

LAND USE COMMISSION
MEETING MINUTES
February 2, 2011

Leiopapa A Kamehameha
Conference Room 406, 4th Floor
235 S. Beretania St.
Honolulu, Hawai'i

COMMISSIONERS PRESENT: Vladimir Devens
Ronald Heller
Normand Lezy
Charles Jencks
Thomas Contrades (arrived at 8:50 a.m.)
Nicholas Teves, Jr.

COMMISSIONERS EXCUSED: Kyle Chock
Lisa Judge
Duane Kanuha

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney
General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner/Acting
Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIANS: Walter Mensching/Todd Miyazano

CALL TO ORDER

Chair Devens called the meeting to order at 8:45 a.m.

APPROVAL OF MINUTES

Chair Devens asked if there were any corrections or additions to the January 20-21, 2011, minutes. There were none. Commissioner Jencks moved to

adopt the minutes. Commissioner Lezy seconded the motion. The minutes were unanimously approved by a voice vote (5-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson provided the following:

- The regular tentative meeting schedule for the calendar year 2011 was distributed in the handout material for the Commissioners.
- The February 24-25, 2011 meeting will include an extensive legislative update for the Commissioners.
- Any questions or conflicts, please contact LUC staff.

There were no questions or comments regarding the tentative meeting schedule

ACTION

A09-782 Tropic Land LLC

Chair Devens announced that this was a continued hearing on Docket No.A09-782 TROPIC LAND LLC to amend the Agricultural Land Use District Boundaries into the Urban Land Use District for approximately 96.0 acres in Lualualei, Wai`anae District, O`ahu, Hawai`i, Tax Map Key No. (1) 8-7-09:02 (por.)

APPEARANCES

William Yuen, Esq., represented Tropic Land LLC

Arick Yanagihara, Tropic Land LLC

Dawn Takeuchi-Apuna, Esq., represented City and County of Honolulu,
Department of Planning and Permitting

Mike Watkins, City and County of Honolulu, Department of Planning and
Permitting

Bryan Yee, Esq., represented State Office of Planning

Ruby Edwards, State Office of Planning

Martha Townsend, Esq., Intervenor- Concerned Elders of Wai`anae

Alice Greenwood, Concerned Elders of Wai`anae

(Please refer to LUC Transcript for more details on this matter.)

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PRESENTATION OF EXHIBITS

PETITIONER

Mr. Yuen offered Petitioner Exhibit 82-Kamaki Kanahele's resume.

There were no objections to Petitioner's Exhibit 82. Exhibit 82 was admitted into evidence.

CITY AND COUNTY

Ms. Takeuchi-Apuna had no Exhibits.

OP

Mr. Yee had no Exhibits.

INTERVENOR

Ms. Townsend offered Intervenor's Exhibit 29- Miwa Tamanaha's resume.

There were no objections to Intervenor's Exhibit. Exhibit 29 was admitted into evidence.

PUBLIC WITNESSES

1. Michael Kumukauoha Lee

Mr. Lee stated his qualifications as a cultural native practitioner and shared his reasons why the Petition Area was culturally sensitive and described how he conducted his stargazing and other cultural practices.

Mr. Yee inquired if Mr. Lee was aware of the Petition Area boundaries and whether there were "iwi" within them. Mr. Lee declined to answer by invoking his Hawaiian State Constitutional legal rights.

There were no further questions for Mr. Lee.

2. Candice Fujikane

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Ms. Fujikane submitted a reference map and timetable of past events for her testimony regarding the farming history of the valley and stated her concerns about granting a land use change for the Petition Area for purposes other than agriculture.

Mr. Yuen requested clarification on the data that Ms. Fujikane referenced in describing the decline of pig farming and asked if she was attempting to draw a correlation. Ms. Fujikane responded that her data merely showed a trend connected to “urban creep”.

There were no further questions for Ms. Fujikane.

Discussion ensued to determine the number of remaining witnesses that the Parties each had. Mr. Yuen stated that he would call Mr. Kanahele and then his rebuttal witnesses.

PETITIONER’S WITNESS

1. Kamaki Kanahele- Native Hawaiian Cultural Practices Expert

Mr. Kanahele described his family’s involvement with the study of Hawaiian culture and its contributions to the field of study of Hawaiian cultural practices. Mr. Kanahele described his perception of the term “wahi pana” and why the Petition Area was a “wasteland” that had no cultural value and served only as a passage way through the valley with no “iwi” upon it.

The County and OP had no questions.

Ms. Townsend requested clarification on what contributions Mr. Kanahele had made to Petitioner’s Cultural Impact Assessment. Mr. Kanahele responded that he had answered questions posed to him by Hanalei Aipolani and did not author the assessment. Mr. Kanahele described his participation in and awareness of how the Cultural Impact Assessment was done.

Commissioner Lezy requested clarification on how there could be such a divergence of opinions of the cultural sensitivity of the Petition Area.

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Mr. Kanahele responded that he could only speak to his awareness of the cultural value of the site and that to his knowledge the area had no cultural value.

Commissioner Jencks inquired if Mr. Kanahele had read the final cultural impact survey and the archaeological survey report. Mr. Kanahele responded that he had only read portions of them since he perceived the land as having no cultural significance.

Mr. Yuen inquired if any lava tubes existed in the Petition Area. Mr. Kanahele responded that he was aware of "sink holes" but no lava tubes.

Mr. Yee inquired if there was any cultural significance to the pathway in the Petition Area. Mr. Kanahele replied that it had none and if there was significance to it, people would have to go around it and find another way through the Petition Area.

Ms. Townsend requested clarification on the statement that "not all knowledge is kept in one school". Mr. Kanahele provided his understanding of what the statement meant and described how secrets were kept in his culture to preserve the integrity of the knowledge.

There were no further questions for Mr. Kanahele.

The Commission went into recess at 9:38 a.m. and reconvened 9:59 a.m.

Chair Devens noted that the Petitioner had no more witnesses except for two rebuttal witnesses and that the order of the Intervenor's witnesses would be adjusted due to time constraints. Ms. Townsend stated that she was standing on the written testimony of her witnesses and was making them available for any questions that the Parties might have.

INTERVENOR WITNESSES

1. Dr. Panos Prevedouros- Traffic expert

Mr. Yuen requested clarification on the reasons why Dr. Prevedouros was critical of Petitioner's traffic expert's methodology. Dr. Prevedouros described the factors that he felt the Petitioner's traffic expert had failed to

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consider in preparing the traffic report for the Petition Area such as fleet size, inaccurate AM/PM trip generation counts, and inadequate consideration for the signalized intersections in the area.

Mr. Yuen inquired if Dr. Prevedouros was aware of future traffic improvement plans for the area. Dr. Prevedouros provided his understanding of the improvement plans and expressed why he felt the proposed traffic mitigations would not significantly improve the level of service (“LOS”) along Farrington Highway.

Ms. Takeuchi-Apuna did not have any questions.

Mr. Yee requested clarification on Dr. Prevedouros’ qualification as a traffic expert and on how he made the conclusion that the proposed project not be approved until an adequate TIAR was completed. Dr. Prevedouros provided further details of his qualifications and described how he arrived at his conclusions and why he felt TIAR considerations needed to be properly sequenced during the land use approval decision-making process.

Mr. Yee requested clarification on Dr. Prevedouros’ awareness of the land use approval process and the level of study required for TIARs before the Commission. Dr. Prevedouros provided his understanding of the role of TIARs and proposed traffic mitigations in the land use process, and how the Department of Transportation approval process functioned.

There were no further questions for Dr. Prevedouros.

2. Kehaulani Souza- Anthropologist

Mr. Yuen requested clarification on why Ms. Souza had questioned the cultural impact assessment that was done for the Petition Area by Tropic Land’s consultants. Ms. Souza stated that she was not aware that the cultural impact assessment that she had prepared for the Nanakuli landfill was not available to the public and described her cultural impact assessment findings and the proximity of the adjacent Nanakuli landfill to the Petition Area.

Mr. Yuen inquired if Ms. Souza had used the term “wahi pana” in her report on the Nanakuli landfill. Ms. Souza replied that she did and explained the circumstances of how she had collected information and reported her findings.

Mr. Yuen inquired if Ms. Souza disagreed with Mr. Kanahele’s perception that the pathway located within the Petition Area had no cultural significance. Ms. Souza responded that she did not agree and described how she had gathered her data and how her informational sources had reported that the Petition Area had experienced cultural impacts. Ms. Souza stated that she had tried to contact Mr. Kanahele for information but that he did not respond to her query.

There were no questions from the County or OP.

Ms. Townsend requested clarification on why the sightlines from Maui rock could not be seen after it was desecrated. Ms. Souza described how the sightlines for the area had been blocked by recent development and why it was important to preserve the Lualualei area for future generations.

Commissioner Lezy inquired if Ms. Souza could respond to the question of why there were so many different opinions of the cultural significance of the Petition Area. Ms. Souza provided her opinion on how the different viewpoints could have developed.

There were no further questions for Ms. Souza.

3. Miwa Tamanaha

Mr. Yuen inquired if Ms. Tamanaha had assisted Stephanie Fried in her testimony. Ms. Tamanaha responded that she had not. Discussion ensued on whether or not Ms. Tamanaha should be allowed to testify regarding Ms. Fried’s written testimony and whether the written testimony should be allowed. Mr. Yuen argued that he had specific questions that he felt only Ms. Fried could answer. Ms. Townsend argued that based on Ms. Tamanaha’s background as an economist, Ms. Tamanaha could competently comment on Ms. Fried’s written testimony and that the Commission should consider accepting it.

Commissioner Lezy suggested that Mr. Yuen ask his questions of the witness so that the Commission could determine whether the testimony should be accepted and what the weight of the testimony should be. Chair Devens agreed that Ms. Tamanaha could testify and that Mr. Yuen be given the opportunity to ask his questions so that the Commission could give appropriate weight to her comments and the written testimony.

Mr. Yuen asked whether the availability of industrially zoned land along the Waianae coast had been considered in the preparation of Ms. Fried's testimony. Ms. Tamanaha responded that Ms. Fried did speak to that in her written testimony and it was reported that it had not been considered by the Petitioner's consultants. Mr. Yuen stated that he did not think he could go further since he was interested in Ms. Fried's thought process in this matter. Discussion ensued on whether Mr. Yuen should continue.

Mr. Yuen asked if Ms. Tamanaha was aware of what Ms. Fried's thought process was. Ms. Tamanaha responded that there were anecdotes included in Ms. Fried's report about unused industrial space along Farrington Highway that were not included in the report prepared by the Petitioner's consultants. Mr. Yuen asked Ms. Tamanaha to comment on Petitioner's Exhibit 75E. Ms. Tamanaha reviewed the Exhibit and stated that she was not qualified to comment on whether or not there was sufficient industrial zoned land.

There were no further questions for Ms. Tamanaha.

Ms. Townsend stated that she had no more witnesses and that she rested her case.

PETITIONER'S REBUTTAL WITNESSES

1. Randall Okaneku

Mr. Okaneku stated that he had reviewed Petitioner's Exhibits 74 and 74A and a transcript of Mr. Sniffen's remarks made at the LUC hearing conducted on December 10, 2010 and described how he perceived the

DOT had approved his report; and provided his understanding of the procedures involved in the DOT approval process. Mr. Okaneku provided his perception on why Dr. Prevedouros' and the DOT's criticisms of his report were made and how different scoping methods were used for various purposes.

Mr. Yuen requested clarification on the report's findings on the intersection mitigation needs, the AM/PM trip LOS and other traffic issues. Mr. Okaneku explained how he arrived at his projection estimates and why he disagreed with the "fair share" determinations that the DOT had made; and how he perceived the method used by the DOT to prioritize its traffic improvement projects.

Mr. Yee argued that Mr. Okaneku should not be making comments regarding how the DOT intended to prioritize its projects. Discussion ensued as to what extent Mr. Okaneku could comment on DOT matters. Mr. Okaneku expressed that based on his experience, traffic safety concerns was a primary reason for DOT highway improvements and that traffic operations was also a consideration since they were inter-related.

Mr. Yuen inquired if 500 trucks a day was a true characterization of the proposed Project. Mr. Okaneku replied that his traffic report was based on peak hour analysis and described how his studies were conducted.

Mr. Yee asked if Mr. Okaneku had reviewed Mr. Sniffen's remarks. Mr. Okaneku replied that he had done so and that some of his testimony today was in response to Mr. Sniffen's request for additional information; and that if the proposed Project were approved, he anticipated having further conversations with the DOT as an ongoing part of the traffic mitigation process.

Ms. Townsend inquired if there were other intersections on Oahu that required mitigation and if there may be other things besides LOS that the DOT took into consideration in its decision-making on establishing priorities for traffic improvements. Mr. Okaneku provided his perception of traffic conditions based on his studies in the region and acknowledged that there were facilities/institutions/homes that generated traffic along the highway.

Commissioner Lezy requested clarification on the criticisms that the DOT and Intervenor's Witness had made in regards to Mr. Okaneku's TIAR and the different scoping and ITE standards that were applied in the preparation of the report. Mr. Okaneku provided his reasoning for applying the ITE standards for the different situations that were involved in his study and explained the methodology that was used. Mr. Okaneku stated that he could not make an estimate on the heavy truck traffic that would be generated until he had more details on what was specifically involved with the proposed Project and could only rely on the general ITE guidelines for his study until such details were available.

Commissioner Heller requested clarification on the calculation methodology involved with the ITE guidelines and how they related to regional mitigation and "fair-share" estimates. Mr. Okaneku responded that anything less than a 5% increase in traffic was not considered a significant increase by ITE standards.

Commissioner Heller inquired if another study could discover different findings. Mr. Okaneku responded that it was possible and stated that he did not include mitigations since his findings did not reflect a 5% increase in traffic. Discussion ensued over the details involved in making the assumptions for the study and how different variables could generate different outcomes. Mr. Okaneku stated that existing data was used as the basis for his estimates.

There were no further questions for Mr. Okaneku.

The Commission went into recess at 11:11 a.m. and reconvened at 1:05 p.m.

2. Arick Yanagihara

Mr. Yuen requested clarification on the status of negotiations between Tropic Land LLC and the Navy in regards to obtaining a long term access to an easement on Lualualei Road. Mr. Yanagihara explained why he had sent an update letter to the Commission and described what progress he had made in obtaining an agreement with the Navy; and stated that he had an agreement in principle for a long term easement and that terms and conditions were being worked out.

Mr. Yuen inquired what term was involved for the easement. Mr. Yanagihara described why a 30 year lease term was initially needed for financing purposes and stated that Tropic Land LLC had asked for a longer term. Mr. Yanagihara also described what progress had been made in assembling participants for the easement agreement with the Navy and what additional zoning efforts were being made at the County level to advance the proposed Project and stated that the timing issue with the Navy was not perceived to be a problem.

The County did not have any questions.

Mr. Yee requested clarification on Petitioner's Exhibit 71, what the 5 year license agreement allowed Tropic Land LLC to do, and what Petitioner's Exhibit 72- the long term easement letter, allowed. Mr. Yanagihara provided the details of the terms and conditions that were still being discussed with the Navy and the other land owners involved with the easement agreement.

Mr. Yee inquired if Tropic Land LLC intended to obtain the zoning approval before it executed the easement agreement. Mr. Yanagihara replied that he hoped to obtain the easement approval as soon as possible, whether or not they obtained final zoning approval. Mr. Yee inquired if a situation of developing a property and failing to meet a condition would pose a problem for Tropic Land LLC. Mr. Yanagihara described what he expected might happen with zoning approval and the easement agreement.

Ms. Townsend inquired what might happen if Tropic Land LLC was unable to secure an executed long term easement with the Navy and whether Tropic Land LLC would continue pursuing permitting for an industrial park and the accompanying zoning. Mr. Yanagihara replied that he had an agreement in principle and would continue his efforts based on the discussions and progress that he had made with the Navy.

Ms. Townsend requested clarification on the participants in the easement agreement. Mr. Yanagihara responded that the Navy had identified the people who had the access to their road and who needed to participate in the agreement.

Ms. Townsend inquired if Tropic Land LLC had asked the Navy for a 50 year term agreement. Mr. Yanagihara replied that they had and that the final decision would be made by Washington D.C. and that a 30 year minimum had been proposed to the local Navy authorities.

Commissioner Jencks inquired if anything was received from the Navy to confirm the state of the current discussions. Mr. Yanagihara responded that he had an email on a related matter.

Commissioner Jencks requested clarification on proposed road standards. Mr. Yanagihara responded that the Navy road was adequate for current needs and that no cost estimates had been made for any curbs, gutters, and sidewalks, etc.; and that no signed agreements with other land owners needing access to the road had been obtained.

Commissioner Jencks inquired if financing would be available without a long term easement. Mr. Yanagihara described how he envisioned that a letter of interest and intent could be obtained from a bank contingent upon receiving a formal agreement for a long term easement. Commissioner Jencks expressed that the Commission still had no paperwork to confirm that progress had been made from the prior December 3, 2010 meeting. Mr. Yanagihara acknowledged that was the case.

Commissioner Lezy requested clarification on the tenure of the current Navy commander of the Lualualei facility. Mr. Yanagihara could not answer and described the experiences that he had with prior commanders and how he had worked with Congressman Abercrombie's office to make headway.

Commissioner Lezy inquired why the easement approval was being vigorously sought so late in the process since it was critical to the proposed Project. Mr. Yanagihara described the circumstances that had created the situation.

Commissioner Lezy asked if Mr. Yanagihara recalled that Tropic Land LLC was supposed to have a long term easement agreement in place before the close of the case before the Commission. Mr. Yanagihara

responded that he did and that no such agreement had been reached; and that the case would be closed with the conclusion of his testimony.

Mr. Yuen referred the Commission to Petitioner's Exhibit 33- Land Court Order No. 45711 in response to Commissioner Lezy's questions and asked Mr. Yanagihara if it formed the basis of his conclusion that Tropic Land LLC enjoyed an easement to a portion of the road. Mr. Yanagihara replied that it did.

Mr. Yuen requested clarification of what needed to be provided to obtain financing for a proposed Project. Mr. Yanagihara described the various agreements and approvals that needed to be obtained and presented to the bank.

Mr. Yee commented that Commissioner Lezy had previously asked a question of OP at the last hearing regarding the number of years that was considered to be "long term" and that it had been determined that 30 years was the appropriate amount of time.

There were no further questions for Mr. Yanagihara. Mr. Yuen stated that his case was concluded and asked that the Commission verify that his Exhibits 1-82 had been introduced into evidence. Mr. Hakoda responded that they had.

Chair Devens announced that the evidentiary portion of the proceedings was closed and directed that the parties draft their individual proposed findings of fact, conclusions of law and decision and order based upon the record in this docket and serve the same upon each other and the Commission. Chair Devens also directed that each party file its proposal with the Commission and serve copies on the other parties no later than the close of business on February 24, 2011. All comments or objections to the parties' respective proposals shall be filed with the Commission and served upon the other parties no later than the close of business on March 14, 2011. Any responses to the objections must be filed with the Commission and served upon the other parties no later than the close of business on March 21, 2011. Oral arguments will be scheduled after receipt of the parties' respective filings.

There were no questions or comments from the Parties regarding the procedures and filing dates.

(Please refer to LUC Transcript for more details on this matter.)

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The Commission went into recess at 1:45 p.m. and reconvened at 1:58 p.m.

STATUS REPORT

SP09-403 Department of Environmental Services (Waimanalo Gulch)

Chair Devens announced that this was a status report on Docket No. SP09-403, a Special Use Permit allowing for the expansion and continued operation of the Waimanalo Gulch Sanitary Landfill, on a limited basis and with conditions, that was approved by the Commission on October 22, 2009.

Chair Devens stated that in light of the recent discharges of municipal solid waste into the ocean from the Waimānalo Gulch Sanitary Landfill, the Commission requested that the Department of Environmental Services appear before the Commission to provide a status report regarding the circumstances surrounding the recent discharges and what steps are being taken to prevent any reoccurrence; provide an update regarding the status of the City's efforts to identify and develop alternative sites to replace or supplement Waimānalo Gulch Sanitary Landfill as required by Condition 4 of the Commission's October 22, 2009 Decision and Order in this matter; and update the Department of Environmental Services July 28, 2010 Report regarding compliance with the 16 Conditions contained in the Commission's Decision and Order.

APPEARANCES

Dana Viola, Esq. and Sharon Blanchard, Esq., represented City and County of Honolulu, Department of Environmental Services

Tim Steinberger, Department of Environmental Services

Raymond Young, City and County of Honolulu, Department of Planning and Permitting

Dawn Takeuchi-Apuna, Esq., City and County of Honolulu, Department of Planning and Permitting

Richard Wurdeman, Esq., represented Intervenor Colleen Hanabusa, Esq. (past attorney for Intervenors and Intervenor)

Wyeth Matsubara, Esq., and Benjamin Matsubara, Esq., represented Intervenors-the Ko Olina Community Association and Senator Maile Shimabukuro

Abbey Mayer, Ko Olina Community Association

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Chair Devens disclosed that he was familiar with Mr. Wurdeman through his union work and affiliation with SHOPO. There were no concerns or objections to Chair Devens' disclosure by the Parties.

Mr. Steinberger stated that Mr. John Whalen of Waste Management would provide a status report regarding the discharge and on what steps are being taken to prevent any reoccurrences.

Mr. Whelan described the cumulative storm effects that occurred to the landfill area, how the waste discharge occurred, what measures were being taken to remedy the situation; and what repairs were being made to the landfill area to prevent further discharges.

Chair Devens inquired if Findings of Fact #74 regarding area drainage had been violated, and requested the details of the extent of the discharge from the landfill area. Mr. Whelan stated that regulatory approvals to begin construction on the long-term system had not yet been obtained and that Waste Management could not take any preventative action while awaiting permitting approvals. Mr. Whelan described the type of municipal solid waste that was discharged and could not quantify the amount of waste that had been carried into the ocean.

Chair Devens inquired if there was anything unusual about the amount of rainfall that contributed to the discharge and what the total volume of waste was that had polluted the leeward shoreline. Mr. Whelan described how the intensity of the storm's rainfall had damaged his facility; and stated that he could not estimate the volume of waste discharge due to the severity of storm damage to several other components of the landfill cell system.

Chair Deven asked when the first discharge occurred. Mr. Whelan provided an estimated timeline of events for January 13, 2011 and described how his company reacted to the discovery of storm damage after around 5:00 a.m., how his management team had conducted its safety assessment of the facility and took measures to prevent uncontrolled discharges.

Chair Devens inquired when the active waste discharge was discovered and when warning was given to the community at large about it. Mr. Whelan estimated that it was sometime during the afternoon when his company realized that active waste discharge was occurring and described the actions that his company took to post warning signs in the outfall area at around 4 or 5 in the

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afternoon. Mr. Whelan stated that it was around the same time in the late afternoon that his company became aware of medical waste being discharged and started a water sampling program in conjunction with the warning sign postings; and that a beach cleaning effort in the outfall area began the next day. Mr. Whelan stated that Waste Management had conducted an area cleanup on its own site on the evening of January 12, 2011 in anticipation of the impending storm.

Commissioner Lezy requested clarification on the timeline chronology and on Waste Management reactions to the series of events leading up to the waste discharge. Mr. Whelan described how his company had constructed an additional berm after the first storm on December 19, 2010 and discovered that the cell was retaining water, and had reinforced the first berm after the second storm on December 27, 2010. Mr. Whelan described the evaluation, assessment and action that his company took between the first, second and third storms to prevent waste discharge and how the evasive/preventative measures failed due to the intensity of the storm and why he considered the discharge unavoidable.

Commissioner Lezy inquired if, during the planning of the permanent diversion system, any cells had been identified as being at particular risk for flooding during this type of rainfall event. Mr. Whelan replied that it wasn't an actual identification of the cells and described what the operating permit contemplated during the construction process when there would be no means to convey stormwater around existing landfill cells or that there could be overflows due to stormwater into the cell 6 area. Mr. Whelan acknowledged that cell 6 was at risk and it was the only cell that had operating capacity to accommodate waste for the facility.

Commissioner Lezy asked why medical waste was not incinerated. Mr. Whelan responded that it was not his area of expertise and described how his facility handled it according to Federal standards.

Chair Devens inquired about precautionary preventative measures in place during the construction work in the landfill area, it may have been possible to avoid the discharge of waste into the ocean and also expressed that he was shocked at how poor the response to the discharge was handled and the lack of urgency shown by Petitioner. Mr. Whelan described the "hotline" and other measures that were implemented by his company to deal with the cleanup and

warning effort; and explained that the long-term diversion plan had been proposed over 10 years ago and described the progress since.

Chair Devens expressed the concerns and considerations that the Commission had made in deliberating whether to grant the extension to the landfill's special permit and conveyed the gravity of this perceived public safety threat to the community resulting from allowing continued landfill operations. Mr. Whelan described the actions that his company had taken on the day of the storm to work with the City and County and Department of Health; and what warnings the media provided to the public regarding the hazardous water conditions.

Mr. Matsubara referred to a clean water report from a Department of Health-Clean Water Branch investigation that was done in response to the first storm that discovered a discharge from the landfill. Mr. Matsubara stated that the report was not public yet and that the study had been done in response to the discovery of Waste Management's stormwater drainage efforts from the cell area. Mr. Whelan responded that no water from within the cell was discharged, but rather surface rainwater which accumulated on top of cell 6 and that he could not comment on the report's findings due to the ongoing investigation. Discussion ensued as to what the report findings were and Mr. Whelan restated that he would not respond to questions due to the ongoing investigation.

Mr. Wurdeman asked if Mr. Whelan was denying the report findings, allegations and violations. Mr. Whelan responded that he was not denying or admitting them but was stating that he could not comment on or respond to questions due to the ongoing investigation. Mr. Wurdeman referred to Intervenor's Exhibit 5 and requested clarification on the response to the Chair's question regarding violation of Finding of Fact 74. Mr. Whelan did not have a copy of the document and Chair Devens read it to him. Miss Viola commented that what was being read was a Finding of Fact 74 and not a condition of the Decision and Order and it was questionable whether or not it was a requirement.

Mr. Wurdeman referenced Finding of Fact 75 regarding leachate and preventing its contact with stormwater and asked if a violation had occurred with the mixture of stormwater and leachate. Mr. Whelan responded that it was his understanding that leachate contained within the cells had not been affected by the storm and described how leachate was handled by his facility.

Mr. Wurdeman requested clarification on what Mr. Whelan was aware of in regards to the investigative report. Mr. Whelan responded that he had not had an opportunity to review the whole report and was reluctant to respond to questions about it.

Mr. Wurdeman requested clarification on the third party sampling that was required of Petitioner. Mr. Whelan responded that a third party had obtained samples on January 13, 2011 and did not recall if sampling had been done in December. Mr. Whelan described the permit requirements his company had to observe.

Commissioner Teves excused himself at 2:50 p.m. and returned at 2:55 p.m.

Ms. Viola requested a recess to meet with Mr. Whelan. Chair Devens granted her request.

The Commission went into recess at 2:55p.m. and reconvened at 3:00 p.m.

Mr. Whelan stated that AECOM had performed the third party sampling in January and that Justin Ladoc, Waste Management Environmental Manager, would most likely know if any sampling had been performed in December.

Mr. Wurdeman asked if Waste Management had entered into an agreement with the EPA on or about January, 2011. Mr. Whelan replied that Robert Longo had signed the agreement on behalf of the company, and that Mr. Longo had the corporate authority to sign such agreements.

Mr. Wurdeman inquired if Mr. Whelan was familiar with the contents of the EPA letter of agreement and submitted the EPA letter of agreement to the Commission and the Parties for examination. Mr. Whelan responded that he was aware of the details and described the activities that occurred at the landfill to contain the discharge and noted that the EPA arrived on Saturday and worked on Sunday and Monday to perform its assessment of the situation. Mr. Whelan also described the work that had been done to conform to the requirements of the EPA letter of agreement.

Ms. Viola stated that the City had not yet received notification of the ongoing investigation and argued that it was premature to be asking questions of it until it was finalized.

Ms. Lisa Miyahara identified herself as the legal representative for Waste Management and stated that she had advised Mr. Whelan not to answer any questions due to the ongoing investigation.

Discussion ensued as to the propriety of asking more questions of Mr. Whelan. Mr. Wurdeman asked why Mr. Whelan believed it was an ongoing investigation. Mr. Wurdeman responded that he would not make any comments since he believed that the EPA document was still preliminary. Chair Devens inquired what the end result of the investigation would be. Mr. Whelan responded that he did not know what might happen.

Commissioner Contrades noted that Mr. Whelan had been advised by his attorney not to answer and suggested that further questioning be discontinued. Discussion ensued on what basis Mr. Whelan could use to refuse to answer Mr. Wurdeman's questions. Chair Devens explained that the basis of the witness's refusal to answer had to be established but that Mr. Wurdeman should be ready to move on.

Mr. Wurdeman requested to make concluding remarks. Discussion ensued and Ms. Viola argued that Mr. Wurdeman was giving testimony. Chair Devens determined that witness questioning still needed to be done and Mr. Wurdeman withheld making further comments.

Ms. Viola inquired what the normal annual rainfall was. Mr. Whelan responded that it was usually 19 inches and that the three recent storms had produced 22 inches over 3 weeks and described the conditions that made the 2010-2011 storms more devastating than 40 consecutive days of rain.

Ms. Viola asked if the drainage that was in place on the facility was in compliance with the permitting requirements. Mr. Whelan responded that it was.

Ms. Viola inquired if Mr. Whelan was aware of the testing that had been performed in and around his facility on the day of the release and of the test

results. Mr. Whelan replied that he was and that the test results were in line with what was expected during “brown out” conditions of a major storm.

Ms. Viola asked how much waste had been collected during post-storm cleanup operations. Mr. Whelan described the amount of waste that had been gathered during the week long clean up after the storm.

Ms. Viola inquired if, during the cleanup efforts, the EPA had given an indication of their opinion of the cleanup efforts. Mr. Whelan responded that the EPA inspectors had commented that they were pleased with the results and follow-up that had been done to restore the area.

Chair Devens inquired if preventative measures were being put into place at the current time. Mr. Whelan described his company’s efforts to complete water diversion work in the Petition Area.

Commissioner Heller requested clarification on whether Waste Management was in permit compliance during the unfinished berm’s construction. Mr. Whelan clarified that his company was in compliance with the terms of the diversion drainage swale that was to take the water around the landfill and it was not for the constructed berm, and that operating without the protections being in place while under construction was still in compliance with the permits.

Commissioner Teves inquired how long Waste Management had been operating the landfill and how often medical waste had been discharged into the ocean. Mr. Whelan responded that Waste Management had been operating the landfill since its opening in 1989, and that to his knowledge, there had never been a release of solid or medical waste.

Commissioner Contrades read the findings from the Department of Health-Clean Water Branch report and noted the seriousness of the investigation and why there would be reluctance to answer questions about it publicly. Commissioner Contrades stated his understanding of why the Commission was hearing this status update on the landfill and described why he felt it was important to treat people fairly during the update process and in obtaining the information.

There were no further questions for Mr. Whelan.

(Please refer to LUC Transcript for more details on this matter.)

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The Commission went into recess at 3:28 p.m. and reconvened at 3:35 p.m.

Mr. Steinberger described the activities that his department had performed in seeking alternative landfill sites and reviewed the 16 conditions and their recent updates for the Commission. Mr. Steinberger explained the purpose of the Landfill Site Selection Advisory Committee, how its members had been selected and what their timetable was to achieve their objectives.

Commissioner Teves left the meeting with the approval of Chair Devens at 3:52 p.m. and did not return.

Commissioner Contrades inquired what the capacities of the H-power boilers were and what the city's total amount of waste was. Mr. Steinberger described the amount of waste that was processed daily and updated the progress that the City had made to get its third H-power plant operational. Mr. Steinberger stated that the total amount of municipal solid waste that the City had was approximately 3000 tons per day and that about 250 tons per day could not be processed at the H-power plants due to the nature of the waste material.

Commissioner Lezy requested clarification on the site selection committee and its authority; and asked why medical waste was not incinerated. Mr. Steinberger described the organizational structure and role that the Landfill Site Selection Committee had, and stated that he did not know why medical waste was not incinerated and opined that it was probably due to the operator of the plant, Covanta's, refusal to burn the medical waste.

Chair Devens inquired if the Department of Environmental Services intended to apply for an extension to the landfill's special permit. Mr. Steinberger responded that his department would probably do so in February or March of 2011.

Commissioner Jencks inquired about when the permits for the water diversion system were applied for. Mr. Steinberger replied that Mr. Whelan could obtain that information for him.

Chair Devens requested clarification regarding the passage "small amount of sterilized medical waste was discharged" on page 5 of the written status

report versus the earlier testimony of Mr. Whelan. Mr. Steinberger responded that he was referring to the amounts of medical waste that had been recovered.

Mr. Matsubara requested clarification on the update for the second part of Condition 10. Mr. Steinberger described how his department was complying with the terms of the condition and was deferring to the Department of Health in the matter.

Mr. Wurdeman asked who performed the EIS for the Petition Area. Mr. Steinberger responded that RM Towill had performed the latest EIS for the current expansion and was not sure about other past EIS work.

Mr. Wurdeman requested clarification on whether there was a potential conflict with RM Towill participating as a facilitator with the alternate landfill selection process and its preparation of the EIS. Mr. Steinberger replied that it was not unusual for the same contractor to be involved with the EIS and as a facilitator and did not perceive a conflict in the matter.

Ms. Takeuchi-Apuna had no questions.

There were no further comments or questions for Mr. Steinberger.

Mr. Matsubara expressed his thanks to the Commission for asking for a status report.

Mr. Wurdeman expressed his thanks and requested that the Commission consider the information that it had obtained today when making future decisions related to the landfill.

Ms. Viola expressed her thanks to the Commission and argued that any of the characterizations made by Mr. Wurdeman were not based on any clear violations that had been determined; and that the City's position was that the landfill was struck by a series of unprecedented storms that severely impacted it; and that Waste Management had been compliant at all times with the permit requirements set for it by the Department of Health; and that this incident was unavoidable in the face of an extreme weather situation.

Mr. Steinberger offered the literature used by the Landfill Selection Committee to the Commission. Chair Devens acknowledged that it would be useful to the Commission and directed that it be submitted for consideration.

The Commission went into recess at 4:25 p.m. and reconvened at 4:30 p.m.

PUBLIC WITNESSES

1. Chuck Krause

Mr. Kraus stated that he thought a relief fund should be started by Waste Management to compensate businesses for their lost revenue due to the discharge and that Waste Management be involved in a public relations effort to correct damage to Hawaii's image as an attractive tourist site; and shared his concern that if this accident was unavoidable, there was all the more reason to find another site to remove the threat of another waste discharge.

There were no questions for Mr. Kraus.

2. Edwin Arellano- Hawaii Bio-Waste

Mr. Arellano shared his concerns on how closure of the landfill would impact his company.

Commissioner Lezy asked why medical waste was not incinerated. Mr. Arellano replied that he thought it might be due to the possibility of "needle sticks" from handling the syringe waste on the conveyor belts and described how his company handled medical waste.

There were no further questions for Mr. Arellano

3. Charles Leonard

Mr. Leonard expressed his concerns with closing the landfill and what an impact it might have upon the community.

There were no questions for Mr. Leonard.

4. Lee Mansfield

Mr. Mansfield provided his opinion on why the landfill should remain open and what an impact a closure would have on his company.

There were no questions for Mr. Mansfield.

5. Cynthia Rezentes

Ms. Rezentes stated her reasons why she opposed the landfill and shared her personal experiences of growing up in the area and experiencing heavy rainfall and described why she felt better precautionary measures should have been taken to have avoided this incident.

Mr. Wurdeman inquired if Ms. Rezentes was an engineer and whether or not she was aware of flooding incidents in the last two years. Ms. Rezentes responded that she was and recalled the incidents.

There were no further questions for Ms. Rezentes.

6. Patricia Patterson

Ms. Patterson expressed her concerns with allowing the landfill to remain open and questioned how matters were handled during the waste discharge; and suggested that the site selection committee consider dispersing waste disposal sites among the different island communities.

There were no questions for Ms. Patterson.

7. William and Sara Barnes

Mr. Barnes stated that he would be speaking for both himself and his wife and shared his reasons for wanting the landfill closed and urged prompt action from the landfill site selection committee.

There were no questions for Mr. and Mrs. Barnes.

8. Claire and Pieter Van Wingerden

(Please refer to LUC Transcript for more details on this matter.)

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Ms. Van Wingerden urged the Commission to consider closing the landfill, and described how they had been affected by the spill.

There were no questions for the Van Wingerdens.

9. Alice Greenwood

Ms. Greenwood stated that she was a member of the Concerned Elders of Waianae and recounted a report of the waste discharge and opined why the landfill should be closed.

There were no questions for Ms. Greenwood.

There being no further business to discuss, Chair Devens announced that the Commission would recess and reconvene on Moloka'i on February 3, 2011 for a site visit and hearing on DR10-41 Molokai Properties Limited.

The Commission went into recess at 5:08 p m.