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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

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 EXCEPTIONS TO PLANNING COMMISSION'S JANUARY 15, 2019 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

DECLARATION OF CHRISTOPHER T. GOODIN

EXHIBITS 1 - 5

CERTIFICATE OF SERVICE

Hearing:

Date: February 28, 2019
Time: 1:30 p.m.
Place: Mission Memorial Hearings Room

R9

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 JANUARY 15, 2019 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Pursuant to Honolulu Planning Commission Rule § 2-75 and the Planning Commission's January 16, 2019 letter, Intervenors 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 transmitted by letter dated January 15, 2019 (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.

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." *Mauna 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, decisonmakers 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 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." 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 Hawaiʻi 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 WGSL:

1. From the date of the Planning Commission's order until **March 1, 2024**, MSW should not be allowed to be deposited at the WGSL 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 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. 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 WGSL 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 reside and automobile-shredder residue from the WGSL to the new landfill.

3. Following the three-year transition period, the WGSL 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 WGSL. 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 WGSL 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]

Section II and III below identify the procedural defects in the Proposed Decision. Section II explains (1) that the adoption of the Proposed Decision did not comply with Planning Commission Rule § 2-76 because the Commissioners did not make the "attestation" required by the rule and (2) that the adoption of the Proposed Decision violates Planning Commission Rule § 2-75 because there is no record of Temporary Commissioner Donald W.Y. Goo voting to adopt the Proposed Decision.

[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.

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 RULES OR DUE PROCESS OF LAW

The Planning Commission adopted the Proposed Decision. *See* 2011 AP 12/6/17 Tr. at 6:19-21. 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 Hawaiʻi 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-

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[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. The Chair and Commissioners Anderson, Hayashida and G. Chang voted to adopt the Proposed Decision on December 6, 2017, but the Commissioners did not satisfy the attestation requirement before adopting the decision. *See* 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."); *see also* 2011AP 3/1/17 Tr. at 19:6-17 (Members Hayashida and Anderson confirming they "reviewed" the records in the case). The Proposed Decision was served the parties the same day. Thereafter, at the March 7, 2018 hearing, Chair McMurdo and Commissioners Anderson, Hayashida and G. Chang confirmed that they "have received, studied and examined and understand the evidence and the entire record from both the 2008 and 2011 application proceedings." AP 3/7/18 Tr. at 5:13-16. However, this was done **after** the Proposed Decision was adopted. The Proposed Decision was re-circulated to the parties on or about January 15, 2019. But this is the same Proposed Decision that was adopted by the Chair and Commissioners Anderson, Hayashida and G. Chang in December 2017, before they provided any attestation in this matter. The attestation must be provided before a proposed decision is adopted.

With respect to the new commissioner, Temporary Commissioner Goo, there are two procedural issues. First, Commissioner Goo did not satisfy the attestation requirement at any time before the Proposed Decision was adopted. Indeed, Commissioner Goo was not a member of the Planning Commission at the time the Proposed Decision was adopted in December 2017.

Second, Commissioner Goo has never voted to adopt the Proposed Decision. Planning Commission Rule § 2-75 requires service of a "proposal for decision" on the parties "containing a statement of reasons and including the determination of each issue of fact or law necessary to the proposed decision . . . ." Unlike the other Commissioners who at least voted to adopt the Proposed Decision, there is no evidence in the record that Commissioner Goo has voted to adopt the Proposed Decision. Accordingly, , the Commission has not provided the parties with a "proposal for decision" by Commissioner Goo.

Having failed to meet the obligations under Rule §§ 2-75 and 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 WGSL, 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 WGSL, 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-

fying 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 WGSL 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 has 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 to 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 WGSL. 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 WGSL 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 WGSL. 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 WGSL 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 Hawaiʻi 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 processes 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 Hawaiʻi 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 WGSL 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 WGSL." 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 WGSL'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 Com-mission 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 WGSL, 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 WGSL. 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 WGSL. The Applicant's effort to identify and develop such site shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's 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 Com-mission 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 bum 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.