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CITY AND COUNTY OF HONOLULU

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IN REPLY REFER TO:
DIR 22-98

December 22, 2022

VIA HAND-DELIVERY

Brian Lee, Chair
Planning Commission

c/o Dawn Takeuchi Apuna, Director Designate
Department of Planning and Permitting
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813



Re: **Special Use Permit (SUP) No. 2008/SUP-2 (SP09-403); State Land Use Commission (LUC) Docket No. SP09-403; In re Department of Environmental Services, City and County of Honolulu; Application to Modify SUP No. 2008/SUP-2 (SP09-403) by Modifying (1) Condition No. 1 of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, dated June 10, 2019 and (2) Condition No. 5 of the LUC's Findings of Fact, Conclusions of Law, and Decision and Order Approving with Modifications the City and County of Honolulu Planning Commission's Recommendation to Approve Special Use Permit, certified on November 1, 2019**

The Department of Environmental Services, City and County of Honolulu (the "Applicant" or "Department of Environmental Services"), respectfully moves the Planning Commission, City and County of Honolulu (the "Planning Commission"), for an Order modifying the State Special Use Permit ("SUP") No. 2008/SUP-2 (SP09-403), which superseded State SUP No. 86/SUP-5 and approved the SUP for the Waimanalo Gulch Sanitary Landfill ("WGSL" or "Landfill") subject to certain conditions.¹

Specifically, Applicant seeks to modify the conditions that set a December 31, 2022 deadline for Applicant to identify an alternative landfill site found in both the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order,

¹ This Application is made in accordance with Section 2-38 and Section 2-49 of the Rules of the Planning Commission and Section 15-15-96.1 of the State of Hawai'i, Land Use Commission ("LUC") Rules.

dated June 10, 2019 ("Planning Commission's 2019 Decision") and the LUC's Findings of Fact, Conclusions of Law, and Decision and Order Approving with Modifications the City and County of Honolulu Planning Commission's Recommendation to Approve Special Use Permit, certified on November 1, 2019 ("LUC's 2019 Decision"). See Exhibits "A" and "B". The December 31, 2022 deadline appears to be a condition that originated with the Planning Commission that the LUC subsequently approved.

Applicant presents this request for modification to the Planning Commission, with the understanding that the modification of conditions for areas greater than fifteen acres will ultimately require the LUC's concurrence. See Rules of the Planning Commission § 2-49. This is also consistent with the process for Special Use Permit applications. See, e.g., Rules of the Planning Commission §§ 2-40, 2-46, 2-47; HRS § 205-6(a) - (d).

The basis for this Application is twofold: (1) Act 73 (Session Laws of Hawaii 2020) ("Act 73"), which was signed into law after the Planning Commission's and LUC's 2019 Decisions, placed new legal restrictions on potential landfill sites and left Applicant with a small selection of sites that are all located above O'ahu's drinking water aquifer system; and, (2) the Honolulu Board of Water Supply ("BWS") recently advised Applicant that it "does not approve any of the six proposed landfill sites that are located above (or mauka) the BWS' "No Pass Zone" and over O'ahu's drinking water aquifer system." See Exhibit "C", BWS' letter to Applicant dated November 16, 2022.

Applicant requests a two-year extension of time to reevaluate its options including, but not limited to, additional time to explore the use of federal lands outside the BWS No Pass Zone and work with the state legislature on new law or amendments to existing law, including Act 73, that would open up potential landfill sites outside the No Pass Zone.

Applicant believes this request for an extension of time is in the best interest of all O'ahu communities as this City administration, under the circumstances, refuses to default to pursuing an extension of the WGSL. Further, in light of the contamination of drinking water associated with leaking petroleum from the U.S. Navy's Red Hill Bulk Fuel Storage Facility,² Applicant believes it is obligated to proceed with extreme caution, taking into consideration any and all potential impacts such as that identified by the BWS, before identifying the next landfill site.

If the Planning Commission approves Applicant's request, then the entire record of this request will be transmitted to the LUC for its consideration and action. See Rules of the Planning Commission § 2-47.

² See, e.g., State of Hawai'i, Department of Health, Red Hill Water Information, <https://health.hawaii.gov/about/red-hill-water-information/> (last visited December 14, 2022).

I. BACKGROUND

A. WGS� Background³

The WGS� is located in Waimanalo Gulch, O'ahu, at 92-460 Farrington Highway, Kapolei, Hawai'i 96707, and Tax Map Key Nos. (1) 9-2-03:72 and 73⁴ (the "Property"). The Property consists of approximately 200 acres. The City and County of Honolulu ("City") has operated a portion of the Property as a landfill subject to a SUP since 1989. See Exhibit "B", at page 52, ¶¶ 276 and 279. The WGS� is the only permitted public municipal solid waste ("MSW") landfill on the island of O'ahu and the only permitted repository for the ash and residue produced by H-POWER.⁵ See Declaration of Roger W. Babcock Jr. ("Dec. Babcock") at 15.

Since 1989, due to the ongoing need for waste disposal via landfilling, Applicant conducted additional environmental reviews and studies to justify continued use of the WGS�, and the Planning Commission and LUC have approved extensions and expansions of the WGS� SUP. See, e.g., Exhibit "B", at pages 53-56 and 62, ¶¶ 280-281, 286, 288, 291, 294, and 311.

³ WGS�'s background, including its history of contested case hearings, has been documented extensively and most recently in the Planning Commission's 2019 Decision (see Exhibit "A", its Findings of Fact, at pages 2-62, ¶¶ 1-276) and the LUC's 2019 Decision (see Exhibit "B", its Findings of Fact, at pages 3-98, ¶¶ 1-458). Thus, Applicant provides a condensed background herein.

⁴ (1) 9-2-03:72 and 73 are the Tax Map Key ("TMK") numbers referenced in the applications and records of the Planning Commission and LUC, relating to their 2019 Decisions. Recently, it came to the Applicant's attention that the Property is also identified by TMK numbers (1) 9-2-050:005 and 006. Nevertheless, the Property at issue remains the same. Declaration of Roger W. Babcock Jr. at 14.

⁵ MSW can be 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." HRS § 342G-1. The Honolulu Program of Waste Energy Recovery ("H-POWER") is the City's award-winning waste-to-energy facility, which began operations in 1990. One of H-POWER's permit conditions is that there must be a landfill to serve as not only a repository for ash but as the backup to H-POWER if there is an emergency that would render H-POWER less effective at disposing of waste or even unable to process waste.

More recently, the Planning Commission consolidated two contested case hearings involving: (1) Applicant's application for a new special use permit, the expansion of the WGS�, and the withdrawal of County Special Use Permit No. 86/SUP-5 (the "2008 Application"), and (2) Applicant's application 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 for County Special Use Permit No. 2008/SUP-2, specifically to delete the July 31, 2012 deadline for the landfill to accept MSW (the "2011 Application"). Please see additional details regarding the 2008 and 2011 Applications and the various contested case hearings in the Planning Commission's 2019 Decision and/or the LUC's 2019 Decision. See Exhibits "A" (at pages 2-45) and "B" (at pages 3-43).

On or about June 10, 2019, the Planning Commission issued its 2019 Decision, which approved the Department of Environmental Services' 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 Facts, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009, through deleting Condition Nos. 4 and 14 and adding four conditions. As part of its decision and order, the Planning Commission added Condition No. 1, which set a December 31, 2022 deadline for the City to identify an alternative landfill site. See Exhibit "A", at page 65, ¶ 1.

Specifically, Condition No. 1 of the Planning Commission's 2019 Decision provides:

1. On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure date for the WGS� because the WGS� 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 WGS� when it reaches capacity at a future date. The identification of an alternative landfill site by December 31, 2022 is based on the evidence presented and that, as the Planning Commission discussed in 2017, a five year timeframe was sufficient time for the Applicant to identify an alternative landfill site before the WGS� nears capacity. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

Id. (emphases added).

On or about November 1, 2019, the LUC issued its 2019 Decision subject to certain conditions, including Condition No. 5 that also set a December 31, 2022 deadline to identify an alternative landfill site. See Exhibit “B”, at page 104, ¶ 5.

Specifically, Condition No. 5 from the LUC’s 2019 Decision provides:

5. By no later than December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon closure of WGSF. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

Id.

B. Act 73 Placed Additional Limitations on a New Landfill Site

Prior to the enactment of Act 73, existing regulations limited and/or restricted new landfills near airport runways, in floodplains, in wetlands, within two hundred feet of a fault, in seismic impact zones, in unstable areas, and in possible tsunami inundation areas. See HAR § 11-58.1-13.

In September 2020, approximately one year after the Planning Commission and LUC issued their respective 2019 Decisions, Governor David Y. Ige approved Act 73, which further restricted landfill siting by amending State law to (1) prohibit “waste or disposal facilities” (e.g., landfills) in conservation districts (see HRS § 183C-4(b)); and, (2) prohibit the construction of “waste or disposal facilities” within one-half mile from residential, school, or hospital property lines (see HRS § 342H-52(b)).⁶

The new restrictions imposed by Act 73 prohibit the City from siting a landfill in a significant portion of the island of O’ahu. The map in Figure 1 depicts the areas of O’ahu where a landfill cannot be sited as a result of the conservation district (green) and one-half mile buffer from residential areas zone (blue) restrictions in Act 73.⁷

⁶ The full text of Act 73 is available on the State Legislature’s website: https://www.capitol.hawaii.gov/slh/Years/SLH2020/SLH2020_Act73.pdf.

⁷ See Appendix B of the Landfill Advisory Committee’s Final Report, available at https://www.honolulu.gov/rep/site/env/envref/envref_docs/OLSS%20and%20LAC%20Final%20Report%2020220627_COMBINED%20r1.pdf, PDF at 89.

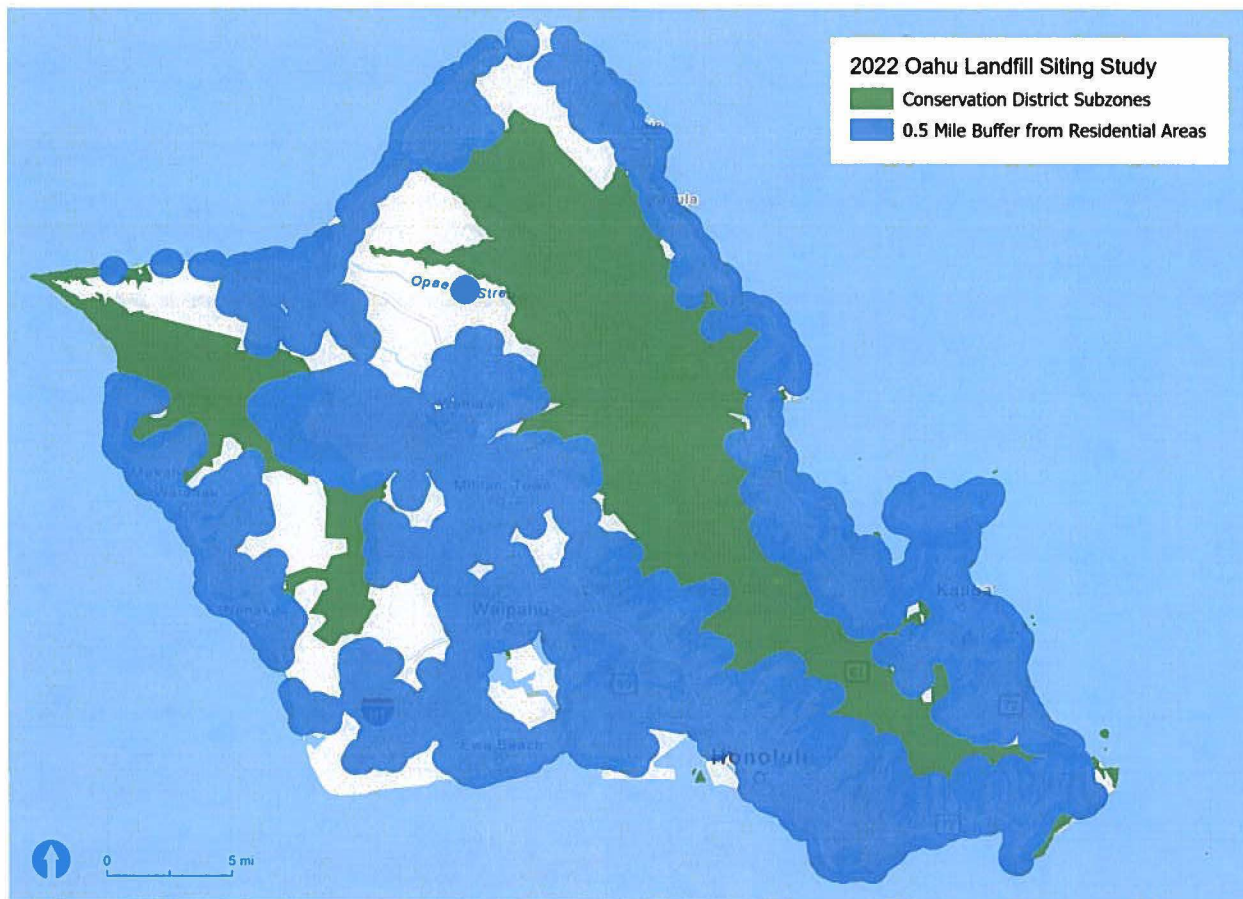


Figure 1

Figure 2 depicts the areas on a large portion of O'ahu where a landfill cannot be sited as a result of Act 73 and pre-Act 73 regulations that limit and/or restrict new landfills, including airport buffer zones and tsunami zones.⁸ Developed and undevelopable lands,⁹ which are not feasible for landfill development, and federal lands¹⁰ are also indicated.

⁸ See Exhibit "D", Landfill Advisory Committee's Final Report (without appendices), at page no. "4-14".

⁹ Developed lands are lands where a major building(s) exists, and undevelopable lands are lands that already have a planned development in place. Applicant removed developed/undevelopable lands from consideration also because those potential sites were too small or restricted by Act 73's one-half mile buffer zone. See Dec. Babcock at 16.

¹⁰ Federal lands are lands owned by the federal government. Given the short deadline to identify a new site, Applicant removed federal lands from consideration because of the long lead-time it would take to negotiate and acquire federal land. Id.

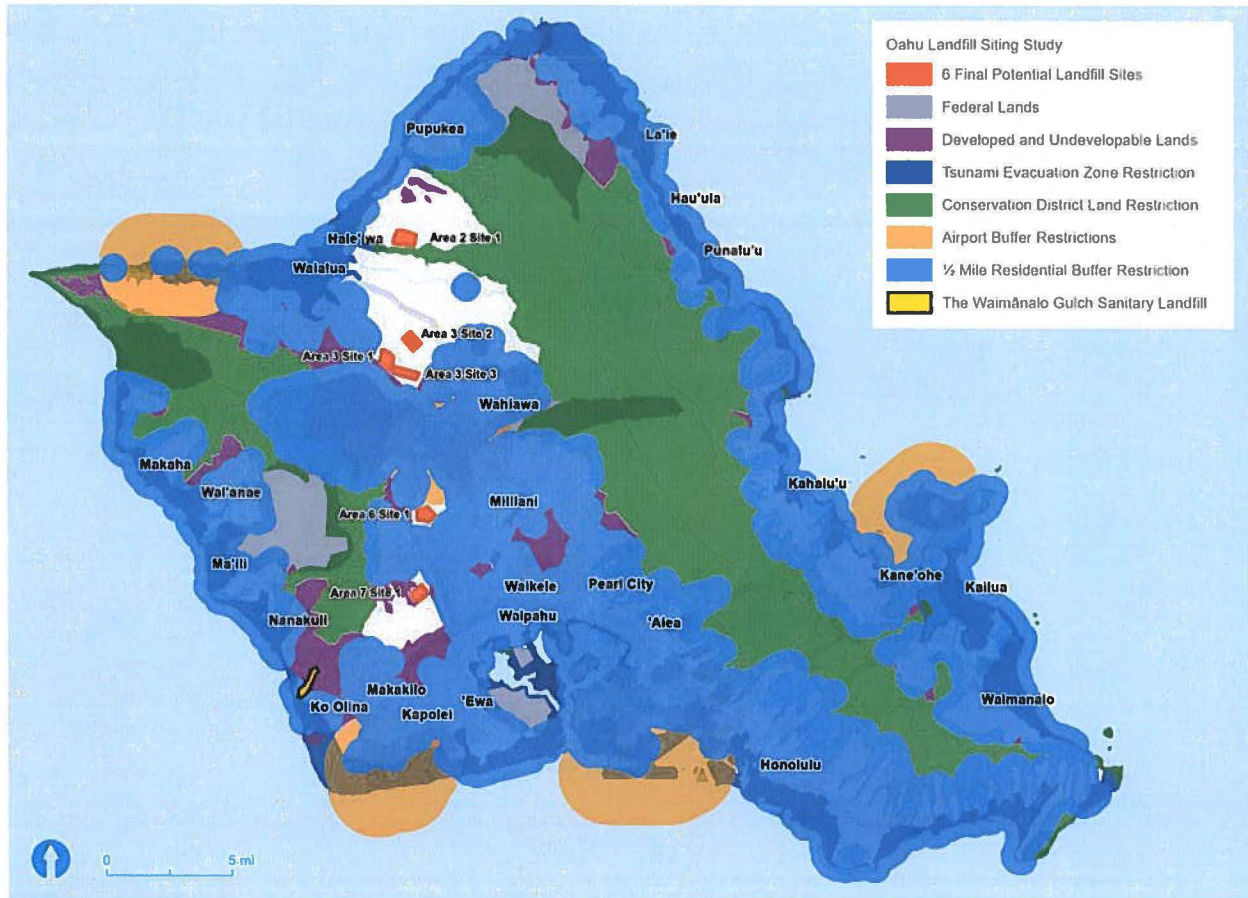


Figure 2

The white areas in Figure 2 represent the only areas where a landfill can be sited, after factoring in all restrictions. Applicant assessed these areas and identified the six proposed landfill sites that the Landfill Advisory Committee further evaluated and ranked. See Exhibit "D", at pages "4-5" to "4-6", "4-10" to "4-11".

Figure 3 adds the BWS No Pass Zone (which is bounded by the red dotted line) to all other restrictions (including restrictions imposed by Act 73), and indicates the proposed sites from previous 2012 and 2017 studies.¹¹ BWS asserts that no landfill should be cited "above (or mauka) the No Pass Zone and over Oahu's drinking water aquifer system." See Exhibit "C", at page 1. The No Pass Zone is further discussed in the next section.

¹¹ See Exhibit "D" at page no. "4-8".

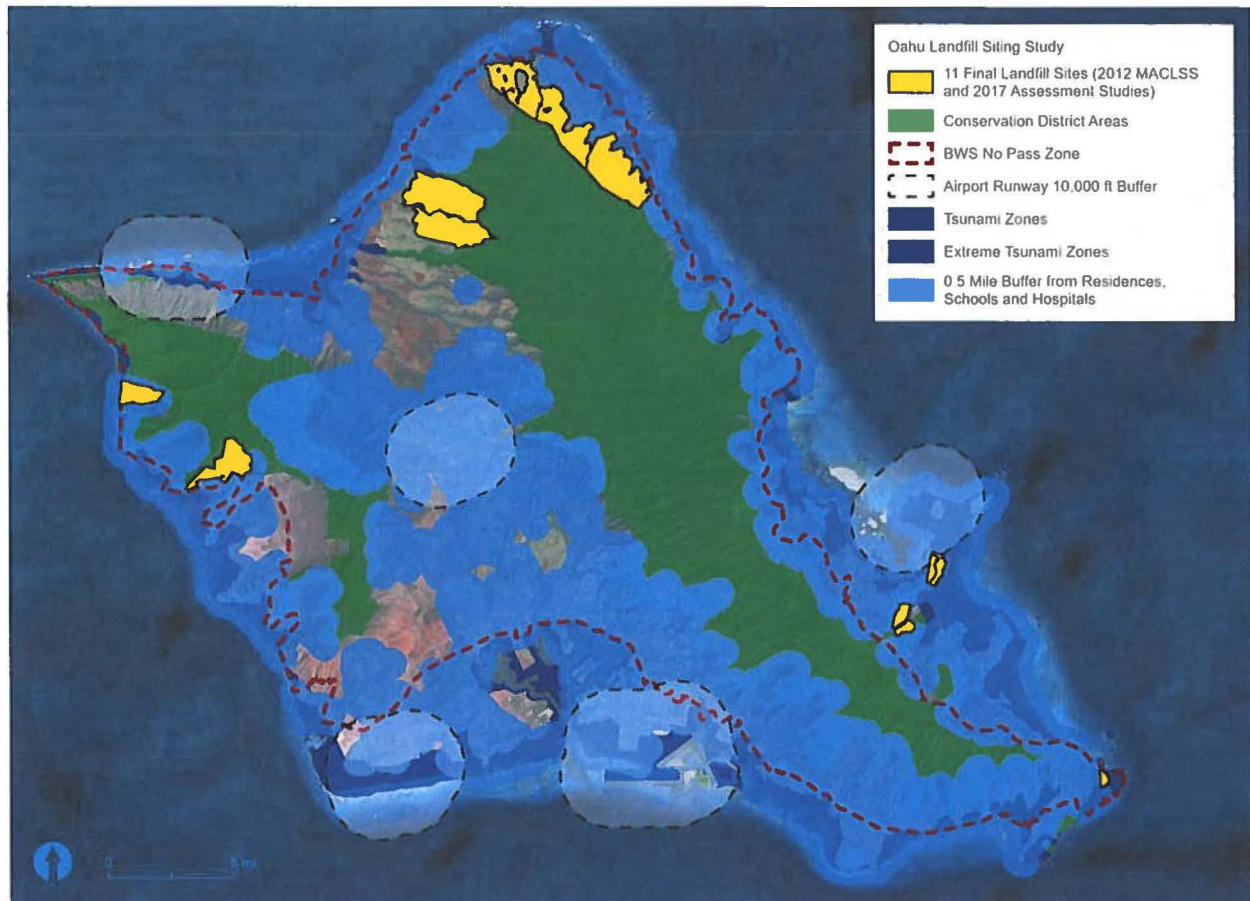


Figure 3

Act 73 eliminated the previously proposed landfill sites outside of the No Pass Zone (shown as yellow areas outside of the area demarcated by the red dotted line). When the No Pass Zone and Act 73 are applied as restrictions, there are zero potential new landfill sites on O'ahu.¹² See Dec. Babcock at 17.

C. The Landfill Advisory Committee Evaluated Six Proposed Sites

In light of the December 31, 2022 deadline, Mayor Rick Blangiardi appointed a new Landfill Advisory Committee ("LAC") in 2021 to assist with the evaluation and scoring of the six sites identified as the WGSL's potential replacement landfill sites.¹³ The LAC held eight public meetings between October 2021 and June 2022, during

¹² Not including federal lands. See also footnote 10.

¹³ The LAC was established in accordance with Section 4-103 of the Revised Charter of the City and County of Honolulu 1973 (Amended 2017 Edition) and as an advisory committee, its function was limited to counsel and advice. See Dec. Babcock at 18.

which it helped develop processes and criteria to evaluate and score the six Act 73 compliant landfill sites under consideration by the City. See Exhibit “D”, at page no. “1-1”.

During the LAC’s fourth meeting held on December 14, 2021, representatives of the BWS, including its Manager and Chief Engineer Ernest Y.W. Lau, P.E. (“Manager Lau”), presented the BWS’ perspective and concerns about siting a new landfill above the groundwater aquifer. The BWS highlighted the dangers of landfill leachate leaking into the aquifer, and presented literature from the Environmental Protection Agency that indicated that all landfills eventually leak. At the same meeting, the Department of Environmental Services’ consultant presented information relating to groundwater protection measures for MSW landfills. See Exhibit “D”, at pages “3-3” to “3-4”; see also Exhibit “E”, LAC Meeting #4 Minutes, at pages 4-6.

In subsequent LAC meetings, the LAC members expressed concern about the location of all proposed landfill sites in the BWS No Pass Zone and the potential implications it might have on the island’s drinking water resources.¹⁴ The LAC scored the six sites and approved a motion to recommend that none of the proposed sites is acceptable because of each site’s location in the No Pass Zone. See Exhibit “D”, at page no. “1-4”.

Details on the final site scoring and rankings can be found in the LAC’s final report titled “O’ahu Landfill Siting Study & Landfill Advisory Committee Recommendations” (dated June 2022) (“LAC’s Final Report”), which is publicly available on the Department of Environmental Services’ website.¹⁵ The following chart is included in the LAC’s Final Report:

¹⁴ According to the BWS, “[t]he No Pass Zone was derived from the review of geologic maps and borings that define the areas of thick caprock around Oahu. Areas that are below (or makai) the No Pass Zone are primarily located on thick caprock. ... Areas that are above the No Pass Zone, have no caprock and are located directly above the groundwater that is used for drinking water.” Exhibit “C”, at page 2. Although the BWS appears to refer to the No Pass Zone as the boundary-line between the areas above the drinking water aquifer and the areas above the thick caprock (i.e., the line/zone that should not be passed), its official rules seem to define the No Pass Zone as the actual areas of land situated above the drinking water aquifer. See BWS Rules and Regulations, Definitions (2010) (defining “No Pass Zone” to mean “areas in which the installation of waste disposal facilities, which may contaminate groundwater resources used or expected to be used for domestic water supplies, shall be prohibited.”).

¹⁵ See New Landfill Siting, Department of Environmental Services, <https://www.honolulu.gov/opala/newlandfill.html> (click on “Final Report”). This PDF also contains the Final Report’s Appendices (A to E), which approximates to 1,400 additional pages; see also Exhibit “D”, LAC’s Final Report (without appendices).

Table 1.1 Final Site Scoring and Ranking			
Rank	Area, Site	Location	Score
1	Area 6, Site 1	Wahiawā near Kunia Road	4,200
2	Area 7, Site 1	Kapolei/Waipahu near Kunia Road	4,061
3	Area 3, Site 1	Wahiawā	3,841
4	Area 3, Site 2	Wahiawā	3,685
5	Area 3, Site 3	Wahiawā	3,634
6	Area 2, Site 1	Hale'iwa near Kawaihoa Road	3,596

Figure 4

D. Applicant's Presentation to the BWS Board of Directors, and the BWS' Subsequent Position Letter and Presentation

On October 24, 2022, the Applicant, along with Mayor Blangiardi and other members of his administration, briefed the BWS Board about the landfill selection status, the urgency of the City's need to identify an alternative landfill site by December 31, 2022, and the LAC's reservations relating to the six proposed sites because they are located in the BWS No Pass Zone. See <https://www.boardofwatersupply.com/boardmeetings> (under "Recorded Board Meetings", select "October 24, 2022 – Board of Directors Meeting" recording), starting at 0:05:47. Applicant posed questions to the Board, specifically to ask for clarity on the BWS' legal authority over landfill siting in the No Pass Zone; whether that authority was exercised; and if not exercised, when the City should seek a determination from the BWS. Id. starting at 0:17:44.

On November 3, 2022, the Applicant sent a follow-up letter to BWS Manager Lau to formally ask for BWS' official position on the six potential landfill sites the LAC evaluated. Specifically, the Applicant asked if the Mayor were to select any of the six ranked sites on the LAC's list, "what would be the BWS' official response or position?" Exhibit "F", Applicant's letter to the BWS dated November 3, 2022.

On November 16, 2022, the BWS responded to Applicant via letter from Manager Lau, stating in part:

For the reasons set forth below, the BWS does not approve any of the six proposed landfill sites that are located above (or mauka) the No Pass Zone and over O'ahu's drinking water aquifer system.

All six of the proposed landfill sites are located above the BWS' No Pass Zone, and all six of the proposed landfill sites are located over Oahu's hydrogeologically-connected drinking water aquifer system. Never has the importance of this groundwater aquifer been more apparent, and never has our responsibility to protect it been more paramount. As you know, the people of Oahu are still coping with what the Hawaii Department of Health aptly described as "a humanitarian and environmental disaster" caused by fuel releases from the U.S. Navy's Red Hill Bulk Fuel Storage Facility that resulted in the contamination of Oahu's drinking water supply and the pollution of this island's irreplaceable sole-source groundwater aquifer. This unfortunate environmental catastrophe is a stark reminder that we all need to be proactive in protecting all of our precious drinking water resources from underground sources of contamination. Oahu's aquifer cannot be replaced.

Exhibit "C", BWS' letter to Applicant dated November 16, 2022 (footnote omitted). The BWS' letter is discussed further herein.

On November 28, 2022, the BWS (including Manager Lau, among others) briefed its Board and the public regarding landfill siting and the potential impact on water resources. See <https://www.boardofwatersupply.com/boardmeetings> (under "Recorded Board Meetings", select "November 28, 2022 – Board of Directors Meeting" recording), starting at 2:08:17.

E. Continued Waste Diversion

Consistent with the requirements of the LUC's 2019 Decision, Applicant has continued its efforts to use alternative technologies to provide a comprehensive waste stream management program.¹⁶ Over the years, Applicant has been able to divert more and more waste from the WGS to H-POWER. See Dec. Babcock at 19.

In Calendar Year 2010 approximately 1,214,904 tons of waste was generated on O'ahu. Of that amount, the Landfill received 163,736 tons of MSW and 179,946 tons of ash and residue from H-POWER (for a combined total of 343,682 tons). See Exhibit

¹⁶ Condition No. 6 of the LUC's 2019 Decision provides: "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." Exhibit "B", at page 104, ¶ 6.

“A”, Planning Commission’s 2019 Decision, at pages 50-51, ¶ 226; see also Dec. Babcock at 20. According to Applicant’s data, the landfill diversion rate for 2010 was 71.7%.¹⁷ See Dec. Babcock at 20.

In Calendar Year 2020, approximately 1,210,281 tons of waste was generated on O’ahu. Of that amount, the Landfill received 56,114 tons of MSW and 182,112 tons of ash and residue from H-POWER (for a combined total of 238,226 tons). See Exhibit “G”, chart (showing data for 2017 to 2021); see also Dec. Babcock at 21. According to Applicant’s data, the landfill diversion rate for 2020 was 82.2%. See Dec. Babcock at 21.

In Calendar Year 2021, approximately 1,215,467 tons of waste was generated on O’ahu. Of that amount, the Landfill received 106,723 tons of MSW and 157,531 tons of ash and residue from H-POWER (for a combined total of 264,254 tons). See Exhibit “G”; see also Declaration of Roger W. Babcock Jr. at 22. According to Applicant’s data, the landfill diversion rate for 2021 was 80.0%. See Dec. Babcock at 22.

Based upon data already collected, Applicant projects that for Calendar Year 2022, the Landfill will receive approximately 70,000 tons of waste and 160,000 tons of ash and residue from H-POWER (for a combined estimated total of 230,000 tons). Based upon current estimates, the MSW landfill diversion rate for 2022 is projected to be approximately 83%. See Dec. Babcock at 23.

In 2012, H-POWER’s capacity increased to 900,000 tons per year because of the addition of a third boiler. The third boiler is a mass burn unit, which can process waste streams that previously required landfilling, including sewage sludge, bulky waste, and treated medical waste (except medical sharps). See Dec. Babcock at 25.

In total, H-POWER’s original refuse derived fuel boilers and mass burn unit processes waste to reduce its volume by 90 percent, and as of 2021, approximately 750,000 tons per year of MSW and sludge are diverted from the WGSL. See Dec. Babcock at 26.

In addition, improvements at the H-POWER facility have resulted in an increased amount of metal recovered for recycling. Currently, H-POWER recovers about 25,000 tons of metal annually for recycling. See Dec. Babcock at 27.

¹⁷ For all of the referenced waste tonnage in this section (i.e., in Calendar Years 2010, 2020, 2021, and 2022), the amounts do not include the construction & demolition (“C&D”) waste received and/or recycled by the private PVT landfill. See Dec. Babcock at 24.

In July 2021, H-POWER began combusting its process residue on a trial basis.¹⁸ Operating data is being collected to determine whether to make the change permanent. This change has reduced the amount of process residue being disposed at the landfill from about 4,000 tons per month to zero (i.e., 48,000 tons per year). See Dec. Babcock at 29.

Applicant is also pursuing ash recycling to further decrease waste that must be landfilled. Applicant executed a contract for the processing and beneficial reuse of ash, and the first phase of the project is currently proceeding. The ash recycling project, once permitted and built, has the potential to divert at least 60% of the H-POWER ash that is currently landfilled at the WGSF. Based on 2021's reported tonnage, this approximates to at least 94,500 tons of ash per year that can eventually be diverted from the Landfill. See Dec. Babcock at 30.

Currently, approximately 30,000 tons per year of auto shredder residue ("ASR") is disposed at the WGSF. Although Applicant had envisioned ASR to be diverted to H-POWER, test data showed that the high fluorine and chlorine content of the material could be extremely harmful to the boiler. This matter is pending further evaluation and possible testing. The ash recycling project may consider ASR processing as a potential future option. See Dec. Babcock at 31.

The following graph (Figure 5) illustrates the reduction of MSW delivered to the WGSF over the years, generally because of source reduction and diverting more waste from the Landfill (red line) to H-POWER (blue line). The total MSW (black line) reflects the MSW reduction during the Great Recession that began in 2008, a slow but steady economic recovery, and another MSW reduction during the COVID-19 pandemic that began in 2019. Slightly higher landfill tonnages in 2017 and 2021 were due to facility refurbishment projects and major turbine-generator maintenance. See Dec. Babcock at 32.

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¹⁸ "Process Residue" is composed of fine (small particle size) materials in the waste stream such as glass, sand and dirt that are separated using trommel screens and removed during pre-combustion waste processing. See Dec. Babcock at 28.

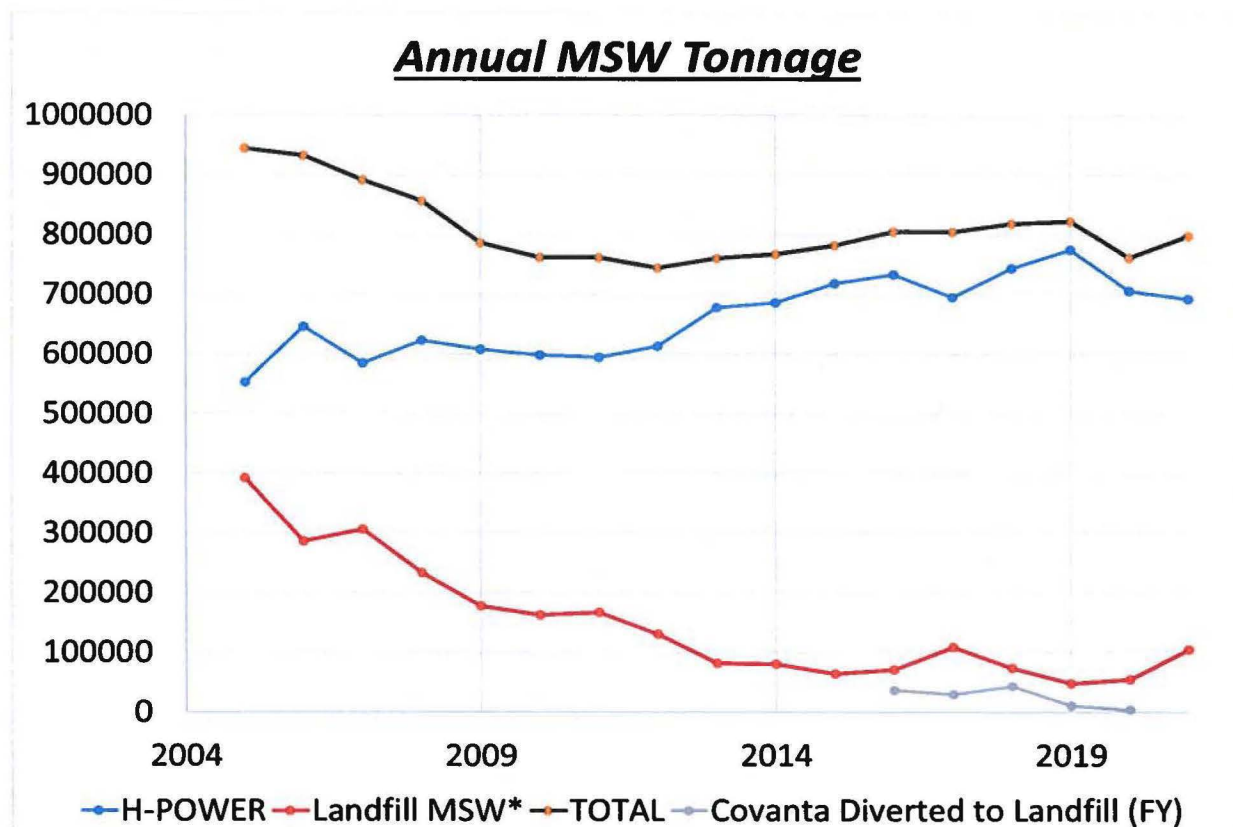


Figure 5

As the decreasing MSW tonnage to the WGS� over time shows, Applicant has continued its effort to significantly reduce solid waste disposal at the WGS� by expanding H-POWER and the waste to materials recycling programs, and developing alternative disposal options for materials presently being landfilled. Collectively, these actions have and will continue to divert significant amounts of waste from the Landfill. However, despite new technological solutions that Applicant continues to consider, Applicant cannot completely eliminate the need for a landfill at this time for reasons elaborated below. See Dec. Babcock at 33.

F. Purpose and Need for a Landfill

A landfill to dispose of MSW is required because there will always be material that cannot be combusted, recycled, reused or shipped. See Dec. Babcock at 34. A landfill also is essential because H-POWER cannot operate without the landfill as a backup disposal option. See Dec. Babcock at 35. Specifically, H-POWER's Solid Waste Management Permit issued by the Department of Health, provides in relevant part:

Section C. MSW Storage and Processing

20. In the event that the facility is unable to combust RDF/MSW or process MSW for more than 72 hours, the permittees shall cease from accepting any more MSW at the affected area until the equipment is back in operation. **During such times, waste shall be diverted to permitted storage and disposal facilities or to operational areas of the facility.** All other permit conditions, including capacity limits, shall be maintained.

Section E. Management and Testing of Pre-Combustion Residue

27. **The residue shall be transported to a permitted landfill for disposal.**

Section F. Management and Testing of Post-Combustion Ash

32. **The ash shall be transported to a permitted ash monofill for disposal.**

Exhibit "H", Solid Waste Management Permit No. IN-0049-11 (bold added).¹⁹

The importance of this condition was evident in Fiscal Year 2022 (July 1, 2021 to June 30, 2022), when H-POWER had approximately 36.5 days of downtime due to repair work, annual maintenance outage, and fire in the waste processing facility, whereby waste that would ordinarily go to H-POWER was diverted to the landfill. See Exhibit "I", Covanta's 2021-2022 annual summary report, under Attachment D. A landfill is also critical to the public health during natural disasters such as tsunamis or hurricanes and during times of emergency to control the rapid and massive accumulation of waste. See Dec. Babcock at 37.

Furthermore, because the PVT landfill stopped accepting asbestos containing material ("ACM") on or about January 1, 2021, the City's landfill took on this waste stream to provide an on-island disposal option.²⁰ It has been reported that the PVT landfill will reach capacity in eight years, after which all of PVT's waste must go to the

¹⁹ H-POWER is still operating under this permit, and Applicant is waiting for the permit renewal. See Dec. Babcock at 36.

²⁰ The PVT landfill is O'ahu's only C&D landfill, and has been in operation since 1985. See PVT Land Company, Ltd., <https://www.pvtland.com/landfill/> (last visited November 29, 2022). WGSL is permitted to receive ACM and other C&D waste. See Dec. Babcock at 39.

only remaining disposal site, the City's landfill).²¹ Applicant is gathering information to support legislation to facilitate C&D recycling by enforcing minimum requirements, practices, and procedures for certain construction projects. Applicant is also working to apply for permit modifications for H-POWER to be able to accept wood and combustible C&D waste. See Dec. Babcock at 38.

Therefore, a landfill is and will be necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of O'ahu. A landfill is a critical component of the City's overall Integrated Solid Waste Management Plan, which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. See Dec. Babcock at 40.

II. REQUEST FOR MODIFICATION OF SUP No. 2008/SUP-2 (09-403)

Section 2-49 of the Rules of the Planning Commission provides, in relevant part:

(a) A petitioner who desires a modification or deletion of a condition imposed by the commission shall make such a request to the commission in writing. This request shall be processed in the same manner as the original petition for a SUP. A public hearing on the request shall be held prior to any commission action.

...

(c) . . . Modification of conditions for areas greater than fifteen (15) acres will require the concurrence of the land use commission.

Section 15-15-96.1 of the LUC Rules also provides:

Any request for modification of a special permit or modification, release, or deletion of a condition imposed on a special permit, whether imposed by the county planning commission or the commission, shall first be submitted to the appropriate county planning commission and, for special permits for land greater than fifteen acres in size, the commission, for consideration and decision.

²¹ See Michelle Van Dyke, What happens to Oahu's trash and recyclables?, Spectrum News (Oct. 22, 2022, 11:33 AM) <https://spectrumlocalnews.com/hi/hawaii/news/-/2022/10/20/what-happens-to-oahu-s-trash-and-recyclables->.

The decision of the county planning commission with respect to modification of a special permit, or modification, release or deletion of a condition to a special permit shall comply with the requirements of section 15-15-95 and 15-15-96.

Both the Planning Commission and the LUC imposed the December 31, 2022 deadline for Applicant to identify an alternative landfill site (Condition Nos. 1 and 5, respectively).

As discussed in this part, events since 2017 prevent Applicant from meeting the current deadline, so it is necessary and appropriate to grant a two-year extension to allow additional time to explore other options, for the following reasons.

A. The Deadline to Name an Alternative Landfill Site Could Not Account for Future Act 73

In setting the current deadline, the Planning Commission reasoned in June 2019 that “[t]he identification of an alternative landfill site by December 31, 2022 is based on the evidence presented and that, as the Planning Commission discussed in 2017, a five year timeframe was sufficient time for the Applicant to identify an alternative landfill site before the WGS� nears capacity.” Exhibit “A”, at page 65, ¶ 1.

In making the above finding to justify the December 2022 deadline, the Planning Commission and the LUC could not have known that Applicant’s existing list of proposed landfill sites, in which the Applicant invested years and undertook various studies to cultivate and refine, would essentially be wiped out the following year as a result of Act 73, and that Applicant would have to start from scratch to build and evaluate a new list of proposed sites while under a short deadline.²²

Upon Act 73 becoming law in September 2020, Applicant did just that – Applicant applied the Act 73 restrictions and pre-Act 73 regulations to a Geographical Information System (GIS) model of the entire island, identified and assessed the feasibility of twelve unrestricted areas, and narrowed the search to six entirely new potential sites to present to the LAC for its further review and evaluation. See Exhibit “D”, at pages “4-5” to “4-6”. But the six Act 73 compliant sites are all located in the BWS No Pass Zone, so although Act 73 and the No Pass Zone could result in the identification of viable landfill sites if the

²² Previously in 2012, Applicant narrowed its search to 11 potential sites. In 2017, Applicant’s consultant conducted a technical and logistical review, which narrowed those 11 sites to 5 proposed sites. See Exhibit “D”, at pages “1-2”, “2-2” to “2-3”, and “4-5” to “4-6”.

restrictions of each were applied independently, the combination of Act 73 restrictions and the No Pass Zone prevents Applicant from designating an alternative landfill site.²³

B. BWS' Letter and Presentation Disapproving All Six Proposed Landfill Sites Necessitates an Extension of Time for Applicant to Identify Other Viable Landfill Options

BWS set forth its official position disapproving Applicant's six proposed landfill sites for reasons including but not limited to the following:

- BWS asserts that its legal authority in regard to protecting O'ahu's drinking water arises from the Hawai'i Constitution and the public trust doctrine;
- "BWS' Rules and Regulations establish 'No Pass Zones' which generally prohibit the installation of waste disposal facilities, including landfills, in areas that may contaminate groundwater resources used or expected to be used for domestic water supplies";
- "When making the decision to approve or disapprove plans proposing certain waste disposal facilities, the No Pass Zone must be considered and the Manager and Chief Engineer may, at his discretion, withhold approval 'if there is any basis to expect that the operation of the proposed waste disposal facility and any wastewater therefrom may to any degree affect the quality and/or quantity of water resources used or expected to be used for domestic water'";
- "All six of the proposed landfill sites are located above the BWS' No Pass Zone";
- "The United States Geological Survey (USGS), citing EPA studies, has concluded that all landfills eventually will leak into the environment and that the fate and transport of leachate in the environment, from both old and modern landfills, is a potentially serious environmental problem";
- Landfill leachate "poses a considerable risk to both Oahu's groundwater aquifer and drinking water resources";
- "Accordingly, there is a compelling basis upon which to expect that any landfill sited at one of the six locations proposed by [the City] may impact

²³ Applicant's pre-Act 73 list of proposed sites included sites that were outside of the No Pass Zone.

the quality and/or quantity of the water resources used or expected to be used as drinking water”; and,

- Therefore, “BWS must disapprove all six of the proposed landfill sites above the No Pass Zone.”

See Exhibit “C” (letter); see also <https://www.boardofwatersupply.com/boardmeetings> (under “Recorded Board Meetings”, select “November 28, 2022 – Board of Directors Meeting” recording), starting at 2:08:17 (November 28, 2022 BWS presentation to the BWS Board of Directors).

To be clear, at this time, Applicant is not addressing each of the BWS’ allegations and assertions. Instead, in recognition of the BWS’ obligation and commendable efforts to protect the aquifer, particularly in light of the environmental and public health consequences of the Red Hill emergency, Applicant feels compelled to re-examine any and all possible alternatives.

Therefore, based on the BWS’ disapproval of the six sites as potentially threatening Oahu’s aquifer and only drinking water source, Applicant believes additional time is needed to identify an alternative landfill, so the December 31, 2022 deadline must be extended.

C. Applicant Will Use the Two-Year Extension to Work Towards Identifying an Alternative Site Outside of the No Pass Zone

As explained above, Applicant is not left with any viable new landfill site, so it will use the next two years to further evaluate and even create other options outside of the No Pass Zone. As recommended by the LAC, Applicant will: (1) seek a repeal of or amendment to Act 73; (2) continue discussions with the U.S. military regarding the acquisition of a site outside the No Pass Zone; and (3) evaluate the feasibility of acquiring (by eminent domain) residential properties adjacent to potential landfill sites to create sites that would comply with the one-half mile buffer from residential areas restriction in Act 73. Applicant will also continue to explore all other legally compliant options to identify a new site. See Exhibit “D”, LAC Final Report, at page nos. “6-4” to “6-5”; see also Dec. Babcock at 41.

1. Repeal or Amend Act 73 to Open up a Few Sites

Applicant will try to amend Act 73 in the upcoming 2023 and/or 2024 legislative sessions.²⁴ See Dec. Babcock at 42. The LAC had “expressed concerns that Act 73,

²⁴ Senator Maile Shimabukuro and Representative Darius Kila authored an opinion piece published in the Honolulu Star-Advertiser on December 7, 2022 asking the City to “carefully reconsider other sites such as the Ameron Hawaii Quarry on the Windward

along with time constraints placed upon the process by the LUC, may have limited the ability to perform a more extensive evaluation of sites outside the BWS No Pass Zone.” See Exhibit “D”, at page no. “6-4”.

The number of potential sites that will become available depends on the degree of success in amending Act 73 (e.g., reduction of the one-half mile buffer zone only; reduction of the one-half mile buffer zone and removal of the conservation district restriction; outright repeal of Act 73 or exemption). Most of these potential sites were previously identified in Applicant’s 2012 and 2017 studies, but there may also be new sites. Applicant would then be able to further evaluate and ultimately identify one of those potential sites as the alternative, by December 31, 2024. See Declaration of Dec. Babcock at 43.

2. Continue Discussions with U.S. Military for Potential Sites

The LAC also recommended “further efforts by the City to encompass federal lands for siting a landfill, including state controlled lands with leases set to expire or underutilized by the federal government.” See Exhibit “D”, at page no. “6-5”.

Applicant is working to identify all of these potential federal sites, and Applicant will continue discussions with the U.S. military regarding acquiring a site that is outside of the No Pass Zone. See Dec. Babcock at 44.

3. Evaluate Feasibility of Eminent Domain of Residential Property

Lastly, Applicant will evaluate sites outside the No Pass Zone that may have been eligible, but for a small number of residential properties that would place nearby landfill sites within the restricted Act 73 one-half mile buffer zone. Applicant will evaluate the feasibility of the eminent domain process to acquire these residential properties, and thereby remove the Act 73 impediment. See Dec. Babcock at 45.

D. An Extension of Time is in the Best Interest of the Entire Community

As BWS contends, a leak into and thus contamination of the drinking water aquifer, as in the case of Red Hill, could be catastrophic for the entire community because of the nature of the hydrogeologically-connected drinking water aquifer system.

side.” See Exhibit “J”; see also <https://www.staradvertiser.com/2022/12/07/editorial/-letters/letter-west-side-shouldnt-keep-hosting-landfill/>. The Ameron site, while outside of the No Pass Zone, was eliminated as a result of Act 73. Applicant hopes that State legislators, including the authors of the opinion piece, will support future legislation to amend or repeal Act 73 so that Applicant may identify a landfill site outside of the BWS No Pass Zone.

See Exhibit "C". Given the high stakes at issue and the BWS' dire warnings, Applicant feels a two-year extension to accomplish the time consuming efforts described above is in the best interest of the entire community. Again, the goal is to identify a site outside of the No Pass Zone that complies with all laws and regulations. See Dec. Babcock at 46.

E. If the Deadline is Not Extended, Applicant Will Be Forced to Select One of the Six Proposed Sites Not Approved By the BWS

As detailed herein, after the Planning Commission and LUC's 2019 Decisions, Applicant assessed and proposed six sites that complied with Act 73, appointed the LAC to further evaluate and score the sites, but ultimately faced the current No Pass Zone dilemma. Should the Planning Commission or LUC refuse Applicant's request for a two-year extension of time to identify a new landfill site to replace the WGSL, Applicant will be left with no choice but to promptly identify and pursue the development of one of the six proposed sites located in the BWS No Pass Zone, despite the LAC's and the BWS' concerns regarding protecting O'ahu's sole drinking water source. See Dec. Babcock at 47.

III. CONCLUSION

For the foregoing reasons, the Department of Environmental Services respectfully requests that the Planning Commission grant this application to modify the conditions of the WGSL SUP. Specifically, Applicant requests that the Planning Commission modify Condition No. 1 of the Planning Commission's 2019 Decision by extending Applicant's deadline to identify an alternative landfill site from December 31, 2022 to December 31, 2024.

Sincerely,




ROGER W. BABCOCK Jr., Ph.D. P.E.
Director
Department of Environmental Services

Attachs.

VERIFICATION

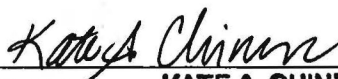
ROGER W. BABCOCK JR., Ph.D. P.E., being duly sworn, on oath,
deposes and says that he is the Director of the Department of Environmental Services,
City and County of Honolulu, and as such is authorized to make this verification on
behalf of the Department of Environmental Services; that he has read the foregoing
Application and knows the contents thereof; and that the same are true to the best of his
knowledge, information and belief.

DATED: Honolulu, Hawai'i, December 22, 2022.



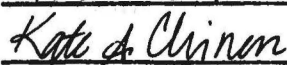
ROGER W. BABCOCK JR., Ph.D. P.E.,
Director
Department of Environmental Services

Subscribed and sworn to me
this 22 day of December, 2022.



Name: KATE A. CHINEN
Notary Public, State of Hawai'i
My commission expires: 4/10/2024



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NOTARY CERTIFICATION

