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DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Application of DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU For a New Special Use Permit to supersede Existing Special Use Permit to allow a 92.5-acre Expansion and Time Extension For Waimanalo Gulch Sanitary Landfill, Waimanalo Gulch, Oahu, Hawaii, Tax Map Key Nos. (1) 9-2-003:072 and 073	DOCKET NO. SP09-403 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION, COLLEEN HANABUSA AND MAILE SHIMABUKURO'S MOTION TO DENY PETITION; AND CERTIFICATE OF SERVICE

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION, COLLEEN HANABUSA AND MAILE SHIMABUKURO'S MOTION TO DENY PETITION

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (hereinafter, "Applicant" or "ENV"), by and through its attorneys, GARY Y. TAKEUCHI and JESSE K. SOUKI, Deputies Corporation Counsel, and hereby

respectfully requests that the Land Use Commission, State of Hawaii (the "Commission" or "LUC"), deny Intervenors Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro's Motion to Deny Petition ("Motion"). This Memorandum in Opposition is brought pursuant to Hawaii Administrative Rules ("HAR") § 15-15-70(e).

Intervenors' Motion is, quite simply, specious, as it is redundant and without basis, and serves to further delay resolution of ENV's application for the land use approvals necessary to expand the only permitted municipal solid waste landfill on Oahu. After a failed attempt to dismiss the special use permit ("SUP") application at the Planning Commission level on similar grounds,[1] Intervenors now seek to have the Commission determine the sufficiency and acceptability of the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii , TMKs: (1) 9-2-003: 072 and 073*, dated October 2008 ("2008 FEIS"), and to deny the SUP Application on the alleged basis that the accepted 2008 FEIS "fails to address the entire project for which the DBA[2] [*sic*] is sought." Motion at 4. Alternatively, Intervenors seek to have ENV's SUP Application "deemed incomplete by the LUC."

As discussed below, the Commission has no jurisdiction to determine the EIS sufficiency issue, Intervenors do not have legal standing to raise this issue now, the accepted 2008 FEIS absolutely does address the "entire project for which the [SUP] is sought," and there is no basis for concluding that the SUP Application is incomplete or that the matter should be remanded. Intervenor Hanabusa already has a pending judicial challenge to the sufficiency and acceptability

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[1] See Intervenors' Motion to Dismiss Application filed with the Planning Commission on June 29, 2009.

[2] Intervenors mistakenly refer to Applicant's concurrent petition for a district boundary amendment ("DBA") throughout their Motion. See, e.g., Motion at 4, 6 and 7. Because the Motion seeks denial of Applicant's SUP Application, it is unclear why Intervenors repeatedly refer to Applicant's DBA petition, which is an entirely separate matter.

of the 2008 FEIS, filed long before the interventions in this proceeding, and Intervenors' attempt to further distract from the pending proceeding by bringing the subject Motion in this inappropriate forum must be rejected.

Intervenors also argue that HAR § 15-15-96 prohibits the Commission from ruling on Applicant's SUP application for another year. This argument is also without basis and stems from a gross misreading of HAR § 15-15-96. Therefore, Intervenors' Motion should be denied in its entirety.

I. RELEVANT FACTS

The City and County of Honolulu ("City") owns two parcels of property located at the Waimanalo Gulch, Oahu, Hawaii, designated as tax map key ("TMK") numbers (1) 9-2-003: 072 and 073 (the "Property"). Located on a portion of the Property is the Waimanalo Gulch Sanitary Landfill ("WGSL"), which is currently operated by Waste Management of Hawaii, Inc. ENV is the Applicant in the subject matter and is seeking a new SUP to designate the entire Property, approximately 200 acres, for use as the WGSL (the "SUP Application").

Concurrent with the SUP Application, ENV is seeking to withdraw the current SUP permit and its conditions for approximately 107.5 acres, File No. 86/SUP-5, if the new SUP permit is granted. See Memo from Applicant to Department of Planning and Permitting ("DPP") Director filed April 2, 2009 (requesting that "contemporaneous with the approval of the subject SUP Application, the current SUP No. 86/SUP-5 (RY) be withdrawn or otherwise rendered null and void, and any conditions therein be deleted in their entirety");[3] DPP Director's Report and Recommendation, dated May 1, 2009 (hereinafter, "DPP Report") at 3.

[3] All of the documents and exhibits referenced herein are located in the Planning Commission record which has been transmitted to the LUC.

The Property has been extensively studied and reviewed since at least 1984 as subsequent portions of the Property were added to the WGSL operation after the original SUP for a portion of the Property was issued in 1987 in File No. 86/SUP-5 and LUC Docket No. SP87-362. See Exhibit "A14."[4] The SUP was subsequently amended to allow expansions of the SUP area. See Exhibits "A15," "A16," "A17" and "A19."

In 1984, the City Department of Public Works, Refuse Division (now part of ENV) prepared the *Revised Environmental Impact Statement ["EIS"] for Leeward Sanitary Landfill at Waimanalo Gulch Site and Ohikilolo Site*, dated May 7, 1984 ("1984 REIS"), which studied the site known as the Waimanalo Gulch for use as a landfill. As shown on Figure 2-1 of the document, the project boundary at that time included a portion of the Property. See Exhibit "1" to ENV's Memorandum in Opposition to Intervenors' Motion to Dismiss Application, filed on July 6, 2009, in the Planning Commission ("ENV's Memo"), at S-3 (excerpt of the 1984 REIS).[5] The 493-page, 1984 REIS studied various environmental impacts, alternatives, and mitigation pursuant to Hawaii Revised Statutes ("HRS") Chapter 343, commonly referred to as the Hawaii Environmental Policy Act ("HEPA"). See id. A final addendum was subsequently prepared for the 1984 REIS entitled, *Final Addendum to Revised Environmental Impact Statement for Leeward District Sanitary Landfill at Waimanalo Gulch Site*, dated August 30, 1985. See Exhibit "2" to ENV's Memo.[6] The addendum was "prepared to expand and clarify specific sections of the [1984 REIS]." Id. at S-1.

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[4] The exhibits labeled "A[#]" refer to the exhibits submitted by ENV to the Planning Commission on June 22, 2009.

[5] The 1984 REIS, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/1980s/1984-05-OA-REIS-LEEWARD-DISTRICT-SANITARY-LANDFILL.pdf (last visited July 3, 2009).

[6] The Final Addendum, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/

In 2001, ENV prepared the *Revised Draft Supplemental Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Expansion, Waimanalo Gulch, Oahu, Hawaii*, dated May 2001 ("2001 RDEIS"). See Exhibit "3" to ENV's Memo (excerpt of the 2001 RDEIS).[7] The 2001 RDEIS was prepared for the WGSL expansion, and the project area was defined as "60.5 acres proposed for development within the 200 acres of the [WGSL] property site." Id. at vi. As shown in Figure 1-2 of the 2001 RDEIS, the project area included a portion of the Property. Id. at 1-3. The 375-page, 2001 RDEIS studied various environmental impacts, alternatives and mitigation pursuant to HEPA. See id. The 2001 RDEIS included a 218-page Appendix G, *Alternatives Analysis for Disposal of Municipal Refuse*, dated March 2001. See Exhibit "4" to ENV's Memo (excerpt of Appendix G to 2001 RDEIS).[8]

In 2002, ENV prepared the *Final Supplemental Environmental Impact Statement (FEIS), Waimanalo Gulch Sanitary Landfill Expansion, Waimanalo Gulch, Oahu, Hawaii*, dated December 2002 ("2002 FSEIS"). See Exhibit "5" to ENV's Memo (excerpt of the 2002 FSEIS).[9] The 2002 FSEIS was prepared for the WGSL expansion, and the project area was defined as "14.9 acres proposed for development within the 200 acres of the [WGSL] property site." Id. at vii. As shown in Figure 1-2 of the 2002 FSEIS, the project area included a portion

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Oahu/1980s/1985-08-OA-REIS-LEEWARD-DISTRICT-SANITARY-LANDFILL-Final-Addendum.pdf (last visited July 3, 2009).

[7] The 2001 RDEIS, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/2000s/2001-06-08-OA-RDEIS-WAIMANALO-GULCH-LANDFILL-EXPANSION.pdf (last visited July 3, 2009).

[8] The Appendix G to the 2001 RDEIS, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/2000s/2001-06-08-OA-RDEIS-WAIMANALO-GULCH-LANDFILL-EXPANSION-APP-G.pdf (last visited July 3, 2009).

[9] The 2002 FSEIS, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/2000s/2003-01-23-OA-FSEIS-WAIMANALO-GULCH-LANDFILL.pdf (last visited July 3, 2009).

of the Property. Id. at 1-3. The 809-page, 2002 FSEIS studied various environmental impacts, alternatives, and mitigation pursuant to HEPA. See id. The 2002 FSEIS included a 1,033-page Appendix H, *Alternatives Analysis for Disposal of Municipal Refuse*, dated December 2002. See Exhibit "6" to ENV's Memo (excerpt of Appendix H to 2002 FSEIS).[10]

In 2008, ENV prepared the 2008 FEIS for the current SUP Application and separate district boundary amendment petition pending before the Commission. See Exhibit "A1." The 2008 FEIS was prepared for the "[l]ateral expansion of the Waimanalo Gulch Sanitary Landfill property for municipal sanitary landfill purposes and accessory uses[.]" 2008 FEIS at xvii. The 2008 FEIS further describes the project area as "92.5 acres are proposed for the lateral expansion. The total Waimanalo Gulch Sanitary Landfill property is 200 acres." Id. Similarly, the DPP Report, describes the project as

> . . . the use of an additional 93.122 acres of the 200.622-acre site for expansion of the existing Waimanalo Gulch Sanitary Landfill . . . [.] Approximately 107.5 acres of the site is presently approved for landfill and accessory uses under Special Use Permit File No. 86/SUP-5. The proposed expansion area, plus the existing approved area, constitutes the entire landfill property owned by the City and County of Honolulu."

DPP Report at 2.

A notice of publication of the EIS Preparation Notice for the 2008 FEIS was published in the November 23, 2006 issue of *The Environmental Notice* by the Office of Environmental Quality Control, State of Hawaii ("OEQC"). See id. at 6. Notice of the availability of the Draft EIS was published by OEQC on May 23, 2008. See *The Environmental Notice* at 6 (May 23, 2008), available at http://oeqc.doh.hawaii.gov/Shared%20Documents/Environmental_Notice/

[10] Appendix H to the 2002 FSEIS, which is a part of the record under File No. 86/SUP-5, is incorporated by reference and available in its entirety at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/2000s/2003-01-23-OA-FSEIS-WAIMANALO-GULCH-LANDFILL-H.pdf (last visited July 3, 2009).

Archives/2008_Environmental_Notice/2008-05-23.pdf (last visited Sept. 22, 2009); ENV's (1) Response to Post-Hearing Brief of Intervenors and (2) Exceptions to Intervenors' Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 6, filed on July 29, 2009, in the Planning Commission ("ENV's Response"). DPP accepted the 2008 FEIS on behalf of the Mayor on October 13, 2008. See DPP report at 6; Exhibit "7" to ENV's Memo. Notice of acceptance of the 2008 FEIS Acceptance was published in the October 23, 2008, issue of *The Environmental Notice*. See DPP Report at 6.

During the thirty (30) day EIS Preparation Notice consultation period and the forty-five (45) day Draft EIS public review period, ENV received and responded to several and various comments from Intervenor Hanabusa and Ken Williams, Manager of Intervenor Ko Olina Community Association ("KOCA"). During the 30-day public comment period for the EIS Preparation Notice, one comment was received from Intervenor Hanabusa on December 26, 2006,[11] and one comment was received from Mr. Williams on behalf of Intervenor KOCA on December 26, 2006. See 2008 FEIS at 15-2. During the 45-day public comment period for the Draft EIS, one comment was received from Intervenor Hanabusa on July 7, 2008 and one comment was received from Mr. Williams on behalf of Intervenor KOCA, also on July 7, 2008. See id. at 16-2.

Importantly, **none** of the comments submitted by Intervenors KOCA and Hanabusa and received during the thirty (30) day consultation period and the forty-five (45) day public review period, raised any issue regarding the sufficiency of the EIS for its alleged failure to address the entire project. See Motion at 4 ("Whether the Application should be denied on the basis that the EIS fails to address the entire project for which the [SUP] is sought."). Intervenor Maile

[11] Intervenor Hanabusa also sent a comment on August 30, 2006, which was prior to the publication of the EIS Preparation Notice on November 23, 2006. That comment is also listed in the 2008 FEIS along with ENV's response. See 2008 FEIS at 15-2.

Shimabukuro did not submit any comments during the EIS Preparation Notice and Draft EIS comment periods.

On December 11, 2008, Intervenor Hanabusa filed a complaint in First Circuit Court, State of Hawaii, challenging the sufficiency of the 2008 FEIS on various grounds. See Colleen Hanabusa v. ENV, Civ. No. 08-1-2562-12, filed December 11, 2008.

II. ARGUMENT

A. The Commission lacks jurisdiction to determine the acceptability of an EIS.

HRS § 343-5(c) states, in relevant part, "Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action." "Acceptance" means a "formal determination that the document required to be filed pursuant to [HRS] section 343-5 **fulfills** the definition of an environmental impact statement, **adequately** describes identifiable environmental impacts, and **satisfactorily** responds to comments received during the review of the statement." HRS § 343-2 (emphasis added). Thus, challenges regarding the adequacy or sufficiency of an EIS are challenges to the acceptance of the EIS.

HRS Chapter 343 does not provide the Commission, or any other decision-making agency, with jurisdiction to adjudicate challenges regarding the sufficiency or acceptance of an EIS after it has been accepted. Rather, challenges regarding the sufficiency of the EIS must be made pursuant to HRS § 343-7(c), which provides in relevant part: "Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of such statement."

Here, it is undisputed that the 2008 FEIS was accepted on behalf of the Mayor by DPP on October 13, 2008. See Exhibit "7" to ENV's Memo. Thus, a determination has been made that

the 2008 FEIS is sufficient and "**fulfills** the definition of an environmental impact statement, **adequately** describes identifiable environmental impacts, and **satisfactorily** responds to comments received during the review of the statement." HRS § 343-2 (emphasis added).

Nevertheless, Intervenors' Motion seeks to have the Commission determine the sufficiency and acceptability of the 2008 FEIS, and seeks to deny the SUP Application on the alleged basis that the accepted 2008 FEIS "fails to address the entire project for which the SUP is sought." Motion at 3. HRS § 343-7(c), however, bars Intervenors' Motion. The SUP proceeding before the Commission is not a "judicial proceeding" within the meaning of HRS § 343-7(c). Consequently, the Commission lacks jurisdiction to determine whether the 2008 FEIS was properly accepted.

Naturally, the Planning Commission also reached the conclusion that it did not have jurisdiction to decide Intervenors' Motion to Dismiss SUP Application, filed on June 29, 2009, in the Planning Commission. See Findings of Fact, Conclusions of Law, and Decision and Order of Planning Commission, August 4, 2009, at 24. There, Intervenors also argued that the 2008 FEIS was insufficient and required the dismissal of the SUP Application. In denying the Intervenors' motion, Chair Holma offered the following rationale:

> [W]e [the Planning Commission] do not have jurisdiction to decide this Motion to Dismiss. I think there are issues about whether or not the Environmental Impact Statement is sufficient or not, but that is subject to [judicial] appeal[.]

See Transcript 7/8/09, 111:1-5.

Undoubtedly, Intervenors' current Motion before the Commission is unprecedented, as challenges regarding the adequacy or acceptability of an accepted EIS have always been adjudicated in the courts of the State of Hawaii, not before the decision-making agency. See e.g., Price v. Obayashi Hawaii Corp., 81 Hawaii 1717, 914 P.2d 1364 (1996); Life of the Land v.

Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978). Indeed, Intervenor Hanabusa has already availed herself of the judicial remedy under HRS § 343-7(c) since she has filed a complaint with the First Circuit Court, State of Hawaii, challenging the sufficiency of the 2008 FEIS on various grounds. See Colleen Hanabusa v. ENV, Civ. No. 08-1-2562-12, filed December 11, 2008.

Therefore, Intervenors' Motion must be denied for lack of jurisdiction.

B. Even if the Commission possessed jurisdiction to determine the acceptability of the EIS, Intervenors lack standing to raise such an issue.

HRS § 343-7(c) provides that affected agencies and persons who submit a written comment about an EIS "during the designated review period shall be adjudged aggrieved parties for purposes of bringing judicial action under this section." HRS § 343-7(c). However, "**contestable issues shall be limited to issues identified and discussed in the written comment**." Id. (Emphasis added). The Hawaii Supreme Court has therefore stated that review of the sufficiency of an EIS is limited to concerns that a person raised in his or her comments. Price v. Obayashi Hawaii Corp., 81 Hawaii 171, 183 (1996) ("our review of the EIS is **limited to those concerns that Price listed** in his comments to the draft EIS," citing HRS § 343-7(c)) (emphasis added).

Even if the Commission possessed jurisdiction to hear an acceptability challenge, which it does not, Intervenors failed to raise allegations during the EIS Preparation Notice and Draft EIS comment periods that the 2008 FEIS was insufficient because it did not address the entire 200-acre Property. As stated in Obayashi, a court's review is limited to those concerns that Intervenors have listed in their comments to the draft EIS. Thus, Intervenors' attempt at a second bite of the apple before the Commission must be denied as they have failed to timely comply with the requirements of HRS § 343-7.

Additionally, the requirements of HRS § 343-7(c) also apply to Intervenors' claim that "The Lateral Expansion EIS Cannot Be Treated As A Supplemental EIS." Motion at 6. Hawaii Administrative Rules ("HAR") § 11-200-23(b) states that an EIS

> shall be deemed to be an acceptable document by the accepting authority or approving agency only if all of the following criteria are satisfied:
>
> (1) The procedures for assessment, consultation process, review and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter;
>
> (2) The content requirements described in this chapter have been satisfied; and
>
> (3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement.

HAR § 11-200-23(b).

Under this framework, challenges to EIS procedures necessarily implicate "the acceptance of an environmental impact statement" such that HRS § 343-7(c) applies. This claim clearly goes to the procedures described in HAR §§ 11-200-26 to 11-200-29, which describe the requirements for a supplemental EIS. HAR § 11-200-27 expressly requires the accepting authority to be "responsible for determining whether a supplemental statement is required." HAR § 11-200-27. Because HAR § 11-200-23(b)(1) requires the accepting authority to review the procedures for and preparation of the EIS, a challenge to whether a new supplemental EIS is necessary pertains to the "acceptance of an environmental impact statement" for purposes of HRS § 343-7(c). As discussed in section A, supra, the Commission does not have jurisdiction to decide the sufficiency of an EIS after it has been accepted.

Therefore, Intervenors lack standing to raise allegations that the 2008 FEIS is insufficient for its purported failure to address the entire 200-acre Property since Intervenors failed to raise

such allegations during the EIS Preparation Notice and Draft EIS comment periods. Additionally, because Intervenors did not provide comments regarding ENV's alleged failure to prepare a new supplemental EIS under HEPA during the draft EIS comment period, their Motion must be dismissed for lack of jurisdiction under HRS § 343-7(c).

C. **Even if the Commission possesses jurisdiction to decide the Motion AND Intervenors have standing to challenge the acceptability of the 2008 FEIS, the Motion must still be denied because 2008 FEIS was properly accepted.**

The minimum content requirements for a draft and a final EIS are found under HAR §§ 11-200-17 and -18. These sections provide a long list of specific topics that must be included within the EIS. See Exhibit "8" to ENV's Memo. However, it is important to note that neither HEPA nor the State of Hawaii administrative rules of Chapter 200 indicate the level of detail or specificity that should be included on any given subject in an EIS. According to the Hawaii Supreme Court, HEPA and its rules were "designed to give latitude to the accepting agency as to the content of each EIS"; thus, "what is required in one EIS may not be required in another, based upon the circumstances presented by the particular project." Obayashi, 81 Hawaii at 183; see also Sensible Traffic Alternatives and Resources, 307 F. Supp. 2d 1149, 1160-62 (D. Haw. 2004). This is consistent with HAR § 11-200-19, which provides:

> § 11-200-19. Environmental Impact Statement Style.
>
> In developing the EIS, preparers shall make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decision-makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement. The scope of the statement may vary with the scope of the proposed action and its impact. Data and analyses in a statement shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. Statements shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the statement, including cost benefit analyses and reports required

> under other legal authorities. Care shall be taken to concentrate on important issues and to ensure that the statement remains an essentially self-contained document, capable of being understood by the reader without the need for undue cross-reference.

The question before the court in Obayashi was whether the EIS was legally sufficient in adequately disclosing facts to enable the accepting authority to render an informed decision as to the acceptability of the EIS, to which it opined as follows:

> In making such a determination the court is guided by the "rule of reason," under which an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

Id., citing Life of the Land v. Ariyoshi, 59 Hawaii 156, 164 (1978).

Obayashi applied the test to the following set of facts. In December 1990, Obayashi Hawaii Corporation and Obayashi Corporation (collectively, "Obayashi") submitted a draft EIS pertaining to its proposed Lihi Lani recreational development project on the North Shore of Oahu. Price challenged the acceptance of the final EIS, complaining that: (1) Obayashi's EIS did not comply with the requirements of HEPA; and (2) Obayashi's project would destroy sacred archeological sites. Price filed suit against Obayashi and the City in June 1991 seeking declaratory and injunctive relief. The complaint alleged that the EIS did not adequately discuss infrastructure and shoreline preservation concerns. The First Circuit Court, State of Hawaii, granted summary judgment in favor of defendants.

Price raised various claims on appeal, but the court limited its review to those concerns that Price listed in his comments to the draft EIS pursuant to HRS § 343-7(c). Applying the "rule of reason," the court held in favor of Obayashi and the City. For each comment cited by

Price, the court held that the EIS's discussion on each issue was compiled in good faith and set forth sufficient information to enable the decision maker to make an informed decision regarding the significant impacts on the environment. For example, in upholding the sufficiency and acceptance of the EIS, the court noted that a review of the final EIS revealed that there were entire sections devoted to topics alleged by Price to have been inadequately addressed. These sections included climate, topography, soils, agriculture, groundwater resources, surface water, storm water runoff, surface water quality, tsunami/flood hazard, vegetation, wildlife, marine resources, archaeological and historic resources, roadways and traffic, noise, air quality, visual resources, social and economic characteristics, infrastructure, and public services. The EIS also contained comprehensive discussions. Experts who studied the impact, effect, and mitigation of environmental issues prepared many of the studies. In addition, the court favorably noted that the EIS consisted of two volumes of material, over 400 pages, which included twenty-four technical reports supporting the recommendations and findings presented.

Here, the Intervenors' HEPA claim regarding sufficiency is only that the 2008 FEIS allegedly fails to address the entire project for which the SUP is sought. Intervenors' contention is that the Applicant should have labeled its 2008 FEIS a "supplemental EIS," putting form over substance. The fact is that the 2008 FEIS is an environmental study of the expansion in the context of the existing landfill. Experts in their respective fields have exhaustively studied the WGSL for over two decades and those studies are referenced in the 2008 FEIS and its technical reports. The "rule of reason," does not require an EIS that is exhaustive to the point of discussing all possible details bearing on the proposed expansion.

The 2008 FEIS is sufficient, because it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors

involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. Environmental impacts were investigated for the entire Property, and the entire Property is discussed extensively in the 2008 FEIS. For example,

- The entire Property, including uses in the current SUP area and proposed uses in the expansion area, is discussed on pages 3-1 through 3-5.
- Pages 2-18 through 2-23 discuss the historical background of the current SUP permit for the current SUP area.
- Pages 2-11 through 2-18, and Appendices A and B discuss the regulatory enforcement actions for the current SUP area.
- The discussion on pages 2-24 through 2-28 regarding the City's handling of solid waste is applicable to both the current SUP area and the proposed expansion area.
- A description of the entire Property and its location is located on pages 4-1 and 4-2.
- The liner system, closure and final cover system for the entire Property, including landfills cells in the current SUP area and the proposed expansion area, are described on pages 4-5 through 4-11, and pages 4-50 through 4-53.
- The proposed landfill grades as described in Figures 4-6 and 4-7 are for the current SUP area as well as the proposed expansion area.
- The description of operational details and impacts resulting from landfill operations on pages 4-14 through 4-37, 4-43 through 4-50, 5-39 through 5-64, 5-93 through 5-111, 6-1 through 6-10, and 6-22 through 6-26, is relevant for the entire Property, and includes extensive disclosures regarding the waste accepted at WGSL, traffic impacts, view impacts, hours of operation, traffic control, litter, odor, waste handling, inclement weather operations, safety procedures, record keeping, emergency procedures, air quality, landfill gases, the landfill gas collection system and noise.
- The drainage control system for stormwater management for both the current SUP area and the proposed expansion area is discussed on pages 4-37 through 4-42 and 5-11 through 5-14.
- The seismic hazard evaluation and seismic stability analysis, as discussed on pages 5-35 through 5-37, are for the entire Property, not just the proposed expansion area. Other natural disasters that could affect the entire Property,

including floods, hurricanes and tsunamis are discussed on pages 5-31 through 5-35, and 5-38 through 5-39.

- The stability analysis as discussed by Dr. Hari Sharma during the contested case hearing in this matter and as referenced on page 4-2 and in Section 17 provides a detailed analysis of stability of the entire Property, not just the 92.5-acre expansion area.

- Impacts of the entire Property to public facilities and services are discussed on pages 6-11 through 6-22.

- Land use policies applicable to the entire Property are discussed on pages 8-1 through 8-29.

- Page 5 of Appendix G, *Archaeological Inventory Survey, Waimānalo Gulch Landfill Expansion, TMK: [1] 9-2-003: por. 072 and 073*, provides as follows: "This 36-acre portion of the overall approximately 90-acre APE is defined as the study area for the current AIS investigation. Through the combined effort of the earlier AIS investigation of entire 200-acre Waimanalo Gulch Landfill property (Hammatt and Shideler 1999) and the current AIS investigation of the 36-acre study area, 100 percent of the project APE was subjected to systematic pedestrian inspection, with limited subsurface testing where appropriate."

Moreover, Intervenors' myopic implication that the Draft EIS spoke only to the proposed expansion area of the Property lacks evidence in the record. While it is true that the Draft EIS is entitled, "Waimanalo Gulch Sanitary Landfill Lateral **Expansion**," the plain meaning of the word "expansion" is the "act or process of expanding." See Merriam-Webster Online Dictionary, available at http://merriam-webster.com/dictionary/expansion (last visited July 23, 2009). Clearly, the title of the Draft EIS was meant to convey that the current SUP area would be **expanded** since the word "expansion" is used. See ENV's Response at 6-7. Nothing in the Draft EIS suggested that the current SUP area would be abandoned and not used, and Intervenors cannot, and do not, cite to anything in the Draft EIS that states this. Id.

Intervenors' other implication that public comments were addressed only to the expansion area of the Property is not supported by the record and contradicted by Intervenor Hanabusa's own comments. Sections 15 and 16 of Exhibit "A1" contain comments and

responses to the EIS Preparation Notice and Draft EIS, respectively. The numerous public comments, including those of Intervenor Hanabusa, regarding the EIS Preparation Notice within Section 15 of Exhibit "A1" that address the current SUP area, as well as the entire 200-acre Property are summarized in Exhibit "1" to ENV's Response. The numerous public comments, including those of Intervenor Hanabusa, regarding the Draft EIS within Section 16 of Exhibit "A1" that address the current SUP area, as well as the entire 200-acre Property are summarized in Exhibit "2" to ENV's Response. See also Transcript 7/8/09, 90:10-19 (Applicant pointed out at the hearing on Intervenors' Motion to Dismiss that Intervenor Hanabusa's own letter dated December 26, 2006, addressed the ash toe berm within the current SUP area). Accordingly, Intervenors' implication that the public comments addressed only the proposed expansion area is without basis.

As shown by the numerous examples above, the 2008 FEIS reasonably addresses the approximately 92.5 acres proposed for the lateral expansion within the context of the entire WGSL Property, which is approximately 200 acres. See 2008 FEIS at xvii. Volume I of the 2008 FEIS cites the entire 200-acre Property numerous times, and the reports and studies in the two appendices to the 2008 FEIS, incorporated therein by reference, also reference the entire Property and previous studies and environmental documents prepared for WGSL. This includes the 1984 REIS, 2001 RDEIS, 2002 FSEIS and their attendant studies and reports as discussed on pages 2-28 and 2-29 of the 2008 FEIS.[12] For example, below are some excerpts from the Volume I of the 2008 FEIS:

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[12] Consideration of previous determinations and accepted statements is a common practice in the preparation of HEPA documents, and it is allowed and encouraged under HAR §11-200-13, which provides, *inter alia*, as follows:

> A. Chapter 343, HRS, provides that whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, when applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required, and previously accepted statements.

- ENV and the Advisory Committee consultant assembled a list of 45 potential sites for the Advisory Committee to consider from the following prior reports:

  (1) Inventory of Potential Sanitary and Demolition Landfill Sites, August 1977.
  (2) Supplement to Inventory of Potential Sanitary and Demolition Landfill Sites, November 1979.
  (3) Revised Environmental Impact Statement for Leeward Sanitary Landfill at Waimānalo Gulch Site and Ohikilolo Site, 1984.
  (4) Solid Waste Integrated Management Plan Update, Final Report, 1995.
  (5) Final Supplemental Environmental Impact Statement, Waimānalo Gulch Sanitary Landfill Expansion, December 2002." 2008 FEIS at 9-57.

- The Revised Draft Supplemental Environmental Impact Statement for the Waimanalo Gulch Sanitary Landfill Expansion, City & County of Honolulu, June 2001, was initially filed to utilize the remaining space of the landfill, but was subsequently revised reducing both the timeframe and the area that would be used in the final published version of this document. 2008 FEIS at 2-28.

- January 10, 2003, the Final Supplemental EIS (FSEIS) for a 14.9-acre expansion of the Waimānalo Gulch Sanitary Landfill was accepted. The FSEIS supported the expansion of the site from 86.5 acres to 101.4 acres. The final landfilling of the last cell was planned to be completed at the end of 5 years based on statements of the prior city administration, from the initial use of the expansion area to accept waste. 2008 FEIS at 2-2.

Because the areas already in use were extensively studied in EIS documents prepared for previous SUP applications, it is reasonable and appropriate for certain parts of the 2008 FEIS to focus on the expansion area since only certain impacts will be associated with that area,[13] under the rule of reason articulated by Obayashi. However, to claim that the rest of the site was not

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B. Previous determinations and previously accepted statements may be incorporated by applicants and agencies whenever the information contained therein is pertinent to the decision at hand and has logical relevancy and bearing to the action being considered.

C. Agencies shall not, without considerable pre-examination and comparison, use past determinations and previous statements to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered.

[13] See, e.g., pages 4-2 through 4-4 and 5-65 through 5-66 regarding construction of the proposed expansion area, and pages 4-53 through 4-54 regarding the costs associated with the proposed expansion area. Obviously, some studies, such as the flora and fauna studies in Appendices E and F, and the invertebrates study in Appendix L, are appropriate only to the expansion area because the existing area has already been disturbed.

included in the expansion analysis, as Intervenors do, is, at best, disingenuous, and at worst, intentionally misleading. Intervenors' contention that the 2008 FEIS does not address the environmental impacts resulting from the use of the 200-acre Property is without merit.

The rule of reason is therefore satisfied as articulated under Obayashi, and the 2008 FEIS was compiled in good faith and sets forth sufficient information to enable the decision maker to make an informed decision regarding the significant impacts on the environment. Accordingly, even if the Commission possessed jurisdiction to decide the merits of the Motion (which it does not), and Intervenors had standing to assert a challenge regarding the acceptance of the EIS (which they do not), the Motion must be denied as the 2008 FEIS was properly accepted.

D. DPP properly determined that the SUP Application was properly filed and accepted for processing.

In addition to the claims discussed above, Intervenors seek to have the SUP Application "deemed incomplete by the LUC." Motion at 4. However, Intervenors' argument is flawed, because DPP, not the LUC, determines whether an application is properly filed and accepted for processing. See Rules of the Planning Commission § 2-40(b). Under the Rules of the Planning Commission, once an SUP application is filed, DPP "shall determine whether a petition is complete...." The SUP was accepted and processed by DPP, as demonstrated by the DPP Report dated May 1, 2009.

HAR § 15-15-96(a) provides that the Commission may only approve, approve with modification, or deny the petition. Nothing in the Commission's rules allow the Commission to deem an SUP Application incomplete. Thus, the Commission is without jurisdiction to deem the SUP Application incomplete.

E. A remand for further proceedings is unwarranted.

A remand back to the Planning Commission is unwarranted because the record contains sufficient evidence for the LUC to make a decision. HAR § 15-15-96 (a) states:

> Within forty-five days after receipt of the county planning commission's decision, together with the complete record of the proceeding before the county planning commission, the commission shall act to approve, approve with modification, or deny the petition. The commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the petitioner. Upon determination by the commission, the petition may be remanded to the county planning commission for further proceedings.

Intervenors' citation of HRS § 91-10 is extraneous and inapposite. The parties have been afforded a 5-day contested case hearing at the Planning Commission, complete with the presentation of evidence; examination and cross-examination of witnesses; opening and closing statements; briefs; and proposed findings of fact, conclusions of law, and decision and orders. Intervenors had the opportunity to present evidence that the 2008 FEIS is incomplete, but did not, or could not, do so. Intervenors also had the opportunity to cross-examine Brian Takeda, the consultant who prepared the 2008 FEIS, but failed to obtain any evidence that the 2008 FEIS is insufficient. See Transcript 6/22/09, 29:15-229:6.

In contrast, the evidence on the record is sufficient for the Commission to determine whether an SUP should be granted under the criteria in HAR § 15-15-95(b), which states:

> Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an "unusual and reasonable use":
>
> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;

(2) The desired use would not adversely affect surrounding property;

(3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;

(4) Unusual conditions, trends, and need shave arisen since the district boundaries and rules were established; and

(5) The land upon which the proposed use is sought is unsuited for the uses permitted in the district.

Moreover, as discussed extensively in the sections above, the 2008 FEIS is complete and covers the entire 200-acre Property contrary to Intervenors' unsupported allegations. There is no basis for remanding back to the Planning Commission.

F. HAR § 15-15-96(b) does not require the Commission to deny the SUP Application.

The same general principles that apply to statutory interpretation also apply to interpretation of administrative rules. Si-Nor, Inc. v. Director, Dept. of Labor and Indus. Relations, 120 Hawaii 135, 141, 202 P.3d 596, 602 (2009) (citation omitted). "If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." Allstate Ins. Co. v. Ponce, 105 Hawaii 445, 454, 99 P.3d 96, 105 (2004). Additionally, one "must read [the rule's] language in the context of the entire [rule] and construe it in a manner consistent with its purpose." Ka Pa`akai O Ka `Aina v. LUC, 94 Hawaii 31, 41, 74 P.3d 1068, 1078 (2000).

1. HAR § 15-15-96(b) applies when an applicant requests withdrawal of an SUP application, which is not the case here.

Intervenors appear to argue that since Applicant has requested a withdrawal of its current SUP permit, HAR § 15-15-96 prohibits the LUC from considering Applicant's SUP Application

for a new SUP permit. Intervenors' argument stems from a gross misreading of that rule and a blatant disregard for the evidence on the record. Specifically, HAR § 15-15-96(b) provides:

> The commission shall not consider any petition for special permit covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of the filing of the findings of fact, conclusions of law, and decision and order denying the petition for special permit unless the petitioner submits significant new data or additional reasons which substantially strengthen the petitioner's position, provided that in no event shall any new petition be accepted within six months of the date of the filing of the findings of fact, conclusions of law, and decision and order. **Additionally, the commission shall not consider any petition for special permit for the same request involving the same land that was before the commission and withdrawn voluntarily by the petitioner within one year of the date of the withdrawal.**

(Emphasis added.)

A plain reading of the second sentence of HAR § 15-15-96(b), the sentence on which Intervenors focus attention, is that it prohibits the LUC from considering an SUP application where a previous application involving the same request was withdrawn. When read in context, the purpose of the second sentence becomes clearer--to prohibit an SUP applicant from circumventing the one-year ban on a new SUP application if it voluntarily withdraws its application in the event that the LUC will likely deny its current application.

This rule is inapplicable to the current SUP Application which seeks to withdraw the current **SUP permit** upon the approval of a new SUP permit. The rule does not function to prohibit the LUC's consideration of an SUP application when an existing **SUP permit** is withdrawn. Rather, the rule prohibits the LUC's consideration of an SUP application when an **SUP application** "for the same request involving the same land that was before the commission" is voluntarily withdrawn by the applicant. Applicant has not withdrawn any SUP applications within a year, and certainly has never withdrawn any SUP applications for the same request

involving the entire 200-acre Property. In addition, there are simply no previous SUP applications before the LUC for the same request within the past year. Thus, Intervenors' reliance on HAR § 15-15-96(b) is misplaced as that rule is completely inapplicable to the instant SUP Application.

2. Applicant's request to withdraw its current SUP permit will only be effective if the LUC grants a new SUP permit.

Even under Intervenors' interpretation of HAR § 15-15-96(b), the LUC would not prohibited from considering the SUP Application because the current SUP permit has not yet been withdrawn.

Although Applicant has requested to withdraw its **current** SUP permit for a portion of the Property, the withdrawal is to take place only upon the approval of a **new** SUP permit for the entire 200-acre Property.[14] See Memo from Applicant to Department of Planning and Permitting ("DPP") Director filed April 2, 2009 (requesting that "**contemporaneous with the approval of the subject SUP Application**, the current SUP No. 86/SUP-5 (RY) be withdrawn or otherwise rendered null and void, and any conditions therein be deleted in their entirety").

Notwithstanding the Planning Commission's approval of the SUP Application, the approval is not effective until the LUC also approves it because the Planning Commission does not have the authority to unilaterally approve Applicant's SUP Application. See HRS § 205-6(d) ("Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission."). Hence, the withdrawal of Applicant's current SUP permit will only be effective if the LUC approves the SUP Application. Even under Intervenors' faulty interpretation, the LUC is not prohibited from considering the SUP Application.

[14] Indeed, Applicant would never withdraw its current SUP without having a new SUP or other land use entitlement in place. Intervenors' assertion to the contrary borders on the ridiculous and is unsupported by the record.

3. Exhibit A to Intervenors' Motion is not in the record and cannot be considered. It is also irrelevant to the alleged applicability of HAR § 15-15-96(b).

Intervenors' insistence that "ENV chose to proceed with a NEW SUP for the 200.622 acres which was contrary to the recommendation of DPP" is wholly irrelevant and misquotes the internal DPP memorandum attached as Exhibit A to Intervenors' Motion (hereinafter, "internal DPP memo").

First of all, the internal DPP memo is not in the record of the Planning Commission upon which the LUC must make its decision, and therefore, it should be stricken from the record and not considered by the LUC. In fact, prior to being served with Intervenors' Motion,[15] Applicant had never seen this allegedly authentic internal DPP memo. Moreover, Intervenors have failed to properly authenticate the memo. There is no evidence, other than the Intervenors' self-serving Declaration of Colleen Hanabusa, that Exhibit A is a true and correct copy of an alleged internal DPP memo. Intervenor Hanabusa is not the custodian of records for DPP and does not, and should not, have any personal knowledge of internal DPP records.

Even if it is authentic, the internal DPP memo is not publicly disclosable under the deliberative process privilege, as publication of, and reliance on, such a pre-decisional inter-agency memo will have a chilling effect on the ability of an agency's staff to communicate frankly with each other.[16] The official position and actual recommendation of DPP, set forth in the DPP Report, is in the record and recommends approval of the SUP Application.

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[15] It should be noted that although the Certificate of Service accompanying Intervenors' Motion certifies that the motion was served on counsel for Applicant, Applicant, DPP, the Planning Commission and the State Office of Planning on September 18, 2009, this is incorrect, as the Motion that was served is file stamped at the LUC on September 21, 2009, at 11:39 a.m., and therefore could not have been served three days earlier. The Motion was in fact served on counsel for Applicant on September 21, 2009, at 1:37 p.m.

[16] See HRS § 92F-13(3) and numerous opinions of the Office of Information Practices (e.g., OIP Op, Ltrs. 04-15, 90-8, 89-9 and 90-3) and the cases cited therein.

In addition, the memo appears to advise the DPP Director to "[a]dvise ENV to process an SUP amendment...." However, there is no evidence in the record that DPP actually recommended that ENV apply for an amendment to the current SUP permit rather than submit a new SUP permit application.[17] Finally, even if DPP had recommended that ENV apply for an SUP amendment, such a recommendation would have no bearing on the clear inapplicability of HAR § 15-15-96(b).

Therefore, HAR § 15-15-96(b) does not prohibit the LUC's consideration of the SUP Application and does not require the LUC to deny the SUP Application.

III. CONCLUSION

For the reasons articulated above, Applicant respectfully requests that the Commission DENY Intervenors' Motion.

DATED: Honolulu, Hawaii, September 23, 2009.

CARRIE K. S. OKINAGA
Corporation Counsel

By _____
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Deputies Corporation Counsel
Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU

[17] It should be noted that Applicant chose to file an application for a **new** SUP permit based on comments from some of the LUC's members in last year's proceedings regarding the 18-month extension in Docket SP87-362. There appeared to be a preference to not further amend the current SUP permit.

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Application of	)	DOCKET NO. SP09-403
	)	
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU	)	CERTIFICATE OF SERVICE
	)	
For a New Special Use Permit to supersede Existing Special Use Permit to allow a 92.5-acre Expansion and Time Extension For Waimanalo Gulch Sanitary Landfill, Waimanalo Gulch, Oahu, Hawaii, Tax Map Key Nos. (1) 9-2-003:072 and 073	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE **DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION, COLLEEN HANABUSA, AND MAILE SHIMABUKURO'S MOTION TO DENY PETITION** was duly served by either hand-delivery or U. S. Mail, postage prepaid, by certified mail, return receipt requested, to the following on the date below, addressed as follows:

	Mail	Delivery
COLLEEN HANABUSA 220 South King Street, Suite 1230 Honolulu, Hawaii 96813		X

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

DATED: Honolulu, Hawai'i, September 23, 2009.

GARY Y. TAKEUCHI
JESSE K. SOUKI
Deputies Corporation Counsel

09-01760.003/92359