

City and County of Honolulu
DEPARTMENT OF PLANNING AND PERMITTING
650 South King Street
Honolulu, Hawaii 96813

PLANNING DIVISION MASTER APPLICATION FORM

Additional data, drawings/plans, and fee requirements are listed on a separate sheet title "Instructions for Filing". *PLEASE ASK FOR THESE INSTRUCTIONS.*

All specified materials described in the "Instructions for Filing" and required fees must accompany this form; incomplete applications will delay processing. You are encouraged to consult with Planning Division staff in completing the application. Please call appropriate phone number given in the "Instructions for Filing".

Please print legibly or type the required information.

SUBMITTED FEE: \$ N/A

PERMIT/APPROVAL REQUESTED (Check one or more as appropriate):

<input type="checkbox"/> GENERAL PLAN AMENDMENT	<input checked="" type="checkbox"/> SPECIAL USE PERMIT
<input type="checkbox"/> STATE LAND USE BOUNDARY AMENDMENT (<15 acres) From _____ (District) to _____ (District)	<input type="checkbox"/> ZONING DISTRICT BOUNDARY ADJUSTMENT, ADMINISTRATIVE
<input type="checkbox"/> DEVELOPMENT PLAN (DP)/SUSTAINABLE COMMUNITIES PLAN (SCP) AMENDMENT Indicate DP/SCP area _____	<input type="checkbox"/> ZONE CHANGE From _____ (District) to _____ (District) <input type="checkbox"/> AMEND UNILATERAL AGREEMENT TO ORDINANCE NO. _____
<input type="checkbox"/> PUBLIC INFRASTRUCTURE MAP REVISION (Indicate Map Symbol Request): <input type="checkbox"/> CY (Corporation Yard) <input type="checkbox"/> DSP (Desalination Plant) <input type="checkbox"/> D (Drainage Way (Open Channel)) <input type="checkbox"/> FS (Fire Station) <input type="checkbox"/> GB (Government Building) <input type="checkbox"/> GC (Golf Course) <input type="checkbox"/> P (Parks) <input type="checkbox"/> PS (Police Station) <input type="checkbox"/> PKG (Parking Facility/Transit Center) <input type="checkbox"/> RES (Water Reservoir) <input type="checkbox"/> SPS (Sewage Pump Station) <input type="checkbox"/> STP (Sewage Treatment Plant) <input type="checkbox"/> SW (Solid Waste Facility) <input type="checkbox"/> TC (Transit Corridor) <input type="checkbox"/> R (Arterial & Collector Roadway) <input type="checkbox"/> W (Potable Well)	

(Project/Parcel specific information should be provided for General Plan and Development Plan amendments only if appropriate.)

TAX MAP KEY(S): 9-2-3: 072 and 073
 STREET ADDRESS/LOCATION OF PROPERTY: 92-460 Farrington Highway, Kapolei, HI 96707
 APPLICATION/SUBJECT AREA (Acres/sq.ft.): N/A

THE PROPOSED PROJECT IS LOCATED INSIDE OUTSIDE THE:

- Urban Growth Boundary
- Urban Community Boundary
- Rural Community Boundary

OF THE Ewa DEVELOPMENT PLAN/SUSTAINABLE COMMUNITY PLAN
 ZONING DISTRICT(S): AG-2, General Agricultural STATE LAND USE DISTRICT: Agricultural

RECORDED FEE OWNER:

Name (& title, if any) City and County of Honolulu
 Organization c/o Dept. of Environmental Services
 Mailing Address 1000 Uluohia Street, Suite 308
Kapolei, HI 96707
 Phone Number 768-3486

Signature [Signature]
 Timothy E. Steinberger, Director

PRESENT USE(S) OF PROPERTY/BUILDING:
Municipal Sanitary Landfill

PROJECT NAME (if any): Waimanalo Gulch Sanitary Landfill

APPLICANT:

Name City and County of Honolulu
 Organization Department of Environmental Services
 Mailing Address 1000 Uluohia Street, Suite 308
Kapolei, HI 96707
 Phone Number 768-3486

Signature [Signature]
 Timothy E. Steinberger, Director

AUTHORIZED AGENT/CONTACT PERSON:
 Name Wilma Namumnart
 Mailing Address 1000 Uluohia Street, Suite 201
Kapolei, HI 96707

Phone Number 768-3486
 Signature [Signature]
 Wilma Namumnart, Refuse Division, Dept. of

REQUEST/PROPOSAL (Briefly describe the nature of the request, proposed activity or project): Environmental Services

Request for modification of condition 14 of SUP FILE No. 2008/SUP-2. See attached documents.

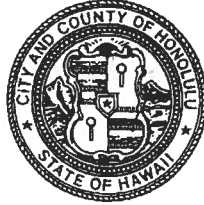
DPP/ELOG NO. _____

DPP/POSSE NO. _____
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DEPARTMENT OF ENVIRONMENTAL SERVICES
CITY AND COUNTY OF HONOLULU

1000 ULUOHIA STREET, SUITE 308, KAPOLEI, HAWAII 96707
TELEPHONE: (808) 768-3486 • FAX: (808) 768-3487 • WEBSITE: <http://envhonolulu.org>

PETER B. CARLISLE
MAYOR



RECEIVED

TIMOTHY E. STEINBERGER, P.E.
DIRECTOR

MANUEL S. LANUEVO, P.E., LEED AP
DEPUTY DIRECTOR

11 JUN 28 AIO 25

ROSS S. TANIMOTO, P.E.
DEPUTY DIRECTOR

IN REPLY REFER TO:
DIR 11-012

June 28, 2011

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

David K. Tanuoue, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

Re: **Special Use Permit (SUP) No. 2008/SUP-2; 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 by Modifying the LUC's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009**

The Department of Environmental Services, City and County of Honolulu (the "Applicant" or the "Department of Environmental Services"), respectfully moves the Planning Commission, City and County of Honolulu (the "Planning Commission"), for an Order modifying State Special Use Permit ("SUP") No. 2008/SUP-2, which superseded State SUP No. 86/SUP-5, and which permitted a 92.5 acre expansion and time extension to capacity as allowed by the Department of Health, State of Hawaii ("DOH") for the disposal of solid waste at the Waimanalo Gulch Sanitary Landfill ("WGSL" or "Landfill").

This Application is made in accordance with Section 2-18 and Section 2-49 of the Rules of the Planning Commission and Section 15-15-70 of the State of Hawaii, Land Use Commission ("LUC") Rules. Further, the LUC has formally asserted to the Circuit Court of the First Circuit that there is nothing precluding the Department of Environmental Services from requesting relief from conditions of the 2009 LUC Order in the future: "there is nothing to preclude ENV from requesting [from the Planning Commission] an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site." See Exhibit "A," Appellee State of Hawai'i, Land Use Commission's Answering Brief, filed on April 12, 2010, In the Matter of Department of Environmental Services, City and County of

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Honolulu vs. Land Use Commission, State of Hawaii, et al., Civil No. 09-1-2719-11, p. 9, attached hereto and incorporated herein.

Also, presenting this Application first to the Planning Commission for its consideration, rather than directly to the LUC, will promote the maximum opportunity for public participation and input by all interested parties. Furthermore, in light of the lack of specificity in the applicable rules, enabling both the Planning Commission and the LUC to consider Applicant's request will reduce the possibility of a procedural challenge. Finally, if the Planning Commission determines that it does not have the authority to consider this request, it may so conclude and direct Applicant to seek consideration from the LUC.

Applicant specifically requests that the Planning Commission modify the LUC's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, dated October 22, 2009 (the "2009 LUC Decision"), by deleting the July 31, 2012, deadline to cease disposal of municipal solid waste ("MSW") at WGSL, as set forth in Condition No. 14 of said Order. The Department of Environmental Services seeks to use the WGSL until it reaches its permitted capacity, as allowed by the DOH, and as set forth in the Planning Commission's Findings of Fact, Conclusions, and Decision, dated August 4, 2009 (the "2009 Planning Commission Decision").

The basis for this Application is that the current permitted area of the Landfill, approximately 200 acres, has a useful life well beyond July 31, 2012. See 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")¹ at Section 1.1, Proposed Action at pg. 1-1 ("The landfill has been in operation since 1989 and has capacity remaining with the unused 92.5 acres of the approximately 200 acre property for an estimated minimum life of approximately 15 years") (footnote omitted); see also Section 2.6.3, Landfill Capacity at pg. 2-27 ("At present, the lifespan of WGSL is projected for a minimum period of 15 years.") The 2008 FEIS, which was accepted by the Department of Planning and Permitting, City and County of Honolulu ("Department of Planning and Permitting") on October 13, 2008, thoroughly studied the current footprint, operations and environmental impacts associated with the use of the WGSL to capacity. See 2009 Planning Commission Decision, pg. 2, ¶ 3; see also 2008 FEIS at Section 1, Executive Summary; Section 3, Introduction; Section 4, Project Description; and Section 5, Environmental Setting, Potential Impacts and Mitigation Measures. Neither the permitted area nor the methods of operation will change with this

¹ Although the 2008 FEIS is a part of the record in Docket No. SP09-403, for ease of reference, attached hereto and incorporated herein as Exhibit "B" is the 2008 FEIS on CD-ROM.

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Application. See 2008 FEIS at Section 1.1, Proposed Action; Section 4, Project Description. Moreover, the Landfill's current footprint has already been approved by the Planning Commission and the LUC and the Landfill has a solid waste permit from the DOH. See 2009 Planning Commission Decision, Decision and Order, pg. 24; see also 2009 LUC Decision pgs. 4-5; Declaration of Timothy E. Steinberger ("Dec. Steinberger"), ¶¶ 17, 19. It is therefore in the public interest to use WGS�, the only permitted MSW landfill on O'ahu, to capacity: this ensures maximum utility of our island's finite land resources and allows Applicant to properly manage the MSW of the City and County of Honolulu ("City") so as to protect the public health and safety of O'ahu's residents and visitors.

If the Landfill is forced to cease accepting MSW for disposal on July 31, 2012, in accordance with Condition No. 14 of the 2009 LUC Order, there will be no viable options to meet O'ahu's solid waste management needs. See 2008 FEIS at Section 1.2.2., No Action Alternative at pgs. 1-2 ("The No Action Alternative, which would involve taking no further action to extend the use of the WGS� was rejected because the consequences would result in an unacceptable health, safety, and economic impact to all communities on O'ahu."); see also Section 9.3., No Action Alternative, pgs. 9-6 to 9-8. For example, certain types of MSW, including special wastes such as sewage sludge, animal carcasses, treated medical waste; residue from the City's Honolulu Program of Waste Energy Recovery waste-to-energy facility ("H-POWER"); and bulky item waste cannot be disposed of at H-POWER and must be disposed of at a permitted landfill. See 2009 Planning Commission Decision, ¶¶ 94, 97, pg. 19. That landfill is WGS�. See 2009 Planning Commission Decision, ¶¶ 91, 92, 94, pgs. 18-19. Without WGS�, the inability to dispose of various wastes will potentially create serious health and safety issues. See 2009 Planning Commission Decision, ¶ 93, pg. 18.

In order to alleviate this potential health and safety risk, it is respectfully requested that the Planning Commission modify SUP No. 2008/SUP-2 by deleting Condition No. 14 of the 2009 LUC Decision, thereby allowing the usage of WGS� to dispose of MSW until the site reaches its permitted capacity as provided in the 2009 Planning Commission Decision.

I. BACKGROUND

A. Establishment of the Landfill

On October 17, 1985, the Director of Land Utilization, City and County of Honolulu (nka the Department of Planning and Permitting), accepted the Environmental Impact Statement for the establishment of a landfill at Waimanalo Gulch, Honouliuli, 'Ewa, O'ahu, Hawai'i. See 2008 FEIS at Section 2.5, Historical Background of the State Special Use Permit, at pgs. 2-18.

On February 4, 1987, the Planning Commission approved the SUP application to establish the Landfill on approximately 60.5 acres of land within the Agricultural District, subject to six conditions. The application was submitted by the Department of Public Works, City and County of Honolulu (nka the Department of Environmental Services). Id.

Because the SUP was for land greater than fifteen acres, on April 20, 1987, the LUC also approved the issuance of the SUP in Special Permit Docket Number 87-362 to establish the Landfill, subject to eight conditions.² See the LUC's Findings of Fact, Conclusions of Law and Decision and Order dated April 20, 1987, attached hereto and incorporated herein as Exhibit "C."

B. Expansion of the Landfill by 26 acres

On July 26, 1989, the Planning Commission approved an amendment to the SUP to expand the Landfill by 26 acres, with one additional condition. Applicant had requested the amendment because 26 acres had been inadvertently left out of the original SUP. The additional 26 acres was necessary to allow enough land area for the proposed administration building, weighing station, drainage structures and access roads. See 2008 FEIS at pgs. 2-19.

On October 31, 1989, the LUC also approved the SUP amendment to expand the existing permitted area by 26 acres, with the additional condition as recommended by the Planning Commission. See the LUC's Findings of Fact, Conclusions of Law and Decision and Order dated October 31, 1989, attached hereto and incorporated herein as Exhibit "D," pgs. 9-10.

C. Further Expansion of the Landfill by 21 acres

On January 10, 2003, the Department of Planning and Permitting accepted the Final Supplemental Environmental Impact Statement ("FEIS"), which addressed a proposed 21-acre expansion of the landfill. See 2008 FEIS at pgs. 2-19.

On March 13, 2003, the Planning Commission granted the application of the Department of Environmental Services to expand the landfill by 21 acres ("2003 Planning Commission Decision" attached hereto and incorporated herein as Exhibit "E"), which, at that time, was projected to extend the life of the landfill by 5 years. The proposed

² "Special permits for areas greater than fifteen (15) acres require approval of both the planning commission and the land use commission." Rules of Planning Commission § 2-38; see also Hawai'i Revised Statutes ("HRS") § 205-6.

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expansion included four cells (E1 through E4) for disposing of MSW, berms, detention and stilling basins, drainage channels and access routes. In this Decision, the Planning Commission recommended that the Department of Environmental Services submit an alternative landfill site, or sites, to the City Council by December 31, 2003. The Planning Commission did not, however, condition its approval on this recommendation. See 2003 Planning Commission Decision.

With its approval of the 21-acre expansion, the Planning Commission imposed two additional conditions. One of those conditions, Condition No. 10, required the following:

Within 5 years from the date of this Special Use Permit Amendment approval or date of the Solid Waste Management Permit approval for this expansion, whichever occurs later but not beyond May 1, 2008, the 200-acre property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan.

Id., at p. 5.

On June 9, 2003, the LUC issued the 2003 LUC Decision, attached hereto and incorporated herein as Exhibit "F." The LUC adopted Condition No. 10 of the 2003 Planning Commission Decision as Condition No. 12 in the 2003 LUC Decision. The LUC Decision also required the City Council to select a new site for a landfill, with the assistance of the Blue Ribbon Site Selection Committee, by June 1, 2004. See 2003 LUC Decision, pgs. 7-9.

D. Resolution Adopted by City Council Selecting WGSL as the City's Future Landfill Site.

After receiving from the LUC an extension of the deadline to make its determination, on December 1, 2004, the City Council selected WGSL as the City's future landfill site. The resolution setting forth the City Council's decision, Resolution No. 04-348, CD1, FD1 (December 1, 2004), City Council, City and County of Honolulu ("WGSL Resolution"), is attached hereto and incorporated herein as Exhibit "G." In selecting the Landfill as the future site, the City Council noted, in pertinent part, the following:

- (1) The site currently has over 15 years capacity left with further expansion, and this capacity can be further extended should the city be successful in reducing the amount of waste currently entering the landfill through recycling and the use of new technologies;

- (2) The city already owns the property and the infrastructure is already in place, making the site the most economical and least expensive to develop and maintain as a landfill;
- (3) Other sites will require a large capital outlay by the city to acquire the land through condemnation and to develop and construct the site and required supporting infrastructure;
- (4) A landfill management contract is already in place for 15 years;
- (5) This is the only site where the costs and revenues for a landfill are known factors; and
- (6) The current landfill operator is committed to implementing necessary improvements to landfill operations to address community concerns regarding visual impact, odors, airborne waste, litter and dust control[.]

WGSL Resolution, pgs. 2-3.

As expressed in the WGSL Resolution, the City Council decided that WGSL would satisfy O'ahu's need for a landfill to manage its solid waste for the foreseeable future.

E. Extension of Waste Acceptance Deadline at WGSL.

On July 6, 2007, the Department of Environmental Services filed an application with the Department of Planning and Permitting to amend Condition No. 10 of the 2003 Planning Commission Decision, by extending the deadline to accept waste at WGSL from May 1, 2008, to May 1, 2010, or until WGSL reached its permitted capacity, whichever occurred first. This timeline extension was necessary in order to accommodate and implement the City Council's selection of WGSL as the City's future landfill site. See State Special Use Permit (SUP) No. 86/SUP-5, In re Department of Environmental Services, City and County of Honolulu (FKA Department of Public Works, City and County of Honolulu); Application to Modify (1) the Findings of Fact, Conclusions and Decision dated March 13, 2003, and (2) the Decision and Order Approving Amendment to Special Use Permit Issued June 9, 2003, filed with the Department of Planning and Permitting on July 6, 2007, without accompanying exhibits ("2007 Application"), attached hereto and incorporated herein as

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Exhibit "H." An FEIS for the further expansion of WGSL by approximately 92.5 acres, to the full acreage of the site at approximately 200 acres, needed to be completed before the Department of Environmental Services could prepare an application for a new SUP that would cover the entire WGSL property. See 2008 FEIS at pgs. 2-21.

On January 16, 2008, the Planning Commission granted the Department of Environmental Services' application to amend Condition No. 10 of the 2003 Planning Commission Decision to extend the waste acceptance deadline by two years (to May 1, 2010), or until WGSL reached its permitted capacity, and issued its Findings of Fact, Conclusions of Law, and Decision and Order (the "2008 Planning Commission Decision"), attached hereto and incorporated herein as Exhibit "I." The Planning Commission recommended that the LUC similarly amend Condition No. 12 of the 2003 LUC Decision. See 2008 Planning Commission Decision, pgs. 7-8.

On March 7, 2008, the LUC issued its Findings of Fact, Conclusions of Law, and Decision and Order adopting with Modifications, the City and County of Honolulu Planning Commission's Recommendation to Approve Amendment to Special Use Permit on March 14, 2008 (the "2008 LUC Decision"), attached hereto and incorporated herein as Exhibit "J." The LUC adopted the Planning Commission's recommendation with modifications by amending the waste acceptance deadline from May 1, 2010, to November 1, 2009, and by requiring the Department of Environmental Services to report to the LUC every six months on the actions taken to alleviate further use of WGSL. See 2008 LUC Decision, p. 18.

F. Application for a New SUP to Supersede Prior SUP to Allow a 92.5-Acre Expansion and Time Extension for WGSL.

On December 3, 2008, the Department of Environmental Services filed an application for a new SUP (the "Application") to supersede the existing SUP (State Special Use Permit No. 86/SUP-5), to allow a 92.5-acre expansion and time extension for the existing operating portion of WGSL. See 2009 Planning Commission Decision, ¶ 5, pg. 2. The Department of Environmental Services concurrently sought to withdraw its existing SUP permit for approximately 107.5 acres (File No. 86/SUP-5) and the conditions imposed therein, if the new SUP permit was granted. Id. at ¶ 6, pg. 3. The Application, designated as County Special Use Permit File No. 2008/SUP-2, was processed by the Department of Planning and Permitting, which recommended to the Planning Commission that the Application be approved with conditions. Id. at ¶ 10, pg. 3.

The Planning Commission conducted a contested case hearing on the Application on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. Id. at ¶¶ 19, 20, 22, 23, 25, pgs. 5-6. On July 31, 2009, the Planning Commission recommended

approval of the Application subject to 10 conditions, and further recommended approval of the withdrawal of the prior SUP for WGSL (SUP File No. 86/SUP-5) upon 2008/SUP-2 taking effect, and that all conditions previously placed on the Property under SUP File No. 86/SUP-5 would then be null and void. The decision of the Planning Commission was set forth in its Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009, attached hereto and incorporated herein as Exhibit "K." The 2009 Planning Commission Decision was based on the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, and the written arguments of the parties. Id. at pg. 1.

Notably, the 2009 Planning Commission Decision does not contain any expiration date for the SUP or any deadline for the acceptance of waste at WGSL. Commissioner Kerry Komatsubara ("Komatsubara"), who authored this Decision, explained that "[t]he term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of 'X' number of years." Komatsubara noted that the Department of Environmental Services had "demonstrated that we need a landfill. I think it's pretty obvious; we need a landfill on this island for us to move forward...it would not be in the community's best interest if we were to close this landfill before we find another landfill." Komatsubara further explained his reasoning as follows:

In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of the Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you're not going to close this landfill until you find another site. I don't think it's in the interest of our community not to have a landfill.

So what this proposal does is, it says look, [Applicant] can keep [WGSL] open until your [*sic*] full, until you've reached the capacity, but you have an obligation starting from next year [2010] to start looking for a new site. Now whether you take it seriously or not, that's up to you because we have the power to call you in, and you have the obligation now to report every year on what you're doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not...the applicant is not in good faith moving forward with reasonable diligence to find a new site.

...I think going down the old path of just putting a [closure] date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further...I'd rather not say it's a certain date only to know that when we reach that date we're going to extend it further until we find the new site. I'd rather focus on an effort to find a new site and have [Applicant] come in every year and explain to us where you are in your effort to find a new site. That's what this [order] does.

Relevant portions of the transcript of the July 31, 2009, decision-making hearing of the Planning Commission are attached hereto and incorporated herein as Exhibit "L."

On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications ("2009 LUC Decision"), attached hereto and incorporated herein as Exhibit "M."

The 2009 LUC Decision granted the Application subject to "(1) the withdrawal of County Special Use Permit File No. 86/SUP-5 and LUC Docket No. SP87-362, provided that the existing conditions therein shall be incorporated to the extent they are consistent with and applicable to this decision and are not duplicative of any additional conditions imposed hereafter; (2) the conditions as recommended by the Planning Commission in County Special Use Permit File No. 2008/SUP-2 (LUC Docket No. SP09-403) and modified as appropriate"; and (3) the following relevant conditions:

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

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

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

2009 LUC Decision, pgs. 4, 8-9.

G. Subsequent Court Proceedings Related to the 2009 LUC Decision

On November 19, 2009, the Department of Environmental Services filed its Notice of Appeal; Statement of the Case; Designation of Record on Appeal; Order for Certification and Transmission of Record; Exhibits "A" and "B" to the Circuit Court of the First Circuit ("Circuit Court"). Specifically, the Department of Environmental Services appealed the LUC's imposition of a July 31, 2012, deadline to cease the disposal of MSW at WGSL, as set forth in Condition No. 14 of the 2009 LUC Decision, as arbitrary and capricious, characterized by abuse of discretion and a clearly unwarranted exercise of discretion in light of the record developed before the Planning Commission. The Department of Environmental Services further appealed the LUC's imposition of reporting requirements, as set forth in Condition Nos. 15 and 16 of the 2009 LUC Decision, as in excess of the statutory authority and jurisdiction of the LUC. See Dec. Steinberger, ¶ 20.

Oral arguments were held before the Honorable Judge Rhonda A. Nishimura of the Circuit Court on July 14, 2010. Id.

On September 21, 2010, the Circuit Court issued its Order Affirming Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order Dated October 22, 2009 with Modifications, which is attached hereto and incorporated herein as Exhibit "N." Said Order modified Conditions No. 15 and 16 of the 2009 LUC Decision by deleting the references to the Honolulu City Council and the City administration, and substituting the same with the Department of Environmental Services. The Order also erroneously affirmed Condition No. 14 of the 2009 LUC Decision. Id.

Final Judgment was filed on October 19, 2010, and the Notice of Entry of Judgment was filed on October 21, 2010. On November 12, 2010, the Department of Environmental Services timely filed its Notice of Appeal and Civil Appeals Docketing Statement to the Intermediate Court of Appeals ("ICA") relating to that portion of the Circuit Court's Order which wrongly affirmed the LUC's arbitrary and unsupported deadline of July 31, 2012, to cease acceptance of MSW at WGSL. See Dec. Steinberger, ¶¶ 20, 21.

The Department of Environmental Services filed its Opening Brief to the ICA on February 15, 2011. Briefing is not yet concluded and the case remains pending before the ICA. Id.

II. **REQUEST FOR MODIFICATION OF SUP No. 2008/SUP-2**

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.

As discussed above, the Planning Commission did not place any expiration date on 2008/SUP-2 or any deadline for the acceptance of waste at WGSL. See generally 2009 Planning Commission Decision; see also Exhibit "L." The LUC, however, imposed the July 31, 2012, deadline to close WGSL to MSW in Condition No. 14. See 2009 LUC Decision, pg. 8.

The current DOH Solid Waste Management Permit for WGSL, which encompasses the approximately 200 acre property, was issued on June 4, 2010, and is attached hereto and incorporated herein as Exhibit "O." That permit states that WGSL "may accept MSW and ash for disposal until the date specified in the associated Special Use Permit or until the landfill/monofill reaches its permitted capacity, whichever comes first." Id. at pgs. 1, 9. The SUP now in effect requires that the Landfill stop accepting MSW on July 31, 2012, well before WGSL will reach its permitted capacity. See 2008 FEIS at Section 1.1, Proposed Action at pg. 1-1; Section 2.6.3, Landfill Capacity at pg. 2-27; see also Dec. Steinberger, ¶ 22. For the reasons that follow below, it is not only practical to extend the Landfill's solid waste acceptance deadline, but also necessary and critical for effective and safe management of the City's solid waste.

A. The Currently Permitted Landfill Has a Useful Life that Will Extend Well Beyond the July 31, 2012, Deadline.

WGSL is located on approximately 200 acres of land and has years of capacity remaining within this permitted area. See 2008 FEIS at Section 1.1, Proposed Action at

pg. 1-1; Section 2.6.3, Landfill Capacity at pg. 2-27; see also Dec. Steinberger, ¶ 22. Based upon typical rates of disposal at WGSL, that remaining capacity is estimated to be approximately fifteen years.³ Id. From 2005 through 2009, the volume of municipal solid waste disposed of at WGSL is illustrated as follows:

Disposal of MSW at WGSL⁴

Year	2005	2006	2007	2008	2009
Tons	391,579	286,842	306,691	233,065	178,512

This chart reflects that the Department of Environmental Services has been actively reducing waste volumes that are directed to WGSL through its various waste diversion programs.⁵ See 2009 Planning Commission Decision, ¶ 100, pg. 20 (“The City is actively reducing waste volume that is directed to the landfill.”). However, even with such waste diversion programs, WGSL remains vitally important to the City’s Integrated Solid Waste Management Plan. See 2009 Planning Commission Decision, ¶ 91, pg. 18. The continued availability of WGSL is a DOH permit condition to operate H-POWER (e.g., to dispose of the waste that exceeds the capacity of H-POWER, or waste that is diverted from that facility due to routine maintenance or unanticipated closures). See 2009 Planning Commission Decision, ¶ 92, pg. 18. The Landfill is also needed for clean up in the event of a natural

³ The remaining capacity of WGSL is an estimate only as rates of disposal fluctuate based upon numerous factors, e.g., the economy, waste diversion programs such as the implementation of island-wide recycling, possible disaster events, etc.

⁴ See Opala.org, Recycling and Landfill Diversion, http://www.opala.org/solid_waste/archive/facts2.html.

⁵ For example, the Department of Environmental Services is expanding its H-POWER plant with a third boiler, which is expected to increase the facility’s capacity by an additional 300,000 tons of MSW per year by late 2011 or early 2012. See 2009 Planning Commission Decision, ¶ 100, pg. 20; see also Dec. Steinberger, ¶ 23. The Department of Environmental Services also completed full implementation of its island-wide, curbside recycling program in May 2010, which is in addition to its program of community recycling bins. Dec. Steinberger, ¶ 23. A facility at the City’s Sand Island Wastewater Treatment Plant turns bio-solids into fertilizer pellets, so that such material may be reused as a soil amendment product. Id. The Department of Environmental Services’ other initiatives include awarding a contract for a new recycling facility that will accept green waste, food waste and sewage sludge. Id.

disaster, to properly dispose of special wastes such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels ("special wastes") and bulky wastes, and because there is waste material that cannot be combusted, recycled, reused, or shipped.⁶ See 2009 Planning Commission Decision, ¶¶ 92, 97, pgs. 18-19.

The City remains committed to adopting and implementing waste handling programs that will reduce O'ahu's dependency on landfilling. Dec. Steinberger, ¶ 23. The fact remains, however, that there are no methods or technologies that will completely eliminate the need for landfilling. See 2008 FEIS, Appendix K, Alternatives Analysis, 2008. If WGS� is forced to cease accepting MSW for disposal on July 31, 2012, then there will be no permitted landfill to serve O'ahu's municipal solid waste disposal needs, and this could have significant public health and safety implications for the residents and visitors of this island. See 2008 FEIS at Section 9.3., No Action Alternative, pgs. 9-6 to 9-8.

B. WGS� Remains an Integral Part of the City's Solid Waste Management System.

The Landfill is a critical component of the City's solid waste management system and the final destination for certain solid wastes including MSW, recycling residue, and H-POWER generated ash, residue and waste that cannot further be combusted, recycled or reused. See 2009 Planning Commission Decision, ¶¶ 92, 95, 97, pgs. 18-19. If SUP No. 2008/SUP-2 is not amended by deleting Condition No. 14 of the 2009 LUC Decision, the Landfill will be forced to stop accepting MSW as of July 31, 2012, and special wastes, bulky wastes and waste material that cannot be combusted, recycled, reused, or shipped, will have nowhere to go for proper disposal. See 2009 Planning Commission Decision, ¶¶ 92, 97, pgs. 18-19; 2008 FEIS at Section 9.3., No Action Alternative, pgs. 9-6 to 9-8; see also Dec. Steinberger, ¶ 24. This stoppage will have an adverse, island-wide impact on all of the communities on O'ahu because the City will no longer have the ability to dispose of certain wastes in a sanitary manner. Id. The City would also no longer be permitted to operate H-POWER, as that facility must have a MSW landfill disposal option as required by its DOH solid waste permit. See 2009 Planning Commission Decision, ¶ 92, pg. 18; see also Dec. Steinberger, ¶ 24. Furthermore, in the event of a disaster such as a hurricane or a tsunami, the City would have no permitted site to dispose of the ensuing debris. Id. In other words, not only would there be no sanitary or secure means of disposing of special wastes and bulky wastes, H-POWER would no longer be permitted to accept any MSW and there would be no facility to properly dispose of disaster debris. Dec. Steinberger, ¶ 24. Therefore, forcing the Landfill to cease accepting MSW will likely result in major public

⁶ As explained in part 2 herein, off-island shipment of MSW is not a viable option.

health and safety problems for the City, its residents and visitors, and the State of Hawai'i. See 2009 Planning Commission Decision, ¶ 93, pg. 18.

1. WGSL Remains Necessary Even with an Expanded H-POWER.

Although most municipal waste is currently directed to the H-POWER facility, H-POWER does not have the capacity, or ability, to accept all of Oahu's refuse. See 2009 Planning Commission Decision, ¶ 97, pg. 19. WGSL also remains necessary in order to dispose of disaster debris, bulky wastes and special wastes. Id.; see also ¶ 92, pg. 18. Further, as discussed previously, the DOH solid waste permit for H-POWER requires that a landfill disposal option for MSW be available. Id. at ¶ 92, pg. 18.

The recent closure of WGSL from January 12 to January 28, 2011, due to unprecedented storms in December 2010 and in January 2011, has served to highlight the need for a landfill. During that seventeen-day closure period, there were delays in the disposal of H-POWER residue, bulky item waste, and wastewater sludge. All such wastes cannot be disposed of at H-POWER and must be disposed of in the Landfill. The closure of WGSL greatly impacted the disposal of H-POWER residue, bulky item waste, and wastewater sludge, all of which cannot be disposed of at H-POWER and must be disposed of at WGSL, the only permitted facility on O'ahu to accept these types of waste. The closure of WGSL also hampered H-POWER's ability to accept MSW because of the backlog of residue that accumulated at the facility. City refuse transfer stations that depend on H-POWER for waste disposal were also adversely impacted and experienced heavy buildups of trash. City wastewater treatment facilities resorted to temporary on-site storage of sewage sludge to cope with the situation. Further, the Department of Environmental Services ceased collection of bulky item wastes, resulting in unsightly piles of waste in many neighborhoods across the island. Generators of other special wastes that are normally disposed of at WGSL had to make their own arrangements to store or otherwise dispose of their waste until the Landfill could be reopened. The closure of WGSL had far reaching impacts upon the City's ability to dispose of solid waste, with restrictions imposed at all six of the City's convenience centers, as well as at its three transfer stations. On April 13, 2011, the WGSL and all City refuse facilities resumed normal operations and were opened to the public. See Dec. Steinberger, ¶ 25.

By 2012, when H-POWER's third boiler is expected to be fully operational, the City anticipates that about eighty percent (80%) of the island's waste stream will be diverted from landfill disposal. See 2009 Planning Commission Decision, ¶ 101, pg. 20. Twenty percent (20%), however, of O'ahu's waste will still need to be landfilled at WGSL, as certain wastes cannot be recycled or combusted. Id., see also ¶¶ 92, 97, pgs. 18-19. Further, the expanded H-POWER facility will still require the continued availability of WGSL as a permit condition to operate, to ensure proper disposal of MSW that is diverted from H-POWER

due to routine maintenance, unanticipated closures or if the amount of waste exceeds the capacity of the facility. Id. at ¶ 92, pg. 18; Dec. Steinberger, ¶ 24.

2. Transshipment of solid waste off-island is no longer a viable alternative.

The off-island shipment of O'ahu's solid waste is no longer a viable alternative, not even for the short term. The City did attempt to ship waste to the mainland but only as an interim solid waste disposal alternative until the H-POWER facility was expanded with the addition of a third boiler. See Planning Commission Transcript dated 07/01/09 at 198:23-199:4; see also Dec. Steinberger, ¶ 26. However, this attempt was not successful and shipping is now precluded by a court imposed injunction on the shipping of waste from Hawai'i to Washington and Oregon via the Columbia River. Dec. Steinberger, ¶ 26.

In January 2008, the City issued an Invitation for Bids ("IFB") for the baling, shipping, offloading, transporting and disposing (transshipment) of City-provided MSW to a U.S. Mainland landfill for a term of at least 36 months. The City received and opened three bids on June 17, 2008. Following the bid opening, the two highest bidders filed a total of four procurement protests, disputing for various reasons the adequacy of the apparent low bid. These protests were resolved after several months, with all the protests ultimately being denied, and no appeals being taken of those denials. See Dec. Steinberger, ¶ 27.

Pursuant to the requirements of the State Procurement Code, the City was prohibited from taking any actions toward the award of a contract during the pendency of the protests. With the protests resolved, the City reviewed the apparent low bid submitted by Hawaiian Waste Systems, LLC ("HWS"), and eventually the City's Chief Procurement Officer issued a determination that the low bid was not responsive to the requirements of the IFB. Pursuant to the State Procurement Code, HWS appealed this determination to the Office of Administrative Hearings at the Department of Commerce and Consumer Affairs ("DCCA"). See Dec. Steinberger, ¶ 28.

Following a hearing at DCCA, and prior to the deadline for the Hearings Officer to issue a decision on the appeal, the City and HWS agreed to settle the procurement protest. The settlement was confirmed in an Order approved by the Hearings Officer. Id. Pursuant to the Settlement and Order, the contract for interim shipment of MSW was awarded to HWS on August 27, 2009. The commencement of services under the contract was to begin by the end of September 2009. The City issued a Notice to Proceed to HWS for September 25, 2009. Both parties agreed that delivery of MSW would start on September 28, 2009. See Dec. Steinberger, ¶ 29.

HWS asked the City to cease delivering waste on April 1, 2010. At that point, approximately 20,000 tons of MSW had been delivered to HWS, which baled, wrapped and stockpiled the MSW at three locations, and no waste had been shipped due to HWS' inability to obtain required permits for the contracted services. See Dec. Steinberger, ¶ 30.

The environmental assessment for HWS' revised plan to ship the baled waste to different ports (Longview, WA; Rainier, OR; and Portland, OR)⁷ was posted on the Federal Register on January 19, 2010 and the closing date for comments was February 18, 2010. On May, 27, 2010 the United States Department of Agriculture ("USDA") concluded their responses to public comments and published a Finding of No Significant Impact ("FONSI"). The required Compliance Agreements were issued in June 2010. See Dec. Steinberger, ¶ 31.

On July 8, 2010, the USDA issued a Notification of Suspension of Operations Pursuant to Compliance Agreement No. Oahu RGOO2 to HWS. Dec. Steinberger, ¶ 32. On August 30, 2010, the United States District Court, Eastern District of Washington issued an injunction enjoining the shipment of waste from Hawaii to Washington or Oregon ports on the Columbia River and/or to the Roosevelt Landfill in Washington in Confederated Tribes and Bands of the Yakama Nation, et al., v. United States Department of Agriculture, et al., No. CV-10-3050-EFS, attached hereto and incorporated herein as Exhibit "P." The USDA has canceled the Compliance Agreement permits of all Hawaii shippers that might otherwise have enabled the shipment of waste to the mainland. As of the filing of this Application, the Yakama Nation lawsuit remains active and the injunction continues in effect. See Dec. Steinberger, ¶ 32.

Accordingly, no waste was ever shipped to the mainland due to various problems encountered by HWS. In order to properly dispose of the approximately 20,000 tons of baled MSW, HWS agreed to disassemble the bales, sort the waste and take the burnable waste to H-POWER and the non-burnable waste to the Waimanalo Gulch Landfill. As of January 2011, approximately 11,000 tons had been taken to H-POWER and 140 tons had been taken to WGSL. See Dec. Steinberger, ¶ 33.

On January 6, 2011, there was a fire at the HWS facility that damaged the building in which the waste bales were disassembled. Because HWS' solid waste permit requires the waste to be processed under cover, without the use of the building, HWS' breaking apart and sorting of the waste for disposal at H-POWER and WGSL had to be suspended. Thereafter, the City and HWS continued to work together, in collaboration with DOH, to dispose of the remaining tons of baled waste. On May 12, 2011, the last bale of waste at the HWS facility

⁷ The original environmental assessment reviewed HWS' originally proposed port located in Roosevelt, WA. Dec. Steinberger, ¶ 31.

was removed and delivered to a City waste disposal facility. Of the original 20,000 tons in its possession, HWS delivered 14,779 tons to H-POWER (76%) and 4,565 (24%) tons to WGS. HWS was able to extract and recycle 1,525 tons of metal. See Dec. Steinberger, ¶ 34.

Accordingly, because WGS is the only currently permitted landfill available to serve O'ahu's municipal solid waste needs, it is also the City's best and only viable option for disposal of certain wastes. See 2009 Planning Commission Decision, ¶¶ 92, 94, 97, pgs. 18-19. Requiring the landfill to stop accepting MSW on July 31, 2012, will have immediate and dire consequences for all of O'ahu. 2009 Planning Commission Decision, ¶ 93, pg. 18; see also 2008 FEIS at Section 9.3., No Action Alternative at pgs. 9-6 to 9-8.

C. Additional Time Is Needed To Identify One or More New Landfill Sites That Shall Either Replace Or Supplement WGS.

Condition No. 1 of the 2009 Planning Commission Decision, which was adopted in most part by the LUC as Condition No. 4 of the 2009 LUC Decision,⁸ provides:

On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's efforts to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 (SP09-403) and shall determine whether modification or revocation of 2008/SUP-2 (SP09-403) is appropriate at that time.

2009 Planning Commission Decision, pg. 25.

Funding for the new landfill site selection process was appropriated in the City's Fiscal Year (FY) 2010 budget with additional funds appropriated in FY 2011. In November 2009, the Department of Environmental Services began the process to allot appropriated funds for a procurement to contract a consultant to facilitate the landfill site selection process. On June 25, 2010, the City contracted with the R.M. Towill Corporation,

⁸ Condition No. 1 of the 2009 Planning Commission Decision is identical to Condition No. 4 of the 2009 LUC Decision except that Condition No. 4 included the added requirement that the "Planning Commission shall make a recommendation to the Land Use Commission." 2009 LUC Decision, pg. 6.

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specifically to assist the Mayor's Landfill Site Selection Advisory Committee ("Landfill Advisory Committee"). The Landfill Advisory Committee is charged by the Mayor to provide advisory recommendations to the City concerning the selection of a future site or sites for a landfill to accept MSW, ash and residue from the City's H-POWER waste-to-energy facility, and construction and demolition debris waste. The procedure involving the use of an advisory committee to assist in landfill site selection was set forth in the City's Integrated Solid Waste Management Plan (October 2008). The Mayor chose 12 members to serve on the Landfill Advisory Committee based upon numerous criteria including technical expertise and experience, community involvement, and availability to serve. See Dec. Steinberger, ¶¶ 35, 36.

The members of the Landfill Advisory Committee are: Bruce Anderson, David Arakawa, Thomas Arizumi, David Cooper, John DeSoto, John Goody, Joe Lapilio, Tesha H. Malama, Janice Marsters, Richard Poirier, Chuck Prentiss, and George West. Due to various personal reasons, however, Bruce Anderson, David Cooper and John DeSoto have since resigned from the committee. See Dec. Steinberger, ¶ 36.

The first meeting of the Landfill Advisory Committee was held on January 20, 2011, and subsequent meetings were held on February 10, March 10, March 31, and May 12, 2011. The next tentatively scheduled meetings are June 23 and July 19, 2011. Additional meetings may be scheduled as needed by the Landfill Advisory Committee. Barring unforeseen delays, the Landfill Advisory Committee's final report is expected to be completed and sent to the Mayor by October 2011. All Committee meetings are open to the public and to public comment. Handouts provided to the Landfill Advisory Committee as well as the Group Memory of each meeting are posted online at opala.org. See Dec. Steinberger, ¶ 37.

Once a site or sites are identified by the Landfill Advisory Committee, as acknowledged in both the 2009 Planning Commission Decision and the 2009 LUC Decision, it will take more than seven years to acquire, permit, design and construct the new landfill site(s). See 2009 Planning Commission Decision, ¶¶ 33, 34; see also 2009 LUC Decision at pgs. 4-5. As noted, the work of the Landfill Advisory Committee is anticipated to be concluded within the third quarter of 2011; the Department of Environmental Services must then continue on with various additional steps, anticipated to require a number of years to complete. Dec. Steinberger, ¶ 38. These tasks include, but are not limited to, the following:

1. Hawai'i Revised Statutes ("HRS") Chapter 343, Environmental Impact Statement ("EIS")

The preparation and processing of an EIS in full compliance with HRS Chapter 343 and related administrative rules for O'ahu's next landfill site or sites to replace or supplement WGSL must satisfy all necessary requirements, including but not limited to conducting site surveys and investigations, analyzing alternatives including alternative sites and technologies, obtaining public and governmental agency input, analyzing direct, secondary, and cumulative impacts, developing appropriate mitigation measures, and ensuring the opportunity for public participation and comments. Dec. Steinberger, ¶ 39.

The EIS process will include among other things the filing of three principal documents with the Office of Environmental Quality Control, State of Hawaii ("OEQC"): (1) a Final Environmental Assessment/EIS Preparation Notice ("FEA/EISPN"), which upon publication will invoke a mandatory thirty (30) day public comment period; (2) a Draft EIS that will incorporate and address all relevant public comments that are received in response to the FEA/EISPN; the publication of the Draft EIS, which will invoke a mandatory forty-five (45) day public comment period; and (3) the acceptance of the Final EIS that will incorporate and address all relevant public comments received in response to the Draft EIS. Id.

The Department of Environmental Services fully expects that because of the inherent difficulty in identifying a new landfill site or sites for O'ahu, extensive environmental documentation will likely be required before the Final EIS for said site(s) can be completed. For example, the 2008 FEIS for WGSL was delayed by approximately one year in order to complete the requisite environmental documentation mandated by HRS Chapter 343.⁹

Based upon the prior experience with the 2008 FEIS, the Department of Environmental Services estimates that the time needed to complete an EIS for the new landfill site(s) is between one and two years, provided that there are no legal challenges. Id. Any legal challenges will only lengthen the time needed to complete an EIS. Id.

⁹ Examples of additional environmental disclosure documentation that was required for the 2008 FEIS included: (1) the discovery of three stone uprights that required archaeological investigation and coordination with the State Historic Preservation Division and cultural informants; and (2) the commissioning of an Invertebrate Survey for the 2008 FEIS. Dec. Steinberger, ¶ 39; see also 2007 Application.

2. Acquisition of the Selected Landfill Site(s)

This task is dependent upon the alternative landfill site(s) that is selected. If the site(s) is not presently owned by the City, the land acquisition process could be lengthy. If the City must acquire new land, a summary of the process is as follows: an appraisal of the land value; a determination by the City regarding the funding source for the acquisition; and approval for the expenditure of public funds by the Honolulu City Council. See Dec. Steinberger, ¶ 40.

Moreover, if the City does not own the property and the landowner is unwilling to sell the property to the City, a condemnation process could ensue. This process is expected to be lengthy and would likely involve litigation. Id.

For these reasons, it is difficult for the Department of Environmental Services to estimate the length of time required to acquire a new landfill site(s). For the purposes of this Application, however, an approximate estimate of time is one to three years. Id.

3. Detailed Engineering Studies, Construction and Bid Documents, and Other Approvals

Following the completion of the EIS process and the acquisition of the site(s), detailed engineering studies will need to be completed to support the landfill design. These studies will include, but are not limited to: land surveys; geotechnical soils and structural investigations; hydrology and hydrogeological investigations. The completion of these studies is required so that the landfill construction drawings can incorporate civil design requirements, such as the provision of drainage, access roadways, and infrastructure, to support the use of the site. Coordination with governmental agencies, utilities, and adjoining landowners, consistent with mitigation measures identified in the EIS, will also be required to minimize disturbance to nearby property owners and utilities. See Dec. Steinberger, ¶ 41.

The length of time required for the completion of detailed engineering studies, construction drawings and bid documents, and the processing of procurements for the design and construction contractors (which could include the selection of a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as a SUP or district boundary amendment, depending on where the site(s) is located, and other necessary approvals, is estimated to be between one and three years. Id.

Based on the foregoing, no new landfill site or sites intended to replace or supplement WGSL will be operational as of the July 31, 2012, deadline to cease accepting

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MSW at WGS� as imposed by Condition No. 14 of the 2009 LUC Decision. See 2009 Planning Commission Decision, ¶ 34, pg. 8; see also Dec. Steinberger, ¶ 42.

III. CONCLUSION

In accordance with the foregoing, the Applicant requests that the Planning Commission modify SUP No. 2008/SUP-2 by deleting Condition No. 14 of the 2009 LUC Decision to enable WGS� to continue accepting MSW until the Landfill reaches its permitted capacity as provided in the 2009 Planning Commission Decision.

For all the foregoing reasons, the Department of Environmental Services respectfully requests that the Planning Commission grant this application.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Steinberger', with a large, stylized flourish extending to the left.


Timothy E. Steinberger, P.E.
Director

Attachments


VERIFICATION

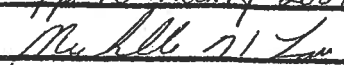
TIMOTHY E. STEINBERGER, P.E., being duly sworn, on oath, deposes and says that he is the Director of the Department of Environmental Services, City and County of Honolulu, and as such is authorized to make this verification on behalf of the Department of Environmental Services; that he has read the foregoing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

DATED: Honolulu, Hawaii, June 28, 2011.


TIMOTHY E. STEINBERGER, P.E.

Subscribed and sworn to me
this 28th day of June, 2011.


Name: MICHELLE N.I. LAU
Notary Public, State of Hawaii
My commission expires: 9-21-2014

Date: <u>6-28-11</u> #Pages: <u>-37-</u>
Name: <u>MICHELLE N.I. LAU</u> <u>1st</u> Circuit
Doc. Description: <u>SUP No. 20081SUP-2</u>
<u>App to modify 20081SUP-2</u>
 Notary Signature
NOTARY CERTIFICATION

DECLARATION OF TIMOTHY E. STEINBERGER

I, TIMOTHY E. STEINBERGER, hereby declare as follows:

1. I am the Director for the Department of Environmental Services.
2. I make this declaration based upon personal knowledge in support the Application to Modify State Special Use Permit ("SUP") No. 2008/SUP-2 by modifying the State of Hawaii Land Use Commission's (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, by deleting the July 31, 2012, deadline to cease disposal of municipal solid waste ("MSW") at the Waimanalo Gulch Sanitary Landfill ("WGSL" or "Landfill"), as set forth in Condition No. 14 of said Order.
3. Attached hereto as Exhibit "A" is a true and correct copy of relevant portions of Appellee State of Hawaii Land Use Commission's Answering Brief to the Circuit Court of the First Circuit, filed on April 12, 2010, In the Matter of Department of Environmental Services, City and County of Honolulu vs. Land Use Commission, State of Hawaii, et al., Civil No. 09-1-2719-11.
4. Attached hereto as Exhibit "B" is a true and correct CD copy 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.
5. Attached hereto as Exhibit "C" is a true and correct copy of the LUC's Findings of Fact, Conclusions of Law and Decision and Order issued April 20, 1987.

6. Attached hereto as Exhibit "D" is a true and correct copy of the LUC's Findings of Fact, Conclusions of Law and Decision and Order issued on October 31, 1989.

7. Attached hereto as Exhibit "E" is a true and correct copy of the Planning Commission's Findings of Fact, Conclusions and Decision dated March 13, 2003 (the "2003 Planning Commission Decision").

8. Attached hereto as Exhibit "F" is a true and correct copy of the LUC's Decision and Order Approving Amendment to Special Use Permit issued June 9, 2003 (the "2003 LUC Decision").

9. Attached hereto as Exhibit "G" is a true and correct copy of Resolution No. 04-348, CD 1, FD 1, adopted by the Honolulu City Council on December 1, 2004.

10. Attached hereto as Exhibit "H" is a true and correct copy of State Special Use Permit (SUP) No. 86/SUP-5, In re Department of Environmental Services, City and County of Honolulu (FKA Department of Public Works, City and County of Honolulu); Application to Modify (1) the Findings of Fact, Conclusions and Decision dated March 13, 2003, and (2) the Decision and Order Approving Amendment to Special Use Permit Issued June 9, 2003, filed with the Department of Planning and Permitting on July 6, 2007, without accompanying exhibits ("2007 Application").

11. Attached hereto as Exhibit "I" is a true and correct copy of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated January 16, 2008 (the "2008 Planning Commission Decision").

12. Attached hereto as Exhibit "J" is a true and correct copy of the LUC's Findings of Fact, Conclusions of Law, and Decision and Order adopting with

Modifications, the City and County of Honolulu Planning Commission's Recommendation to Approve Amendment to Special Use Permit, dated March 14, 2008 (the "2008 LUC Decision").

13. Attached hereto as Exhibit "K" is a true and correct copy of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 ("2009 Planning Commission Decision").

14. Attached hereto as Exhibit "L" is a true and correct copy of relevant portions of the transcript of the July 31, 2009, decision-making hearing of the Planning Commission.

15. Attached hereto as Exhibit "M" is a true and correct copy of 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 ("2009 LUC Decision").

16. Attached hereto as Exhibit "N" is a true and correct copy of the Circuit Court of the First Circuit's Order Affirming Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order Dated October 22, 2009 with Modifications, dated September 21, 2010 ("Circuit Court Order").

17. Attached hereto as Exhibit "O" is the State of Hawai'i, Department of Health Solid Waste Management Permit No. LF-0182-09, issued on June 4, 2010

18. Attached hereto as Exhibit "P" is a true and correct copy of the United States District Court, Eastern District of Washington's order granting an injunction to enjoin the shipment of waste from Hawaii to Washington or Oregon ports on the

Columbia River and/or to the Roosevelt Landfill in Washington in Confederated Tribes and Bands of the Yakama Nation, et al., v. United States Department of Agriculture, et al., No. CV-10-3050-EFS, dated August 30, 2010.

19. On June 4, 2010, the State of Hawai'i, Department of Health ("DOH") issued Solid Waste Management Permit No. LF-0182-09, which encompasses the Landfill's current footprint, which consists of approximately 200 acres. That DOH permit states that WGSL "may accept MSW and ash for disposal until the date specified in the associated Special Use Permit or until the landfill/monofill reaches its permitted capacity, whichever comes first."

20. On November 19, 2009, in relation to the 2009 LUC Decision, the Department of Environmental Services filed its Notice of Appeal; Statement of the Case; Designation of Record on Appeal; Order for Certification and Transmission of Record; Exhibits "A" and "B" to the Circuit Court of the First Circuit ("Circuit Court"). Specifically, the Department of Environmental Services appealed the LUC's imposition of a July 31, 2012, deadline to cease the disposal of MSW at WGSL, as set forth in Condition No. 14 of the 2009 LUC Decision, as arbitrary and capricious, characterized by abuse of discretion and a clearly unwarranted exercise of discretion in light of the record developed before the Planning Commission. The Department of Environmental Services further appealed the LUC's imposition of reporting requirements, as set forth in Condition Nos. 15 and 16 of the 2009 LUC Decision, as in excess of the statutory authority and jurisdiction of the LUC. Oral arguments were held before the Honorable Judge Rhonda A. Nishimura of the Circuit Court on July 14, 2010. On September 21, 2010, the Circuit Court issued its Order Affirming Land Use Commission's Order

Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order Dated October 22, 2009 with Modifications. Said Order modified Conditions No. 15 and 16 of the 2009 LUC Decision by deleting the references to the Honolulu City Council and the City administration, and substituting the same with the Department of Environmental Services. The Order also erroneously affirmed Condition No. 14 of the 2009 LUC Decision. Final Judgment was filed on October 19, 2010, and the Notice of Entry of Judgment was filed on October 21, 2010.

21. On November 12, 2010, the Department of Environmental Services timely filed its Notice of Appeal and Civil Appeals Docketing Statement to the Intermediate Court of Appeals ("ICA") relating to that portion of the Circuit Court's Order which wrongly affirmed the LUC's arbitrary and unsupported deadline of July 31, 2012, to cease acceptance of MSW at WGSL. The Department of Environmental Services filed its Opening Brief to the ICA on February 15, 2011. Briefing is not yet concluded and the case remains pending before the ICA.

22. The current permitted area of the Landfill, which is approximately 200 acres, has the capacity to continue to accept MSW well beyond the July 31, 2012, deadline to cease accepting MSW at WGSL imposed by the 2009 LUC decision. Based upon typical rates of disposal at WGSL, the remaining capacity in the permitted area is estimated to be approximately fifteen years. The remaining capacity of WGSL is an estimate only as rates of disposal fluctuate based upon numerous factors, e.g., the economy, waste diversion programs, such as the implementation of island-wide recycling, possible disaster events, etc.

23. The Department of Environmental Services has been actively reducing waste volumes that are directed to WGSL through its various waste diversion programs. For example, the Department of Environmental Services is expanding its H-POWER plant with a third boiler, which is expected to increase the facility's capacity by an additional 300,000 tons of MSW per year by late 2011 or early 2012. The Department of Environmental Services also completed full implementation of its island-wide, curbside recycling program in May 2010, which is in addition to its program of community recycling bins. A facility at the City's Sand Island Wastewater Treatment Plant turns bio-solids into fertilizer pellets, so that such material may be reused as a soil amendment product. The Department of Environmental Services' other initiatives include awarding a contract for a new recycling facility that will accept green waste, food waste and sewage sludge. The City remains committed to adopting and implementing waste handling programs that will reduce O'ahu's dependency on landfilling.

24. If SUP No. 2008/SUP-2 is not amended by deleting Condition No. 14 of the 2009 LUC Decision, the Landfill will be forced to stop accepting MSW as of July 31, 2012, and special wastes, bulky wastes and waste material that cannot be combusted, recycled, reused, or shipped, will have nowhere to go for proper disposal. This stoppage will have an adverse, island-wide impact on all of the communities on O'ahu because the City will no longer have the ability to dispose of certain wastes in a sanitary manner. The City would also no longer be permitted to operate H-POWER, as that facility must have a MSW landfill disposal option as required by its DOH solid waste permit. Furthermore, in the event of a disaster such as a hurricane or a tsunami, the City would have no permitted site to dispose of the ensuing debris. In other words, not

only would there be no sanitary or secure means of disposing of special wastes and bulky wastes, H-POWER would no longer be permitted to accept any MSW and there would be no facility to properly dispose of disaster debris. Further, even when the H-POWER facility is expanded, it will still require the continued availability of WGSL as a permit condition to operate, to ensure proper disposal of MSW that is diverted from H-POWER due to routine maintenance, unanticipated closures or if the amount of waste exceeds the capacity of the facility.

25. The recent closure of WGSL from January 12 to January 28, 2011, due to unprecedented storms in December 2010 and in January 2011, has served to highlight the need for a landfill. During that seventeen-day closure period, there were delays in the disposal of H-POWER residue, bulky item waste, and wastewater sludge. All such wastes cannot be disposed of at H-POWER and must be disposed of in the Landfill. The closure of WGSL greatly impacted the disposal of H-POWER residue, bulky item waste, and wastewater sludge, all of which cannot be disposed of at H-POWER and must be disposed of at WGSL, the only permitted facility on O'ahu to accept these types of waste. The closure of WGSL also hampered H-POWER's ability to accept MSW because of the backlog of residue that accumulated at the facility. City refuse transfer stations that depend on H-POWER for waste disposal were also adversely impacted and experienced heavy buildups of trash. City wastewater treatment facilities resorted to temporary on-site storage of sewage sludge to cope with the situation. Further, the Department of Environmental Services ceased collection of bulky item wastes, resulting in unsightly piles of waste in many neighborhoods across the island. Generators of other special wastes that are normally disposed of at WGSL had to make their own

arrangements to store or otherwise dispose of their waste until the Landfill could be reopened. The closure of WGSL had far reaching impacts upon the City's ability to dispose of solid waste, with restrictions imposed at all six of the City's convenience centers, as well as at its three transfer stations. On April 13, 2011, the WGSL and all City refuse facilities resumed normal operations and were opened to the public.

26. The off-island shipment of O'ahu's solid waste is no longer a viable alternative, not even for the short term. The City did attempt to ship waste to the mainland but only as an interim solid waste disposal alternative until the H-POWER facility was expanded with the addition of a third boiler. However, this attempt was not successful and shipping is now precluded by a court imposed injunction on the shipping of waste from Hawai'i to Washington and Oregon via the Columbia River.

27. In January 2008, the City issued an Invitation for Bids ("IFB") for the baling, shipping, offloading, transporting and disposing (transshipment) of City-provided MSW to a U.S. Mainland landfill for a term of at least 36 months. The City received and opened three bids on June 17, 2008. Following the bid opening, the two highest bidders filed a total of four procurement protests, disputing for various reasons the adequacy of the apparent low bid. These protests were resolved after several months, with all the protests ultimately being denied, and no appeals being taken of those denials.

28. Pursuant to the requirements of the State Procurement Code, the City was prohibited from taking any actions toward the award of a contract during the pendency of the protests. With the protests resolved, the City reviewed the apparent low bid submitted by Hawaiian Waste Systems, LLC ("HWS"), and eventually the City's Chief

Procurement Officer issued a determination that the low bid was not responsive to the requirements of the IFB. Pursuant to the State Procurement Code, HWS appealed this determination to the Office of Administrative Hearings at the Department of Commerce and Consumer Affairs ("DCCA").

29. Following a hearing at DCCA, and prior to the deadline for the Hearings Officer to issue a decision on the appeal, the City and HWS agreed to settle the procurement protest. The settlement was confirmed in an Order approved by the Hearings Officer. Pursuant to the Settlement and Order, the contract for interim shipment of MSW was awarded to HWS on August 27, 2009. The commencement of services under the contract was to begin by the end of September 2009. The City issued a Notice to Proceed to HWS for September 25, 2009. Both parties agreed that delivery of MSW would start on September 28, 2009.

30. HWS asked the City to cease delivering waste on April 1, 2010. At that point, approximately 20,000 tons of MSW had been delivered to HWS, which baled, wrapped and stockpiled the MSW at three locations, and no waste had been shipped due to HWS' inability to obtain required permits for the contracted services.

31. Originally, HWS' proposed port on the U.S. mainland was located in Roosevelt, WA. HWS submitted a revised plan to ship baled waste to different ports (Longview, WA; Rainier, OR; and Portland, OR) and the environmental assessment for HWS' revised plan was posted on the Federal Register on January 19, 2010, and the closing date for comments was February 18, 2010. On May, 27, 2010 the United States Department of Agriculture ("USDA") concluded their responses to public comments and

published a Finding of No Significant Impact ("FONSI"). The required Compliance Agreements were issued in June 2010.

32. On July 8, 2010, the USDA issued a Notification of Suspension of Operations Pursuant to Compliance Agreement No. Oahu RGOO2 to HWS. On August 30, 2010, the United States District Court, Eastern District of Washington issued an injunction enjoining the shipment of waste from Hawaii to Washington or Oregon ports on the Columbia River and/or to the Roosevelt Landfill in Washington in Confederated Tribes and Bands of the Yakama Nation, et al., v. United States Department of Agriculture, et al., No. CV-10-3050-EFS. The USDA has canceled the Compliance Agreement permits of all Hawaii shippers that might otherwise have enabled the shipment of waste to the mainland. As of the filing of this Application, the Yakama Nation lawsuit remains active and the injunction continues in effect.

33. Accordingly, no waste was ever shipped to the mainland due to various problems encountered by HWS. In order to properly dispose of the approximately 20,000 tons of baled MSW, HWS agreed to disassemble the bales, sort the waste and take the burnable waste to H-POWER and the non-burnable waste to the Waimanalo Gulch Landfill. As of January 2011, approximately 11,000 tons had been taken to H-POWER and 140 tons had been taken to WGSL.

34. On January 6, 2011, there was a fire at the HWS facility that damaged the building in which the waste bales were disassembled. Because HWS' solid waste permit requires the waste to be processed under cover, without the use of the building, HWS' breaking apart and sorting of the waste for disposal at H-POWER and WGSL had to be suspended. Thereafter, the City and HWS continued to work together, in

collaboration with DOH, to dispose of the remaining tons of baled waste. On May 12, 2011, the last bale of waste at the HWS facility was removed and delivered to a City waste disposal facility. Of the original 20,000 tons in its possession, HWS delivered 14,779 tons to H-POWER (76%) and 4,565 (24%) tons to WGSL. HWS was able to extract and recycle 1,525 tons of metal.

35. As required by Condition No. 1 of the 2009 Planning Commission Decision and Condition No. 4 of the 2009 LUC Decision, the Department of Environmental Services is diligently working towards identifying one or more new landfill sites that shall either replace or supplement the WGSL. Funding for the new landfill site selection process was appropriated in the City's Fiscal Year (FY) 2010 budget with additional funds appropriated in FY 2011. In November 2009, the Department of Environmental Services began the process to allot appropriated funds for a procurement to contract a consultant to facilitate the landfill site selection process. On June 25, 2010, the City contracted with the R.M. Towill Corporation, specifically to assist the Mayor's Landfill Site Selection Advisory Committee ("Landfill Advisory Committee").

36. The Landfill Advisory Committee is charged by the Mayor to provide advisory recommendations to the City concerning the selection of a future site or sites for a landfill to accept MSW, ash and residue from the City's H-POWER waste-to-energy facility, and construction and demolition debris waste. The procedure involving the use of an advisory committee to assist in landfill site selection was set forth in the City's Integrated Solid Waste Management Plan (October 2008). The Mayor chose 12 members to serve on the Landfill Advisory Committee based upon numerous criteria including technical expertise and experience, community involvement, and availability to

serve. The members of the Landfill Advisory Committee are: Bruce Anderson, David Arakawa, Thomas Arizumi, David Cooper, John DeSoto, John Goody, Joe Lapilio, Tesha H. Malama, Janice Marsters, Richard Poirier, Chuck Prentiss, and George West. Due to various personal reasons, however, Bruce Anderson, David Cooper and John DeSoto have since resigned from the committee.

37. The first meeting of the Landfill Advisory Committee was held on January 20, 2011, and subsequent meetings were held on February 10, March 10, March 31, and May 12, 2011. The next tentatively scheduled meetings are June 23 and July 19, 2011. Additional meetings may be scheduled as needed by the Landfill Advisory Committee. Barring unforeseen delays, the Landfill Advisory Committee's final report is expected to be completed and sent to the Mayor by October 2011. All Committee meetings are open to the public and to public comment. Handouts provided to the Landfill Advisory Committee as well as the Group Memory of each meeting are posted online at opala.org.

38. Once a site or sites are identified by the Landfill Advisory Committee, it will take more than seven years to acquire, permit, design and construct the new landfill site(s). As noted, the work of the Landfill Advisory Committee is anticipated to be concluded within the third quarter of 2011; the Department of Environmental Services must then undertake various additional steps, anticipated to require a number of years to complete.

39. The preparation and processing of an Environmental Impact Statement ("EIS") in full compliance with Hawai'i Revised Statutes ("HRS") Chapter 343 and related administrative rules for O'ahu's next landfill site or sites to replace or supplement

WGSL must satisfy all necessary requirements, including but not limited to conducting site surveys and investigations, analyzing alternatives including alternative sites and technologies, obtaining public and governmental agency input, analyzing direct, secondary, and cumulative impacts, developing appropriate mitigation measures, and ensuring the opportunity for public participation and comments. The EIS process will include among other things the filing of three principal documents with the Office of Environmental Quality Control, State of Hawaii ("OEQC"): (1) a Final Environmental Assessment/EIS Preparation Notice ("FEA/EISPN"), which upon publication will invoke a mandatory thirty (30) day public comment period; (2) a Draft EIS that will incorporate and address all relevant public comments that are received in response to the FEA/EISPN; the publication of the Draft EIS, which will invoke a mandatory forty-five (45) day public comment period; and (3) the acceptance of the Final EIS that will incorporate and address all relevant public comments received in response to the Draft EIS. The Department of Environmental Services fully expects that because of the inherent difficulty in identifying a new landfill site or sites for O'ahu, extensive environmental documentation will likely be required before the Final EIS for said site(s) can be completed. For example, the 2008 FEIS for WGSL was anticipated to be completed by December 2007, but was delayed by approximately one year in order to complete the requisite environmental documentation mandated by HRS Chapter 343 in relation to the discovery of three stone uprights that required archaeological investigation and coordination with the State Historic Preservation Division and cultural informants as well as to commission an Invertebrate Survey. Based upon the prior experience with the 2008 FEIS, the Department of Environmental Services estimates

that the time needed to complete an EIS for the new landfill site(s) is between one and two years, provided that there are no legal challenges. Any legal challenges will only lengthen the time needed to complete an EIS.

40. The timeline for the acquisition of the landfill site or sites identified by the Landfill Advisory Committee is dependent upon the alternative landfill site(s) that is selected. If the site(s) is not presently owned by the City, the land acquisition process could be lengthy. If the City must acquire new land, a summary of the process is as follows: an appraisal of the land value; a determination by the City regarding the funding source for the acquisition; and approval for the expenditure of public funds by the Honolulu City Council. Moreover, if the City does not own the property and the landowner is unwilling to sell the property to the City, a condemnation process could ensue. This process is expected to be lengthy and would likely involve litigation. For these reasons, it is difficult for the Department of Environmental Services to estimate the length of time required to acquire a new landfill site(s). For the purposes of this Application, however, an approximate estimate of time is one to three years.


41. Following the completion of the EIS process and the acquisition of the site(s), detailed engineering studies will need to be completed to support the landfill design. These studies will include, but are not limited to: land surveys; geotechnical soils and structural investigations; hydrology and hydrogeological investigations. The completion of these studies is required so that the landfill construction drawings can incorporate civil design requirements, such as the provision of drainage, access roadways, and infrastructure, to support the use of the site. Coordination with governmental agencies, utilities, and adjoining landowners, consistent with mitigation

measures identified in the EIS, will also be required to minimize disturbance to nearby property owners and utilities. The length of time required for the completion of detailed engineering studies, construction drawings and bid documents, and the processing of procurements for the design and construction contractors (which could include the selection of a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as a SUP or district boundary amendment, depending on where the site(s) is located, and other necessary approvals, is estimated to be between one and three years.

42. Based on the foregoing, no new landfill site or sites intended to replace or supplement WGSL will be operational as of the July 31, 2012, deadline to cease accepting MSW at WGSL as imposed by Condition No. 14 of the 2009 LUC Decision.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: Honolulu, Hawai'i, June 28, 2011.


TIMOTHY E. STEINBERGER, P.E.