfill). If the ENV

were to prohibit any green waste disposal at the Landfill, the capture rate for green waste would obviously be higher.

Finding of Fact 96 states, “All but incidental food waste . . . is diverted from the WGSL.” This finding is false. The ENV currently has no residential food waste collection program. 2011AP Ex. K195 at 2, 4 (12/09 food waste article); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum). Food waste is landfilled at the WGSL, particularly when H-POWER is at capacity or down. 2011AP 4/11/12 Tr. at 123:20–24 (Steinberger).

Finding of Fact 97 states in part that “green waste is one of the few recyclable materials that is all reused on the Island.” This finding is misleading and unsupported by the record. Only 77% the green waste is recycled. 2011AP Steinberger Written Direct Testimony at 19 (¶ 56). There is no evidence regarding whether the green waste is recycled on O‘ahu or elsewhere.

Finding of Fact 108 states in part that “it was reported in December 2011 that 15,000 to 20,000 tons per year of sewage sludge was still being landfilled, and as of July 31, 2011, there is nowhere else to dispose of that sewage sludge.” This finding is partially misleading and contrary to the reliable, probative and substantial evidence in the record. It is true that 15,000 to 20,000 tons per year of sewage sludge is still being landfilled. By October or November 2012, H-POWER’s third boiler will be able to accept all of that sewage sludge. 2011AP 4/11/12 Tr. at 90:3–21, 174:1–6, 176:7–10, 211:12–15 (Steinberger); 2011AP Steinberger Written Direct Testimony at 23 (¶ 71).

3. LANDFILL DESIGN AND OPERATIONS

Finding of Fact 115 states that when the Landfill was hit by heavy rains in December 2010 and January 2011 and Cell E6 was flooded, Waste Management “was in the process of completing construction of the Western Surface Drainage System that was intended to divert stormwater around the landfill.” This finding is misleading, materially incomplete and contrary to the reliable, probative and substantial evidence in the record.

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

Second, the ENV claims that the SUP for the construction of the diversion channel was delayed because of archaeological issues and that the Landfill was running out of capacity in the permitted cells. The supposed permitting and processing delays—a challenge to the Final Environmental Impact Statement for the Landfill expansion project and opposition in the SUP approval process—were foreseeable. 2011AP 4/11/12 Tr. at 145:22–23 (Steinberger); 2011AP 4/11/12 Tr. at 145:24–146:14, 149:3–5 (Steinberger); 2011AP Ex. K2 (6/5/03 LUC order); 2011AP Ex. K155 at 3 (¶¶ 5–8) (3/14/08 LUC order); 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). Inadequate planning by the ENV and Waste Manage-

ment caused the Landfill to run out of safely useable space before the diversion channel had been completed. 2011AP 3/7/12 Tr. at 186:4–21 (Miller). This inadequate planning forced the ENV and Waste Management to deviate from the Landfill’s design plans and the industry standard and to fill Cell E6 before the diversion channel was in place. 2011AP 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 2011AP 3/7/12 Tr. at 129:25–130:4 (Miller).

Finding of Fact 117 makes certain representations about Waste Management’s efforts to work with the EPA following the events in December 2010 and January 2011. The record does not support this finding. No one from Waste Management testified before the Commission following the events. No evidence was introduced regarding Waste Management’s efforts to work with the EPA.

Finding of Fact 121 is false and materially incomplete and contrary to the reliable, probative and substantial evidence in the record. First, The DOH currently has a pending enforcement case against the Landfill based on the events surrounding the January 2011 flooding. 2011AP 4/4/12 Tr. at 156:20–22 (Gill: “There is a pending enforcement case which I can’t speak to in any detail regarding the handling of storm water runoff from the landfill.”); 2011AP 4/4/12 Tr. at 157:10–12 (Gill: “There is . . . , to be clear, potential enforcement action regarding the events around the flood event at the landfill.”).

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

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

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

C. PURPOSE AND NEED

Findings of Fact 122 to 123 state in part that the WGS� is necessary. The findings are false and contrary to the reliable, probative and substantial evidence in the record. While the continued availability of a landfill is necessary for a limited number of wastes, the landfill does need not be the WGS�. On the contrary, the ENV is compelled to develop a new landfill with reasonable diligence. 2011AP Ex. K12 at 25 (8/4/09 PC order). The ENV has not contested that condition.

Finding of Fact 124 is identical to the Finding of Fact 85. For the reasons set forth above in the objection to Finding of Fact 85, Finding of Fact 124 is misleading, materially incomplete and contrary to the reliable, probative and substantial evidence in the record.

Finding of Fact 125 states in part that “[o]ther items . . . cannot be recycled or burned at H-POWER.” The finding is partially false, materially incomplete and contrary to the reliable, probative and substantial evidence in the record.

First, Finding of Fact 125 does not identify the period to which it applies. There is a material difference between the waste that could be accepted at H-POWER at the time of the contested case hearing in early 2012 and the waste that could be accepted at H-POWER after the third boiler is operational in October or November 2012. The two existing boilers are refuse-derived fuel (“RDF”) units. For these units, the RDF goes into a holding barn where the material, the residue, and any recyclable material is separated. 2011AP 1/11/12 Tr. at 66:1–4 (Steinberger). This pre-preparation requires worker handling of the waste. 2011AP 1/11/12 Tr. at 66:18–22 (Steinberger). Worker handling of the waste has been proffered as the reason the ENV and Covanta, the H-POWER operator, have been reluctant to take sewage sludge and medical waste in the past. 2011AP 4/11/12 Tr. at 170:22–171:10 (Steinberger). The third boiler is a mass burn unit. 2011AP 1/11/12 Tr. at 65:9–10 (Steinberger). As a mass burn unit, the third boiler will be able to accept significantly larger material and will require significantly less pre-preparation of waste. 2011AP 1/11/12 Tr. at 66:8–10 (Steinberger). With less pre-preparation, there will be less worker interaction with the waste. 2011AP 1/11/12 Tr. at 66:18–21 (Steinberger).

Second, Finding of Fact 125 fails to disclose that H-POWER’s third boiler will be operational in October or November 2012. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–

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

Finding of Fact 126 indicates in part that the third boiler at H-POWER will be operational “by 2013.” The finding is misleading and contrary to the reliable, probative and substantial evidence in the record. During the April 11, 2012 hearing, Director Steinberger admitted that the third boiler, with its 300,000 tons of additional capacity, will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 84:22–24, 176:7–10, 211:12–15 (Steinberger).

Finding of Fact 128 states in part that the City has a digester at Sand Island and that the City is pursuing alternative technologies for sewage sludge. The finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. In particular, the finding does not acknowledge that the City is far behind other municipalities in non-incinerator diversion, especially with respect to biosolids. 2011AP 4/4/12 Tr. Supp. at 12:5–6 (Gill); 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids

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

Finding of Fact 129 admits that further “progress” in waste diversion is needed. This statement is true. But the finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. The City is far behind other municipalities in non-incinerator diversion, particularly with respect to biosolids and food waste. While other municipalities began biosolids programs in the 1970s and 1980s, the ENV did not establish a biosolids program for Honolulu until 2006. 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids webpage); 2011AP Ex. K148 at 10 (Parametrix alternatives memorandum); 2011AP 3/7/12 Tr. at 139:11–140:4 (Miller). The current program is extremely limited. *See* 2011AP Ex. K148 at 7–9 (Parametrix alternatives memorandum). Further, the ENV currently has no food waste collection program. 2011AP Ex. K195 at 2, 4 (12/09 food waste article); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum).

Finding of Fact 133 states, “It will take at least seven years from site selection for a new landfill site to be operational.” The finding (1) is based on a record created by unlawful procedure, for the reasons set forth in the Motion to Deny the Applica-

tions, (2) is not supported by admissible or admitted evidence and (3) is contrary to the reliable, probative and substantial evidence in the record.

There is no credible evidence to support the ENV's statement that it will take at least seven years from site selection. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). The ENV's estimates keep increasing. In 2003, the ENV admitted it would only take three to five years to identify and develop a new landfill. 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle). In 2009, the ENV asserted that it would take seven years to identify and develop a new site. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). Now, the ENV claims it will take more than seven years **after** site selection. *E.g.*, 2011AP 4/11/12 Tr. at 122:25 (Steinberger).

Consistent with the ENV's admission in 2003, Mr. Miller testified that it would take three to five years to identify and develop a landfill. Mr. Miller was the only expert in landfill siting to testify in this proceeding. He explained, “[I]f you’re putting out a number of seven years, it’s somewhat of a self-fulfilling prophecy. If you’re saying, Oh God, it’s going to take us seven years, that’s how long it’s going to take you.” 2011AP 3/7/12 Tr. at 202:20–24 (Miller). But if the ENV is willing to “put out” and “push a schedule,” the timetable will be shorter. 2011AP 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV represents that it is “committed” to finding a new site. *See* 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). If the ENV's representations are true, no more than seven years is necessary to select and develop a new site.

V. OBJECTIONS TO THE PLANNING COMMISSION'S CONCLUSIONS OF LAW

Conclusion of Law 4 states that the Applications "(a) are not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection."

Conclusion of Law 4 (1) is based on a record created by unlawful procedure, for the reasons set forth above, (2) is based on clearly erroneous findings, (3) is not supported by admissible or admitted evidence, (4) makes no findings regarding the objectives sought to be accomplished by the state land use law and regulations or the mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS, (5) is vague and lacks the specificity required for agency decisions and (6) is contrary to the reliable, probative and substantial evidence in the record.

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

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

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

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

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

After the Landfill stored MSW collected from the entire island of O’ahu for the last 25 years and after the community relied on the ENV’s broken promises of closure, there is no reason why the WGSL must or should be filled to capacity.

Conclusion of Law 5 erroneously states that “the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.” Conclusion of Law 5 (1) is based on a record created by unlawful procedure, for the reasons

set forth in the Motion to Deny the Applications, (2) is based on clearly erroneous findings, (3) is not supported by admissible or admitted evidence, (4) makes no findings regarding the provisions set forth in Section 2-45, (5) is vague and lacks the specificity required for agency decisions and (6) is contrary to the reliable, probative and substantial evidence in the record. Simply put, the ENV has not met its burden of proving that landfilling should be allowed at the WGS� until it reaches capacity. The ENV promised to close the Landfill long ago. Further, the Landfill has posed serious problems to public health and safety, especially since its expansion.

Conclusion of Law 6 states that the Planning Commission denied motions to reopen the evidence because the Commission has “sufficient” information. That determination is an abuse of discretion. When relevant information becomes available after the initial hearing, an agency abuses its discretion by refusing to admit it. *See, e.g., Byers v. Dir., Dept. of Workforce Servs.*, No. E-14-52, 2014 WL 2804905, at *1 (Ark. Ct. App. Jun. 18, 2014). As explained in the Motion to Reopen, relevant information became available after the close of evidence six years ago. The relevant information includes the ENV’s progress toward selecting and developing a new landfill site, the Landfill’s capacity, the rate at which waste is being diverted from the Landfill and the current operations of the Landfill.

Conclusion of Law 7 suggests that the subject of the remand from the Hawai’i Supreme Court was limited to the LUC’s closure condition, Condition 14. Condition 4 was one subject of the remand, but it was not the only subject. Specifically, the court “remand[ed] to the LUC for further hearings as the LUC may deem appro-

priate” and “encourage[d] the LUC to consider **any new testimony** developed before the Planning Commission in [the 2011 Application] case.” *Dep’t of Envtl. Servs., City & County of Honolulu v. Land Use Comm’n, State of Hawaii*, 127 Hawai’i 5, 18, 18 n.16 (2012) (emphasis added). On remand from the court, the LUC remanded the 2008 Application to the Planning Commission to consolidate the 2008 and 2011 Applications and issue a single decision. Accordingly, the remand to the Planning Commission was not limited to consideration of Condition 14. On the contrary, the remand was specifically intended to consider new evidence and to consolidate the two proceedings.

Conclusion of Law 7 also states that the LUC’s Condition 14 was not material to the Planning Commission’s decision to approve the 2008 Application. This statement is wrong as a matter of law. The substance of Condition 14 is material to the Planning Commission’s decision because the condition imposes temporal and waste-acceptance restrictions. A temporal restriction such as Condition 14 is necessary to process the Applications as special use permits. *See Neighborhood Bd. No. 24*, 64 Haw. at 272. In other words, without Condition 14 or a similar temporary restriction, the Planning Commission cannot approve the Applications. Under the Planning Commission’s Rules, the Commission must attach conditions that are “necessary to protect the public health, safety and welfare” from the Landfill. *See Hon. Planning Comm’n R. § 2-46(e)*.

VI. OBJECTIONS TO THE PLANNING COMMISSION'S DECISION AND ORDER

A. Modification and Incorporation.

The Proposed Decision's Decision and Order approves the 2011 Application and modifies the LUC's 2009 Decision. Proposed Decision at 37. This decision is erroneous because the LUC's 2009 Decision was vacated by the Hawai'i Supreme Court and, as such, cannot be modified by the Planning Commission.

The Planning Commission's Decision and Order also incorporates by reference the LUC's 2009 Decision, which adopted as modified the Planning Commission's 2009 Decision. Proposed Decision at 39. Likewise, the Planning Commission's Conclusion of Law 4 appears to premise its conclusions on the findings in the Planning Commission's 2009 Decision. *Id.* at 36. The Proposed Decision fails to reconcile the evidence from the 2008 Application and the 2011 Application proceedings. The following are examples of findings of fact in the Planning Commission's 2009 Decision that cannot stand particularly in light of the record from the 2011 Application proceeding:

- **Findings of Fact 53 to 61** identify the uses surrounding the Landfill, including Ko Olina and Makaiwa Hills development. This finding is clearly erroneous because it does not address the distance of Makaiwa Hills from the Landfill. Todd Apo testified that Makaiwa Hills was within 1,500 feet of the Landfill expansion area. 2008AP 7/2/09 Tr. at 262:16-18. Under Revised Ordinances of Honolulu § 21-5.680, "No waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment mixed use or resort district. When it can be deter-

mined that potential impacts will be adequately mitigated due to prevailing winds, terrain, technology or similar considerations, this distance may be reduced, provided that at no time shall the distance be less than 500 feet.” Given the serious health and safety issues the Landfill has created for the surrounding community over the years, the Landfill’s potential impacts have not been adequately mitigated.

- **Finding of Fact 60** states that Waste Management responded to complaints regarding the Landfill in 2007, 2008 and 2009 and that in 2009 the General Manager of Ihilani Hotel at Ko Olina testified that he had not submitted any complaints to Waste Management regarding the Landfill in 2009. This finding is clearly erroneous because the evidence in the 2011 Application proceeding showed that in January 2011 the Landfill released waste and leachate into the coastal waters, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report); that the waste washed up in Ko Olina’s lagoons, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 44); and that Waste Management sent workers for only one day to assist in the cleanup efforts, even though waste continued to wash ashore in the area, 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). The evidence from 2011 Application proceeding also showed that Ko Olina’s residents, workers and visitors have expressed concerns regarding the odors, noise, dust, blasting, visual blight, truck traffic and flying

litter from the Landfill. 2011AP Williams Written Direct Testimony at 9 (¶ 29).

- **Finding of Fact 75** states that “[l]eachate does not come into contact with storm water.” This finding based on evidence from the 2008 Application proceeding is no longer accurate, given that storm water plainly came into contact with leachate during the discharges from the Landfill that occurred in December 2010 and January 2011. *See* Ex. 1 (KOCA’s Findings) at 50-56 (¶¶ 290-301). For example, in the January 2011 incident, the Landfill’s drainage system failed and allowed storm water to flow “like a waterfall” into Cell E6. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5).
- **Findings of Fact 77 to 81** discuss the Landfill’s gas collection and control system and a Notice of Violation issued by the U.S. Environmental Protection Agency on April 4, 2006. These findings are based solely on the 2008 Application proceeding. The evidence in the 2011 Application proceeding established that on September 5, 2008, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations, including the failure to submit written notification of the exceedance and verification of methane gas monitoring results. 2011AP Ex. K82 at 2 (9/5/08 warning letter). Further, in 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. 2011AP Steinberger Written Direct Testimony at 27 (¶ 82). The failure to monitor gas readings was a threat to public health and safety. 2011AP 3/7/12 Tr. at 131:23–132:10

(Miller); 2011AP 1/11/12 Tr. at 91:1–92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).

- **Finding of Fact 90** states that the City Council “selected” the WGS� as the “new” landfill. The statement is false and contrary to the reliable, probative and substantial evidence in the record. City Council passed a non-binding resolution to designating the existing site as the “new” landfill. 2011AP 1/11/12 Tr. at 52:6–15 (Steinberger); 2011AP 4/4/12 Tr. at 138:23–139:1 (Timson). The resolution was not binding on the City. *Wemple v. Dahman*, 103 Hawai‘i 385, 396 n.13 (2004) (“We also note that County Council Resolution No. 81-252 is a resolution, not an ordinance, and therefore does not have the binding effect of an ordinance . . .”).
- **Finding of Fact 101** states in part, “By 2012, when H-POWER’s third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGS�.” This finding is contrary to the reliable, probative and substantial evidence in the record. The ENV has publicly stated that when the third boiler is operational, the landfill diversion will be 90%. 2011AP Ex. K251 at 1–2 (5/5/11 ENV press release).
- **Findings of Fact 103 to 110** purport to explain the Landfill’s compliance with state and county land use law and regulations. The findings are clearly

erroneous. First, as explained above, the record shows that the Landfill does not comply with Revised Ordinances of Honolulu § 21-5.680, because the Landfill is located within 1,500 feet of a zoning lot in a country, residential, apartment, apartment mixed use or resort district. Findings of Fact 103 to 110 fail to discuss this provision.

- Second, while the findings purport to summarize state regulations, they fail to mention the letter submitted by the State Office of Planning in the 2008 Application proceeding, which read in part (2011AP Ex. K6 at 2):

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

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

- Third, the findings fail to mention the Landfill's violations of the state law. DOH 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 for the period of 2006 to 2011. 2011AP 1/25/12 Tr. at 15:25–16:13, 39:24–40:3 (Chang).
- **Finding of Fact 103** states that “[t]he Project complies with the guidelines as established by the Planning Commission.” This finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. For the use of the Landfill to comply with the Planning Commis-

sion's and the Land Use Commission's guidelines, the Planning Commission should impose condition "necessary to mitigate adverse impacts of the landfill on the environment and the adjacent community," and to ensure that City "fulfill[s] [its] commitment [to close the Landfill] as soon as possible," as the Office of Planning recommended and based on the evidence in this contested case. The evidence confirms the City's commitment to close the Landfill. The evidence also demonstrates that the Landfill has posed serious problems for public health and safety.

B. Conditions in the Planning Commission's Proposed Decision.

The conditions imposed in the Proposed Decision are inadequate to protect the community's health, safety and welfare.

Condition 1 from the Planning Commission's Proposed Decision provides:

On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon Waimanalo Gulch Sanitary Landfill reaching its capacity at a future date. This identification shall have no impact on the closure date for the Waimanalo Gulch Sanitary Landfill because the Waimanalo Gulch Sanitary Landfill shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2022 but is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace Waimanalo Gulch Sanitary Landfill when it reaches capacity at a future date. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

First, at no point in the Proposed Decision does the Planning Commission provide an explanation why it should take until December 31, 2022, for the ENV to merely "identify" an alternative site. The Planning Commission in August 2009 imposed the following condition: "On or before **November 1, 2010**, the Applicant shall begin to identify and develop one or more new landfill sites that shall either

replace or supplement the WGSL. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence" 2011AP Ex. A18 at 25 (¶ 1) (emphasis added). The Proposed Decision offers no justification for why it should take the ENV twelve years to merely identify a Landfill. The substantial evidence shows that it should take no more than five to seven years to site and develop a landfill. Ex. 1 (KOCA's Findings) at 70.

Second, Condition 1 imposes no restriction on the wastes allowed at the Landfill even though the record shows that certain wastes can be disposed of through other means. Notably, the Planning Commission did not even impose the restriction that the ENV had itself proposed, specifically in the ENV's proposed Condition 10:

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

While this proposal is a step in the right direction, it does not go far enough. Condition 10 is contrary to Condition 1 in the ENV's Findings filed May 2, 2012, which read:

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

Accordingly, under the ENV's proposed Condition 1, **by today** the Landfill should have already closed to accepting municipal solid waste "provided HPOWER or other facility is capable of processing the MSW" The ENV provides no explanation why it has pushed its own proposed deadline to accept MSW from January 1, 2014, to December 31, 2026, for nearly **13 years**. No new evidence has been received since

the ENV filed its Findings and proposed Condition 1 on May 2, 2012. *See Proposed Decision* at 37 (“[A]ny and all evidence that the parties attempted to enter into the record after April 23, 2012 is not part of the record . . .”). In essence, the ENV’s position in 2017 has become more aggressive and less consistent with the evidence than it was in 2012. The only plausible explanation for the 13-year slippage is that the ENV has not acted with reasonable diligence in identifying and developing a new landfill.

Additionally, the Planning Commission’s Condition 1 also ignores the Stipulation the ENV signed in which it made a commitment to “work to divert all waste from the landfill that can be disposed of by a method other than by landfilling . . .” *Ex. 2 at 2 (Stipulation)*. The Planning Commission offers no explanation why the ENV should be able to freely accept waste at the Landfill indefinitely, when such waste “can be disposed of by a method other than by landfilling . . .”

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

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

Finally, the Planning Commission’s Condition 1 imposes no time limitation for the proposed use. As explained in detail in the Introduction Section and as the Office of Planning previously observed, the absence of a time limit for such a major urban use clearly crosses the line between a special use permit and a boundary amendment. Ex. 4 (9/22/09 letter from OP) at 8; *Neighborhood Bd. No. 24*, 64 Haw. at 272. Absent a temporal limitation, the ENV’s intense urban use on 92.5 acres “is not an ‘unusual and reasonable use’ which would qualify for a special permit under HRS § 205-6,” and would “frustrate[] the effectiveness and objectives of Hawaii’s land use scheme.” *See Neighborhood Bd. No. 24*, 64 Haw. at 272.

KOCA’s Condition 3, which was outlined in the Introduction Section above, provides a staged approach to closure over the span of a decade. KOCA’s Condition is consistent with the obligation to develop a new landfill with reasonable diligence, the prior promises and orders and the substantial evidence in this matter. KOCA respectfully asks that the Commission adopt Condition 3.

Condition 2 of the Planning Commission’s Proposed Decision provides (emphasis added):

The Applicant shall provide semi-annual reports to the Planning Commission and the LUC regarding (a) **the status of the efforts to identify and develop a new landfill site on O’ahu**, (b) the WGS�’s operations, including gas monitoring, (c) the ENV’s compliance with the conditions imposed herein,

(d) the landfill's compliance with its Solid and Hazardous Waste Permit and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the landfill, (e) the City's efforts to use alternative technologies, (f) the extent to which waste is being diverted from the landfill and (g) any funding arrangements that are being considered by the Honolulu City Council or the City Administration for activities that would further divert waste from the landfill.

The Planning Commission voted to adopt this condition from KOCA's Condition 1.c. *See Ex. 3 (3/1/17 transcript) at 32:6-35:1 (adopting, among other things, KOCA's Condition 3.c on page 82 of KOCA's Findings).* However, the Planning Commission's written Condition 2 omits an important clause in KOCA's Condition 1.c, which stated, "the status of the efforts to identify and develop a new landfill site on O'ahu, **including but not limited to an approximate date on which a new landfill will be operational . . .**" The omitted clause provides greater accountability by requiring the ENV's reports to state an approximate opening date and by then enabling the public and this Commission to hold the ENV to its estimates. The Planning Commission's Proposed Decision offers no explanation why this critical language was left out, in contravention of the vote of the Planning Commission. KOCA asks that the Planning Commission impose KOCA's Condition 1.c in its entirety.

Additionally, while the Planning Condition adopted one of KOCA's reporting conditions, the Planning Commission offered no reason why it declined to adopt KOCA's remaining reporting conditions, which include the following:

1.d. The semi-annual reports shall be submitted to the Planning Commission, the LUC and the Association. Each report shall be posted on the ENV's website on the same day the report is submitted.

1.e. Within 30 days after each semi-annual report is submitted, the Association may request that the Planning Commission issue an order to show cause why the SUP should not be revoked if there is reason to believe that there has been a failure to perform according to the conditions imposed by this decision and order pursuant to Planning Commission Rule § 2-48. If so requested, the Planning Commission shall issue the order and schedule a hearing. The ENV shall provide the public with at least 14 days' notice of the hearing by posting the hearing date, time, location and subject matter on the ENV's website. The ENV shall also provide at least 14 days' written notice of the hearing to all neighborhood boards on O'ahu and the Association.

1.f. The ENV shall report to the public every three months on the efforts of the City in regard to the continued use of the WGS�, including any funding arrangements that are being considered by the City. On the date each report is published, the ENV shall send a copy of the report to the Association.

1.g. The ENV shall present to the Planning Commission in a public hearing every six months on the status of the City's efforts to either reduce or continue the use of the WGS�. The ENV shall provide at least 14 days' written notice of each hearing to the Association of such hearings.

These conditions will enable the Planning Commission and Land Use Commission to exercise greater oversight of the site-selection process and the ENV's compliance with other conditions. Requiring the ENV to report to the public regularly will provide opportunities for public participation and will promote government accountability. KOCA respectfully asks that the Planning Commission adopt KOCA's Conditions 1.d to 1.g. *See Ex. 1 (KOCA's Findings) at 82-83.*

C. KOCA's Other Conditions

The Planning Commission's Proposed Decision adopts the LUC's Conditions from its 2009 Decision (which was vacated by the supreme court) without Condition 14 (the closure condition). The Planning Commission provided no analysis of whether and to what extent these conditions that were adopted in 2008 Application proceeding should be revised in light of the record developed in 2011 Application

proceeding. As noted above, that one of the very reasons why the LUC instructed the Planning Commission to prepare a single, consolidated decision.

In its proposed conditions, KOCA incorporated all of the LUC's conditions with slight revisions and some new conditions in light of the record in the 2011 Application proceeding. Below we review KOCA's proposed conditions and respectfully ask that they be adopted by the Planning Commission.

KOCA's Condition 1.a states:

The Applicant shall continue its efforts to identify and develop one or more new landfill sites that shall either replace or supplement the WGSF. 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 efforts to select a new landfill site on O'ahu. Upon the selection of a new landfill site or sites on O'ahu, the Applicant shall provide written notice to the Planning Commission. Upon receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

This condition is substantively identical to Condition 4 in the LUC's 2009 Decision, Condition 1 in the Planning Commission's 2009 Decision, and Condition 1 in the ENV's 2017 proposed conditions. KOCA's Condition 1.a removes the reference to "November 1, 2010" stated in prior conditions, as the start date to identify a new landfill has long since passed.

KOCA's Condition 1.b provides:

b. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge. The Applicant shall use alternative technologies, to the extent reasonably practicable, to divert waste from

the Landfill as set out in Exhibit A (proposed Stipulation to Continue Proceedings Until April 22, 2017).

This condition is similar to Condition 5 of the LUC's 2009 Decision, Condition 2 of the Planning Commission's 2009 Decision, and Condition 2 of the ENV's 2017 proposed conditions. The difference is that KOCA's Condition further provides that, upon identifying a viable alternative technology, the ENV should be required to use that technology to the extent practicable. Accordingly, the condition should further provide, "The Applicant shall use alternative technologies, to the extent reasonably practicable, to divert waste from the Landfill as set out in the ENV's proposed Stipulation to Continue Proceedings Until April 22, 2017 [(the 'Stipulation')]."

That Stipulation, a copy of which is attached as Exhibit 5, stated in part:

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

1. Municipal Solid Waste, specifically:

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

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

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

enhance inspections of incoming waste loads such that waste that could be burned at H-POWER will be identified and screened out in the future.

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

3. Automotive Shredder Waste ("ASR"), which comprises the majority of the Miscellaneous Special Waste category: The Department of Health has approved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to enable H-POWER processing.

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

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

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

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

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

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

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

Ex. 5 at 2-3 (Stipulation). This Stipulation was signed by the ENV. *Id.* The Planning Commission and the ENV offered no reason why these provisions should not be included in the conditions.

KOCA's Conditions 1.c to 1.g are discussed above.

KOCA's Condition 2.a provides:

WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that H-POWER ash and residue may be accepted at the Landfill 24-hours a day.

This condition is identical to Condition 8 in the LUC's 2009 Decision, Condition 5 in the Planning Commission's 2009 Decision, and Condition 4 in the ENV's 2017 proposed conditions.

KOCA's Condition 2.b provides:

As appropriate, the ENV shall coordinate construction of the Landfill cells and the operation of the WGSL with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

This condition is identical to Condition 9 in the LUC's 2009 Decision, Condition 6 in the Planning Commission's 2009 Decision, and Condition 5 in the ENV's 2017 proposed conditions.

KOCA's Condition 2.c provides:

The operations of the Landfill shall be in compliance with the requirements of Revised Ordinances of Honolulu § 21-5.680, to the extent applicable, and all applicable statutes, rules and regulations of the State Department of Health, the United States Environmental Protection Agency and any other federal or state agency and the Solid Waste Management Permit for the Landfill. A violation of any applicable statute, rule or regulation or any viola-

tion of a condition of the Solid Waste Management Permit for the Landfill shall be a violation of this Order.

This condition is similar to Condition 10 in the LUC's 2009 Decision, Condition 7 in the Planning Commission's 2009 Decision, and Condition 6 in the ENV's 2017 proposed conditions. The concept is that the operations of the landfill must comply with applicable laws and regulations. During the 2011 Application proceeding, we reviewed the Landfill's poor regulatory track record, including the violations cited by the EPA. 2011AP Ex. K59 (1/31/06 DOH NOV with 18 counts); 2011AP Ex. K101 (10/25/06 DOH Warning Letter); 2011AP Ex. K125 (5/3/07 DOH Warning Letter); 2011AP Ex. K82 (9/5/08 DOH Warning Letter); 2011AP Ex. K66 (5/13/10 DOH NOV); 2011AP Ex. K60 (4/5/06 EPA NOV); 2011AP Ex. K123 (11/29/11 EPA NOV for violating the Clean Water Act). KOCA's proposed Condition requires compliance with the EPA, the solid waste management permit and any other federal or state agency. KOCA's Condition also provides that a violation of the identified rules and regulations is a violation of the decision and order. That condition is already implied in the prior orders.

KOCA's Condition 2.d provides:

The ENV shall obtain all necessary approvals from the United States Environmental Protection Agency, the State Department of Health, the State Department of Transportation, the State Commission on Water Resource Management, the City and County of Honolulu Board of Water Supply and any other federal, state or municipal agency prior to commencing any onsite or off-site improvements or activities.

This condition is similar to Condition 1 of the LUC's 2009 Decision, except that KOCA has added a reference to the EPA.

KOCA Condition 2.e provides:

In accordance with Chapter 11-60.1 of the Hawai'i Administrative Rules, entitled "Air Pollution Control," the ENV shall be responsible for ensuring that effective dust control measures during all phases of development, construction and operation of the Landfill are provided to prevent any visible dust emission from impacting surrounding areas. The dust control management plan for the Landfill, which must identify and address all activities that have a potential to generate fugitive dust, is incorporated and made a part of this Order.

This condition is similar to Condition 2 of the LUC's 2009 Decision, except that KOCA's condition makes the dust control management plan a part of the decision and order.

KOCA's Condition 2.f provides:

The ENV shall prepare, implement and maintain a landscaping plan for the Landfill that (1) incorporates the features of the surrounding natural landscape and enables the Landfill to blend seamlessly into its environment and (2) reduces erosion and rivulets at the Landfill. Prior to the implementation of the landscaping plan, the ENV shall submit the plan to the Association for review and comment.

This condition is new and intended to mitigate the visual blight of the Landfill on the surrounding community.

KOCA's Condition 2.g provides: "The ENV shall prepare, implement and maintain a schedule pursuant to which City and commercial waste collection and transportation vehicles enter the Landfill without waiting or queuing on Farrington Highway for a period of more than five minutes." **KOCA's Condition 2.h** provides:

"The ENV shall prepare, implement and maintain a plan to minimize the emission of noise and odors from the Landfill. With respect to odors, the plan shall include the use of an odor-neutralizing mist system as contemplated by the FEIS." These conditions are new and intended to mitigate the effects of truck traffic and the release of waste from their loads.

KOCA's Condition 2.i provides: "The ENV shall prepare, implement and maintain a schedule for the weekly monitoring and removal of waste, including but not limited to trash and debris, in the area surrounding the Landfill." This condition is new and intended to mitigate the effect of fugitive waste on the surrounding area.

KOCA's Condition 2.j provides: "The ENV shall monitor whether City and commercial vehicles entering the Landfill have covered and secured their loads to prevent the spilling or scattering of the contents and shall enforce violations." This condition is new and intended to mitigate the adverse effects of the Landfill.

KOCA's Conditions 3.a to 3.b are discussed above.

KOCA's Condition 4 provides: "The ENV shall file with the Planning Commission an approved closure plan one year prior to closing to all forms of waste on March 2, 2027." This condition is new and intended to ensure timely closure of the Landfill.

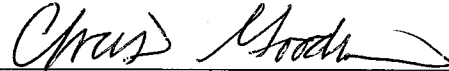
KOCA's Condition 5 was discussed above and was already adopted by the Planning Commission.

VII. CONCLUSION

In light of the foregoing, KOCA respectfully requests that the Planning Commission deny the Applications unless it imposes the additional conditions in KOCA's Findings.

DATED: Honolulu, Hawai'i, February 5, 2018.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

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

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

FILE NO. 2008/SUP-2

**DECLARATION OF
CHRISTOPHER T. GOODIN**

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

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

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

DECLARATION OF CHRISTOPHER T. GOODIN

I, Christopher T. Goodin, hereby declare as follows:

1. I am one of the attorneys for Ko Olina Community Association and Senator Maile Shimabukuro (together, "KOCA") in this action and make this declaration based on personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of KOCA's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed January 27, 2017, with the Honolulu Planning Commission.

3. Attached hereto as **Exhibit 2** is a true and correct copy of an excerpt of the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed May 2, 2012, with the Honolulu Planning Commission.


4. Attached hereto as **Exhibit 3** is a true and correct copy of the Transcript of Proceedings from March 1, 2017, before the Honolulu Planning Commission.

5. Attached hereto as **Exhibit 4** is a true and correct copy of the letter dated September 22, 2009, from Abbey Seth Mayer of the State Office of Planning to Ransom Plitz of the State Land Use Commission.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the Stipulation and Order to Continue Proceedings to April 22, 2017, signed by counsel for the Department of Environmental Services.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, February 5, 2018.


CHRISTOPHER T. GOODIN

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

In the Matter of the Application of

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For a New Special Use Permit to
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Sanitary Landfill, Waimānalo Gulch,
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And 73

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

FILE NO. 2008/SUP-2

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

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

EXHIBITS 1 & 2

CERTIFICATE OF SERVICE

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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RECEIVED

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

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

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

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

The central issues this proceeding are directly related: when will Applicant Department of Environmental Services of the City and County of Honolulu (the “**ENV**” or “**City**”) close the Waimanalo Gulch Sanitary Landfill (the “**Landfill**” or “**WGS�**”) and open a new landfill. As the record shows, the City repeatedly agreed to close WGS� and repeatedly broke its promises. Instead of closing the Landfill, the City has doubled the size of WGS�.

As the record shows, WGS� burdens the community. Among other problems, WGS� has been cited for more violations of federal and state laws than any landfill in the State of Hawai‘i. Those violations reflect operating practices that harm the nearby residents, local businesses and the environment. For example, in Janu-

ary 2011 the Landfill released vast amounts of municipal solid waste into coastal waters. The waste, including medical sharps, washed up on public beaches.

As the record shows, the Honolulu Planning Commission (the “**Commission**”) and the Hawai‘i Land Use Commission (“**LUC**”) have repeatedly ordered the City to open a new landfill. Most recently, beginning in 2010, the Commission ordered the City to develop a new landfill with “reasonable diligence.” More than six years later, the City has merely identified eleven “potential sites” for a landfill. To date, the City has not settled on a single site as the future location of the landfill.

Rather than work with reasonable diligence to identify a new landfill site, the City opposes a firm closure deadline for WGSL. The community has endured the Landfill for 28 years. It is time for another area to share in the burden that all O‘ahu residents and business share in creating.

As the record shows, a new landfill could be developed in less than seven years. To provide the City ample time to site and develop a new landfill and ensure that the parties do not have to appear before the Commission on a request for an extension, KOCA proposes a reasonable closure schedule. Specifically, the Landfill should (1) immediately close to all forms of MSW that may be disposed of through other means, subject to certain exceptions (consistent with the ENV’s prior proposed form of order); (2) close to most remaining forms of waste by March 1, 2024; and (3) and close completely by March 1, 2027. The evidence in this case, as set forth in the attached findings, supports these deadlines and the other conditions in KOCA’s proposed order.

To assist the Commission in reviewing the proposed orders, Exhibit 1 to the this submission is a table listing each element of KOCA's proposed form of order and comparing those elements with prior orders entered by the Commission and the LUC and with the form of order that the ENV proposed in 2012. A copy of ENV's prior proposed form of order is attached as Exhibit 2.

KOCA respectfully asks that the Commission enter its proposed Findings of Fact, Conclusions of Law and Decision and Order.

DATED: Honolulu, Hawai'i, January 27, 2017.

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Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
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In the Matter of the Application of the

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And 73

FILE NO. 2008/SUP-2

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

EXHIBIT A

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special
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**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER**

On December 3, 2008, Applicant Department of Environmental Services of the
City and County of Honolulu (the “ENV” or “City”) filed an application (the “2008

Application) for a new special use permit (“**SUP**”) for the Waimanalo Gulch Sanitary Landfill (the “**Landfill**” or “**WGSL**”) and for the withdrawal of the existing SUP for the Landfill. On June 28, 2011, the ENV filed an application to modify the SUP for the Landfill (the “**2011 Application**”). The Honolulu Planning Commission (the “**Planning Commission**”) consolidated the 2008 and 2011 Application proceedings.

Pursuant to Planning Commission Rule § 2-77(a) and the State of Hawai‘i Land Use Commission’s (the “**LUC**”) October 8, 2012 order, and based on the record in this consolidated matter, including the evidence and arguments presented at the contested case hearings; the credibility of the witnesses testifying at the hearings; 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 consolidated findings of fact, conclusions of law and decision and order. These findings, conclusions, and decision and order shall completely supersede the Planning Commission’s August 4, 2009 Findings of Fact, Conclusions of Law 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

1. The Landfill is located at 92-460 Farrington Highway, Honouliuli, Ewa, O‘ahu. 2008 Application at Part 1.

2. In 2003, the Landfill was expanded by 21 acres for a total of 107.5 acres. 2011 Application Proceeding (“**2011AP**”) Ex. K2 (LUC’s 2003 decision).

3. In this consolidated matter, the ENV seeks, among other things, to expand the permitted size of the Landfill by 92.5 acres for a total of approximately 200 acres. 2008 Application at 1-1.

A. Procedural History Regarding the 2008 Application

(a) The DPP Accepted an FEIS for the Landfill Expansion.

4. On November 23, 2006, the Office of Environmental Quality Control of the State of Hawai‘i (the “**OEQC**”) published notice that the environmental impact statement (“**EIS**”) for the expansion of the WGSL was available for public review and comment. *See* 2008 Application Proceeding (“**2008AP**”) 5/1/09 Department of Planning and Permitting of the City and County of Honolulu (“**DPP**”) findings of fact, conclusions of law, and decision and recommendation (“**DPP’s 2009 Recommendation**”) at 6.

5. On October 13, 2008, a final environmental impact statement for the Landfill expansion (the “**2008 FEIS**”) was accepted by the DPP on behalf of the Honolulu Mayor. 2008AP DPP’s 2009 Recommendation at 6; 2008AP 8/11/09 ENV’s opp. to Intervenors’ motion to dismiss, Ex. 7.

6. On October 23, 2008, the OEQC published notice of the 2008 FEIS acceptance. 2008AP DPP's 2009 Recommendation at 6.

(b) The ENV Filed the 2008 Application.

7. On December 3, 2008, the ENV filed the 2008 Application to expand the 107.5-acre operating portion of the property by approximately 92.5 acres for a total of approximately 200 acres (the "Project"). 2008 Application at 1-1.

8. Of the approximately 92.5 acres in the expansion area, approximately 37 acres were to be utilized for landfill cells and related uses. 2008 Application at 1-2.

9. In addition, the expansion area was to include the development of landfill-associated support infrastructure, including drainage, access roadways, a landfill gas collection and monitoring system, leachate collection and monitoring systems, stockpile sites, a public drop-off center, a landfill gas-to-energy system and other related features. 2008 Application at Part 1.

10. In the 2008 Application, the ENV sought to withdraw its existing SUP for approximately 107.5 acres, Special Use Permit File No. 86/SUP-5, and the conditions imposed therein, if the request for the new SUP was granted. 2008AP DPP's 2009 Recommendation at 3.

11. The Planning Commission scheduled a public hearing to consider ENV's application for May 6, 2009.

12. On April 3, 2009, a notice of the hearing of the matter was published in the *Honolulu Star-Bulletin*.

(c) Ko Olina Community Association, Ms. Shimabukuro and Ms. Hanabusa Moved to Intervene.

13. On April 16, 2009, Ko Olina Community Association (the "**Association**"), the Honorable Maile Shimabukuro and the Honorable Colleen Hanabusa (collectively, "**Intervenors**") filed a petition to intervene in the 2008 Application proceeding.

14. On April 24, 2009, the ENV filed a memorandum in opposition to Intervenors' petition to intervene.

(d) The DPP Recommended Approval of the 2008 Application.

15. On May 1, 2009, the DPP transmitted its report and recommendation for approval of the 2008 Application to the Planning Commission.

(e) May 1, 2009 Site Visits.

16. On May 1, 2009, the Planning Commission conducted a site visit to the Landfill and the H-POWER facility.

(f) May 6, 2009 Hearing.

17. On May 6, 2009, the Planning Commission held a public hearing at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawai'i, and heard public testimony.

(g) Mr. Apo Moved to Intervene.

18. On May 7, 2009, Todd K. Apo ("**Mr. Apo**") filed a petition to intervene.

19. On May 18, 2009, the ENV filed a memorandum in opposition to Mr. Apo's petition.

(h) Intervenors Filed a Motion to Recuse Commission Kaopua.

20. On May 19, 2009, Intervenors filed a motion to recuse Commissioner John Kaopua.

(i) May 20, 2009 Hearing.

21. On May 20, 2009, the Planning Commission resumed the public hearing at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawai'i.

22. The Planning Commission heard and granted Intervenors' petition to intervene.

23. Pursuant to Planning Commission Rules Subchapter 5, the matter was noted as a contested case.

24. The Planning Commission also heard argument on Mr. Apo's petition to intervene.

(j) The ENV Opposed Intervenors' Motion to Recuse.

25. On June 5, 2009, the ENV filed a memorandum in opposition to Intervenors' motion to recuse Commissioner Kaopua.

(k) June 10, 2009 Hearing.

26. On June 10, 2009, the hearing resumed at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawai'i.

27. The Planning Commission heard and granted Intervenors' motion to recuse Commissioner Kaopua. 2008AP 6/10/09 Minutes at 9.

28. The Planning Commission denied Mr. Apo's petition to intervene on the grounds that it was untimely filed, that Mr. Apo's position regarding the 2008 Ap-

plication was substantially the same as the position of the Intervenors and that the proceeding would be inefficient and unmanageable if Mr. Apo were allowed to intervene. 2008AP 7/27/09 Planning Commission's findings of fact, conclusions of law, and order at 3.

29. The Planning Commission closed the public hearing on the 2008 Application.

(l) The Parties Filed Their Respective Witness Lists.

30. On June 15, 2009, Intervenors filed their list of witnesses naming 42 potential witnesses, including Mr. Apo. The ENV also filed its list of witnesses naming six potential witnesses.

(m) June 22, 2009 Hearing.

31. On June 22, 2009, the contested case hearing began at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawai'i.

32. The ENV offered Exhibits A1 through A31, which were accepted into the record by the Planning Commission. 2008AP 6/22/09 Tr. at 29:2-13.

33. The ENV called to testify Brian Takeda, who was qualified as an expert in the field of urban and regional planning, and Hari Sharma, Ph. D., who was qualified as an expert in the field of geotechnical and geo-environmental engineering. 2008AP 6/22/09 Tr. at 33:5-8 (Takeda), 234:7-12 (Sharma).

34. Intervenors offered, and the Planning Commission received into the record, Exhibits B1 and B4. 2008AP 6/22/09 Tr. at 81:6-11; 226:14-15.

(n) June 24, 2009 Hearing.

35. On June 24, 2009, the Planning Commission resumed the contested case hearing at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawai'i.

36. The examination of Dr. Sharma was completed.

37. The ENV called to testify Joseph R. Whelan, who was the General Manager of Waste Management of Hawaii, Inc. ("**Waste Management**"), which operates the Landfill.

(o) Intervenors Moved to Dismiss the 2008 Application.

38. On June 29, 2009, Intervenors filed a motion to dismiss the 2008 Application, contending that the 2008 FEIS did not cover the entire 200-acre site and, therefore, the 2008 Application must be dismissed.

(p) July 1, 2009 Hearing.

39. On July 1, 2009, the Planning Commission resumed the contested case hearing at Kapolei Hale, 1000 Ulukouia Street, Kapolei, Hawai'i.

40. The examination of Mr. Whelan was completed.

41. The ENV called to testify Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering, and Frank Doyle, who at the time was the Chief of the Division of Refuse, City and County of Honolulu. 2008AP 7/1/09 Tr. at 93:2-8 (Von Pein); 176:4-9 (Doyle).

42. The ENV offered, and the Planning Commission accepted for the record, Exhibit A32. 2008AP 7/1/09 Tr. at 168:16-17.

(q) July 2, 2009 Hearing.

43. On July 2, 2009, the Planning Commission resumed the contested case hearing at the City Council Chambers, Third Floor, 530 South King Street, Honolulu, Hawai'i.

44. The ENV offered no further witnesses and concluded its case-in-chief. 2008AP 7/2/09 Tr. at 4:15-17.

45. Intervenors began their case-in-chief and presented testimony from Abbey Mayer, Josiah Hoohuli, William J. Aila, Jr., Daniel Banchiu, Cynthia Rezentes, Maeda Timson and Mr. Apo.

46. The ENV offered, and the Planning Commission received into the record, Exhibits A33 and A34. 2008AP 7/2/09 Tr. at 32:20-25, 240:7-13.

47. Intervenors offered, and the Planning Commission received into the record, Exhibit B5. 2008AP 7/2/09 Tr. at 185:21-23.

48. Other documents were referenced by the Planning Commission and the parties as Exhibits B2 and B3, but the documents were not received into evidence. 2008AP 7/2/09 Tr. at 9:4-6, 21:25.

49. Intervenors rested their case. 2008AP 7/2/09 Tr. at 279:15.

(r) The ENV Opposed Intervenors' Motion to Dismiss.

50. On July 6, 2009, the ENV filed a memorandum in opposition to Intervenors' motion to dismiss the 2008 Application.

(s) **July 8, 2009 Hearing.**

51. On July 8, 2009, the Planning Commission resumed the contested case hearing at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawai'i.

52. The ENV presented as a rebuttal witness David M. Shideler, who was qualified as an expert in archaeology and historical cultural resources. 2008AP 7/8/09 Tr. at 11:16–21.

53. The ENV offered, and the Planning Commission received into the record, Exhibits A35, A36 and A37. 2008AP 7/8/09 Tr. at 8:25–9:5, 65:14–22, 68:6–13.

54. Intervenors made their witness, Mr. Apo, available for additional questions by Commissioner Beadie Dawson.

55. The examination of Mr. Apo was completed.

56. The Planning Commission heard and denied Intervenors' motion to dismiss the 2008 Application.

(t) **Post-Hearing Submissions by the Parties.**

57. On July 17, 2009, the ENV filed its post-hearing brief and its proposed findings of fact, conclusions of law, and decision and order ("**proposed findings**"). Intervenors also filed their post-hearing brief and proposed findings.

58. On July 29, 2009, the ENV filed a response to Intervenors' post-hearing brief and exceptions to Intervenors' proposed findings. Intervenors filed a reply brief to the ENV's post-hearing brief and its proposed findings.

(u) The Commission's 2009 Decision

59. On August 4, 2009, the Planning Commission entered its findings of fact, conclusions of law, and decision and order granting the 2008 Application.

60. In its decision, the Planning Commission imposed several conditions, including the following:

1. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. The Applicant's effort to identify and develop such sites 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 O'ahu. Upon the selection of a new landfill site or sites on O'ahu, 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/SUP-2 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time.

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

3. The Applicant shall provide, without any prior notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on O'ahu, the WGS�'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 on June 1 of each year subsequent to the date of this Decision and Order.

....

5. WGS� shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.

6. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGS� with Hawaiian Electric Company, with

respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

7. The operations of the WGS� under 2008/SUP-2 shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.

8. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

9. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

10. The Applicant shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

2011AP Ex. K12 at 25-26 (2009 decision).

(v) The LUC's 2009 Decision.

61. The Planning Commission transferred the record and its decision in the 2008 Application proceeding to the LUC.

62. On September 10, 2009, Intervenors filed a motion to intervene before the LUC.

63. On September 17, 2009, the ENV filed a memorandum in opposition to Intervenors' motion to intervene.

64. On September 21, 2009, Intervenors filed a motion to deny the 2008 Application.

65. On September 23, 2009, the ENV filed a memorandum in opposition to Intervenors' motion to deny the 2008 Application.

66. On September 24, 2009, the LUC conducted a meeting on the 2008 Application in the Kaua'i Meeting Room, Sheraton Waikiki Hotel, Honolulu, Hawai'i. The LUC held a hearing and recognized the Association, Ms. Shimabukuro and Ms. Hanabusa as having intervenor status based their intervenor status before the Planning Commission.

67. The LUC also heard argument from the ENV and Intervenors regarding the 2008 Application.

68. Following discussion, a motion carried to grant the 2008 Application, subject to:

- (1) the withdrawal of County Special Use Permit File No. 86/SUP-5 and LUC Docket No. SP87-362, provided that the existing conditions therein shall be incorporated to the extent they are consistent with and applicable to this decision and are not duplicative of any additional conditions imposed hereafter;
- (2) the conditions as recommended by the Planning Commission in County Special Use Permit File No. 2008/SUP-2 (LUC Docket No. SP09-403) and modified as appropriate; and (3) . . . additional conditions

2011AP Ex. K15 at 4 (LUC's 2009 decision).

69. On October 22, 2009, the LUC filed its decision and imposed the following additional conditions:

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.

15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regard to the continued use of the WGSL, including any funding arrangements that are being considered by the City Council and the City Administration.

16. The City Council and the City Administration shall have a public hearing every three months to report on the status of their efforts to either reduce or continue the use of the WGSL.

2011 AP Ex. K15 at 8–9 (LUC’s 2009 decision).

(w) The Parties Appealed the LUC’s 2009 Decision.

70. The ENV and Intervenors appealed the LUC’s 2009 decision.

a. The ENV’s Appeal to Circuit Court.

71. On November 19, 2009, the ENV filed a notice of appeal to the Circuit Court of the First Circuit, State of Hawai’i, challenging the LUC’s Conditions 14, 15 and 16.

72. The ENV did not challenge any conditions imposed by the Planning Commission.

b. Intervenors’ Appeal to Circuit Court.

73. On November 19, 2009, Intervenors filed a notice of appeal challenging the LUC’s decision to permit the expansion of the Landfill and its continued operation.

c. The Circuit Court’s Decision in the Appeals.

74. On July 14, 2010, the circuit court held a hearing.

75. On September 21, 2010, the circuit court entered an order affirming the LUC’s 2009 decision with modifications. The circuit court affirmed Condition 14. With respect to Conditions 15 and 16, the circuit court deleted the references to the Honolulu City Council and the City administration and substituted the ENV as the responsible body. The circuit court affirmed the LUC’s decision in all other respects.

76. On October 19, 2010, the circuit court entered final judgment in both appeals.

d. The ENV Appealed the Circuit Court's Decision to Affirm Condition 14 to the ICA.

77. On November 12, 2010, the ENV filed its notice of appeal with the State of Hawai'i Intermediate Court of Appeals (the "ICA"). On appeal, the ENV only challenged Condition 14.

78. Intervenors did not appeal the circuit court's ruling.

79. On July 14, 2011, the ENV filed an application to transfer the case to the Hawai'i Supreme Court.

80. On August 1, 2011, the supreme court granted the application to transfer.

B. Procedural History Regarding the 2011 Application

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

81. While the ENV's appeal of Condition 14 was pending, on June 28, 2011, the ENV filed the 2011 Application to modify the SUP by deleting the LUC's Condition 14. 2011AP Ex. K161 at 1 (2011 Application).

82. The 2011 Application sought 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 "LUC's 2009 Order")], by deleting the July 31, 2012, deadline to cease disposal of municipal solid waste at [the Waimanalo Gulch Sanitary Landfill], as set forth in Condition No. 14 of said Order." 2011AP Ex. K161 at 3 (6/28/11 Steinberger letter).

83. By requesting the deletion of Condition 14, the ENV "seeks to use the WGSL until it reaches its permitted capacity" 2011AP Ex. K161 at 3 (6/28/11 Steinberger letter).

84. According to the ENV, “[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.” 2011AP Ex. K161 at 4 (6/28/11 Steinberger letter).

85. The ENV further asserts that it is “in the public interest to use WGSLS . . . to capacity.” 2011AP Ex. K161 at 4 (6/28/11 Steinberger letter).

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

87. On September 9, 2011, the DPP Director sent the Planning Commission a report and recommendation for approval of the 2011 Application. 2011AP 9/9/11 Memorandum from David K. Tanoue to Chair Pingree and Members of the Planning Commission (“**DPP’s 2011 Recommendation**”). See Planning Commission Rules § 2-41(d).

(b) The Association, Ms. Shimabukuro and Schnitzer Moved to Intervene.

88. On September 16, 2011, the Association and Ms. Shimabukuro (together, “**KOCA**”) filed a motion to recognize them as parties or, alternatively, to intervene.

89. The same day, Schnitzer Steel Hawaii Corp. (“**Schnitzer**”) filed a motion to intervene.

90. On September 23, 2011, the ENV filed a memorandum in opposition to KOCA’s motion.

91. On September 30, 2011, KOCA filed a reply to the ENV’s memorandum in opposition.

92. On October 5, 2011, the Planning Commission held a public hearing on the 2011 Application at the Mission Memorial Auditorium, 550 South King Street, Honolulu, Hawai'i.

93. The Planning Commission heard testimony in favor of the 2011 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. 2011AP 10/5/11 Tr. at 5:3, 19:6, 20:6, 25:13, 28:8, 31:17.

94. The Planning Commission heard testimony in opposition to the 2011 Application from Councilmember Tom Berg of the Honolulu City Council; Patty Teruya of Nanakuli-Maili Neighborhood Board No. 36; Celeste Lacuesto; and Evelyn Souza. 2011AP 10/5/11 Tr. at 15:4, 22:21, 29:4, 30:11.

95. The Planning Commission granted Schnitzer's petition to intervene, granted KOCA's motion to intervene and denied KOCA's alternative motion for continued recognition as party intervenors. 2011AP 10/5/11 Tr. at 35:5-23, 42:9-43:3.

96. Accordingly, pursuant to Planning Commission Rule § 2-56(c), the 2011 Application was "processed as a contested case."

(c) The Planning Commission Held a Prehearing Conference.

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

(d) The Parties Filed Witness Lists.

98. On October 26, 2011, the ENV filed a list of witnesses naming five potential witnesses. KOCA filed a list of witnesses naming 31 potential witnesses. Schnitzer filed a list of witnesses naming one potential witness.

(e) The Planning Commission Entered an Order Regarding the Prehearing Conference.

99. 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).

(f) KOCA Moved to Dismiss the 2011 Application for Lack of Jurisdiction.

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

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

(g) The Parties Stipulated to Amend the Briefing Schedule.

102. 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.”

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

103. On December 7, 2011, the Planning Commission held a hearing on KOCA’s motion to dismiss at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawai‘i (“**Mission Memorial Hearings Room**”).

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

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

106. Thereafter, the parties made opening statements.

(i) **Written Direct Testimony.**

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

108. 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**”).

109. Schnitzer attempted to file the written direct testimony of Schnitzer General Manager Larry Snodgrass. Because Mr. Snodgrass did not sign his written direct testimony, it is not admissible in the contested case hearing.

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

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

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

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

112. At the request of KOCA, on January 6, 2012, the Planning Commission issued a subpoena duces tecum to Waste Management, which operates the Landfill. 2011AP Ex. K164 (subpoena duces tecum).

113. 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." 2011AP Ex. K164 (subpoena duces tecum at 2).

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

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

116. Waste Management did not produce any notes or other records of employee interviews, despite the fact that an internal investigation report prepared for Waste Management references interviews with employees and concludes, "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." 2011AP Ex. K160 at 1 (9/28/11 landfill gas report). Nevertheless, Waste Management represented that it had produced all responsive documents and that it had no additional documents to produce related to its internal investigation regarding fabricated gas wellhead readings or any other matter responsive to the subpoena. 2011AP 2/8/12 Tr. 9:17-13:21.

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

(I) January 11, 2012 Hearing.

118. On January 11, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

119. The ENV called Director Steinberger to testify.

120. 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. 2011AP 1/11/12 Tr. at 15:12-17:23, 96:2-4.

(m) January 25, 2012 Hearing.

121. On January 25, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

122. The ENV called Branch Chief Chang to testify. Schnitzer called Mr. Snodgrass to testify.

123. The ENV rested, subject to its right to call rebuttal witnesses. Schnitzer rested without reserving the right to call rebuttal witnesses. 2011AP 1/25/12 Tr. at 71:17-72:1, 86:20.

124. The ENV indicated that it intended to call two rebuttal witnesses. 2011AP 1/25/12 Tr. at 87:12-16.

125. KOCA objected to ENV's intention to call these witnesses as rebuttal witnesses, rather than direct witnesses. 2011AP 1/25/12 Tr. at 87:17-24, 88:24-89:10. The Commission overruled KOCA's objection. 2011AP 1/25/12 Tr. at 89:16-17.

126. Without objection, the Planning Commission received into evidence the ENV's Exhibits A1-A33 and KOCA's Exhibits K163-K169. 2011AP 1/25/12 Tr. at 6:10-20; 37:14-20, 51:8-13, 55:12-16, 85:22-86:3.

(n) February 8, 2012 Hearing

127. On February 8, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

128. KOCA called Mr. Williams, Ms. Munson, Ms. Rezendes and Mr. Hospodar to testify.

129. Without objection, the Planning Commission received into evidence the ENV's Exhibits A34 and A35. 2011AP 2/8/12 Tr. at 29:25–30:2, 56:6–9.

(o) **March 7, 2012 Hearing**

130. On March 7, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

131. KOCA called Mr. Kane and Mr. Miller to testify.

132. 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.” 2011AP 3/7/12 Tr. at 17:25–19:25.

133. Without objection, the Planning Commission received into evidence KOCA's Exhibits K170, K171, K173, K174, K175, K176, K178, and K179. 2011AP 3/7/12 Tr. at 152:19–155:5, 122:17–123:1.

134. 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, Dr. Sharma and DOH Deputy Director Gary Gill (“**Deputy Director Gill**”). 2011AP 3/7/12 Tr. at 218:7–15.

135. 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. 2011AP 3/7/12 Tr. at 218:18–219:1.

136. The Planning Commission overruled KOCA's objection. 2011AP 3/7/12 Tr. at 219:6–7.

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

(p) April 4, 2012 Hearing.

138. On April 4, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

139. The parties agreed to take the remaining witnesses out of order due to scheduling difficulties. 2011AP 4/4/12 Tr. at 6:6-7-15.

140. Schnitzer called Tom Zalenka, vice president of environmental affairs for Schnitzer, as a rebuttal witness.

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

142. KOCA called Ms. Shimabukuro and Ms. Timson to testify.

143. KOCA rested subject to its right to call rebuttal witnesses. 2011AP 4/4/12 Tr. at 143:11-13.

144. 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. 2011AP 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.

(q) April 11, 2012 Hearing.

145. On April 11, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

146. The ENV called Dr. Sharma and Director Steinberger as rebuttal witnesses.

147. Without objection, the Planning Commission qualified Dr. Sharma as an expert in landfill design and permitting. 2011AP 4/11/12 Tr. at 9:11–20.

148. The Planning Commission received into evidence the ENV's Exhibits A37–A50. 2011AP 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. 2011AP 4/4/12 Tr. at 36:15–17, 37:7–12.

149. Without objection, the Planning Commission also received into evidence KOCA's Exhibits K189, K190, K193, K195, K196, K198, K230, K247, and K251. 2011AP 4/11/12 Tr. at 191:19–21.

(r) April 23, 2012 Hearing.

150. On April 23, 2012, the Planning Commission resumed the contested case hearing at the Mission Memorial Hearings Room.

151. KOCA called Mr. Miller and Eddie Belloumini of Ko Olina Resort Operations as rebuttal witnesses.

152. 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.

153. Thereafter, the Planning Commission closed the evidentiary portion of the hearing. 2011AP 4/23/12 Tr. at 49:16–21.

154. The Planning Commission heard closing arguments from the parties. 2011AP 4/23/12 Tr. at 49:22–80:7.

155. The Planning Commission scheduled decision-making for the 2011 Application on May 25, 2012, at the Mission Memorial Hearings Room.

(s) 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.

156. At the April 23, 2012 contested case hearing the Planning Commission received into evidence without objection 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. 2011AP 4/23/12 Tr. at 48:4-23.

157. On April 27, 2012, KOCA moved 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 in the SSC's scores that was discovered after the hearing closed.

158. The motion explained that 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. Because of the error, SMS provided new scores for the sites, a new ranking list and a new map of the ranked sites. Based on the new list, the scores and map entered into evidence as Exhibit K258 were no longer accurate.

159. 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.

160. On May 1, 2012, the ENV filed a memorandum in opposition to KOCA's motion.

(t) The Parties Filed Proposed Findings of Fact, Conclusions of Law, and Decisions and Orders.

161. On May 2, 2012, the ENV, Schnitzer and KOCA filed their respective proposed findings of fact, conclusions of law, and decisions and orders (“**proposed findings**”).

162. On May 14, 2012, the ENV filed a response and Schnitzer filed exceptions to KOCA’s proposed findings. KOCA also filed responses to the ENV’s and Schnitzer’s proposed findings.

C. The Hawai’i Supreme Court’s Decision on Condition 14 and the Subsequent Proceedings on the 2008 and 2011 Applications.

(a) The Hawai’i Supreme Court’s Decision.

163. On May 4, 2012, the Hawai’i Supreme Court decided the ENV’s appeal of the LUC’s 2009 decision.

164. The supreme court held that Condition 14 was “not supported by substantial evidence in the record,” and therefore, could not be affirmed. *Dep’t of Env’tl. Servs. v. Land Use Comm’n*, 127 Hawai’i 5, 17, 275 P.3d 809, 821 (2012).

165. The supreme court further concluded that, “[h]aving held that Condition 14 cannot stand because it is inconsistent with the evidence shown in the record and not supported by substantial evidence, the LUC’s approval of SUP-2 also cannot stand because Condition 14 was a material condition to the LUC’s approval.” *Id.* at 17–18, 275 P.2d at 821–22.

166. Accordingly, the supreme court vacated the circuit court’s judgment affirming the LUC Decision and remanded the case on the 2008 Application “to the

LUC for further hearings as the LUC deems appropriate.” *Id.* at 18, 275 P.2d at 822.

167. In remanding the 2008 Application proceeding, the supreme court acknowledged the 2011 Application proceeding pending before the Planning Commission and “encourage[d] the LUC to consider any new testimony developed before the Planning Commission in that case.” *Id.* at 19 n.16, 275 P.2d at 823 n.16.

(b) The ENV Filed a Notification or Motion to Stay in the 2008 Application Proceeding.

168. On May 15, 2012, the ENV filed a notification of the Hawai'i Supreme Court's decision on Condition 14 or, alternatively, a motion to stay proceedings on the 2011 Application during the pendency of the remand proceedings before the LUC.

169. On May 22, 2012, KOCA filed a memorandum in opposition to the motion.

(c) The LUC Urged the Planning Commission to Stay Proceedings on the 2011 Application.

170. On May 22, 2012, LUC Chair Normand R. Lezy sent a letter on behalf of the LUC to Planning Commission Chair Gayle Pingree urging the Planning Commission to stay its proceedings on the 2011 Application until the LUC remands the 2008 Application proceedings to the Planning Commission.

171. Based on the supreme court's recommendation for the LUC to consider the new testimony in the 2011 Application proceeding, Chair Lezy explained that consolidation on remand of the 2008 and 2011 Application proceedings would serve the public interest and provide a more economical disposition of both matters.

172. Chair Lezy noted that, if the Planning Commission stayed the proceedings on the 2011 Application, the LUC would forward the record on remand for the 2008 Application proceeding to the Planning Commission.

(d) May 25, 2012 Hearing in the 2008 Application Proceeding.

173. On May 25, 2012, the Planning Commission held a hearing in the contested case at the Mission Memorial Hearings Room.

174. Chair Pingree confirmed that the hearing portion of the contested case hearing was not closed. 2011AP 5/25/12 Tr. at 11:5–7.

175. The Planning Commission entered a six-month stay of 2011 Application proceeding pending the decision of the LUC on the 2008 Application proceeding or any future request by the parties to the Planning Commission. 2011AP 5/25/12 Tr. at 11:14–13:2. Based on its disposition, the Planning Commission did not decide KOCA's motion to supplement or the ENV's motion to stay.

(e) The Planning Commission Advised the LUC of Its Decision to Stay the 2011 Application Proceeding.

176. On May 29, 2012, Chair Pingree sent a letter to Chair Lezy explaining that on May 25, 2012, the Planning Commission had decided that a six-month stay of its proceedings on the 2011 Application was warranted pending the LUC's decision on the 2008 Application proceeding after remand or a future request to the Planning Commission by any party.

177. Chair Pingree stated that it was unnecessary for the LUC to remand the 2008 Application proceeding to the Planning Commission.

178. Chair Pingree noted that, as an exception to the stay, the Planning Commission would transmit the record for the 2011 Application proceeding to the LUC for its consideration.

(f) The LUC Remanded the 2008 Application Proceeding to the Planning Commission for Consolidation with the 2011 Application Proceeding and Entry of a Consolidated Decision.

179. On July 5, 2012, the LUC met in Leiopapa A Kamehameha, Conference Room 204, Second Floor, 235 South Beretania Street, Honolulu, Hawai'i. The purpose of the meeting was to discuss and deliberate on the procedural issues arising from the remand from the supreme court.

180. At the meeting, the LUC heard public testimony from Ian Sandison, Esq. on behalf of Schnitzer.

181. Following public testimony, the LUC heard oral argument on the procedural options available to the LUC. The ENV orally moved for, and the LUC granted, an additional two weeks for the parties to file written briefs to more fully address the procedural issues.

182. On July 12, 2012, the LUC filed an order granting the ENV's request to submit additional briefing.

183. On July 18, 2012, Schnitzer filed a statement regarding procedural issues and next steps in light of the supreme court's decision.

184. On July 19, 2012, KOCA filed a brief in support of remand with instructions. The ENV filed a brief in support of the LUC retaining jurisdiction. Ms. Hanabusa filed a memorandum regarding procedural issues. The State of Hawai'i Office of Planning filed a brief on procedural issues.

185. On September 14, 2012, the LUC met at Ihilani Hotel, Lurline Room, 92-1001 Olani Street, Ko Olina, Hawai'i, to continue discussion and deliberation on procedural issues.

186. After receiving public testimony, the LUC heard argument from the parties on the procedural issues and options available to the LUC.

187. On October 8, 2012, the LUC entered an order remanding the 2008 Application proceeding to the Planning Commission "for the expressed purpose of consolidating it with the proceeding on the [2011 Application] in order that the Planning Commission may issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order on the matter to the LUC for further action pursuant to section 205-6, HRS, and sections 15-15-95 and 15-15-96, HAR."

(g) December 19, 2012 Hearing Before the Planning Commission.

188. On December 19, 2012, the Planning Commission held a hearing at the Mission Memorial Hearings Room to discuss the 2008 and 2011 Applications and the remand order from the LUC.

189. At the hearing, the ENV asked the Planning Commission to continue the proceeding to allow the parties an opportunity to discuss the submission of joint findings and conclusions. KOCA joined in the request. Ms. Hanabusa and Schnitzer did not object.

190. The Planning Commission continued the hearing.

(h) KOCA Filed a Motion to Effect Consolidation of the 2008 and 2011 Application Proceedings.

191. On January 15, 2013, KOCA filed a motion to effect the consolidation of the 2008 and 2011 Application proceedings as ordered by the LUC.

192. On January 23, 2013, the ENV filed a memorandum in opposition to the motion.

(i) The Planning Commission Continued the Hearing.

193. The Planning Commission hearing resumed on February 20, 2013, at Mission Memorial Hearings Room.

194. The hearing concerned the LUC's October 8, 2012 remand order and KOCA's motion to effect consolidation.

195. The same day, the parties filed a stipulation to continue the hearing so that the parties could discuss a resolution of this matter.

196. The Planning Commission continued the hearing to April 17, 2013.

197. On April 10, 2013, the Commission continued the hearing to allow the parties to attempt to reach a stipulated order to be presented to the Commission for review and decision.

(j) The LUC's October 22, 2015 Hearing.

198. On October 22, 2015, the LUC held a hearing at the Airport Conference Center, 400 Rodgers Boulevard, Suite 700, Room #3.

199. The ENV and KOCA updated the LUC on the parties' negotiations.

(k) The LUC's May 18, 2016 Hearing.

200. On May 18, 2016, the LUC held a hearing at State Office Tower, Leiopapa A. Kamehameha Building, Conference Room 405.

201. The ENV updated the LUC on the parties' negotiations.

202. The LUC directed that a letter be written to the Planning Commission to inquire about the status of proceedings.

(l) The Planning Commission's May 25, 2016 Letter.

203. On May 25, 2016, the Planning Commission wrote a letter to the parties requesting a status report.

204. By letter dated June 3, 2016, the ENV advised that all parties, except for Ms. Hanabusa, had signed a stipulation to stay proceedings and that the ENV was preparing a motion to stay proceedings. The ENV submitted a copy of the stipulation, a copy of which is attached hereto as Exhibit A.

205. On June 13, 2016, the State Office of Planning submitted a status report to the Planning Commission.

(m) The ENV's June 22, 2016 Motion to Stay Proceedings.

206. On June 22, 2016, the ENV moved to stay proceedings to April 22, 2017 so that the parties could continue to explore a stipulated resolution of this matter.

207. KOCA filed a joinder in the motion, and Schnitzer filed a joinder in KOCA's joinder.

(n) The Planning Commission's August 17, 2016 Hearing on the LUC's Remand Order and KOCA's Motion to Effect Consolidation.

208. On August 17, 2016, the Planning Commission held a hearing at Mission Memorial Hearings Room.

209. The Planning Commission granted KOCA's motion to effect consolidation. 2011AP 8/17/16 Tr. at 32:21-33:16. The Planning Commission denied the ENV's motion to stay proceedings. 2011AP 8/17/16 Tr. at 33:19-34:2.

(o) The ENV's September 30, 2016 Motion to Reopen Evidence.

210. On September 30, 2016, the ENV moved to reopen the contested case hearing for the limited purpose of taking official notice of facts.

211. On October 6, 2016, Schnitzer filed a joinder in the motion.

212. On October 7, 2016, KOCA filed a response to the motion and Hanabusa filed a statement.

213. On September 22, 2016, Hanabusa filed a statement regarding KOCA's motion to reopen.

(p) The ENV's September 30, 2016 Motion to Reopen Evidence.

214. On October 5, 2016, the ENV moved for an extension of time for filing of proposed findings and for consideration of and decision making on all motions pending before the Planning Commission.

215. On October 6, 2016, KOCA filed a response to the motion.

(q) The Planning Commission's October 12, 2016 Hearing on KOCA's and the ENV's Motions to Reopen Evidence.

216. The Planning Commission held a hearing on October 12, 2016 in the Mission Memorial Hearings Room.

217. The Planning Commission denied KOCA's motion to reopen the contested case hearing filed April 27, 2012, denied the ENV's motion to reopen the contested case hearing filed September 30, 2016 and granted in part the ENV's motion for extension of time to the extent that the motion requested additional time for filing of proposed findings.

(r) The Parties Filed Proposed Findings of Fact, Conclusions of Law and Decisions and Orders.

218. On January 27, 2017, the parties filed proposed findings of fact, conclusions of law and decisions and orders.

219. On February 10, 2017, the parties filed responses to the other parties' proposed findings of fact, conclusions of law and decisions and orders.

(s) The Planning Commission's March 1, 2017 Hearing on the Proposed Findings of Fact, Conclusions of Law and Decisions and Orders.

220. On March 1, 2017, the Planning Commission held a hearing at Mission Memorial Hearings Room regarding the proposed findings of fact, conclusions of law and decisions and orders.

D. Substantive Findings

(a) History of the Landfill.

221. The Landfill is owned by the City and operated by Waste Management. See 2008AP 7/1/09 Tr. at 179:4-8 (Doyle).

222. The state land use district designation for the property is Agricultural District. 2011AP DPP's 2011 Recommendation at 1.

223. The existing City zoning district for the property is AG-2, General Agricultural District. 2011AP DPP's 2011 Recommendation at 1.

224. The Ewa Development Plan recognizes the Landfill. 2011AP DPP's 2011 Recommendation at 1.

225. Existing uses of the property are landfill and open space. 2011AP DPP's 2011 Recommendation at 1.

226. Elevations at the property range from a low of 70 feet above mean sea level (msl) to 940 feet (msl) in the northern portion. Except for areas of fill, the steep-sloped valley contains dryland grasses and an abundance of rock outcrops. 2008AP DPP's 2009 Recommendation at 8.

227. The soil found at the property consists primarily of Rock Land (rRK) with small amounts of Stony Steep Land (rSY). 2008 Application at 2-30.

228. According to the Agricultural Lands of Importance to the State of Hawai'i system, the property is not classified as Prime Agricultural Land, Unique Agricultural Land or Other Important Agricultural Lands. 2008AP Ex. A1 at 8-13 (2008 FEIS).

229. The University of Hawai'i Land Study Bureau overall master productivity rating for the property is "E," which indicates very poor crop productivity potential. 2008 Application at 2-31.

230. The Federal Emergency Management Agency Flood Insurance Rate Map identifies the Landfill property as within "Zone D," an area in which flood hazards are undetermined. 2008AP Ex. A1 at 5-31 to 5-32 (2008FEIS).

231. The property is not located within the Special Management Area. 2008AP Ex. A1 at 8-12, 8-14 (2008 FEIS).

(b) History of the Landfill Prior to the 2008 Application Proceeding.

232. Because the Landfill is located with the State Land Use Agricultural District, 2011AP Ex. K12 at 9 (¶ 42) (8/4/09 Commission order), and a landfill is not a use expressly allowed under Hawai'i Revised Statutes chapter 205, 2011AP Ex. K155 at 17 (¶ 7) (3/14/08 LUC order), the landfill operations require an SUP pursuant to HRS § 205-6.

233. Because the area is more than 15 acres, the Commission and the LUC have permitting responsibility and oversight for the Landfill. 2011AP 4/11/12 Tr. at 185:15-18 (Steinberger).

234. The Landfill received an SUP in 1987 to operate on 60.5 acres. 2011AP Ex. K69 (04/20/87 LUC Decision). In its decision approving the SUP, the LUC 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." 2011AP Ex. K69 4 (¶ 15) (4/20/87 LUC Decision). The "projected full-life" of the landfill was "approximately eight years." 2011AP Ex. K69 7 (¶ 29) (4/20/87 LUC Decision).

235. The Landfill was permitted to accept municipal solid waste and sewage sludge.

236. "Municipal solid waste" or "MSW" 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 Rules ("HAR") § 11-58.1-03.

237. The Landfill began operations in 1989. 2011AP Ex. K93 at 2 (9/08 ENV status report).

238. That same year, the site was expanded by an additional 26 acres. 2011AP Ex. K70 at 5 (¶ 18), 9 (10/31/89 LUC order).

239. As the Landfill approached capacity, the ENV proposed that the site be expanded by 60 acres and extended "for another fifteen years." 2011AP Ex. K85 at 96:18-20 (3/27/03 Tr.: Doyle).

240. 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. 2011AP Rezendes Written Direct Testimony at 3–4 (¶¶ 8–10).

241. “After numerous lengthy meetings within the community, in June or July of 2002[,] [former acting ENV Director Frank Doyle (“**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.” 2011AP Rezendes Written Direct Testimony at 4 (¶ 12).

242. “In exchange, the community tended to back off, and the process went through the Planning Commission and the [LUC].” 2011AP Rezendes Written Direct Testimony at 4 (¶ 13); *see also* 2011AP 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.”).

243. In the 2003 proceedings before the LUC, 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.” 2011AP 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.”); 2011AP 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.”); 2011AP Ex. K220 at 177:1–9 (7/1/09 Tr.: Doyle).

244. In the 2003 proceedings, 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.**” 2011AP 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.” 2011AP 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.” 2011AP Ex. K85 at 145:21–146:2 (3/27/03 Tr.).

245. Consistent with the City’s agreement with the community, in the 2003 proceedings before the LUC the community made no request for intervention and no contested case hearing was held. *See* 2011AP Ex. K2 (6/9/03 LUC Order).

246. At the conclusion of the 2003 proceedings, the LUC directed the Honolulu City Council to select a new site by June 1, 2004 and to close the Landfill by May 1, 2008. 2011AP Ex. K2 at 7 (¶ 1), 9 (¶ 12), 10 (¶ 15) (6/9/03 LUC Order).

247. Businesses were started and homes were purchased in the area with the understanding that the Landfill would close in 2008. 2011AP Munson Written Direct Testimony at 3 (¶ 5), 9 (¶ 21); 2011AP 2/8/12 Tr. at 15:11–15 (Williams); 2011AP Williams Written Direct Testimony at 13 (¶ 29.j).

248. In 2003, the ENV convened a site selection committee, which identified several potential sites for a new landfill, none of which included the WGSL. 2011AP 1/11/12 Tr. at 50:17–21 (Steinberger); 2011AP Ex. K58 at 5 (12/1/03 SSC report).

249. This recommendation was consistent with the ENV's representations to the LUC 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." 2011AP Ex. K85 at 177:22–25 (3/27/03 Tr.: Doyle).

250. The City Council received an extension of the June 1, 2004 deadline from the LUC to December 1, 2004. 2011AP Ex. A10 at 6 (5/10/04 LUC order).

251. 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. 2011AP 1/11/12 Tr. at 52:6–15 (Steinberger).

252. No new landfill was developed.

253. 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.” 2011AP Ex. K155 at 1–2 (3/14/08 LUC order).

254. On March 14, 2008, the LUC amended the condition to extend the closure deadline to November 1, 2009. 2011AP 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.”).

255. The Landfill’s solid waste management permit issued by the DOH states that the Landfill “may accept MSW and ash for disposal until the date specified in the associate[d] Special Use Permit or until the landfill/monofill reaches the permitted capacity, whichever comes first.” 2011AP Ex. A4 (6/4/10 solid waste management permit).

(c) The 2008 Application and the Expansion Project.

256. On December 3, 2008, the ENV filed the 2008 Application for a new special use permit to utilize an additional 93 acres, for a total of 200 acres. 2011AP Ex. K12 at 2 (¶ 5) (8/4/09 Commission order).

257. In addition to completing an FEIS for the Project, *see supra* section I.A.(a), the ENV obtained a traffic impact report (“**TIR**”) for the Project. 2008AP Tr. 6/22/09

51:6–11 (Takeda); 2008AP Ex. A1, Appendix I (2008 FEIS). The TIR analyzed the existing traffic transiting Farrington Highway on both the eastbound and westbound approaches as well as the volume of traffic entering and exiting the Landfill. 2008AP Ex. A1, Appendix I (2008 FEIS).

258. The TIR concluded that even with the expansion of the Landfill, the volume of traffic would not be expected to increase dramatically. Traffic going in and out of the Landfill is less than approximately one percent of the total volume of traffic in the region. 2008AP Tr. 6/22/09, 51:18–24 (Takeda).

259. Also in connection with the Project, an Archaeological Inventory Survey, Waimanalo Gulch Landfill Expansion, 2008 (“AIS”) and a Cultural Impact Assessment (Draft), Waimanalo Gulch Landfill Expansion, 2008 (“**Cultural Impact Assessment**”) were prepared. 2008AP Ex. A1, Appendices G and H, respectively (2008 FEIS).

260. One historic property, State Inventory of Historic Properties (“SIHP”) #50-80-12-6903, was identified by the study. 2008AP Ex. A1, Appendix G at 45. SIHP# 50-80-12-6903 consists of three large upright boulders potentially utilized as trail or boundary markers. 2008AP Ex. A1, Appendix G at 45 (2008 FEIS).

261. The ENV proposed to address SIHP# 50-80-12-6903 within a mitigation/preservation plan to be reviewed and accepted by the State Historic Preservation Division, Department of Land and Natural Resources, State of Hawai‘i (“SHPD”). 2008AP 6/22/09 Tr. at 49:21–50:5 (Takeda); 2008AP Ex. A3 (3/4/09 letter from ENV to SHPD). Specifically, the ENV proposed to temporarily relocate the

upright stones to Battery Arizona and return the upright stones as close as possible to their current locations after the Landfill has been closed. 2008AP 6/22/09 Tr. at 49:5–20 (Takeda); 2008AP Ex. A3 (3/4/09 letter from ENV to SHPD).

262. SHPD reviewed the ENV's proposed mitigation and determined that there is no effect to historic properties, as stated in a letter from SHPD to the DPP April 2, 2009. 2008AP 6/22/09 Tr. at 49:20–51:1 (Takeda); 2008AP Ex. A4 (4/2/09 letter from SHPD to DPP).

263. The Cultural Impact Assessment found that “[t]he importation of landfill material over the past fifteen years has most likely eliminated any historic properties and plant resources related to Hawaiian cultural practices and beliefs that may have been present within the bounds of the landfill property.” 2008AP Ex. A1, Appendix H at 79 (2008 FEIS); see also 2008 Application at 2-98.

(d) The Leeward Community Has Opposed the Continued Operation of the Landfill.

264. The Landfill is located across the street from Ko Olina Resort. 2011AP 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.” 2011AP Williams Written Direct Testimony at 2 (¶ 5).

265. Before the Landfill was permitted, the area where Ko Olina Resort sits was intended to be a resort. 2011AP Williams Written Direct Testimony at 2–3 (¶¶ 7–9); 2011AP Ex. K132 at 3, 7 (Ewa Development Plan: “[The area now known as Ko Olina] shall be developed as a resort destination area providing scenic, recrea-

tional and open space elements with an integration of residential and commercial uses into the overall design of the resort.”). O’ahu

266. By the time Ko Olina was developed, the Landfill was supposed to have been closed. 2011AP Williams Written Direct Testimony 9 (¶ 3); 2011AP Ex. K69 at 7 (¶ 28) (4/20/87 LUC order).

267. Ko Olina is home to thousands of residents and dozens of business. 2011AP 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).

268. Ko Olina is an economic engine for the west side of O’ahu 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.” 2011AP 2/8/12 Tr. at 21:8–14 (Williams).

269. “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 onetime tax—in one-time taxes from construction period spending.” 2011AP 2/8/12 Tr. at 21:15–20 (Williams).

270. 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." 2011AP 2/8/12 Tr. at 21:21–22:1 (Williams).

271. These benefits are jeopardized by the continued operation of the Landfill. 2011AP 2/8/12 Tr. at 15:15–17 (Williams); 2011AP 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).

272. Ko Olina's residents, workers and visitors have expressed concerns regarding the odors, noise, dust, blasting, visual blight, truck traffic and flying litter from the Landfill. 2011AP Williams Written Direct Testimony at 9 (§ 29).

273. 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." 2011AP 2/8/12 Tr. at 58:21–24 (Munson).

274. Ms. Munson also testified that her lanai is covered with dirt every day from the Landfill. 2011AP 2/8/12 Tr. at 59:19–60:8 (Munson).

275. 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.

276. Ms. Shimabukuro testified that her constituents and her fellow legislators, State Representative Jo Jordan and then-U.S. Representative Hanabusa, have consistently voiced their opposition to the Landfill. 2011AP 4/4/12 Tr. at 124:25–126:10 (Shimabukuro); 2011AP Ex. K44 (8/12/11 letter from Representative Jordan); 2011AP Ex. K46 (8/13/11 letter from Congresswoman Hanabusa).

277. Councilmember Tom Berg, who represented District 1, which includes the Waianae Coast, Kapolei, and Ewa, testified in opposition to the Landfill. 2011AP 10/5/11 Tr. at 15:11–22.

278. The Makakilo/Kapolei/Honokai Hale, Waianae Coast, and Nanakuli-Maili Neighborhood Boards have consistently voted to close the Landfill. 2011AP 10/5/11 Tr. at 23:6–7, 24:1–6, 24:23–25:2 (Patty Teruya, Chair of the Nanakuli-Maili Neighborhood Board); 2011AP 4/4/12 Tr. at 131:12–14 (Shimabukuro); 2011AP 3/7/12 Tr. at 134:22–135:1 (Timson); 2011AP Ex. K47 (8/17/11 letter from George S. Yamamoto, Chair of the Makakilo/Kapolei/Honokai Neighborhood Board).

279. The Leeward coast has a larger share of environmental burdens, including “the military bases, Kahe Power Plant, H-POWER, [and] Honouliuli Waste Treatment Plant.” 2011AP 3/7/12 Tr. at 127:9–20 (Shimabukuro).

280. No member of the Leeward community testified in support of the Landfill.

(e) The Landfill Has Posed a Danger to Health and Safety.

281. 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. 2011AP 1/25/12 Tr. at 15:25–16:13, 39:24–40:3 (Chang).

282. 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.” 2011AP 3/7/12 Tr. at 133:24–134:1 (Miller); *see also* 2011AP 3/7/12 Tr. at 20:10–21, 33:33–35:15.

283. 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, containing eighteen counts. 2011AP 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. 2011AP Ex. K101 (10/25/06 warning letter). These potential violations included exceeding permitted fill grades and failure to monitor leachate levels. 2011AP Ex. K101 at 2 (10/25/06 warning letter). Additionally, Waste Management was required to resubmit its storm water management system design to ensure compliance with applicable regulations and the SUP. 2011AP 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. 2011AP Ex. K125 (5/3/07 warning letter). These potential violations included exceeding permitted fill grades, failure to monitor leachate levels and inadequate soil cover. 2011AP 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. 2011AP Ex. K82 (9/5/08 warning letter). These potential violations included unauthorized storage of materials and the failure to submit written notification of the exceedance and veri-

fication of methane gas monitoring results. 2011AP 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. 2011AP Ex. K66 (5/13/10 NOV); 2011AP 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. 2011AP Ex. K66 (5/13/10 NOV)

284. Since 2006, the DOH has assessed close to \$2 million in fines against the Landfill. 2011AP Ex. K59 (1/31/06 NOV); 2011AP Ex. K66 (5/13/10 NOV).

285. In 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. 2011AP Steinberger Written Direct Testimony at 27 (¶ 82). The failure to monitor gas readings was a threat to public health and safety. 2011AP 3/7/12 Tr. at 131:23–132:10 (Miller); 2011AP 1/11/12 Tr. at 91:1–92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).

286. In addition to the foregoing, at the time of the hearing in 2011 the DOH had a pending enforcement case against the Landfill. 2011AP 4/4/12 Tr. at 156:20–22 (Gill: “There is a pending enforcement case which I can’t speak to in any detail regarding the handling of storm water runoff from the landfill.”); 2011AP 4/4/12 Tr.

at 157:10–12 (Gill: “There is . . . , to be clear, potential enforcement action regarding the events around the flood event at the landfill.”).

287. 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. 2011AP 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. 2011AP Ex. K123 (letter at 1; 11/29/11 NOV at 4–5).

288. 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.” 2011AP 3/7/12 Tr. at 28:12–16 (Miller).

289. The City and Waste Management have taken actions to remedy the violations. 2011AP 1/11/12 Tr. at 147:23–149:1 (Steinberger); 2011AP 1/25/12 Tr. at 59:10–22 (Chang); 2011AP Steinberger Written Direct Testimony at 26–27 (¶ 81).

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

290. In December 2010 and January 2011, the Landfill experienced heavy rains. 2011AP 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. 2011AP Ex. K52 (12/23/10 DOH investigation report).

291. 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.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report).

292. 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.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report).

293. “The Landfill’s storm water drainage system discharges to the Pacific Ocean at a shoreline outfall of the Ko Olina resort.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report).

294. 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.” 2011AP Ex. K52 at 2–3 (12/23/10 DOH investigation report); 2011AP Ex. K97 (1/11/11 DOH inspection report at 2).

295. 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.

296. The ENV refused to issue the press release on the ground that the storm water was not leachate. 2011AP Ex. K55 at 3 (1/12/11 Steinberger e-mail).

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

298. 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. 2011AP Ex. K55 at 4–5 (1/12/11 Steinberger e-mail).

299. On January 12, 2012, the Landfill received heavy rains. 2011AP Ex. K56 at 1 (1/12/11 and 1/13/11 station summaries from Palehua Hawaii).

300. 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. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5).

301. The water dislodged unknown quantities of MSW, sewage sludge, leachate and medical solid waste from Cell E6 into coastal waters. 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report: “Contents of the E6 cell include municipal solid waste such as general refuse, medical waste, as well as intermediate cover material.”).

302. The medical solid waste included sharps, chemotherapy wastes and pathological wastes. K73 at 2 (1/27/11 Honolulu Civil Beat article); 2011AP Williams Written Direct Testimony at 18 (¶ 43).

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

304. The waste spread to beaches up the Leeward coast as far as Pokai bay, 2011AP Shimabukuro Written Direct Testimony at 7 (¶ 10.e), and east as far as Nimitz Beach, 2011AP Williams Written Direct Testimony at 18 (¶ 44).

305. No one from the ENV or Waste Management called Ko Olina's operations to warn them about the flood. 2011AP 2/8/12 Tr. at 94:12-19 (Hospodar).

306. For ten days, Ko Olina expended substantial time and resources to clean up the MSW that had washed up on Ko Olina's beaches. 2011AP Williams Written Direct Testimony at 22 (¶ 48); 2011AP Hospodar Written Direct Testimony at 7-11 (¶ 21); 2011AP 4/23/12 Tr. at 42:9-16 (Belluomini).

307. The ENV and Waste Management did not provide any assistance in cleaning up Ko Olina's lagoons. 2011AP 2/8/12 Tr. at 85:22-86:8, 94:24-95:2 (Hospodar); 2011AP 4/23/12 Tr. at 42:4-6 (Belluomini).

308. Neither the ENV nor Waste Management offered to reimburse Ko Olina for the more than \$20,000 in clean-up costs. 2011AP 2/8/12 Tr. at 95:19-96:5 (Hospodar).

309. Waste Management charged Ko Olina to redeposit the collected waste at the Landfill. 2011AP 2/8/12 Tr. at 88:24-89:1 (Hospodar); 2011AP 4/23/12 Tr. at 69:6-8 (Belluomini).

310. 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. 2011AP Ex. K133a (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini).

311. 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. 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar).

312. 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.” 2011AP 4/4/12 Tr. Supp. at 8:7–13 (Gill); *see also* 2011AP 4/11/12 Tr. at 65:11–16, 67:1–4 (Sharma); 2011AP 3/7/12 Tr. at 29:1–6, 39:12–21 (Miller).

313. 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.” 2011AP Ex. K208 at 1 (1/22/11 article: Gill).

314. The industry standard is to have necessary drainage systems completed before filling cells at a landfill. 2011AP 3/7/12 Tr. at 39:25–40:4, 126:13–20, 128:14–129:13, 172:19–173:3 (Miller); 2011AP 4/11/12 Tr. at 31:24–32:10 (Sharma).

315. As Dr. Sharma explained, “[b]efore you place the waste, the diversion should be completed.” 2011AP 4/11/12 Tr. at 32:9–10 (Sharma).

316. The Landfill's design plans contemplated that the diversion channel would be in place before Cell E6 was filled. 2011AP 4/11/12 Tr. at 66:7-9, 66:15-17 (Sharma); 2011AP 4/11/12 Tr. at 74:10-15 (Steinberger).

317. However, the ENV stated that Waste Management had to begin filling Cell E6 before the western diversion channel was in place. 2011AP 4/11/12 Tr. at 33:12-21 (Sharma); 75:13-18 (Steinberger).

318. 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. 2011AP 4/11/12 Tr. at 145:6-12 (Steinberger); 2011AP 4/11/12 Tr. at 47:22-24, 67:5-9 (Sharma).

319. Director Steinberger identified two such delays. First, there was a challenge to the Environmental Impact Statement (EIS) for the Landfill. 2011AP 4/11/12 Tr. at 74:19-23, 145:16-19 (Steinberger).

320. Director Steinberger conceded that a challenge to the EIS was not unexpected. 2011AP 4/11/12 Tr. at 145:22-23 (Steinberger).

321. Second, intervenors opposed the expansion of the Landfill in 2009. 2011AP 4/11/12 Tr. at 74:23-25 (Steinberger).

322. However, the ENV knew it would have to go through the SUP approval process and, given the history of the Landfill and the prior proceedings, should have anticipated intervention in the approval proceedings. 2011AP 4/11/12 Tr. at 145:24-146:14, 149:3-5 (Steinberger); 2011AP Ex. K2 (6/5/03 LUC order); 2011AP Ex. K155

(3/14/08 LUC order); 2011AP Ex. K155 at 3 (¶¶ 5–8) (6/5/03 LUC order); 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle).

323. No one from Waste Management appeared to testify.

324. Based on the record, it is apparent that inadequate planning by the ENV and Waste Management caused the Landfill to run out of safely useable space before the diversion channel had been completed. 2011AP 3/7/12 Tr. at 186:4–21 (Miller).

325. This inadequate planning forced the ENV and Waste Management to deviate from the Landfill's design plans and the industry standard and by filling Cell E6 before the diversion channel was in place. 2011AP 4/11/12 Tr. at 66:7–9 (Sharma: "And [the diversion channel] was intend to be [in place prior to the storm]."); 2011AP 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."); 2011AP 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.").

(g) The City's Current Waste Stream and Alternative Disposal Methods.

326. The MSW in the City's current waste stream includes putrescible waste, such as sewage sludge, biosolids, green waste and food waste. 2011AP 3/7/12 Tr. at 100:16–17; 102:9–12 (Miller).

327. Putrescible waste is of one of the greatest concerns because it decomposes and causes odors that burden the community. 2011AP 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”); 2011AP 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”); 2011AP 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.”).

328. Currently, all putrescible waste that is not burned or recycled is taken to the Landfill. 2011AP 1/11/12 Tr. at 68:11-15 (Steinberger); 2011AP 4/11/12 Tr. at 114:9-14, 123:20-24 (Steinberger).

329. 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 in the contested case proceeding, the ENV diverted 34.4% of the total MSW from the Landfill to H-POWER. 2011AP Ex. A27 (O’ahu MSW waste stream chart). In 2010, the ENV also diverted 36.9% of the total MSW from the Landfill through general material recycling. 2011AP Ex. A27 (O’ahu MSW waste stream chart). In May 2010, ENV accomplished island wide-expansion of its curbside green waste recycling program to 160,000 residences. 2011AP Steinberger Written Direct Testimony at 19 (¶ 56). The City has a program of community recy-

cling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. 2011AP Steinberger Written Direct Testimony at 20–21 (¶¶ 61–62).

330. Despite these efforts, in 2010 the Landfill still accepted 163,736 tons of MSW. 2011AP Ex. A27 (O’ahu MSW waste stream table).

331. The continued 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” 2011AP 4/4/12 Tr. Supp. at 12:5–6 (Gill).

332. 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.” 2011AP 3/7/12 Tr. at 21:24–22:5 (Miller).

a. Sewage Sludge and Biosolids.

333. The record shows that particular areas for improvement are the sewage sludge and biosolids programs. 2011AP 1/11/12 Tr. at 68:13–15 (Steinberger); 2011AP 1/25/12 Tr. 54:3, 54:11-13 (Chang).

334. “Sewage sludge” refers to the raw sludge from wastewater prior to processing in a treatment system where the biosolids are extracted. 2011AP 4/11/12 Tr. at 77:19–22 (Steinberger).

335. As of 2011, “[a]bout 65 percent of the island’s generated sewage sludge goes to the [L]andfill.” 2011AP 1/11/12 Tr. at 68:13–15 (Steinberger). The ENV took “15,000 to 20,000 tons per year of sewage sludge” to the Landfill. 2011AP Steinberger Written Direct Testimony at 24 (¶ 74).

336. Branch Chief Chang acknowledged that sewage sludge can be burned and that other municipalities do burn sewage sludge. 2011AP 1/25/12 Tr. 54:3, 54:11-13 (Chang); *see also* 2011AP 1/11/12 Tr. 68:17 (Steinberger: “Sewage sludge can be incinerated.”). As of the close of evidence in this matter, the ENV did not burn sewage sludge. 2011Ap 1/11/12 Tr. at 68:12–15.

337. “Biosolids” are what can be extracted from the sludge and left after exiting a treatment system. 2011AP 4/11/12 Tr. at 77:22–24 (Steinberger). Class A biosolids may be used as a “growth enhancer,” similar to fertilizer. 2011AP 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. 2011AP 4/11/12 Tr. at 78:4, 80:16–19 (Steinberger).

338. While other municipalities began biosolids programs in the 1970s and 1980s, the ENV did not establish a biosolids program for Honolulu until 2006. 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids webpage); 2011AP Ex. K148 at 10 (Parametrix alternatives memorandum); 2011AP 3/7/12 Tr. at 139:11–140:4 (Miller). Approximately, thirty-five percent of the island’s sewage sludge was reused as biosolids. 1/11/12 Tr. at 68:13–15 (Steinberger).

339. The City's current alternative sewage sludge and biosolids management includes a digester or "egg" at the Synagro facility located at 1350 Sand Island Parkway, Honolulu, Hawai'i 96819 (the "**Synagro Facility**"). 2011AP 4/11/12 Tr. at 179:4-9 (Steinberger). This facility can only handle approximately 20,000 tons per year of sewage sludge. 2011AP Steinberger Written Direct Testimony at 23 (§ 71).

340. The ENV has conducted studies on sewage sludge management. Those studies recommended incineration at H-POWER and a second digester at the Synagro Facility. 2011AP 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. 2011AP 4/11/12 Tr. at 180:3-5 (Steinberger).

341. "About 65 percent of the island's generated sewage sludge goes to the [L]andfill." 2011AP 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. 2011AP 3/7/12 Tr. at 22:18-20, 96:4-7, 98:17-22, 139:11-140:4 (Miller).

b. Food Waste and Green Waste.

342. Another area for improvement is food waste recycling. At the close of evidence, the ENV had no food waste collection program. 2011AP Ex. K195 at 2, 4 (12/09 food waste article); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum). Although the ENV has entered into a contract for an In-Vessel Conversion Facility, which was expected be able to process green waste, food waste and biosolids, the facility was not expected to be operational until early 2013. 2011AP Steinberger Written Direct Testimony at 20 (§58).

343. Food waste can be disposed at H-POWER. 2011AP 1/11/12 Tr. at 71:7–10 (Steinberger); 2011AP 4/11/12 Tr. at 114:25-115:5, 123:23-24 (Steinberger).

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

c. Medical Waste.

345. Another area for improvement is the disposal of medical waste. While the prevailing trend is to burn medical waste, 2011AP 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. 2011AP Ex. K192 (Waste Management medical waste webpage).

d. Comparison with Other Municipalities.

346. San Francisco is a national leader in landfill waste diversion with a rate of 78%. 2011AP 1/11/12 Tr. at 79:2–5, 142:12–17 (Steinberger); 4/11/12 Tr. at 164:1–4 (Steinberger).

347. 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 (O'ahu waste stream table).

348. 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).

349. 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).

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

350. The existing H-POWER facility requires pre-preparation of waste so that it can be accommodated in the burn unit. 2011AP 1/11/12 Tr. at 65:14-17 (Steinberger). All non-burnable materials need to be separated out. 2011AP 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. 2011AP 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. 2011AP 1/11/12 Tr. at 66:1-4 (Steinberger). This pre-preparation requires worker handling of the waste. 2011AP 1/11/12 Tr. at 66:18-22 (Steinberger).

351. 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. 2011AP 4/11/12 Tr. at 170:22-171:10 (Steinberger).

352. No one from Covanta testified in these proceedings.

353.

354. At the close of evidence, a third H-POWER boiler was expected to be operational by October or November 2012. 4/11/12 Tr. at 176:7-10, 211:12-15 (Steinberger).

355. The third boiler was anticipated to have the capacity to take 300,000 tons of MSW a year. 2011AP Steinberger Written Direct Testimony at 18 (¶¶ 47, 50); 2011AP 4/11/12 Tr. at 84:22–24 (Steinberger).

356. With the third boiler, the ENV has said it will achieve a Landfill diversion rate of 90%. 2011AP Ex. K251 at 1–2 (5/5/11 ENV press release).

357. In 2010, the last year for which waste totals are available, the Landfill accepted 163,736 tons of MSW. 2011AP Ex. A26 (O‘ahu waste stream table).

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

359. The third boiler is known as a “mass burn unit.” 2011AP 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. 2011AP 1/11/12 Tr. at 66:8–10 (Steinberger). With less pre-preparation, there is less worker interaction with the waste. 2011AP 1/11/12 Tr. at 66:18–21 (Steinberger).

360. 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. 2011AP Steinberger Written Direct Testimony at 23 (¶ 71).

361. Director Steinberger confirmed that the ENV had instituted a change order to be able to burn sewage sludge. 2011AP 4/11/12 Tr. at 90:9–10, 90:20–21 (Steinberger).

362. Director Steinberger also confirmed that, with the third boiler operational, the ENV could stop sending sewage sludge to the Landfill by fall 2012. 2011AP 4/11/12 Tr. at 90:3–20, 174:1–6, 203:25 (Steinberger).

363. The third boiler will also have the capacity to burn the 10,000 tons of medical waste that currently goes to the Landfill. 2011AP 1/11/12 Tr. at 75:13–18 (Steinberger); 2011AP 4/11/12 Tr. at 163:12–16 (Steinberger).

364. Director Steinberger confirmed that with the third boiler operational, the ENV could stop sending medical waste to the Landfill by fall 2012. 2011AP 1/11/12 Tr. 75:19–22 (Steinberger); 2011AP 4/11/12 Tr. 171:16–172:10, 196:20–24 (Steinberger); *cf.* 2011AP 3/7/12 Tr. at 209:12–25 (Miller).

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

366. Steinberger agreed: “If it’s just solely MSW, I would say [Mr. Miller is] probably correct.” 2011AP 4/11/12 Tr. at 106:12–22 (Steinberger).

367. 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. 2011AP 1/11/12 Tr. at 77:7–13 (Steinberger).

368. Much of this small percentage “can go to . . . [the] PVT [C&D landfill],” including resins and chemical debris and petroleum contaminated soil. 2011AP

1/11/12 Tr. at 47:19–22, 145:4–146:1 (Steinberger); 2011AP 1/25/12 Tr. at 12:2–3, 44:12–14 (Chang).

369. After the third boiler is operational, but before a new landfill 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. 2011AP 4/11/12 Tr. at 118:9–15, 125:15–126:4, 189:13–17, 201:20–202:1 (Steinberger); 2011AP 3/7/12 Tr. at 24:23–23:7 (Miller).

370. 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).

371. 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.” 2011AP 3/7/12 Tr. at 100:10–12 (Miller).

372. H-POWER is generally burning twenty-four hours a day, seven days a week. 2011AP Ex. K220 at 220:23–223:1 (7/1/09 Tr.: Doyle); 2011AP 4/23/12 Tr. at 23:27 (Miller).

373. Only one H-POWER boiler is generally taken offline at a time and total shutdowns are typically not required. 2011AP Ex. K220 at 223:6–9 (7/1/09 Tr.: Doyle); *cf.* 2011AP 3/7/12 Tr. at 101:4–8 (Miller).

374. Unexpected shutdowns at waste-to-energy facilities are rare. 2011AP 3/7/12 Tr. at 101:12–14 (Miller).

375. H-POWER has to be reliable and predicable because, with the addition of the third boiler, it will be providing eight percent of O'ahu's power. 2011AP Ex. K251 at 1-2 (5/5/11 ENV press release).

376. 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.").

377. 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. All sewage sludge and all other putrescible waste, such as food waste and green waste, all treated medical waste (except sharps), and all combustible general MSW can be burned or disposed of through alternative means.

(i) In Addition to the Third Boiler, the ENV Will Have Alternative Means of Diverting Sewage Sludge, Food Waste and Green Waste from the Landfill.

378. In addition to the third boiler at H-POWER, the ENV will have the ability to recycle green waste, food waste and biosolids through its In-Vessel Conversion Facility, which was scheduled to be operational in 2013. 2011AP 4/11/12 Tr. at 79:2-3, 87:25-88:2, 176:11-13 (Steinberger); 2011AP Steinberger Written Direct Testimony at 20 (¶ 58); 2011AP Ex. K148 at 4 (Parametrix alternatives memorandum).

379. The facility will be able to take 15,000 to 20,000 tons of sewage sludge annually. 2011AP 4/11/12 Tr. at 177:3-10 (Steinberger).

380. In addition to the In-Vessel Conversion Facility, the ENV is also seeking to construct a second “egg” digester at its Sand Island facility. 2011AP 4/11/12 Tr. at 179:10–11 (Steinberger).

381. The second digester would provide redundancy for the existing facility and “take the over-capacity off the current digester.” 2011AP 4/11/12 Tr. at 179:6–9 (Steinberger).

382. 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. 2011AP 3/7/12 Tr. at 140:14–141:12, 176:22–177:1, 210:14–22 (Miller).

383. According to Director Steinberger, “ultimately, all of the biosolids that are produced on O‘ahu will go into some type of beneficial reuse as a class A biosolid.” 2011AP 4/11/12 Tr. at 79:3–6 (Steinberger). The “product will be distributed as a [plant] growth enhancer.” 2011AP 4/11/12 Tr. at 81:19–20 (Steinberger).

384. 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. 2011AP 3/7/12 Tr. at 176:22-177:1 (Miller).

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

385. It took the ENV “about two-and-a-half years” to identify, permit, and have the Landfill operational. 2011AP Ex. K220 at 244:16–19 (7/1/09 Tr.: Doyle).

386. On August 4, 2009, the Planning Commission ordered the ENV to find a new landfill site for MSW. 2011AP Ex. K12 at 25–26 (2009 decision).

387. The Planning 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.” 2011AP Ex. K12 at 25–26 (2009 decision).

388. The ENV was directed to proceed with “reasonable diligence.” 2011AP Ex. K12 at 25–26 (2009 decision).

389. 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. 2011AP 3/7/12 Tr. at 199:24–200:1 (Miller). The EIS process should take a year to a year and a half. 2011AP 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* 2011AP 3/7/12 Tr. at 202:14–203:6 (Miller).

390. Mr. Miller’s estimate is consistent with the timeline set out by Director Doyle. Director Doyle stated before the LUC: “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.” 2011AP Ex. K85 at 95:6–8 (3/27/03 Tr.: Doyle). 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).

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

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

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

394. Director Steinberger stated that to develop a new site would take “at best seven years” from site identification to operations. 2011AP 4/11/12 Tr. at 122:25 (Steinberger).

395. 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.

396. 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. 2011AP 4/4/12 Tr. at 56:17–18 (Marsters).

397. 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).

398. Although Dr. Sharma testified that “after mid ‘90s and in 2000 and onward, it has been a long, drawn process” based on new regulations enacted in 1993, 2011AP 4/11/12 Tr. at 51:22–52: 12, he conceded that those regulations were in place when Director Doyle provided his 5-year estimate to the LUC on March 27, 2003, 2011AP 4/11/12 Tr. at 52:15–18 (Sharma).

399. 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.” 2011AP 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.” 2011AP 4/11/12 Tr. at 41:21–22 (Sharma).

400. Dr. Sharma’s expertise is in design. 2011AP 4/11/12 Tr. at 9:11–20 (Sharma).

401. He has never sited a landfill, and he testified that he was not qualified to give expert testimony on landfill siting. 2011AP 4/11/12 Tr. at 41:10–15, 5:22–23 (Sharma).

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

(k) The City’s Current Site Selection Efforts.

403. The LUC’s 2009 Order directed the ENV to select and develop a “new” site that would either “replace or supplement” the existing Landfill. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

404. This directive removes the option of selecting WGSL as the “new” site. 2011AP 1/11/12 Tr. at 53:20–54:1 (Steinberger).

405. The site selection and development process was to begin on November 1, 2010. 2011AP Ex. K15 at 6 (¶ 4) (10/22/09 LUC order).

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

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

408. The site selection process has not followed the City’s Integrated Solid Waste Management Plan (“**Solid Waste Plan**”), which Director Steinberger referred to as the City’s “framework” for waste management. 2011AP 1/11/12 Tr. at 26:21–27:1 (Steinberger); *see also* 2011AP 3/7/12 Tr. at 25:2–20 (Miller); 2011AP 4/4/12 Tr. at 73:9–13 (Marsters).

409. 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); 2011AP 4/4/12 Tr. at 76:3–6, 76:16–18, 76:19–21, 77:21–24 (Marsters).

410. A number of the sites that the SSC may recommend are west of Makakilo. 2011AP Ex. K258 (4/20/12 SSC meeting photographs).

411. Further, the site selection process has not followed the detailed site selection procedures set out in the Solid Waste Plan. 2011AP Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update).

412. For instance, the ENV did not direct SCC to consider mitigation factors and obtain input from potentially affected neighborhoods before developing rankings. 2011AP 4/4/12 Tr. at 113:11–14, 116:10–21 (Marsters); 2011AP Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update); 2011AP Ex. K147 at 3 (Parametrix site selection memorandum).

413. Nor did the ENV 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); 2011AP Ex. K144 at 11-5 (10/08 Integrated Solid Waste Management Plan Update); 2011AP Ex. K147 at 3 (Parametrix site selection memorandum).

414. 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. 2011AP Ex. K147 at 3–4 (Parametrix site selection memorandum); 2011AP 3/7/12 Tr. at 94:9–12 (Miller).

415. More fundamentally, the site selection process did not move linearly from a broad consideration of sites to a narrow list of sites. 2011AP 3/7/12 Tr. at 23:8–13, 24:2–23 (Miller); 2011AP Ex. K147 at 4 (Parametrix site selection memorandum).

416. The consultant had the SSC start with the same list of approximately 40 sites, some of which were no longer viable options. 2011AP 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

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

418. The SSC had to repeatedly “[r]emove screens that [it] had not either previously discussed or authorized.” 2011AP 4/4/12 Tr. at 104:24–105:4 (Marsters).

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. 2011AP Ex. K218 at 2 (7/19/11 SSC group memory); 2011AP 4/4/12 Tr. at 84:3–16 (Marsters); 2011AP 4/4/12 Tr. at 84:17–23 (Marsters); 2011AP 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. 2011AP 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. 2011AP 4/4/12 Tr. at 87:13–15 (Marsters); 2011AP 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. 2011AP 4/4/12 Tr. at 88:1–17 (Marsters); 2011AP Ex. K152 at 2 (11/8/11 SSC group memory). One exclusionary criterion screened out lands owned by the State. 2011AP 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. 2011AP 4/4/12 Tr. at 89:11–17, 90:9–12 (Marsters); 2011AP 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. 2011AP 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. 2011AP Ex. K170 at 2 (2/1/12 SSC group memory). But the consultant applied nine screening factors to the 464 sites. 2011AP 4/4/12 Tr. at 93:10–13 (Marsters); 2011AP Ex. K170 at 2 (2/1/12 SSC group memory). After applying the screening factors, only six sites remained. 2011AP 4/4/12 Tr. at 93:18–21 (Marsters); 2011AP Ex. K170 at 3 (2/1/12 SSC group memory). The SSC eliminated four of those sites, so only two sites remained. 2011AP 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. 2011AP 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. 2011AP 4/4/12 Tr. at 96:12–22 (Marsters); 2011AP 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. 2011AP 4/4/12 Tr. at 96:23–97:3 (Marsters); 2011AP 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. 2011AP 4/4/12 Tr. at 97:4–18 (Marsters); 2011AP 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. 2011AP 4/4/12 Tr. at 98:7–99:21 (Marsters); 2011AP 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. 2011AP Ex. A47 (3/16/12 SSC group memory at 2). However, the consultant added an exclusionary criterion for parcels up gradient of parcels in or planned for residential use. 2011AP 4/4/12 Tr. at 102:23–103:2 (Marsters); 2011AP Ex. A47 (3/16/12 SSC group memory at 2). The SSC had not previously directed the consultant to include the up gradient screen. The SSC directed the consultant to eliminate the screen. 2011AP 4/4/12 Tr. at 103:3–10 (Marsters); 2011AP 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. 2011AP Ex. A47 (3/16/12 SSC group memory at 4).

419. Ms. Marsters explained: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.” 2011AP 4/4/12 Tr. at 104:20–23 (Marsters).

420. The SSC ranked sites in April 2012. 2011AP Ex. K258 (4/20/12 SSC meeting photographs).

421. 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.

422. There is no evidence in the record that the landfill site selection process is finished or that the ENV has set a deadline to complete the process.

423. 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.

(I) Closure of the Landfill.

424. One of the ENV's stated goals is "the elimination of landfilling materials other than ash in the near future." 2011AP Ex. K230 at 9 (3/12 sewage sludge report).

425. Under the Planning Commission's 2009 Order, the ENV had the option to select and develop a site that would either "replace or supplement" the Landfill. 2011AP Ex. K12 at 25-26 (2009 decision).

426. As Director Steinberger explained, "to develop a[n] [ash] monofill within an existing site is not that difficult of an accomplishment." 2011AP 1/11/12 Tr. at 61:22-24 (Steinberger).

427. To date, however, the ENV has directed the SSC to identify a site that could accept all forms of waste. 2011AP 4/4/12 Tr. at 72:13-24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory).

428. 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. 2011AP 4/4/12 Tr. at 72:25-73:4, 111:17-25 (Marsters); 2011AP 1/11/12 Tr. at 61:13-18 (Steinberger).

429. Once the new site opens, the ENV will no longer need the Landfill.

430. It is in the best interest of the community and consistent with the standards set by HRS § 205-6 to close the WGS� to landfill operations as soon as practicable after the ENV develops a new landfill site.

431. It is in the best interest of mitigating the impacts of the WGS�, including but not limited to the impact on native Hawaiian traditional practices, 2011AP Ex. A48 (4/2/09 letter to David K. Tanoue from the State Historic Preservation Division), to close the WGS� to landfill operations as soon as practicable after the ENV develops a new landfill site.

II. CONCLUSIONS OF LAW

1. The Planning Commission has jurisdiction to hold public hearings and make recommendations on all proposals to approve special use permits for "unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified," in accordance with the Planning Commission Rules. HRS § 205-6(a); HAR § 15-15-95; Planning Commission Rule § 2-45.

2. The Landfill requires a special use permit for its operations.

3. HRS § 91-10(5) provides that "the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

4. The ENV has the burden of proof to show by a preponderance of the evidence that its Applications meet the provisions of Planning Commission Rule § 2-45.

5. The ENV seeks a new SUP for the Landfill. Chapter 2, Subchapter 4 of the Planning Commission Rules sets forth the standards applicable to SUPs. Specifically, Planning Commission Rule § 2-45 of the provides as follows:

Test to be applied. Certain "unusual and reasonable" uses within agricultural districts other than those for which the district is classified may be permitted. The following guidelines are established as guidelines in determining an "unusual and reasonable" use:

- (a) Such use shall not be contrary to the objectives sought to be accomplished by the state land use law and regulations.
- (b) That the desired use would not adversely affect the surrounding property.
- (c) Such use would not unreasonably burden public agencies to provide public roads and streets, sewer, water, drainage and school improvements, and police and fire protection.
- (d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.
- (e) That the land upon which the proposed use is sought is unsuited for uses permitted in the district.

6. Based on the findings set forth above, and specifically considering the mitigating effect of and subject to the conditions imposed below, the Planning Commission concludes as follows:

a. The continued operation of the Landfill for a specific period and the requested expansion Project are not contrary to the objectives sought to be accomplished by the state land use law and regulations.

b. The continued operation of the Landfill for a specific period and the requested expansion Project would not adversely affect surrounding property as long as (1) operated in accordance with the conditions imposed below and governmental approvals and requirements and (2) mitigation measures are implemented

in accordance with the ENV's representations as documented in the 2008 FEIS and as set forth below.

c. The continued operation of the Landfill for a specific period and the requested expansion Project would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements or police and fire protection.

d. Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established that required the relocation of the City landfill for a specific period.

e. The land on which the WGSL is located is unsuited for agricultural purposes.

f. The foregoing findings continuing the SUP for WGSL depend upon the following:

- i. From the date of this Order until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGSL unless it cannot be disposed of within the City by any means other than landfilling; provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would other-

wise be processed at H-POWER or other facilities may be disposed of at the WGSL.

- ii. From March 2, 2024, until March 1, 2027, WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER; and (2) automobile-shredder residue.
- iii. The Landfill shall stop accepting any form of waste and close on or before March 2, 2027.
- iv. The ENV shall file a notice of intent to close approved closure plan for WGSL with the Planning Commission one year prior to the closing of the Landfill on March 2, 2027.

7. Based on the findings set forth above and subject to the conditions imposed below, the ENV has met its burden of proof with respect to the provisions set forth in Planning Commission Rule § 2-45.

8. This Commission has the authority to impose conditions on the SUP, including a time limit for the duration of the particular use at issue. Planning Commission Rule § 2-46(e); HAR § 15-15-95(e).

9. Based on the findings of fact set forth above, the Planning Commission concludes that the conditions imposed below are necessary to protect public health, safety and welfare and are material to the approval of the Application.

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 the consolidated Applications and APPROVE a new SUP in Special Use Permit File No. 2008/SUP-2

("2008/SUP-2") for the continued operation of the WGS� totaling approximately 200 acres, subject to the following conditions:

1. **General Conditions**

a. The Applicant shall continue its efforts to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. 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 efforts to select a new landfill site on O'ahu. Upon the selection of a new landfill site or sites on O'ahu, the Applicant shall provide written notice to the Planning Commission. Upon receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time. The Planning Commission shall make a recommendation to the LUC.

b. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge. The Applicant shall use alternative technologies, to the extent reasonably practicable, to divert waste from the Landfill as set out in Exhibit A (proposed Stipulation to Continue Proceedings Until April 22, 2017).

c. The ENV shall provide semi-annual reports to the Planning Commission and the LUC regarding (1) the status of the efforts to identify and develop a new landfill site on O'ahu, including but not limited to an approximate date on which a new landfill will be operational as provided by this Order, (2) the WGSL's operations, including gas monitoring, (3) the ENV's compliance with the conditions imposed herein, (4) the Landfill's compliance with its Solid and Hazardous Waste Permit and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the Landfill, (5) the City's efforts to use alternative technologies, (6) the extent to which waste is being diverted from the Landfill and (7) any funding arrangements that are being considered by the Honolulu City Council or the City Administration for activities that would further divert waste from the Landfill.

d. The semi-annual reports shall be submitted to the Planning Commission, the LUC and the Association. Each report shall be posted on the ENV's website on the same day the report is submitted.

e. Within 30 days after each semi-annual report is submitted, the Association may request that the Planning Commission issue an order to show cause why the SUP should not be revoked if there is reason to believe that there has been a failure to perform according to the conditions imposed by this decision and order pursuant to Planning Commission Rule § 2-48. If so requested, the Planning Commission shall issue the order and schedule a hearing. The ENV shall provide the public with at least 14 days' notice of the hearing by posting the hearing date, time,

location and subject matter on the ENV's website. The ENV shall also provide at least 14 days' written notice of the hearing to all neighborhood boards on O'ahu and the Association.

f. The ENV shall report to the public every three months on the efforts of the City in regard to the continued use of the WGS�, including any funding arrangements that are being considered by the City. On the date each report is published, the ENV shall send a copy of the report to the Association.

g. The ENV shall present to the Planning Commission in a public hearing every six months on the status of the City's efforts to either reduce or continue the use of the WGS�. The ENV shall provide at least 14 days' written notice of each hearing to the Association of such hearings.

2. Operational Conditions

a. WGS� shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that H-POWER ash and residue may be accepted at the Landfill 24-hours a day.

b. As appropriate, the ENV shall coordinate construction of the Landfill cells and the operation of the WGS� with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

c. The operations of the Landfill shall be in compliance with the requirements of Revised Ordinances of Honolulu § 21-5.680, to the extent applicable, and all applicable statutes, rules and regulations of the State Department of

Health, the United States Environmental Protection Agency and any other federal or state agency and the Solid Waste Management Permit for the Landfill. A violation of any applicable statute, rule or regulation or any violation of a condition of the Solid Waste Management Permit for the Landfill shall be a violation of this Order.

d. The ENV shall obtain all necessary approvals from the United States Environmental Protection Agency, the State Department of Health, the State Department of Transportation, the State Commission on Water Resource Management, the City and County of Honolulu Board of Water Supply and any other federal, state or municipal agency prior to commencing any onsite or off-site improvements or activities.

e. In accordance with Chapter 11-60.1 of the Hawai'i Administrative Rules, entitled "Air Pollution Control," the ENV shall be responsible for ensuring that effective dust control measures during all phases of development, construction and operation of the Landfill are provided to prevent any visible dust emission from impacting surrounding areas. The dust control management plan for the Landfill, which must identify and address all activities that have a potential to generate fugitive dust, is incorporated and made a part of this Order.

f. The ENV shall prepare, implement and maintain a landscaping plan for the Landfill that (1) incorporates the features of the surrounding natural landscape and enables the Landfill to blend seamlessly into its environment and (2) reduces erosion and rivulets at the Landfill. Prior to the implementation of the

landscaping plan, the ENV shall submit the plan to the Association for review and comment.

g. The ENV shall prepare, implement and maintain a schedule pursuant to which City and commercial waste collection and transportation vehicles enter the Landfill without waiting or queuing on Farrington Highway for a period of more than five minutes.

h. The ENV shall prepare, implement and maintain a plan to minimize the emission of noise and odors from the Landfill. With respect to odors, the plan shall include the use of an odor-neutralizing mist system as contemplated by the FEIS.

i. The ENV shall prepare, implement and maintain a schedule for the weekly monitoring and removal of waste, including but not limited to trash and debris, in the area surrounding the Landfill.

j. The ENV shall monitor whether City and commercial vehicles entering the Landfill have covered and secured their loads to prevent the spilling or scattering of the contents and shall enforce violations.

3. Waste Acceptance Conditions

a. From the date of this Order until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGSF unless it cannot be disposed of within the City by any means other than landfilling; provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or

other facilities may be disposed of at WGSL, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL.

b. From March 2, 2024, until March 1, 2027, WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER; and (2) automobile-shredder residue.

c. The Landfill shall stop accepting any form of waste and close on or before March 2, 2027.

4. The ENV shall file with the Planning Commission an approved closure plan one year prior to closing to all forms of waste on March 2, 2027.

5. Public Health and Safety Conditions: If the Landfill releases waste or leachate, the ENV must immediately (1) notify the surrounding community, including the Makakilo/Kapolei/Honokai Hale, Waianae Coast and Nanakuli-Maili Neighborhood Boards, Intervenors Schnitzer Steel Hawaii Corp., Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa and (2) 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 debris barriers and booms at the Landfill's shoreline outfall to prevent waste from spreading into the ocean.

6. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

7. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Planning Commission Rules, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this decision and order.

8. The ENV shall notify the Planning Commission of termination of the use of the WGSJ property as a landfill for appropriate action or disposition of 2008/SUP-2.

Pursuant to the foregoing findings of fact and conclusions of law, it is also the decision and order of the Planning Commission to APPROVE the 2008 Application as provided herein to the extent it seeks to withdraw Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect, at which point all conditions previously placed on the Landfill under Special Use Permit File No. 86/SUP-5 shall be null and void.

DATED: Honolulu, Hawai'i, _____, 2017.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By _____
DEAN I. HAZAMA, Chair

By _____
CORD D. ANDERSON, Vice Chair

By _____
ARTHUR B. TOLENTINO, Member

By _____
DANIEL S.M. YOUNG, Member

By _____
WILFRED A. CHANG, JR., Member

By _____
KAIULANI K. SODARO, Member

By _____
STEVEN S.C. LIM, Member

By _____
KEN K. HAYASHIDA, Member

By _____
THERESIA C. McMURDO, 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

RECEIVED

ROBERT CARSON GODBEY, 4685
Corporation Counsel
DANA VIOLA, 6095
ROBERT BRIAN BLACK, 7659
Deputy Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
Telephone: 768-5240
768-5135

'12 MAY -2 P4:14

DEPT. OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

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

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

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

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

DATED: Honolulu, Hawaii, May 2, 2012.

Respectfully submitted,



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

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

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

FILE NO. 2008/SUP-2

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

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

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

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

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

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

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

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

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

DECISION AND ORDER

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

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

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

In the Matter of the) File No. 2008/SUP-2
Application of)
) DRAFT ONLY
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 as 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.")
_____)

CONTINUED - CONTESTED CASE HEARING

Ewa-State Special Use Permit Amendment Application -
2008/SUP-2 (RY) Waimanalo Gulch Sanitary Landfill

Taken at Mission Memorial Conference Room, Mission
Memorial Building, 550 South King Street, Honolulu, Hawaii,
96813, commencing at 1:30 p.m. on March 1, 2017, pursuant to
Notice.

1 APPEARANCES:

2

3 Planning Commissioners present:

4

Dean I. Hazama, Chair

5

Cord D. Anderson

6

Daniel S. M. Young

7

Ken K. Hayashida

8

Wilfred A. Chang, Jr.

9

10 Planning Commissioners excused:

11

Arthur B. Tolentino

12

Kaiulani K. Sodaro [recused,

13

prior notice given]

14

Steven S. C. Lim [recused,

15

prior notice given]

16

Theresa c. McMurdo, Vice Chair

17

[prior notice given]

18

19 Deputy Corporation Counsel:

20

Jennifer D. Waihee-Polk

21

(Advisory to the Commission)

22

23 Planning Commission staff:

24

Gloria Takara,

25

Secretary-Hearings Reporter

1 For the City and County of Honolulu, Department of
2 Environmental Services:

3 Kamilla C. K. Chan, Esq.
4 Deputy Corporation Counsel
5 City and County of Honolulu
6 530 South King Street, Room 110
7 Honolulu, Hawaii 96813

8
9 For intervenor Ko Olina Community Association and Senator
10 Maile Shimabukuro:

11 Calvert G. Chipchase, Esq.
12 Christopher T. Goodin, Esq.
13 Cades Schutte LLP
14 1000 Bishop Street, Suite 1200
15 Honolulu, Hawaii 96813

16
17 For intervenor Schnitzer Steel Hawaii Corp.:

18 Arsima Muller, Esq.
19 Carlsmith Ball LLP
20 ASB Tower, Suite 2200
21 1000 Bishop Street
22 Honolulu, Hawaii 96813

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For intervenor Colleen Hanabusa:

Richard N. Wurdeman, Esq.
1003 Bishop Street, Suite 720
Honolulu, Hawaii 96813

P R O C E E D I N G S

1
2
3 Chairman: Good afternoon. Welcome to the Planning
4 Commission meeting for Wednesday, March 1st, 2017. Call
5 this meeting to order. [bangs gavel] First item on our
6 agenda is approval of our January 4th and January 18th, 2017
7 meeting minutes. Commissioners, do you have any questions,
8 corrections or concerns regarding both meeting minutes for
9 January 4th and January 18th. [no response] Okay. Seeing
10 none, any objections to adopting the minutes? [no response]
11 Any abstentions? [no response] Okay. The minutes have been
12 adopted.

13 Moving on to continued contested case hearing, Ewa
14 State Special Use Permit, amendment application 2008/SUP-2,
15 Waimanalo Gulch Sanitary Landfill, WGSL.

16 Okay. Moving on for action. First item for
17 action is Department of Environmental Services, City and
18 County of Honolulu, Motion to Strike Intervenor Colleen
19 Hanabusa's (1) Renewal of Submission of Proposed Findings of
20 Fact and Conclusions of Law. Department. Okay. For the
21 record.

22 Ms. Chan: Kamilla Chan for the City and County of
23 Honolulu.

24 Mr. Wurdeman: Richard N. Wurdeman for intervenor
25 Colleen Hanabusa.

1 Chairman: Okay. Ms. Chan.

2 Ms. Chan: Thank you, Chair. The City request that
3 the Planning Commission grant its motion to strike
4 intervenor Hanabusa's Proposed Findings of Fact and
5 Conclusions of Law on the basis that they were submitted
6 late. The deadlines were set by the Planning Commission
7 back in October and no objections were raised during the
8 four months that lapsed between then and the actual
9 deadline. Objections to the deadline could've been raised
10 before the deadline reached under the Planning Commission's
11 rules, yet objections were raised for the first time and the
12 Proposed Findings of Fact were filed two weeks after the
13 deadline. Bottom line is they are late. The Planning
14 Commission didn't set further extended deadlines for the
15 parties to respond to that submission. In the event that
16 the Planning Commission is intending to consider intervenor
17 Hanabusa's filings, the City would request additional time
18 to supplement its 2009 response.

19 I know intervenor Hanabusa argues that she refers
20 to those filings or the resubmission of those filings in her
21 October 7th, 2016 statement. However, it's not clear what
22 was going to be filed. It does reference that modifications
23 may be made into the pleading. There has been additional
24 evidence since the time that the 2009 filing was initially
25 filed with the Planning Commission and the City would be

1 supplementing its response.

2 Chairman: Okay. Mr. Wurdeman.

3 Mr. Wurdeman: Well, the reason why there's been
4 evidence since 2009 is one, there was a separate proceeding
5 in which Ms. Hanabusa did not participate. And over
6 strenuous objections this Commission consolidated its two
7 records, depriving her of her rights of due process to
8 confront witnesses in those proceedings, to present her own
9 evidence in those proceedings. And that's one point with
10 respect to evidence subsequent to July 17th, 2009. She
11 objects to again that record and that certainly not going to
12 be something that she's incorporating in her proposed
13 findings if she's objecting to it.

14 The second point is that Ms. Hanabusa has been the
15 one consistent party since the remand to object to a number
16 of continuances by the City, Environmental Services under
17 the guise of they were in negotiations with Ko Olina
18 Community Association. That went on for years. We were in
19 front of the Land Use Commission, and they wanted status
20 reports what's going on. The City kept--at one point gave
21 them a presentation about the recycling program that was
22 completely irrelevant to anything. And what has happened is
23 since 2009, the City during that first contested case
24 hearing. And this is another point that we continue to bring
25 up is that the City during those proceedings represented to

1 both the Planning Commission and the Land Use Commission
2 that it would be at least seven years in which to find an
3 alternative site. And, we are here now on the 8th year and
4 haven't done a darn thing to find an alternative site. And,
5 I think this is really reflective of their gamesmanship in
6 stalling in these proceedings. Because they didn't have,
7 never had any intention whatsoever of looking for
8 alternative sites. And, Ms. Hanabusa as a result relied
9 consistently upon her July 17th, 2009 filing which is
10 certainly timely, is filed as part of the record. She's
11 relying on it. The City filed its objections at that time.
12 In October 7th, 2016, she's indicated that she was going to
13 rely on that again, although there may have been some
14 changes to the names because two of the parties in that
15 original findings have proceeded with other counsel and have
16 submitted their own proposed findings. And those parties
17 did participate in the second proceedings, contested case
18 hearings. So, you know, given that this has been on file
19 since July 17th, 2009. We indicated that we are relying on
20 it. There is no surprise to the City, and we ask as a
21 result that their motion be denied.

22 Chairman: Okay. Thank you. Commissioners, any
23 questions of either party? [no response] So, Mr. Wurdeman,
24 then your contention is, therefore, that your Findings of
25 Fact, Conclusions of Law, Decision and Order, regarding your

1 2009 submission is what you have submitted before the
2 Commission?

3 Mr. Wurdeman: Yes. That's what was submitted in
4 2009, which is still pending before the Commission and upon
5 which intervenor Hanabusa is still relying.

6 Chairman: Okay. Corporation Counsel, then
7 therefore your motion to strike applies to Mr. Wurdeman's
8 2017--I guess, that is where the confusion is coming in.
9 His February 10th 2017 submission to the Planning Commission
10 that is what you are motioning to strike?

11 Mr. Chan: Yes. We're seeking to strike that.

12 Chairman: So, your motion is not to strike
13 intervenor's 2009 submission to the Land Use Commission?

14 Mr. Chan: No. And our position is that was
15 previously decided by the Planning Commission. They
16 considered--

17 Chairman: You mean the deadline? What was
18 decided previously--

19 Ms Chan: No. That 2009 filing was submitted when
20 the application was first brought before the Planning
21 Commission. That was the case that eventually went up to
22 LUC, to supreme court. The deadline was struck, and it came
23 back down to the Planning Commission.

24 Chairman: Right. However---

25 Ms. Chan: So, that's already been considered by

1 the Planning Commission.

2 Chairman: Correct. However, based on the October
3 meeting, that all parties were allowed to submit amendments
4 to the original filings, Decision and Order. So, I'm of the
5 belief that the 2009 filing stands. I mean, you're not
6 trying to strike his 2017?

7 Ms. Chan: We're striking, I guess the style, the
8 resubmittal of the 2009 filing.

9 Chairman: Okay. So, for clarification, Mr.
10 Wurdeman, now mainly perhaps the title of your filing is
11 misleading in the sense--

12 Mr. Wurdeman: Yes. If that's the case, then I
13 apologize for that, but we certainly just wanted to make it
14 a point that she continue to rely on her 2009 filing and
15 that was the only intent for that Part 1.

16 Chairman: Okay. So for clarification purpose, you
17 have not submitted any amendment of Findings of Fact,
18 Conclusions of Law, and Decision and Order, after your 2009
19 filing?

20 Mr. Wurdeman: Correct.

21 Chairman: Okay. Commissioners, any questions at
22 this time? [no response] Okay. We have to take action on
23 the motion before us in regards to Environmental Services
24 motion to strike intervenor Colleen Hanabusa's February
25 10th, 2017 document. Do we have a motion? You can ask

1 questions.

2 Member Hayashida: So, it's irrelevant, right?

3 I mean--

4 Chairman: The motion--

5 [colloquy between DCC Jennifer Waihee-Polk and
6 Chairman Hazama]

7 Member Anderson: Make a motion to move into
8 executive session, please.

9 Chairman: Okay. So moved.

10 Member Hayashida: Second.

11 Chairman: Moved and seconded. Any objections?

12 [no response] Any abstentions? [no response] Okay. The
13 Commission will move into executive session to consult with
14 Corporation Counsel on authority, duties, privileges,
15 immunities pertaining to Section 205-6 of the Hawaii Revised
16 Statutes as amended in Chapter 2, Subchapters 4 and 5 of the
17 Rules of the Planning Commission and in accordance with HRS
18 92-5. Okay. We're in executive session.

19 [EXECUTIVE SESSION MINUTES]

20 Out: 1:43 p.m.

21 In: 2:11 p.m.

22 Chairman: Okay. Thank you for your patience. I
23 call this meeting back to order. [bangs gavel] At this time
24 we are still in regards to the Environmental Services motion
25 to strike. Do we have a motion before the Commission?

1 Member Anderson: Sure. I'll make a motion to
2 strike intervenor Colleen Hanabusa's renewal of submission
3 of Proposed Findings of Fact and Conclusions of Law.

4 Chairman: Okay. So moved. Do we have a second?

5 Member Hayashida: Second.

6 Chairman: Okay. All those in favor, say aye.

7 All Commissioners: Aye.

8 Chairman: I'm sorry. Do we have any discussion on
9 the matter regarding this issue? [no response] I don't
10 see--

11 Mr. Wurdeman: Could I ask for a clarification? So,
12 you're striking--I'm sorry, what was--

13 Chairman: We're striking your February 10th,
14 2017--

15 Mr. Wurdeman: Okay. So, the July 2009 though is
16 still part of the record, that can't be stricken.

17 Member Anderson: Yes.

18 Mr. Wurdeman: Okay.

19 Chairman: I don't see any objections,
20 Mr. Wurdeman, or any of the parties, so like I said I don't
21 have a problem supporting the City's position on this issue.
22 Any further discussion, Commissioners? [no response] If
23 not, all those in favor, say aye.

24 All Commissioners: Aye.

25 Chairman: Any opposed? [no response] Any

1 abstentions? [no response] Okay. The motion is granted.

2 Okay. Moving on to the second item of the agenda,
3 Adoption of Findings of Fact, Conclusions of Law, and
4 Decision and Order. At this time I call all parties up.

5 Okay. For the record, appearances, please.

6 Mr. Wurdeman: Richard N. Wurdeman for intervenor
7 Colleen Hanabusa.

8 Ms. Chan: Kamilla Chan for the City and County of
9 Honolulu.

10 Ms. Muller: Arsima Muller for intervenor Schnitzer
11 Steel Hawaii Corp.

12 Mr. Chipchase: And Cal Chipchase and Chris Goodin
13 for Ko Olina Community Association and Senator Maile
14 Shimabukuro. With us in the hearing room is Ken Williams,
15 who's the general manager for the association, association's
16 designated representative and was a witness in these
17 proceedings.

18 Chairman: Okay. Thank you. So for the record,
19 Commissioners, the Planning Commission is in receipt of, I
20 guess, submission of Findings of Fact, Conclusions and Law,
21 Decision and Order for the parties with the exception of
22 Mr. Wurdeman. So, we have your records as well as your
23 rebuttals regarding each others decision and orders.

24 Okay. Commissioners. Also for the record I'd
25 like to confirm that the evidentiary portion of the

1 contested case hearing is closed. So before us now, I
2 guess, is Commission's action.

3 [colloquy between DCC Waihee-Polk and Commissioner
4 Anderson]

5 Member Anderson: Chair, I'd like to make a
6 motion, please.

7 Chairman: Okay.

8 Member Anderson: Motion to adopt the 2011 ENV
9 application Findings of Fact, Conclusions of Law, and
10 Decision and Order with the following conditions. I would
11 like to add from page 82 of intervenor Ko Olina Community
12 Association and Maile Shimabukuro's Proposed of Findings of
13 Fact, Conclusions of Law, and Decision and Order. Again,
14 page 82, Item C, that deals with ENV providing semi-annual
15 reports to the Planning Commission and LUC. The second
16 added condition will be on the same document, page 86, Item
17 No. 5, which deals with public health and safety conditions,
18 and the third condition would be that the City, ENV in
19 particular, ID an alternate site by December 31st, 2022,
20 that will be used upon Waimanalo Gulch Sanitary Landfills
21 reaching its capacity.

22 Chairman: Okay. Do we have a second?

23 Member Hayashida: Second.

24 Chairman: Okay. It's moved and seconded. Okay.

25 Commissioners, we are now in discussion. Any further

1 discussion?

2 Mr. Chipchase: Commissioners, I'm sorry to
3 interrupt. It's always been customary in presentations that
4 I've done in findings to be able to present the findings to
5 the Commission before they adopt them and ask for that
6 opportunity, particularly, as majority of the Commission
7 didn't have an opportunity to sit through the proceedings.

8 Chairman: Okay. However, we have the record.
9 So, we have all evidentiary records and have reviewed them.
10 So, that's each Commissioner's responsibility, and we also
11 have your submittal. So, we have everything.

12 Mr. Chipchase: No. I understand that you have
13 the record, Commissioners, and I appreciate that. But it
14 has always been customary in my experience to have an
15 opportunity to present those findings, and we certainly did
16 in the 2012, conclusion of 2012 proceedings, had an
17 opportunity to present those to the Commission. But there's
18 a dialog and discussion about why we're requesting certain
19 conditions before the Commission actually adopts a proposed
20 form of order. And I ask for that before the Commission
21 votes on the motion.

22 [colloquy between DCC Waihee-Polk and Chairman
23 Hazama and Member Anderson]

24 Member Anderson: I make a motion for executive
25 session.

1 Member Hayashida: Second.

2 Chairman: Moved and seconded. Basically the
3 Commission has made a motion to go into executive session to
4 consult with the Commissioner's attorney on the authority,
5 duties, privileges and immunities pertaining to Section
6 205-5 of the Hawaii Revised Statutes as amended in Chapter
7 2, Subchapters 4 and 5 of the Rules of the Planning
8 Commission in accordance with HRS 92-5. Okay.

9 Mr. Wurdeman: Mr. Chairman, may I be heard please
10 before you go into executive session. The City's last
11 motion was for a Part 1 of the February 10th filing and not
12 Part 2. And not it only was it our findings timely filed on
13 July 17th, 2009, but we reiterated our reliance on October
14 12, 2016, and two separate times, not only was it filed
15 timely but it was reiterated that it be relied upon timely
16 in October well before any other parties submitted anything,
17 one. Two, is in the second part that wasn't the subject of
18 the City's motion is my objections to this Chair presiding
19 over this matter because of this Chair's apparent
20 pre-determination of the facts and conclusions in the
21 attached newspaper article in the Honolulu Star Advertiser
22 that it was dated August 19th, 2016, in which is part of my
23 February 10, 2016 [sic] submission. And that is
24 respectfully challenging you, Mr. Chairman, in presiding
25 over these matters when you've already pre-determined this

1 case.

2 And, I have some familiarity with this issue
3 because the cited decision, Mauna Kea Anaina Hou, is a case
4 that I argued before the Hawaii Supreme Court on.
5 Pre-determining matters before the parties have been allowed
6 and meaningful opportunity be heard. And given our timely
7 filings, it makes me wonder--And I have to call into
8 question, the last Board's ruling on intervenor Hanabusa's
9 decision. Because that was done without taking it into
10 consideration the Part 2 of my pleading, which was my
11 objections respectfully to you, presiding over this because
12 of your pre-determination on this matter. So, I'd like that
13 to be decided on before we move any further and talk about
14 anything further in these matters because obviously the
15 Chair does have a lot of influence on the other Commission
16 members. And, if the Chair has already decided on this
17 matter before all the proper submissions were made; and it's
18 obvious in the quotes back in August that was done by this
19 Chair. "We have to have an operating landfill. I think it's
20 unreasonable to expect the City to just close it down,"
21 Hazama said. Another quote is, "that's my hope that we can
22 move this along so that at least the City will have a valid
23 permit that will allow it to operate it," Hazama said. This
24 was all in the August news article that I reference. You
25 were quoted in that, Mr. Chair. And, intervenor Hanabusa

1 takes exception to given that that's your stated position
2 publicly that you are now in these proceeding precluding her
3 from submitting proposals that are contrary to your opinion
4 way back in August before all of these submissions were
5 made. So, I would like that objection to be made. I would
6 respectfully ask you to recuse yourself from these
7 proceedings because of your pre-determination of the issues.

8 And, finally, I would like to also ask that there
9 be a confirmation, because the law requires that especially
10 in light of, I believe, that--and if not all of the
11 Commissioners were present in both proceedings, I believe at
12 least most of the Commissioners were present. And the law
13 requires a review of all records, evidence going through
14 transcript, going through exhibits, of all those
15 proceedings, by each and every Commissioner before a vote
16 can be had, and I'd like that to be confirmed as well. With
17 all of the Commissioners, since none of them had, as far as
18 I know, sat through both of the proceedings. So, that would
19 also be my second request. But my first is I respectfully
20 ask yourself to recuse yourself because of your comments
21 that were made publicly back in August. Thank you.

22 Chairman: So, you had your say? So, the motion on
23 the floor is for executive session. Seconded it. Any
24 objections? [no response] Any abstentions? [no response]
25 Okay. At this time, we will move into executive session.

1 [EXECUTIVE SESSION MINUTES]

2 Out: 2:26 p.m.

3 In: 2:44 p.m.

4 Chairman: Okay. Thank you. I call this meeting
5 back to order. [bangs gavel]6 Okay. For the record, Commissioners, I need
7 confirmation from you that you have reviewed all evidence
8 and the entire record from the 2008 and 2011 SUP
9 proceedings. Commissioners.

10 Member Hayashida: I reviewed the records.

11 Chairman: Okay. Commissioner Chang.

12 Member Chang: I have as well.

13 Chairman: Okay. Commissioner Young.

14 Member Young: So have I.

15 Chairman: Okay.

16 Member Anderson: Yes. I have reviewed all of the
17 records presented to us. Thank you.18 Chairman: Okay. And, likewise, I have as well.
19 In regards to, for the record, Mr. Wurdeman, your
20 presumption on my influence over the entire Commission, I
21 think is incorrect. So, I'm one Commissioner that has one
22 vote equal to the weight of any other Commissioner on this
23 body.24 In regards to your request regarding Part 2.
25 Because we received, the Commission has received it, so it

1 is part of the record. We have not stricken it from the
2 record. Just for your clarification.

3 And in regards to your comments about my
4 objectivity in this matter, I believe that your citing, my
5 personal opinions taken out of context in regards to the
6 news article. So, I don't have any influence in regards
7 to--execution of my duties as Chair.

8 In regards to Mr. Chipchase's request, because
9 as--

10 Mr. Wurdeman: Excuse me, if I may, what does that
11 mean, Mr. Chair? Those are direct--I'd like a clarification
12 on how it was taken out of context because--

13 Chairman: I'm not going to clarify because I
14 didn't write the article. So, in regards to Mr. Chipchase's
15 request--

16 Mr. Wurdeman: Mr. Pang is here. I'd like to call
17 him as a witness then.

18 Chairman: Denied. In regards to Mr. Chipchase's
19 request, because the Commissioners have reviewed all
20 evidence, entire record that is on file, at this time we are
21 not going to be allowing any presentations.

22 Mr. Chipchase: Very well, Chair. Then for the
23 record allow me just to state my objection to that.

24 Chairman: That's fine.

25 Mr. Chipchase: The motion made by Commissioner

1 Anderson was made without public discussion. The decision or
2 the motion to adopt particular parties, Findings of Fact,
3 Conclusions of Law, is then made not in a public setting.
4 The genesis for it is not identified in any public
5 proceeding that I am aware of. The selection of particular
6 conditions from our proposed Findings of Fact, Conclusions
7 of Law, and Decision and Order that would amend the ENV's
8 proposed findings. I'm not aware that there was any public
9 deliberation or public discussion as to why those were to be
10 included in the motion. And, so it seems to me that the
11 decisions in this matter were not made open and publicly and
12 certainly were not made following the opportunity of the
13 parties to present their evidence in this case, in the form
14 of discussion and argument regarding the Findings of Fact,
15 Conclusions of Law, Decision and Order. It would then allow
16 the Commission to ask the parties questions and to fair it
17 out why particular conditions were included and why
18 particular conditions were not. I would note that as part
19 of that a number of the conditions that are existing in the
20 orders today from both this body and the LUC were not
21 included in the City's proposed submission. Yet, this
22 Commission would adopt those providing less protection,
23 providing less notice, providing less than its currently
24 imposed through prior orders.

25 I don't believe that those kinds of decision

1 should have been made in private or without an opportunity
2 for the parties to present the record. And, so I make an
3 objection to that process. I make an objection to the
4 refusal to allow argument on the motions and the
5 presentation today. And, I join in Mr. Wurdeman's motions,
6 both recusal and his objections to this process.

7 Mr. Wurdeman: And, I'd like to also join with
8 Mr. Chipchase's objections as well.

9 Chairman: Okay. Your objection is noted. Okay.
10 Moving on to the motion--So, I'll put the motion back on the
11 floor, been seconded. So we are in discussion regarding the
12 motion. Any discussions, Commissioners, at this time?

13 Member Hayashida: The only thing that I have is
14 the Findings of Fact before 2011, ENV's 2011 application do
15 not need to be included for the record.

16 Chairman: Are you making a motion to include the
17 changes?

18 Member Hayashida: I'll make the motion to include
19 the changes, to not include the Findings of Fact before
20 ENV's 2011 application.

21 Chairman: Okay. Any objections to accepting the
22 motion?

23 Member Anderson: No.

24 Chairman: Okay. Commissioners--

25 Member Anderson: Just to clarify. He--There was

1 an additional condition added upon my motion?

2 Chairman: Yes.

3 Member Anderson: Okay. Yeah, I have no objection
4 there.

5 Chairman: Okay. Is there a second to his motion?

6 Member Anderson: I'll second it.

7 Chairman: Now, do you have any objections?

8 Member Anderson: No objections. But I do have just
9 some general discussion points why I included, I guess, the
10 two conditions from KOCA and the timing of the
11 identification of an alternate site. Mr. Chipchase, I do
12 appreciate the thoroughness of your Findings of Fact,
13 Conclusions of Law, Decision and Order. Looking through the
14 numerous conditions in there, I did pick out these two
15 items, I think should be added to ENV's--Also with the--I
16 did have some reservations about identifying a specific date
17 when the landfill should be closed primarily due to the fact
18 that, I think that date is more contingent upon the capacity
19 and filling the capacity. Not a specific date. Thus, I felt
20 a little more comfortable identifying an alternate site at a
21 specific date and that site will just be, in other words, I
22 guess a stand-by site until the current landfill hits
23 capacity. That's a justification behind my three conditions
24 I added to the motion.

25 Chairman: Okay. Any further discussions? [no

1 response] I understand, I guess, and I appreciate the
2 parties positions. There are extensive submissions that you
3 gave us. We as Commissioners have to review and study all of
4 that and understand your position. So, you know, I
5 appreciate all the hard work you guys put into this.
6 However, I agree with Commissioner Anderson the fact that
7 putting dates necessarily on particular, this particular
8 subject matter and with the lack of another landfill or any
9 other option that is affordable to the residents of this
10 county, we have really no other choice in my opinion but we
11 have to have an operating landfill. I mean whether your
12 positions are that we don't or not, but I can appreciate
13 that. But in reality of the matter is that we need a
14 landfill.

15 Now, the City has two technology. I believe the
16 City has stated, you know, their increase and the capability
17 of reducing the amount of landfill, the amount of material
18 that's going into the landfill. And, I further have a
19 problem then with setting a date. I also think it's a more
20 function of capacity rather than just coming and trying for
21 any body whether it's this body or the LUC to try and set a
22 potential date when that landfill will be closed in the
23 absence of a working landfill or another existing landfill.
24 Whether you agree with me or not, you know, we need a
25 landfill. We just can't put it in somebody's backyard,

1 can't dump it in the ocean. We have to comply with whatever
2 EPA standards and Department of Health standards that are
3 required.

4 So, having said that, I concur with Commissioner
5 Anderson's assessment that we do--It should really be a
6 function of capacity. Having said that, however, personally
7 I believe the City had an obligation and have an obligation
8 to start working in identifying another landfill once this
9 once hits whatever capacity. I'm not so sure from reading
10 the submissions and the record that has been--That we're
11 actually up to a point where we need to be as far as finding
12 that. And, therefore--or I might not agree with the
13 motion's date, as far as the deadline. I think that it's
14 perfectly fine to set a deadline for the City to at least
15 identify their next landfill. I think that's an obligation
16 the City owes the people as well. And, I can appreciate
17 that. Any other discussion?

18 Member Anderson: I could echo some of your
19 comments, sir. One, in specific just to go on record, that
20 it is disheartening. I believe I've been part of this
21 Commission for several years now. I would say in 2012, the
22 City made some progress and, I think we had a presentation
23 identifying certain sites for replacement landfills. And so
24 it's disheartening. I'm not sure if the ball was dropped
25 there or what progress has been made to that effect in the

1 time being. And the 2022 date of identifying was 5.5 years
2 from today. That's debatable whether that's enough time or
3 not. It could be done in two years, it could be 10 years.
4 I'm not sure. I just picked 5 years.

5 Chairman: That's fine. So, to clarify your point
6 is for identification of a landfill, correct? Or a new
7 landfill?

8 Member Anderson: Yes.

9 Chairman: So, it's not necessarily--

10 Member Anderson: And I acknowledge that's going to
11 be a difficult decision by anyone. It's not that easy.

12 Chairman: Okay.

13 Ms. Chan: Chair, may I respond to the
14 concerns--the one concern that was raised of the siting of
15 the landfill and the City's work on that.

16 Chairman: Is it on the record already or--

17 Ms. Chan: No. My comment is just that the record
18 in this proceeding for all intents and purposes was closed
19 in 2012. So, there was no opportunity for the City to
20 supplement that record, to add in any additional
21 information, and that would be the reason that it appears
22 that nothing had occurred since that time.

23 Chairman: That may be true, however, the City's
24 requirement to submit your annual report has always been a
25 condition on the record.

1 Ms. Chan: And the City has continued to comply
2 with that as we reported in our annual report.

3 Chairman: Well, I guess my comment to that would
4 be that, yes, the City has complied with submission of the
5 record and even contentiousness to how far you've progressed
6 in regards to actually identifying the next landfill site.
7 So, that's not our fault.

8 Ms. Chan: No. I understand the concern. I just
9 wanted to clarify why some of that is not currently in the
10 record.

11 Chairman: Okay. Thank you.

12 Member Anderson: I appreciate it, and I think
13 some of my concern might have been even though I've reviewed
14 all of the material, I can't represent it verbatim, but I
15 believe that in 2012 thereabouts when we were given a
16 presentation on the alterate sites. I believe that might've
17 been triggered in 2008, and there were discussion about why
18 it has taken so long just to get to that point.

19 So, hopefully there has been progress since 2012. That's
20 all.

21 Chairman: Okay. Any further discussion,
22 Commissioners, at this time?

23 [colloquy between DCC Waihee-Polk and all
24 Commissioners]

25 Member Anderson: Chair, make a motion for

1 executive session, please.

2 Member Hayashida: Second.

3 Chairman: Moved and seconded. Any objections?

4 [no response] Any abstentions? [no response] Okay. At
5 this time the Commissioners move into executive session to
6 consult with the Commission's attorney on the authority,
7 duties, privileges and immunities pertaining to Section
8 205-6 of the Hawaii Revised Statutes as amended in Chapter
9 2, Subchapters 4 and 5 of the rules of the Planning
10 Commission in accordance with HRS 92-5.

11 Mr. Chipchase: Chair, I have to object going into
12 executive session while the motion to adopt an order is
13 pending. And, I believe that counsel stated reasons for the
14 executive session were to clarify the motion, which I
15 believe should be done publicly and not in executive
16 session.

17 Mr. Wurdeman: I join in with that assertion.

18 Counsel Waihee-Polk: I guess, further advice which
19 I don't want to say in open meeting. So, I'm just going to
20 say, I was trying--It's not something I want to discuss in
21 open meeting. It's a legal advice I want to provide to my
22 client, and it's not exactly that. That's partially what I
23 started to say, and then I realized as I spoke on, I was
24 actually starting to actually give advice openly in open
25 meeting, and that's not something I should be doing. So,

1 I've requested that, and we can hold that just so that I can
2 give one word of advice and you go back for discussion.

3 Chairman: Okay.

4 [EXECUTIVE SESSION MINUTES]

5 In: 3:00 pm.

6 Out: 3:18 p.m

7 Chairman: Okay. I'll call this meeting back into
8 order. [bangs gavel] We have a motion, seconded. We're on
9 discussion regarding Commissioner Hayashida's motion to
10 remove all items from 2011, well from prior to 2011
11 proceedings.

12 Okay. Commissioners, any further discussion on the
13 matter?

14 Member Anderson: Chair, I'd like to discuss a
15 little more openly just so I'm clear on couple things. I'm
16 fairly certain that my motion perhaps isn't overly clear at
17 the moment with the rest of the Commissioners. Try not to
18 lose sight of the fact that in front of us right now is the
19 LUC approved 2008/SUP-2. In my motion I reference that 2011
20 ENV application and include the D&O. I think I prefer
21 withdrawing my motion and clarifying and restating it. Just
22 looking at the LUC approved 2008/SUP-2. Removing Condition
23 14 and adding the three conditions I'd previously stated.
24 Does that help clarify things?

25 Member Hayashida: So, you're removing the ENV's

1 Decision and Order, Item--

2 Member Anderson: Yes. I'm removing Condition 14.

3 Member Hayashida: This the document--

4 Member Anderson: Yes.

5 Chairman: Well, let me ask you this question
6 then. The motion that you accepted was to strike from ENV's
7 submission anything prior to 2011, correct?

8 Member Anderson: Commissioner Hayashida's.

9 Chairman: Yes.

10 Member Anderson: Correct.

11 Chairman: So, then for clarification purposes
12 anything in the document prior to the 2011 proceedings then
13 would be stricken anyway, correct?

14 Member Anderson: Yes.

15 Chairman: Okay. Any other discussion there? I
16 mean, that's my understanding what his motion was.

17 Member Anderson: Yes. Technically, I just
18 mentioned I'd like to withdraw my motion and just restate it
19 to add some clarity. Is that okay with you, Chair? How
20 should we address that open motion on the table?

21 Chairman: Well, the problem with withdrawing is
22 he already--I guess--

23 Member Hayashida: You want me to withdraw my
24 motion?

25 Chairman: You need a motion too. So--I mean, I

1 think for clarification purposes--Oh, may be not. I
2 was thinking if he can restate the motion again, but he
3 already made a motion that you accepted. So we're still in
4 discussion on his motion. So, I guess that's fine. I mean,
5 if you want, if that's what you--

6 Member Anderson: I would prefer, yeah. I mean,
7 my intent is to just clarify the situation right now. It
8 seems like there is some indecision on all of our parts,
9 mine included, whether it's my motion and Commissioner
10 Hayashida's. I would almost prefer just to start a clean
11 slate and restate it clearly all at one time.

12 Chairman: Okay. So, then you need to withdraw
13 your motion.

14 Member Hayashida: Withdraw my motion.

15 Chairman: Motion to withdraw. Do we have a
16 second?

17 Member Anderson: Second.

18 Chairman: Moved and seconded. Any discussion on
19 the motion to withdraw? [no response] Seeing none, any
20 objections or any abstentions? [no response] Okay. Seeing
21 none, then Commissioner Hayashida's motion has been
22 withdrawn. Now you can go and withdraw yours.

23 Member Anderson: Okay. I would like to withdraw
24 my original motion due to lack of clarity, I believe.

25 Chairman: Okay. So moved.

1 Member Hayashida: Second.

2 Chairman: Moved and seconded. Any discussion?

3 [no response] Okay. Seeing none, any objections or any

4 abstentions? [no response] Okay. Seeing none, then

5 Commissioner Anderson's original motion--

6 Member Anderson: So, the motion I'd like to make,

7 Chair, is look at the LUC approved 2008/SUP-2 to strike

8 Condition 14 and add the three conditions that I'd

9 previously mentioned from the KOCA D&O, page 82, Section C;

10 page 86, No. 5; and the identification of an alternate site

11 by December 31st, 2022.

12 Chairman: Okay. Clarification purposes, then the

13 ENV submission you are still accepting the Findings of

14 Fact--

15 Member Anderson: Conclusions of Law; correct.

16 Chairman: However, regarding the Decision and

17 Order, you're just adding the three conditions?

18 Member Anderson: Correct.

19 Chairman: Okay. And what was--

20 Mr. Chipchase: I'm sorry, that's not how I

21 understood the motion. If I could have clarity of that.

22 I thought Commissioner Anderson you were adopting these

23 Findings and Conclusions, but proposing to amend the

24 Decision and Order to be the LUC's approved Decision and

25 Order with deletion of Condition 14 and the addition of the

1 three conditions you mentioned earlier?

2 Member Anderson: Correct. That's my
3 understanding.

4 Chairman: Okay.

5 Member Anderson: I believe, Chair, we're saying
6 the same thing, although you may have left out removing, the
7 deletion of Condition 14.

8 Chairman: Oh, okay. Correct, correct.

9 Okay. So, adding on the deletion of Condition 14, you're
10 still accepting ENV's Findings of Fact, Conclusions of Law
11 and adding your three additional conditions.

12 Member Anderson: Yes, while removing Condition
13 14.

14 Chairman: Okay.

15 Member Anderson: Does that clarify things a little
16 bit?

17 Member Hayashida: Yes.

18 Member Anderson: Okay.

19 Chairman: In regards to the Findings of Fact and
20 Conclusions of Law; in regards to striking anything prior to
21 2011?

22 Member Anderson: Yes. Sorry. It goes without
23 saying picking up on what Commissioner Hayashida earlier
24 said that anything in there prior to 2011 would be removed.

25 Chairman: Okay. It's been moved. Do we have a

1 second?

2 Member Hayashida: Second.

3 Chairman: Okay. Moved and seconded. We are in
4 discussion on the motion basically for, I guess, my
5 clarification purposes, the D&O portion from the 2008/SUP-2
6 that was ruled on already by the LUC is what stands and then
7 you're just adding the three additional conditions today to
8 that?

9 Member Anderson: Yes, and removing 14.

10 Chairman: And removing 14.

11 Member Anderson: Yes.

12 Chairman: And 14 was the date restriction.

13 Member Anderson: Yes. Page 14 is basically solid
14 waste shall be allowed at WGSJ up to July 31st, 2012,
15 provided that only ash and residue from HPOWER shall be
16 allowed at the WGSJ after July 31st, 2012.

17 Chairman: That's basically your clarification
18 because my understanding is that the court have already
19 struck down Condition 14.

20 Member Anderson: Yes.

21 Chairman: Okay. All right. Any further
22 discussion, Commissioners? [no response] Okay. Seeing none,
23 the motion on the floor. All those in favor, say aye.

24 All Commissioners: Aye.

25 Chairman: Any opposed? [no response]

1 Any abstentions? [no response] Okay. The motion is passed.

2 You have anything else, Commissioners? Okay.

3 Seeing none, do you have a motion to adjourn?

4 Member Hayashida: Motion to adjourn.

5 Chairman: It's been moved.

6 Member Young: Second.

7 Chairman: Moved and seconded. Any objections? [no

8 response] Any abstentions? [no response] Okay. Thank you

9 very much, Commissioners. This meeting is adjourned.

10 [bangs gavel].

11 ADJOURNMENT:

12 There being no further business before the

13 Planning Commission, the meeting was adjourned by Chair

14 Hazama at approximately 3:28 p.m.

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1 I certify that the foregoing is
2 a true and correct transcription
3 of the proceedings, prepared to
4 the best of my ability, of the
5 meeting held on Wednesday,
6 March 1, 2017.

7

8

9

10 Gloria Takara

11 Secretary-Hearings Reporter

12

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14 ADOPTED ON: _____

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Ref. No. P-12764

September 22, 2009

Mr. Ransom Piltz, Chair
State Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96804

2009 SEP 22 A 9:57
LAND USE COMMISSION
STATE OF HAWAII

Dear Chair Piltz:

Subject: Testimony of the Office of Planning on the Application for a Special Use Permit for an Expansion and Time Extension for the Waimanalo Gulch Sanitary Landfill 2008/SUP-02 and 86/SUP-5 92-460 Farrington Highway, Kapolei, Hawaii
TMK: 9-2-3: 72 and 73

The Office of Planning ("OP") recommends that the 2008/SUP-02 be denied. OP also recommends that the request to withdraw 86/SUP-05 be denied, and that 86/SUP-05 instead be extended for three years, with additional expansion space of one cell for ash and two cells for Municipal Solid Waste ("MSW"). Further, the Petitioner should be required to complete an inclusive, transparent, public site-selection process (like the Blue Ribbon Committee previously formed) within twelve months of the date of the Decision and Order, followed by the City Council being required to select a site(s) based on the forwarded recommendations within an additional six months, with an automatic expiration of the Permit if this condition is violated. If the Land Use Commission believes that 86/SUP-05 cannot be extended, OP then recommends that all applicable conditions in 86/SUP-05 be included in 2008/SUP-02, along with the above-discussed requirements.

Alternatively, the OP recommends that the Land Use Commission (LUC) should remand the entire docket back to the City and County of Honolulu Planning Commission.

The LUC has 45 days from August 20, 2009 to approve, disapprove or modify the City Planning Commission's ("CPC") Decision and Order ("D/O").

0087

Exhibit 4

Mr. Ransom Piltz
September 22, 2009
Page 2

The State Office of Planning offers the following comments for your consideration:

Background: Summary of the Record and the Reasons for the Decision

The CPC has approved the City Department of Environmental Services' (ENV) application for a new SUP for expansion of the existing Waimanalo Gulch Sanitary Landfill from approximately 107 acres to a total of 200 acres until capacity is reached, as allowed by the State Department of Health, without time limit, subject to ten conditions. The Planning Commission has approved on a contingent basis the withdrawal of 86/SUP-05 upon 2008/SUP-02 taking effect and that all conditions previously placed on the property under 86/SUP-05 shall be null and void.

In summary, the City Planning Commission placed the following conditions on 2008/SUP-02:

- 1) On or before November 1, 2010, ENV shall begin to identify and develop one or more new landfill sites to either replace or supplement Waimanalo Gulch Sanitary Landfill.
- 2) ENV shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification, reuse of stabilized, dewatered sewage sludge, and recycling.
- 3) ENV shall provide annual reports to the Planning Commission on June 1 of each year.
- 4) Closure of existing cells must be completed by December 31, 2012.
- 5) WGS� shall be operational only from 7:00 A.M. to 4:30 P.M. daily, except that ash and residue may be accepted 24 hours a day.
- 6) ENV shall coordinate with HECO to ensure safety of overhead power lines.
- 7) WGS� will be operated in compliance with City Ordinance 21-5.680 and any and all applicable rules and regulations of the State Department of Health.
- 8) The Planning Commission may at any time impose additional conditions.

9) Enforcement of the conditions of 2008/SUP-02 may include an order to show cause why 2008/SUP-02 should not be revoked if the Commission has reason to believe there is a failure to perform the conditions.

10) ENV shall notify the Planning Commission of termination of the use of the property as a landfill for appropriate action or disposition of 2008/SUP-02.

It is significant to note that the CPC provided no condition containing an expiration date for this SUP. Commissioner Komatsubara explained his decision to craft the draft D/O without an expiration date at the CPC hearing for Decision-Making on July 31, 2009:

"To me, clearly simply having a specified end date certain on the previous SUPs has not resulted in the closure of Waimanalo Gulch. We have been down this road many times. I think it's been extended three or four times. In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you are not going to close this landfill until you find another site....how do you get the City to select a new site? That's the.....big question here." (Exhibit 71, Tr. 7/31/09, p. 3-4)

Commissioner Komatsubara went on to explain the limits of the CPC's powers, as he views them:

"The only power we really have is the power to revoke under our rules. But then we come back to the same question. If our only power is to revoke, how meaningful is it when everyone knows that we still need this landfill because, you know, we're not going to throw the baby out with the bath water. That's the biggest problem." (Exhibit 71, Tr. 7/31/09, p. 4)

"This, in essence is our attempt to keep the applicant true to its representation in the hearing that it will begin in 2010 its effort to identify and develop a supplemental landfill site on Oahu. The problem still remains how to enforce this condition, how to enforce this promise.....I don't know if

there is every going to be a simple answer, but I think going down the old path of just putting a date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further. I can understand why people feel they have been deceived because this keeps on being extended.”
(Exhibit 71, Tr. 7/31/09, p.4)

Later in the same Decision-Making discussion, Commissioner Komatsubara concluded:

“It becomes incumbent on us as to whether we enforce that commitment or not. It is kind of a game of chicken, however, because at the same time we really don’t want to close this landfill [by revoking the permit]. I asked myself the question, I said, “Would you, Kerry, really be willing to close the Waimanalo Gulch?” And the answer is no”
(Exhibit 71, Tr. 7/31/09, p. 7)

After additional discussion, Commissioner Gaynor voiced her concerns about issuing an SUP without a deadline for closure of the landfill:

“I felt strongly about how the community was misled, and I don’t have a lot of confidence that ENV can get the job done and that they’re getting the political leadership and willpower especially if we lead everyone to believe that this landfill could go on indefinitely. I like every single condition in here. The only thing I would like to see is a deadline. This landfill will close, then let them come and report every year.” (Exhibit 71, Tr. 7/31/09, p. 12)

Following these comments, Commissioner Dawson immediately attempted to propose an amendment to the draft D/O, but was told by Chair Holma that she could not propose any amendment without the motion first being voted on.

The CPC then voted (6 in favor, 2 opposed, 1 recused) to approve the draft Findings of Fact, Conclusions of Law, and Decision and Order (D/O), as drafted, without amendment.

The Office of Planning has several procedural, technical, legal and policy concerns with the CPC’s D/O and the accompanying record, as transmitted to the LUC.

Procedural, Technical and Legal Issues

1. Motion to Amend

During discussion of the Motion to Approve the draft D/O, Commissioner Beadie Dawson stated her intention to propose an amendment. Chair Karen Holma immediately interjected, improperly ruled that amendments to motions were not allowed, and then cut off further discussion by calling for a vote on the motion. Chair Holma's actions were an abuse of discretion, requiring remand of 2008/SUP-02 and 86/SUP-02.

Dawson: We could talk about this item for item, but I'd like to propose an amendment.

HOLMA: Well, you can't do that right now.

DAWSON: I can't?

HOLMA: No.

DAWSON: We have to vote it up or down?

HOLMA: Yes. We have the motion.

DAWSON: Because I think Vicki has given perhaps a good out for us.

HOLMA: I'm going to call for a vote on the motion.
(Exhibit 71, Tr. 7/31/09, p. 12).

Under normal rules of parliamentary procedure, motions can be amended by majority vote. Even if there is disagreement, each commissioner has the right to make a motion to amend. Furthermore, Chair Holma cut off any further discussion by calling for the question, but failed to ask for a majority vote to cut off any further debate. The Chair's refusal to allow Commissioner Dawson to even frame her motion for amendment and then to immediately and unilaterally cut off further discussion was a violation of the rules of order and an abuse of discretion requiring that 2008/SUP-02 and 86/SUP-02 be remanded back to the CPC.

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2. City and County of Honolulu, Land Use Ordinance, Sec. 21-5.680, Waste disposal and processing.

Approval of a new SUP will violate section 21-5.680 of the City and County of Honolulu's ordinances. Section 21-5.680 states as follows:

"No waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment, mixed use or resort district. When it can be determined that potential impacts will be adequately mitigated due to prevailing winds, terrain, technology or similar considerations, this distance may be reduced, provided that at no time shall the distance be less than 500 feet. (Added by Ord. 99-12)"

On September 24, 2008, the Makaiwa Hill subdivision was re-zoned from its previous Agricultural (AG-2) zoning to a mix of residential, commercial and preservation zoning districts by the Honolulu City Council. According to the GIS analysis provided in OP's attachment, the Low-Density Apartment Zoning in Makaiwa Hills subdivision is from 100 feet to 150 feet away from the existing landfill cells, in clear violation of LOU Sec. 21-5.680. (See also Testimony of Todd Apo, Exhibit 54, Transcript 7/2/09, p. 222, line 24 to p. 223, line 3). A new SUP, therefore, would locate a waste disposal and processing facility within 500 feet of a residential lot.

ENV may argue that only the closed cells of the waste disposal and processing facility are within 500 feet of the residential lots. But the closed cells are still part of the Waimanalo Gulch Sanitary Landfill, and are therefore a part of a waste disposal and processing facility. Furthermore the closed cells present a risk to the future residents of Makaiwa Hills through the emission of gases, the potential malfunction of the gas collection system, runoff, and possible contaminants.

A new SUP, therefore, should not be approved and issued in violation of the City and County's own ordinance. Additionally, if either the old SUP is extended or the new SUP approved, a condition requiring the City and County to correct any violations (through e.g. variance, grandfathering or zoning change) of its own Ordinances, specifically Section 21-5.680, should be included in the final D/O.

3. Motion to Withdraw 86/SUP-5

86/SUP-05 should be extended, not withdrawn, and ENV should be required to comply with the applicable requirements.

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Pursuant to the Decision and Order issued on August 4, 2009, the CPC allowed ENV to escape the conditions of 86/SUP-05. It reads:

"IT IS ALSO the Decision and Order of the Planning Commission to APPROVE the withdrawal of the Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and that all conditions previously placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void."(D/O p. 27)

86/SUP-5 has been amended at least three times in the past, most significantly in 1998, 2003 and 2008. These three amendments have both expanded the footprint of the landfill and extended the time limit for operations. Clearly, ENV could have followed prior practice and asked for an extension and expansion of 86/SUP-05. Instead, ENV presents a new factual record to the Commission, one which does not include the various representations, commitments, and conditions contained in 86/SUP-05.

But the factual record of 86/SUP-05 is essential in analyzing the appropriateness of an SUP for the Waimanalo Gulch Sanitary Landfill. Most significantly, the City and County of Honolulu's representations to close the Waimanalo Gulch Sanitary Landfill cannot be simply ignored. Even if, or perhaps especially if, the City and County of Honolulu intends to renege on its former promises and to instead operate the Waimanalo Gulch Sanitary Landfill as long as additional space can be found for the deposition of waste, the facts contained in the prior record must be confronted and acknowledged. Accordingly, prior practice should be followed, and the amendment of 86/SUP-05 (considering the prior record) should be evaluated rather than a new SUP based on an entirely new factual record.

For all of these reasons, the OP believes the new 2008/SUP-2 should be denied and the 86/SUP-5 reinstated, as discussed in depth, below, or in the alternative the entire matter should be remanded back to the CPC.

4. Special Use Permit or District Boundary Amendment

The CPC's decision to grant an SUP without any time limit may cross the line between an SUP and a district boundary amendment. ENV asked for a fifteen (15) year SUP. CPC, however, gave more than was requested by eliminating all time limits whatsoever.

In Neighborhood Board No. 24 v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982), the Hawaii Supreme Court found that a special permit to allow 103 acres within an agricultural district for an amusement park, consisting of cultural theme rides, restaurants, fast food shops, retail stores, exhibits, theaters, amphitheater, bank, nurseries, twelve acres of parking, sewage treatment plant, and other related support services was not an "unusual and reasonable use" qualified for a special permit, and was more properly the subject of a district boundary amendment. In that case, the Court stated that the "unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes." Id. at 272.

In this case, although the type of use is limited, the duration of use is not. The issuance of a limited-term SUP for a landfill is an appropriate use of the SUP process. The issuance of an SUP with an unlimited term identically resembles the intended outcome of the district boundary amendment petition (A08-780) filed by the ENV and currently being heard by the LUC. The OP believes the CPC has overstepped the bounds of its authority in issuing a SUP without a firm time limit for operations.

Policy Issues

1. Keeping One's Word

In 2003, the ENV committed unequivocally to selecting a new landfill site and to closing the Waimanalo Gulch Sanitary Landfill. The 2003 transcripts are replete with these representations. For example:

"COMMISSIONER COPPA: My next question is to ask you to be as honest as you can to me because I think I'm trying to see what it's going to look like, whether it's two years from now or five years from now.

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 the commitment, yes."

(Exhibit 68, Tr. 3/27/03, page 125, lines 3-11).

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In accordance with the representations made by the City and County of Honolulu, Condition 1 was placed on the 2003 Amended 86/SUP-5 to convene a Blue Ribbon Advisory Committee charged with recommending a new landfill site, and to require the City Council to select a new site by June 1, 2004. A six-month extension to the time limit was later issued, making the deadline for selection of the new landfill site by the City Council Dec. 1, 2004. Significantly, this same Condition 1 provided for an automatic expiration of the SUP if either of these deadlines were not met.

The Blue Ribbon Committee convened and worked in a double-blind process to rank sites. Consensus was reached on the naming of the five best sites (Maili, Makaiwa, Nanakuli B, Ameron Quarry and Waimanalo Gulch). The Blue Ribbon Committee was intended to be subject to the sunshine laws.

"MR. TSUJI: I assume being that it's an advisory committee it will be complying with whatever sunshine laws, whatever open record laws are available.

MR. DOYLE: Yes."

(Exhibit 68, Tr. 3/27/03, page 159, line 23 to page 160, line 1).

Unfortunately, after the elimination of one of those five sites (Waimanalo Gulch), the Office of Information Practices determined on January 13, 2004, that the Blue Ribbon Committee had violated the Sunshine Law, and the final report was deemed void. Accordingly, the Blue Ribbon Committee never completed its assignment.

By Resolution No. 04-348, the City Council then selected Waimanalo Gulch as the site of its "new landfill." ENV now seeks to continue the operation of the Waimanalo Gulch Sanitary Landfill, and to be excused from the site selection process previously required and never completed.

Many people believe that the selection of the Waimanalo Gulch was a violation of the City and County of Honolulu's original promise. The ENV argues that the new Administration that took office in December 2003 simply changed its mind, and this may be true. But the argument ignores the simple but compelling truth that petitioners should keep their word, and conditions on permits run with the land, regardless of the owner, lessee, developer.

The OP has consistently argued that it is in the best interests of the State for past conditions to be adhered to. As in other recent dockets before the LUC (e.g., Ko Olina Boat Ramp and Bridge Aina Lea), the OP has argued that significant time and effort by

the public and the parties to petitions are placed into the development of conditions appropriate to each project. Amending conditions, or enforcing conditions in cases of non-compliance, must be done with extreme sensitivity and rigor. The practice of allowing Petitioners to simply amend or eliminate conditions when they become too onerous to comply with risks undermining the meaning and integrity of our land use entitlement processes, and with it, the public trust in government.

In fact, the Petitioner's EIS acknowledges the issue of eroding public trust in government as a real impact of this application. FEIS, p. 1-15, and Appendix J, page 2. The issues of public trust in government are magnified in this case, because the Applicant is itself a government agency. Holding government agencies to their commitments, and enforcing the law and previously imposed conditions on other government agencies is of primary importance in this case. We have witnessed throughout history that when governments fail to abide by their own laws – or when governments fail to enforce their own laws upon themselves – to varying degrees civilizations tend to deteriorate. At the very least, in this case, the OP recommends that the LUC correct the entitlement record for the WGSL by limiting the term of the SUP and re-imposing the applicable requirements that have been violated for so long, and in so doing, help to rebuild public trust in Hawaii's land use entitlement processes.

2. Essential Conditions

a. The Blue Ribbon Committee.

ENV should be required to convene a Blue Ribbon Committee to recommend an appropriate landfill site

A Blue Ribbon Committee allows for an opportunity to provide an inclusive process whereby public participation can be encouraged far more than in the normal public hearings. An inclusive public participatory process before a neutral third-party is especially essential to avoid the cynicism which is likely to occur if ENV has the unilateral task of recommending an appropriate landfill site.

A Blue Ribbon Committee should also be required because that was the requirement under 86/SUP-05. Whatever the reasons were for not fulfilling this requirement in the past, the City and County of Honolulu should be required to complete the process now. A promise was made. That promise should be kept.

The Blue Ribbon Committee should be transparent. Early in the process, it must be determined how many sites the Committee will ultimately recommend to the Council, whether Waimanalo Gulch will be eligible to be considered as a potential site, and if the

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Committee will eliminate potential sites by consensus only or by majority vote.¹ These parameters must be established early to avoid the suspicion that the process is being manipulated in order to reach a particular conclusion.

Additionally, the County Council should again be required to select a site(s) for a new landfill(s) within a limited and reasonable amount of time, with failure to do so resulting in the automatic expiration of the Permit.

b. Selection of Site

As previously required by 86/SUP-02, a site must be selected by a particular date. If a site is not selected by that date, the SUP should be automatically terminated.

The City Council can only make an informed decision after the open, inclusive, and transparent public process is completed and a recommendation is made. Any other process invites cynicism and suspicion. A requirement for site selection is necessary to ensure that the City and County of Honolulu completes the process, and does not merely delay and then provide no alternatives to the Planning Commission and Land Use Commission.

c. A deadline.

Based upon Commissioner Komatsubara's statements, it appears that the CPC has surrendered its obligation to regulate the City and County of Honolulu by removing any time limit on the SUP. He stated the problem as follows:

"The problem still remains how to enforce this condition, how to enforce this promise.....I don't know if there is ever going to be a simple answer, but I think going down the old path of just putting a date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further. I can understand why people feel they have been deceived

¹ In 86/SUP-05, the LUC previously deferred to the City and County of Honolulu as to whether the Waimanalo Gulch may be selected as the "new" landfill site. Just as Petitioners should be held to the conditions previously imposed, so should the LUC be held to its past determinations. In retrospect, that decision (which was also supported by OP) to defer to the City and County of Honolulu may have been incorrect, inasmuch as the decision to extend the SUP in 2003 was based on the City's commitment to close the WGS. Nevertheless, respecting the integrity of the process means that in this case we must respect prior decisions, both the requirement for a Blue Ribbon Committee process with an automatic expiration date as well as the deferral to the City and County as to the consideration of the Waimanalo Gulch location.

because this keeps on being extended." (Exhibit 71, Tr. 7/31/09, p.4)

Having correctly stated the problem with enforcement, Commissioner Komatsubara concluded that the CPC could not enforce a time deadline. He stated:

"It becomes incumbent on us as to whether we enforce that commitment or not. It is kind of a game of chicken, however, because at the same time we really don't want to close this landfill [by revoking the permit]. I asked myself the question, I said, "Would you, Kerry, really be willing to close the Waimanalo Gulch?" And the answer is no." (Exhibit 71, Tr. 7/31/09, p. 7)

Commissioner Komatsubara, however, is wrong. He tries to resolve the problem of enforcing the time deadline by eliminating the time deadline. But this merely surrenders the CPC's obligation to impose appropriate conditions. The solution actually lies in setting clear requirements with clear deadlines, and an automatic expiration if these requirements are not met. It is then up to the City and County of Honolulu to follow through. If the City and County of Honolulu wants to avoid the early expiration of the SUP, it will be forced to conduct a site selection process, make a selection, and come back to the Planning Commission and the LUC with that decision and information about the alternatives considered.

d. Automatic expiration

The CPC's new Condition 1 on the 2008/SUP-2 only calls for the Applicant to "begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL." This condition, which is so loosely constructed, easy to fulfill and so unenforceable so as to render it meaningless, is further stripped of its meaning by the CPC's own admission that it was unwilling to enforce a condition anyway.

The LUC should look to the language of the 2003 Amended 86/SUP-5, Condition 1. In 2003, the LUC eased much of the very real burden of having to enforce critical conditions against the County by adding a provision for an automatic expiration of the Permit. Although there continued to be problems with compliance, the County Council and Administration did take affirmative action in convening the Blue Ribbon Committee and passing a Resolution to choose a site.

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In this case, if the Blue Ribbon Committee fails to complete its process within twelve months or the City Council fails to make a site selection six months thereafter, the SUP should automatically expire.

e. Other Conditions.

Certainly, if the third boiler at H-Power is completed, curbside recycling and transshipment continued, then the City & County can reduce the MSW stream to minimal amounts. These practices should significantly alter the County's need for additional MSW landfill space. The SUP condition involving the County's pursuit of landfilling alternatives should be more tightly constructed, providing measurable and enforceable benchmarks whose failure to obtain would result in the automatic expiration of the Permit. In keeping with the OP's original recommendations, an extension of the 86/SUP-05 for a short timeframe of no more than three years could be granted for the entire SUP, which will allow regulators and policymakers to reassess the actual success of these three new and developing programs in the context of a new site selection process.

A condition requiring the City and County of Honolulu to correct any violations (through e.g. variance, grandfathering or zoning change) of its own Ordinances, specifically Section 21-5.680, should be included.

A community benefits package as approved by the City Council should be given for each fiscal year in which the SUP is valid.

Annual Reports should be provided to the Department of Planning and Permitting and the Land Use Commission, not just the Planning Commission.

The Department of Planning and Permitting as well as the Land Use Commission should be allowed to impose additional conditions, not just the Planning Commission.

Conclusions

For all these reasons, OP recommends that the 2008/SUP-02 be denied. OP also recommends that the request to withdraw 86/SUP-05 be denied, and that 86/SUP-05 instead be extended for a maximum of three years, with additional expansion space for a maximum of one cell for ash and two cells for MSW. Further, the Petitioner should be required to complete an inclusive, transparent, public, site-selection process (like the Blue Ribbon Committee previously formed) within twelve months, with an automatic expiration if this condition is violated. Subsequently, the City Council should be required to select a site(s) based on the forwarded recommendations within an additional six months (or 18 months from the date of the Decision and Order), again with an automatic

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expiration of the Permit if this condition is violated. If the Land Use Commission believes that 86/SUP-05 cannot be extended, OP then recommends that all applicable conditions in 86/SUP-05 be included in 2008/SUP-02, along with the above-discussed requirements.

Alternately, the OP recommends that the entire Application be remanded back to the CPC in order to correct procedural errors and conflicts with the County's Land Use Ordinances.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Abbey Seth Mayer", with a long horizontal line extending to the right.

Abbey Seth Mayer
Director

Encl: Map

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CITY AND COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

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

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

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

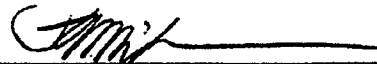
During the continuation, ENV will work to divert all waste from the landfill that can be disposed of by a method other than by landfilling, except if (1) H-POWER cannot accept the landfill waste or there is an emergency, and (2) there is no reasonably available alternative disposal method for the waste,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

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

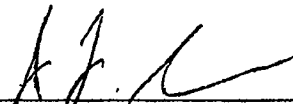
3. Automotive Shredder Waste ("ASR"), which comprises the majority of the Miscellaneous Special Waste category: The Department of Health has approved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to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

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

DATED: Honolulu, Hawaii, _____.



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APPROVED AND SO ORDERED:

Authorized Representative of the
Honolulu Planning Commission

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

09-01760/483350

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

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

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

CERTIFICATE OF SERVICE

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

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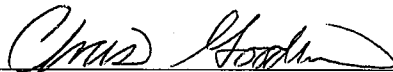
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OFFICE OF PLANNING, STATE OF HAWAII

DATED: Honolulu, Hawai'i, February 5, 2018.

CADES SCHUTTE
A Limited Liability Law Partnership



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