

LAND USE COMMISSION  
STATE OF HAWAII

Hearing held on October 9, 2019  
Commencing at 9:10 a.m.

Airport Conference Center  
400 Rogers Blvd., Suite 700, Room #IIT#3  
Honolulu, Hawaii 96819

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION

SP09-403 Department of Environmental Services  
(Waimanalo Gulch Sanitary Landfill Remand-O'ahu  
Civil No. 09-1-2719-11 To consider the Findings  
of Fact, Conclusions of Law, and Decision and  
Order of the City and County of Honolulu  
Planning Commission Approving the City and  
County of Honolulu Department of Environmental  
Services' Application for a New Special Use  
Permit to Supersede the Existing Special Use  
Permit to Allow an Expansion and Time Extension  
for the Waimanalo Gulch Sanitary Landfill and  
to Modify Special Use Permit No. 2008/SUP-2 by  
Modifying the Land Use Commission's Order  
Approving 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.

V. Recess

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JONATHAN SCHEUER, Chair  
3 NANCY CABRAL, Vice Chair  
4 DAWN N.S. CHANG  
5 EDMUND ACZON  
6 DAN GIOVANNI  
7 GARY OKUDA  
8 LEE OHIGASHI  
9 ARNOLD WONG

10 STAFF:

11 LORI TANIGAWA, ESQ.  
12 Deputy Attorney General

13 DANIEL ORODENKER, Executive Officer  
14 RILEY K. HAKODA, Planner/Chief Clerk  
15 SCOTT DERRICKSON, AICP/Planner  
16 BERT SARUWATARI, Planner  
17 RASMI AGRAHARI, Planner

18 BRIAN YEE, Deputy Attorney General  
19 MARY ALICE EVANS, Director  
20 AARON SETOGAWA, Planner  
21 For State Office of Planning

22 KAMILLA CHAN, ESQ.  
23 City Corporation Counsel  
24 For Department of Environmental Services

25 IAN SANDISON, ESQ.  
Watanabe Ing LLP  
For Schnitzer Steel

CALVERT CHIPCHASE, ESQ.  
CHRISTOPHER GOODIN, ESQ  
Cades Schutte LLP  
For KOCA and Senator Maile Shimabukuro

RICHARD N. WURDEMAN, ESQ.  
For Colleen Hanabusa

DINA WONG, ESQ.  
Deputy Corporation Counsel  
Department of Planning and Permitting

## INDEX

PUBLIC WITNESSES:	PAGE
THOMAS-RYAN CLEEK Direct Examination	16
CYNTHIA REZENTES Direct Examination	19

1 CHAIRPERSON SCHEUER: Aloha, good morning.  
2 This is the October 9th, 2019 Land Use  
3 Commission Meeting.

4 Our first order of business is adoption of  
5 the September 25 and 26, 2019, minutes; however,  
6 those minutes are not ready for adoption yet.

7 Our next agenda item is the tentative  
8 meeting schedule.

9 Mr. Orodenker?

10 EXECUTIVE OFFICER: Thank you, Mr. Chair.  
11 Tomorrow we will be here if necessary for  
12 continuation of this SP09-403, Waimanalo Gulch  
13 matter.

14 On October 24th, we will be in Hilo for the  
15 Kanahale Declaratory Ruling.

16 October 25th, we're also scheduled to be in  
17 Hilo, and if necessary, October 28th.

18 On October 31st, we will be having a  
19 videoconference for adoption of DR19-67, the Kanahale  
20 matter.

21 On November 6th, we will be on Maui for the  
22 Sacred Earth matter as well as November 7th.

23 On November 20th, we will be on Oahu for  
24 the Poma'ikai Partners and Waiawa matter.

25 On November 21st, we will also be on Oahu

1 for the Hawaiian Memorial Life.

2 On December 4th, we will be on Maui for the  
3 Pulelehua matter as well as December 5th.

4 On December 18th, we have tentatively  
5 scheduled Hokua on Kaua'i as well as December 19th.

6 On January 8th, we will be in Kona for the  
7 Bancorp matter and the HHFDC matter.

8 January 9th is going to be open.

9 On January 22nd, we will be on Oahu for the  
10 Hawaiian Memorial Life matter. January 23rd is also  
11 set aside for that matter, and the schedule is open  
12 after that.

13 CHAIRPERSON SCHEUER: Thank you, Dan.

14 Are there any questions for Mr. Orodénker?

15 Our next agenda item is a meeting on Docket  
16 No. SP09-403, Department of Environmental Services  
17 Waimanalo Gulch Sanitary Landfill Remand-Oahu, Civil  
18 No. 09-1-2719-11 to consider the Findings of Fact,  
19 Conclusions of Law, and Decision and Order of the  
20 City and County of Honolulu Planning Commission  
21 approving the City and County of Honolulu Department  
22 of Environmental Services' Application for a New  
23 Special Use Permit to Supersede the Existing Special  
24 Use Permit to Allow an Expansion and Time Extension  
25 for the Waimanalo Gulch Sanitary Landfill and to

1 Modify Special Use Permit No. 2008/SUP-2 by Modifying  
2 the Land Use Commission's Order Approving the City  
3 and County of Honolulu Planning Commission's Findings  
4 of Fact, Conclusions of Law, and Decision and Order  
5 with Modifications Dated October 22, 2009.

6 Will the parties please identify themselves  
7 for the record?

8 MR. SANDISON: Ian Sandison appearing on  
9 behalf of Intervenor Schnitzer Steel Hawaii,  
10 Corporation.

11 MS. CHAN: Kamilla Chan for the City and  
12 County of Honolulu and the Department of  
13 Environmental Services, the Applicant in this matter.

14 MR. CHIPCHASE: Cal Chipchase and  
15 Christopher Goodin for Ko Olina Community Association  
16 and Senator Maile Shimabukura.

17 MR. WURDEMAN: Good morning, Richard M.  
18 Wurdeman for Intervenor Colleen Hanabusa.

19 MS. WONG: Good morning, Dina Wong for City  
20 and County of Honolulu Department of Planning and  
21 Permitting.

22 MR. YEE: Good morning, Deputy Attorney  
23 General Brian Yee on behalf of the Office of  
24 Planning. With me is Aaron Setogawa and Mary Alice  
25 Evans from the Office of Planning.

1 CHAIRPERSON SCHEUER: Good morning, thank  
2 you.

3 On that, I'll update the record.

4 On May 24th and 25th of 2017, the  
5 Commission met and granted in part and denied in part  
6 KOCA/Shimabukuro's Motion to Deny and Remand.

7 From June 2017 to April 2019, the City and  
8 County of Honolulu Planning Commission met with the  
9 Parties at various times to develop its final revised  
10 proposed Findings of Fact, Conclusions of Law and  
11 Decision and Order with exceptions by the Applicant  
12 and Schnitzer.

13 On June 10th, 2019, the Planning Commission  
14 issued its Findings of Fact, Conclusions of Law, and  
15 Decision and Order.

16 On September 11th of this year, the  
17 Commission received its portion of the Planning  
18 Commission -- received a portion of the Planning  
19 Commission's proceedings.

20 On September 17th, Intervenor  
21 KOCA/Shimabukuro filed their objections to the  
22 Planning Commission's Decision and Order with the  
23 Commission.

24 On September 20th, the remaining portion of  
25 the Planning Commission's proceedings were received

1 by the Commission.

2 On September 24th, Intervenor Hanabusa  
3 filed her Position Statement and Objections to the  
4 Planning Commission's Decision and Order.

5 On September 25th, the Applicant filed its  
6 response to the Intervenor KOCA/Shimabukuro's  
7 Objections to the Planning Commission's Decision and  
8 Order. And On the same day, Intervenor Schnitzer  
9 filed comments on Intervenor KOCA/Shimabukuro's  
10 Objections to the Planning Commission's Decision and  
11 Order.

12 On October 1, 2019, the planning -- the  
13 Office of Planning filed a Memorandum recommending  
14 approval of the Planning Commission's Decision and  
15 Order.

16 On October 2, Intervenor KOCA/Shimabukuro  
17 filed a Reply in Support of their Objection to the  
18 Planning Commission's Decision and Order. On the  
19 same day, the Commission mailed and emailed the  
20 October 9th and 10th, 2019, LUC meeting agenda notice  
21 to the Statewide, email and Oahu mailing lists.

22 The Commission received the mandated  
23 reports from the Department of Environmental Services  
24 for 2015 through 2019.

25 Further On October 7, Intervenor



1 KOCA/Shimabukuro filed their reply to OP's October 1,  
2 2019 letter regarding the Planning Commission's June  
3 10, 2019 Decision and Order.

4 On the same day, October 7th, the Applicant  
5 filed its comments to OP's Memorandum dated October  
6 1st.

7 And this morning, the Commission received a  
8 letter notifying the Commission that the Office of  
9 Planning and the Applicant jointly agreed to amended  
10 conditions to the Planning Commission's June 10, 2019  
11 Decision and Order.

12 For any members of the public here, please  
13 be reminded that the Commission is considering this  
14 as a consolidated proceeding involving Environmental  
15 Service's 2008 application for a new Special Use  
16 Permit and the Environmental Service's 2011  
17 Application to modify the LUC D&O of October 2009.

18 Now, let me go over the procedures for  
19 today.

20 Is there anybody in the room who is wishing  
21 to give public testimony? Do we have sign-ins? One.  
22 Are there others?

23 Okay. So first we will do public  
24 testimony, and I will call you forward, swear you in.  
25 We will then close -- take all the public testimony

1 that there is. We will then close the public  
2 testimony.

3 I will call for the Applicant,  
4 Environmental Services, to make your presentation on  
5 the matter. And then after the Applicant has made  
6 their presentation and there has been questioning by  
7 the Commission, the Intervenors will be heard in the  
8 following order.

9 First, Ko Olina Community Association and  
10 Senator Shimabukuro, then Intervenor Hanabusa, then  
11 Intervenor Schnitzer.

12 The State Office of Planning will then be  
13 given an opportunity to comment, and the Commission  
14 will ask any final questions they have of the  
15 parties.

16 Also note that from time to time, I will be  
17 calling for short breaks. I try to go about an hour  
18 at a time on taking breaks so as to preserve our  
19 court reporter's hands among other reasons.

20 Are there any questions on our procedures  
21 today?

22 Parties, no questions?

23 Commissioner Okuda.

24 COMMISSIONER OKUDA: Chair, thank you.

25 If it's appropriate at this time, I'd like

1 to make a disclosure.

2 CHAIRPERSON SCHEUER: Please proceed.

3 COMMISSIONER OKUDA: As I believe I've  
4 disclosed in the prior proceeding, first of all, I am  
5 familiar and know Mr. Chipchase from the practice of  
6 law. We do not have any type of social relationship.  
7 I don't think he's ever even bought me a plate lunch.

8 But I'd like to disclose the fact that, you  
9 know, I have dealt with him in various cases over  
10 time.

11 The second thing is that I represent a  
12 party, the TOJO, T-O-J-O, Revocable Trust in two  
13 actions involving the City and County of Honolulu,  
14 specifically the Department of Planning and  
15 Permitting.

16 These actions bear Civil No. 18-1-4-01JPC,  
17 and a Land Court Petition LD19-1-277. The issue in  
18 those cases are whether or not the TOJO property in  
19 Waianae is a consolidated lot with an adjoining  
20 property. The matter is set for mediation. It's  
21 somewhat just a technical issue, but I felt I should  
22 disclose that.

23 These cases, and my knowledge of Mr.  
24 Chipchase, will not affect my decision-making in this  
25 case.

1           CHAIRPERSON SCHEUER: Thank you for the  
2 disclosure, Mr. Okuda.

3           Are there any objections from the parties  
4 that Mr. Okuda continues to participate?

5           MR. SANDISON: None.

6           MS. CHAN: No, no objections.

7           MR. CHIPCHASE: No, Chair.

8           MR. WURDEMAN: No.

9           MS. WONG: None.

10          MR. YEE: No objection.

11          CHAIRPERSON SCHEUER: Are there any further  
12 disclosures?

13          Commissioner Chang.

14          COMMISSIONER CHANG: Thank you, Mr. Chair.

15          I would like to disclose that I was part of  
16 a litigation trial team in the representation of Mr.  
17 Lotting (phonetic) who was a defendant in federal  
18 court. I'm sorry, the case was quite awhile ago,  
19 involving the release at the Waimanalo Gulch. This  
20 was several years ago.

21          I'm so sorry, I don't even remember the  
22 name of the case, but it was a federal action against  
23 the individual. And I was just part of the trial  
24 litigation team.

25          CHAIRPERSON SCHEUER: Do you believe this

1 will prevent you from being able to be fair and  
2 impartial in this proceeding?

3 COMMISSIONER CHANG: No, it will not. As  
4 you can see, I can barely remember the case. I do  
5 apologize.

6 CHAIRPERSON SCHEUER: I didn't want to put  
7 that part in. If you can't remember, it's hard to  
8 have it bias you.

9 Is there any objection to Commissioner  
10 Chang's continued participation in these proceedings?

11 MR. SANDISON: None.

12 MS. CHAN: No.

13 MR. CHIPCHASE: No, Chair.

14 MR. WURDEMAN: No.

15 MS. WONG: No.

16 MR. YEE: No objection.

17 CHAIRPERSON SCHEUER: Okay. Commissioners,  
18 any others?

19 In the interest of full and complete  
20 disclosure, I will note that my wife, Cami Kloster,  
21 worked for the Department of Environmental Services  
22 and the Recycling Division for three years from 2000  
23 and -- or from 1999 to 2002.

24 I had no involvement in those issues  
25 whatsoever. And I went to Iolani with Maile

1 Shimabukuro. But neither of those things I believe  
2 will prevent me from being fair and impartial on this  
3 matter.

4 Is there any objection from any of the  
5 parties for my participation?

6 MR. SANDISON: None.

7 MS. CHAN: No objections.

8 MR. CHIPCHASE: No, Chair.

9 MR. WURDEMAN: No.

10 MS. WONG: No, none.

11 MR. YEE: No objection.

12 CHAIRPERSON SCHEUER: Thank you very much.

13 We now will proceed with public testimony.  
14 Our first testifier is Thomas-Ryan Cleek. If you  
15 would come forward. I believe we received your  
16 written testimony as well.

17 Here's how we do it. You've got to make  
18 sure the microphone is on, so it's lit. You get  
19 close enough so that you almost are kissing the mic.  
20 I will swear you in.

21 Ask that you affirm that the testimony  
22 you're about to give is true?

23 THE WITNESS: Yes

24 CHAIRPERSON SCHEUER: Okay. And now, if  
25 you could just state your name and address for the

1 record and then proceed with your testimony.

2 THE WITNESS: My name is Thomas-Ryan Cleek,  
3 and my address is 92-233 Awahea Way, Kapolei.

4 CHAIRPERSON SCHEUER: Mahalo. You may  
5 proceed.

6 THOMAS-RYAN CLEEK  
7 Was called as a witness by and on behalf of the  
8 Public, was sworn to tell the truth, was examined and  
9 testified as follows:

10 DIRECT EXAMINATION

11 THE WITNESS: I am a native to Honokai  
12 Hale, near Maka'iwa Gulch, the valley adjacent to  
13 Waimanalo Gulch. I have lived in Honokai Hale my  
14 entire life and continue to reside there.

15 We all remember what happened in 2010, when  
16 a torrential downpour washed medical waste being  
17 stored at Waimanalo Gulch Sanitary Landfill into the  
18 ocean. No one wants that to happen again.

19 I think it is crucial that the City and  
20 County of Honolulu take deadlines seriously. Giving  
21 an extension to the Special Use Permit is not going  
22 to nullify the negative repercussions of a potential  
23 flash flood.

24 The City and County of Honolulu needs to  
25 take -- needs to find an alternative site for waste,

1 per the November 10 -- the 2010 deadline. It is  
2 clear that Waimanalo Gulch does not have the capacity  
3 to store O'ahu's Municipal Solid Waste, hence, the  
4 application for expansion.

5 It is imperative that we always take the  
6 preservation and maintenance of important natural  
7 systems and habitats into consideration, and account  
8 for the impact of this proposed reclassification of  
9 Waimanalo Gulch.

10 Mahalo for giving me the opportunity to  
11 speak on behalf of my community.

12 CHAIRPERSON SCHEUER: Thank you. Now, if  
13 you'll just stay put, we have the opportunity for any  
14 of the parties or Commissioners to ask you questions.

15 Any questions for the testifier?

16 MR. SANDISON: No questions.

17 MS. CHAN: No questions.

18 MR. CHIPCHASE: No questions, Chair.

19 Thank you, Mr. Cleek.

20 MR. WURDEMAN: No questions.

21 MS. WONG: No questions.

22 MR. YEE: No.

23 CHAIRPERSON SCHEUER: Commissioners?

24 VICE CHAIR CABRAL: I don't have a  
25 question, but I do want to say thank you. We got



1 your letter yesterday, and I appreciate the fact that  
2 you put those sentiments in an organized manner and  
3 got it to us ahead of time so we could read it and  
4 then be more keenly aware of -- wow, that is a real  
5 problem.

6 So thank you for taking the effort to put  
7 it in writing and to attend. Thank you.

8 CHAIRPERSON SCHEUER: If I may ask you a  
9 question.

10 One of the criteria that the Land Use  
11 Commission is supposed to consider in issuing a  
12 Special Use Permit or approving one is that the  
13 desired use would not adversely affect surrounding  
14 property.

15 Do you feel that --

16 THE WITNESS: The Waimanalo Gulch adversely  
17 affects property. I think it has the potential to,  
18 if, you know, mismanaged.

19 CHAIRPERSON SCHEUER: Thank you.

20 Are there any other questions for the  
21 testifier? Thank you.

22 Is there anybody else wishing to give  
23 public testimony on this matter? Please step  
24 forward.

25 I will disclose I've known Ms. Rezentes in

1 a number of capacities over many years.

2 Do you swear or affirm the testimony you're  
3 about to give is the truth?

4 THE WITNESS: Yes, I do.

5 CHAIRPERSON SCHEUER: Speak right into the  
6 microphone, please.

7 THE WITNESS: Thank you. My name is  
8 Cynthia Rezentes. I live at 87-149 Maipela Street in  
9 Waianae.

10 CYNTHIA REZENTES

11 Was called as a witness by and on behalf of the  
12 Public, was sworn to tell the truth, was examined and  
13 testified as follows:

14 DIRECT EXAMINATION

15 THE WITNESS: I have actually been  
16 following this case now for 21 years. Many don't  
17 realize that the first salvo that was fired regarding  
18 the expansion of Waimanalo Gulch was made in 1998.

19 At that point in time, the community was  
20 very much against the expansion of Waimanalo Gulch  
21 then, based on a former mayor's statement that once  
22 the capacity was reached of the landfill based off of  
23 the first EIS for approximately 60-plus or minus  
24 acres, that the landfill would be closed.

25 Subsequent to that time, over the last

1 21 years, the community has been a subject of a  
2 ping-pong match regarding whether or not this  
3 landfill was going to continue, in what capacity it  
4 would continue, and when it would ever close.

5           There have been commitments made that the  
6 community thought it should have closed this  
7 particular landfill a number of years ago. Those  
8 were always challenged by the City regarding we  
9 either don't have another site for it, or there's  
10 fill capacity or for whatever reason.

11           So we've now gone from the original EIS  
12 which was, again, I said around 60-plus or minus  
13 acres of requests to utilizing the entire 200-acre  
14 property, of course minus the buffers for the  
15 surrounding property.

16           The thing that I think annoys me the most  
17 is it's not just filling a hole in the ground. It's  
18 digging a deeper hole to put more stuff into the  
19 ground, then just taking an existing landscape and  
20 utilizing the capacity of that existing landscape.

21           One of the things that came out in the  
22 original EIS was that they did not anticipate  
23 expanding the landfill based on the contours of the  
24 sides of the walls of the gulch going in. The  
25 steepness of them and whether or not they could even

1 go beyond the original 60 acres.

2 Well, we've learned over time that you can  
3 engineer anything you want to continue a project  
4 moving forward.

5 Again, we're here today. I've read the  
6 latest decision from the Planning Commission --

7 CHAIRPERSON SCHEUER: Ask you to summarize,  
8 please.

9 THE WITNESS: And the community again is  
10 faced with a never-ending situation where we have to  
11 figure out what the heck the capacity is going to be,  
12 because there is no timeframe.

13 Granted, they're saying that they will give  
14 you a new landfill site within the next few years,  
15 but that's the same promise that has occurred at  
16 least once, if not twice before.

17 So I'm skeptical for my community as to  
18 whether or not all of these actions are going to  
19 provide relief for the community. And I say that  
20 from somebody who's looking at a community that has  
21 two landfills, the only two landfills on the island,  
22 and we have to deal with it. So I thank you for  
23 listening to me.

24 CHAIRPERSON SCHEUER: Thank you. Are there  
25 questions for the testifier?

1 MR. SANDISON: No questions.

2 MS. CHAN: No questions.

3 MR. CHIPCHASE: No, Chair.

4 Thank you, Mrs. Rezentes.

5 MR. WURDEMAN: No.

6 MS. WONG: No.

7 MR. YEE: No questions.

8 CHAIRPERSON SCHEUER: Commissioners?

9 Commissioner Okuda.

10 COMMISSIONER OKUDA: Thank you, Mr. Chair.

11 Ms. Rezentes, how long have you lived in  
12 the Leeward Coast or Waianae District?

13 THE WITNESS: I was born and raised out  
14 there.

15 COMMISSIONER OKUDA: Okay. Not that it  
16 makes a difference, but did you attend high school  
17 out there, too?

18 THE WITNESS: I graduated from Waianae High  
19 School.

20 COMMISSIONER OKUDA: Okay. And please  
21 don't take this question as being stupid or  
22 facetious, but I just want it for the record.

23 Do you see any benefit to your community by  
24 having the landfill in the community?

25 THE WITNESS: Not any longer. At one point

1 in time there was a community benefits package which  
2 provided some funds from the City and County towards  
3 the Leeward Coast community that was impacted by the  
4 landfill for funds for nonprofit organizations to  
5 build their organizations up within the community,  
6 and part of the funds were used for improvement for  
7 parks along the coast.

8 That fund has been taken away for a number  
9 of years now. So right now, we're just the waste  
10 receptacle for the island.

11 COMMISSIONER OKUDA: And when you say that  
12 the fund has been taken away for a number of years,  
13 how many years has the fund been taken away? Or  
14 when, to your knowledge, was the fund last available  
15 for the Waianae Coast?

16 THE WITNESS: I can't recall exactly when  
17 it was terminated, but I think within the last ten  
18 years, somewhere in that timeframe.

19 COMMISSIONER OKUDA: And my final question  
20 is this: As a long-time Waianae resident, how does  
21 it make you feel, based on your description that you  
22 folks are the receptacle for two waste sites?

23 THE WITNESS: I think you need to  
24 understand that growing up out in Waianae. And I was  
25 one of the fortunate ones having enough relatives and

1 family all over the island, I was able to go all over  
2 the island.

3 But when you grew up out there, even back  
4 in the '50s and '60s, you were always laughed at for  
5 coming from the sticks, coming from the country. It  
6 was more of a derogatory -- I don't know how to say  
7 it. You were not viewed as a positive member of a  
8 resident on the island of Oahu if you came from  
9 Waianae. You were out in the sticks. You were  
10 nowhere near where the action was. You had to be  
11 barefoot or whatever the case may be. And yet, now  
12 we're being valued to be the dumping pot for the  
13 island, the waste receptacle for the island.

14 So it's not something that is new, because  
15 I've heard and had people tell me to my face, so you  
16 from the sticks? Yeah, I'm from the sticks. My  
17 family actually moved out there because they wanted  
18 to move out there for the lifestyle and the fishing,  
19 and yet it was -- we were looked down upon, and that  
20 includes my cousins from Honolulu.

21 So to have this concept perpetuated by  
22 its -- you know, this is good enough to put out in  
23 Waianae and keep it out there. It doesn't --  
24 everybody wants to raise themselves up. Not be  
25 looked at as somebody's dumping ground, and yet

1       that's what you end up being.

2               It's a cultural social concept that I don't  
3 think people who didn't grow up out in the country  
4 really understand.

5               COMMISSIONER OKUDA: Thank you very much.

6               CHAIRPERSON SCHEUER: Any further questions  
7 for the witness?

8               Thank you very much.

9               THE WITNESS: Thank you.

10              CHAIRPERSON SCHEUER: I think our staff is  
11 checking on the sound coming from next door.

12              I think it's probably making it a little  
13 bit difficult for our court reporter with --

14              THE COURT REPORTER: Yeah, it can be a  
15 little distracting.

16              CHAIRPERSON SCHEUER: I'll take this moment  
17 just for the -- take at least a couple minutes. The  
18 public, who I don't believe have been in front of us  
19 before, if you are not aware of who we are, the Land  
20 Use Commission is nine volunteer members, currently  
21 we have one vacancy. We volunteer. We're appointed  
22 by the governor, confirmed by the state senate. If  
23 you don't like what we do, you have a chance in four  
24 years to testify against our confirmation. We can  
25 only serve twice. And we do this without pay to try



1 and help Hawai'i. Okay. Thank you.

2 Ms. Chan, are you ready to proceed?

3 MS. CHAN: I know it's a little early for a  
4 break, but could we just take a couple minutes before  
5 we start?

6 CHAIRPERSON SCHEUER: For?

7 MS. CHAN: So that I can just reorganize.

8 CHAIRPERSON SCHEUER: Yeah.

9 MS. CHAN: Thank you.

10 CHAIRPERSON SCHEUER: We'll take a  
11 two-minute recess.

12 (Recess taken.)

13 CHAIRPERSON SCHEUER: We're ready to start  
14 again.

15 MS. CHAN: Thank you very much.

16 CHAIRPERSON SCHEUER: We're missing Mr.  
17 Wurdeman and some Commissioners.

18 (Recess continued)

19 We're back on the record.

20 Ms. Chan, you may proceed.

21 COMMISSIONER CHANG: Thank you, Chair.

22 The last time the parties appeared before  
23 this Commission, the LUC remanded the proceedings  
24 back to the Planning Commission for further  
25 proceedings to clarify the findings.

1           Those five items that the Commission asked  
2           the Planning Commission to clarify has been addressed  
3           in the 2019 Decision that they issued in June.

4           They've addressed whether they've followed  
5           the rules of the Planning Commission Section 2-75, as  
6           well as the basis for the December 22nd -- I'm sorry,  
7           December 31st, 2022 date upon which the Applicant is  
8           to identify the site and the implications that that  
9           would have on closure.

10          They've clarified that the intent is to  
11          allow Waimanalo Gulch to be used to capacity of the  
12          landfill.

13          For the third item, Conclusion of Law No. 6  
14          addresses whether the record needs to be updated or  
15          reopened to include updated information.

16          There have been several requests to reopen  
17          the record in this proceeding. And the Planning  
18          Commission has decided each time that it was not  
19          necessary in order to issue a Decision on the  
20          consolidated applications.

21          With respect to Item No. 4, the Planning  
22          Commission has clarified effective date of their  
23          Findings of Fact and Conclusions of Law. They've  
24          clearly stated that they have modified the 2009  
25          Special Use Permit by deleting a couple of conditions

1 and adding three additional conditions.

2 And for the 5th item, the Planning  
3 Commission has also clarified in their written  
4 decision that they are ruling on both the 2008 and  
5 2011 applications.

6 The Waimanalo Gulch Sanitary Landfill is a  
7 critical component of the City's Solid Waste  
8 Management System. As you know, the Department of  
9 Environmental Services is taxed with managing the  
10 municipal solid waste on Oahu. And that system  
11 consists of various components such as recycling, the  
12 promotion of source reduction.

13 We have the H-Power facility which  
14 processes much of the solid waste on Oahu and turns  
15 that into energy.

16 But there are still items that cannot be  
17 handled by those other processes. There's materials  
18 that can't be combusted. They can't be recycled.  
19 They can't be reused. And in addition to the solid  
20 waste that's collected that must be sent to Waimanalo  
21 Gulch at this point in time, there's still ash that's  
22 produced by H-Power as a byproduct of their process.

23 As well as automobile shredder residue that  
24 has no other method for the City to process. There's  
25 also disaster debris. If we have hurricanes, tsunami

1 debris that washes up on shore, there're certain  
2 items that we at this point in time are not able to  
3 handle in any other fashion.

4           So in this case, the City has come to the  
5 Planning Commission and to the LUC to ask to use  
6 the -- to use our property which is located in an  
7 Agricultural District for this landfilling use. And  
8 as it's permitted to, the Planning Commission has  
9 granted the permit with protective conditions that  
10 they've added in.

11           And as you know, because of the size of  
12 this property, it's a full 200 acres, we are now here  
13 seeking the LUC's approval.

14           The LUC may impose additional restrictions  
15 in this process as may be necessary and appropriate  
16 to granting approval of the permit.

17           So just for a really brief background. The  
18 2008 Application sought the expansion. We were using  
19 roughly 100 acres, and so this expands out to the  
20 full 200 acres of the City's property there.

21           That particular proceeding went up to the  
22 supreme court, came back down, and was eventually  
23 consolidated with a second proceeding. The City has  
24 filed an application to remove a condition that would  
25 have required us to close in 2012.

1           And so while the first case was up on  
2 appeal, the second one was heard by the Planning  
3 Commission. There were a number of days of testimony  
4 that were provided and evidence submitted, and that  
5 record closed in April of 2012.

6           So in 2016, the Planning Commission  
7 consolidated the two cases. And earlier this year  
8 issued its final Decision finding that the Department  
9 of Environmental Services has met its burden of proof  
10 with respect to the rules of the Planning Commission  
11 Section 2-45, and determined that this is a  
12 permissible and unusual -- a permissible, unusual,  
13 and reasonable use of the property.

14           There are some additional conditions that  
15 KOCA has sought to have added into this permit, and  
16 I'll start with the closure condition.

17           The closure condition is not supported by  
18 the evidence. As I've mentioned, there are waste  
19 that cannot be processed by means other than  
20 landfilling. That includes the automobile shredder  
21 residue, the ASR that the shredder produces as well  
22 as some other recyclers, the H-Power ash, large  
23 animal carcasses. We still have medical sharps. And  
24 at the time of the case, sewage sludge was still  
25 going to H-Power. I'm sorry, was still going the

1 landfill and not to H-Power.

2           Even when we have processes in place, there  
3 are times when waste that is normally processed at  
4 H-Power must be diverted to the landfill. And the  
5 evidence had established that H-Power undergoes  
6 annual maintenance, scheduled maintenance where they  
7 shutdown for typically a period of up to two weeks  
8 where they work on maintaining their facility to  
9 ensure that it is running the rest of the year.

10           They don't necessarily shutdown the entire  
11 facility. They work on one of the three boilers at a  
12 time, but it does require some diversion of waste,  
13 and that is because H-Power is not allowed to store  
14 more waste on-site. They're allowed a certain amount  
15 in their solid waste management permit. It's  
16 whatever they can combust within a 72 hours.

17           So if we're facing a situation where  
18 there's more waste then the remaining boilers can  
19 handle, they are required to send it to the landfill.

20           There's also the debris from natural  
21 disasters and other emergencies that may require us  
22 to send things to the landfill instead of to H-Power.  
23 So there is abundant evidence in the record that a  
24 landfill is still needed.

25           In the 2011 proceeding, we had the then

1 deputy director of DOH Environmental Health Program  
2 who testified and acknowledged that even though there  
3 have been a lot of progress in improving recycling  
4 and waste minimization, that the need for landfilling  
5 still existed, not just on Oahu but in virtually  
6 every community in the United States.

7           The Planning Commission has consistently  
8 taken the position since its 2009 decision that the  
9 duration of a Special Use Permit is to capacity.

10           Back in 2009, Commissioner Matsubara noted  
11 that this -- the Planning Commission had continued to  
12 support a to-capacity deadline even in 2017 when  
13 Commissioner Anderson had stated that Waimanalo Gulch  
14 site should be used to its capacity.

15           And then in 2019, the Planning Commission  
16 again allowed us to continue to use Waimanalo Gulch  
17 to its full capacity.

18           KOCA in its filings has argued that the  
19 Planning Commission and the LUC is required to  
20 include a time limit on the duration of the proposed  
21 use. But based on the administrative rules Section  
22 15-15-95(f), it states that the Planning Commission  
23 shall establish, if appropriate, a time limit for the  
24 duration of the proposed use which shall be a  
25 condition of the special permit.

1           In this case no time limit is required  
2 because the landfill duration is measured by its  
3 capacity. It is a finite amount that we're allowed  
4 to landfill. In the past we were not using the full  
5 200 acres as landfill. Our permit covered much  
6 smaller areas. As one of the public testifiers has  
7 already mentioned, we started off using 60 of those  
8 200 acres, and over the years have expanded it.

9           Once we reach the full capacity of the  
10 200 acres, there is nothing else we can do to add  
11 more space to it. We will have used all of our  
12 entire property that's available for landfilling.

13           So in this particular case, the capacity of  
14 the landfill is a better method for measuring the  
15 duration of use. We would also point out that it's  
16 already a site that is owned by the City that has  
17 available space, and that continuing use of  
18 landfilling at this site will ensure that we don't  
19 need to take up other land on Oahu which may or may  
20 not be similarly situated in Agricultural District  
21 and need to be used for the same purpose.

22           The fact that the duration is to capacity  
23 doesn't amount to its being an unlimited use, because  
24 of the capacity restriction. Capacity just as a  
25 cycle is something that we already report to the



1 Department of Health on. It's among the many things  
2 that we -- that ENV annually reports to them. And so  
3 it's a situation where the amount of remaining space  
4 is monitored and reported on that basis.

5 As ENV has achieved diversion of waste and  
6 the record reflects that there were things ENV was  
7 putting into place to ensure that it would not have  
8 to rely on the landfill for as many waste streams as  
9 technology will allow it to send elsewhere.

10 And with that, that does change or slow  
11 down the rate at which ENV utilizes the landfill.

12 Regarding the point about unlimited use,  
13 there are also restrictions on the type of waste that  
14 ENV is permitted to place and dispose of at Waimanalo  
15 Gulch. Under the City's permit, things like bulk,  
16 green waste, scrap tires, scrap vehicles and like  
17 goods are not allowed into the landfill.

18 In addition, Waste Management of Hawai'i  
19 who operates the City's landfill has its own  
20 unacceptable waste exclusion program that prevents  
21 the disposable -- the disposal of things like  
22 hazardous waste, PVC, contaminated waste, pesticide  
23 containers and so on.

24 The record also establishes that it would  
25 take more than seven years to identify and develop a

1 new landfill site.

2           The condition that KOCA has proposed, I  
3 believe that they've called it a phased closure  
4 condition, requires that beginning in 2024 the City  
5 would not be permitted to send any waste other than  
6 ash and residue from H-Power as well as ASR to the  
7 landfill.

8           That is an extremely limited number of  
9 waste streams. That would mean that the City would  
10 not be able to dispose of waste that cannot be  
11 recycled for use for ships or things like the large  
12 whale carcasses that show up on shore. We would have  
13 no place to dispose of something like that.

14           The partial closure of Waimanalo Gulch at  
15 that point in time would also force the City to  
16 become noncompliant with its solid waste management  
17 permit for H-Power. H-Power requires us to have a  
18 backup for the site in order to properly manage the  
19 solid waste that we would normally process there.

20           So Waimanalo Gulch is a necessary facility  
21 for the City to be able to properly manage solid  
22 waste that's generated here on the Island of Oahu.  
23 And if we didn't have that resource, we would  
24 potentially endanger public health and create serious  
25 health and safety issues for the residents here on

1 the island.

2 Similarly, the condition that KOCA has  
3 proposed would require closure in roughly eight  
4 years. And, again, you know, we would assert that  
5 that would leave us in a position where we would not  
6 be able to adequately process those wastes.

7 Thank you.

8 CHAIRPERSON SCHEUER: Thank you, Ms. Chan.  
9 Commissioners? Commissioner Wong.

10 COMMISSIONER WONG: Thank you.

11 CHAIRPERSON SCHEUER: And you'll bear with  
12 Commissioner Wong who has some voice issues.

13 COMMISSIONER WONG: First off --

14 CHAIRPERSON SCHEUER: Right into the mic.

15 COMMISSIONER WONG: Sorry. Okay.

16 I have a question. So on the information  
17 that we received for the evidentiary portion was in  
18 2009, correct?

19 MS. CHAN: I believe that this  
20 Commission -- you did receive the 2009, but also the  
21 2012 proceedings after the Planning Commission  
22 consolidated the two cases and sent it up.

23 COMMISSIONER WONG: However, we had a  
24 public testimony here, Mr. Cleek, who said that in  
25 2010 there was a big storm that had a lot of waste

1 going into the ocean.

2 Was that ever part of any of the evidence?

3 MS. CHAN: Yes. That was addressed in the  
4 2012 proceeding.

5 COMMISSIONER WONG: So then the question --  
6 so after the 2012, it's now 2019, correct?

7 MS. CHAN: Correct.

8 COMMISSIONER WONG: Seven years. Within  
9 that seven-year period, do you think anything else  
10 happened of significance that could have affected the  
11 evidence portion that, you know, we need to do any --  
12 to review this permit?

13 MS. CHAN: I don't believe so. For a  
14 facility like the landfill that is -- we were -- we  
15 already existed under a prior permit, and we've  
16 already been operating, due to continuously updating  
17 the record would put us in a position where we would  
18 never -- I mean, really all of the parties where we  
19 would not be able to ever really conclude this  
20 proceeding. So at some point, the evidence does need  
21 to close.

22 COMMISSIONER WONG: Okay. So seven years  
23 to me is a very long time. I had more hair at seven  
24 years, up here now, not in other places, but  
25 anyway -- I had a perm also maybe -- but I just think

1 that within seven years a lot of things could have  
2 happened that could have changed this issue such as  
3 capacity, you know, and maybe another information  
4 could have came out such as different technologies  
5 could have -- that could have came out that you could  
6 say, hey, we're looking into this also.

7 But this was never in evidence because you  
8 closed it at 2012, right?

9 MS. CHAN: We didn't close it. Not the  
10 Department of Environmental Services, the Planning  
11 Commission that heard the hearing, correct.

12 COMMISSIONER WONG: Okay.

13 MS. CHAN: I'm not attempting to argue that  
14 this is part of the evidence, but the City has  
15 continued to provide annual reports to the Land Use  
16 Commission, and that's in compliance with the  
17 remaining conditions in the 2009 permit that were not  
18 invalidated by the supreme court.

19 And so part of that is the annual reporting  
20 requirement where we address a number of things,  
21 including technologies that we're looking at, the  
22 amount of waste that's being landfilled during the  
23 period covered by the permit.

24 So to say that information has not been  
25 provided to the Commission or to the public would not

1 really be accurate, it's there. But I understand  
2 what you're saying, that it's not part of the record  
3 in this case.

4 COMMISSIONER WONG: Correct. So it's just  
5 that hypothetically if you were sitting as a judge,  
6 and it was a trial that happened seven years ago, and  
7 other evidence came in front of you, but you can't  
8 use it, what would you do?

9 I mean, that's just a hypothetical  
10 situation. I mean so you don't need to answer that.

11 The other thing is, you're saying you want  
12 to keep it open to capacity. Okay. So let's say,  
13 for example, your statement of some sort of emergency  
14 happened, hopefully, heaven forbid a tsunami,  
15 hurricane or something that you have to fill that  
16 sucker up, the Waimanalo Gulch. Okay, then you're  
17 going to be hitting capacity at that point.

18 MS. CHAN: That's assuming that everything  
19 would need to be landfilled. There is certain  
20 processes that are followed in those emergencies.  
21 For example, triage and to deal with different types  
22 of waste.

23 COMMISSIONER WONG: Of course. But let's  
24 just say we're doing a hypothetical situation, where  
25 you have to fill it as soon as possible clear of

1 people, because people need, you know, places to  
2 live, et cetera.

3 Now, if that capacity is hit, and you have  
4 no other landfill, does that mean all the other waste  
5 that's coming from wherever will be going into the  
6 parks or just staying in the street?

7 MS. CHAN: No. That's why there's a -- I  
8 can't remember the name -- but there's a management  
9 plan for disaster debris like that. You know, a lot  
10 of it presumably would be construction and demolition  
11 debris which Waimanalo Gulch does not landfill.

12 So it would really depend on the nature of  
13 the waste. If H-Power is spared and we can process  
14 waste there, we would be able to do that. Something  
15 far more recent that the City is looking at is  
16 bailing waste and being able to store it somewhere so  
17 that it can be sent to H-Power and not to the  
18 landfill.

19 I mean, those would be the kinds of things  
20 we would be looking at if we were facing that  
21 situation at this point in time.

22 COMMISSIONER WONG: Of course. This is  
23 hypothetical because it's not in evidence at this  
24 point in time.

25 So the question I have is: Has the City --

1 or should I ask DPP -- we don't know when capacity  
2 is, even starting to look at another site.

3 MS. CHAN: I can respond to that. So one  
4 of the things that ENV regularly monitors, and  
5 actually it's through our operator waste management.  
6 They keep track of what's in the landfill, the  
7 tonnages of bulk, municipal solid waste as well as  
8 ash. And so they are aware sort of in real time as  
9 to what the remaining capacity is. That is reported  
10 to DOH. So ENV is aware of what the remaining  
11 capacity is.

12 COMMISSIONER WONG: So you just stated  
13 there is an approximate timeline you have? How come  
14 you're not using that rough date instead of for your  
15 timeline?

16 MS. CHAN: Because as we have committed to  
17 further diversion, that number changes, you know.  
18 I'm trying to stick with the evidence. I don't want  
19 to stray too far.

20 But, for example, things like ASR was  
21 mentioned in the hearing, and ash from Waimanalo  
22 Gulch. And, you know, several years ago the City  
23 pursued an RFP to look at ash processing, and this is  
24 something that came up in the hearing. At that point  
25 in time, the technology wasn't there. Really no one



1 ever responded to the RFP. But this is public  
2 knowledge now, not part of the evidence, but the City  
3 has sent out another RFP and we're currently going  
4 through that procurement process.

5 So, you know, something like that that's a  
6 significant amount of the waste that we send to the  
7 landfill. Right now if it's not landfilled any more,  
8 it changes those numbers, so it's hard to put a date  
9 on it for that reason. It changes over time.

10 Or, you know, if as you mention, if there  
11 is disaster just a -- causes us to use up more space,  
12 you know, that would -- we would acknowledge that  
13 that does change the projections as well. So we  
14 constantly look at that.

15 COMMISSIONER WONG: So, again, you said  
16 there's constant changes in the capacity, because of  
17 different issues that may arise. So you couldn't use  
18 a conservative number, say, oh, you know what, in  
19 20 years or ten years, we are going to be at  
20 capacity?

21 I'm just using hypothetical numbers, of  
22 course, but we should -- DPP should start doing the  
23 site review right now. Shouldn't that happen, or say  
24 here's the timeline? It takes seven years to start  
25 up, you know, to select the site, go through the EIS

1 and all that.

2 So we have, let's say if it was ten years.  
3 We have three more years of play then you got to  
4 start up? I mean, wouldn't that --

5 MS. CHAN: Separate and apart from this  
6 proceeding, and especially use permits, that is  
7 something that ENV does as part of their regular  
8 work. For the Refuse Division which is just one part  
9 of the department, the management of solid waste  
10 is -- really the reason they exist, you know, they  
11 collect waste from residential facilities. They  
12 accept waste from private haulers, and they need to  
13 figure out where it's going to go. They're tasked  
14 with that. That's their mandate.

15 And so they are very keenly aware of what  
16 they're going to do if Waimanalo reaches capacity.

17 COMMISSIONER WONG: Thank you.

18 CHAIRPERSON SCHEUER: Commissioner  
19 Ohigashi.

20 COMMISSIONER OHIGASHI: I'm not from here,  
21 so maybe I'm confused. Are you saying that it's  
22 impossible to determine when capacity will be  
23 reached?

24 MS. CHAN: No, that is not what I'm saying.  
25 I apologize for confusing you.

1 COMMISSIONER OHIGASHI: Is it possible to  
2 estimate when capacity will be reached?

3 MS. CHAN: Yes.

4 COMMISSIONER OHIGASHI: And have the City  
5 performed estimates of when capacity will be reached?

6 MS. CHAN: Yes.

7 COMMISSIONER OHIGASHI: And did they base  
8 it on their estimates, on stuff like the amount of  
9 trash being taken in at this point in time as well as  
10 the trends over the last years as well as taking a  
11 look at perhaps future innovation techniques that  
12 they going to take place?

13 MS. CHAN: Yes. This exactly --

14 COMMISSIONER OHIGASHI: And was there a  
15 study like that established in the record?

16 MS. CHAN: For which specific part are you  
17 asking?

18 COMMISSIONER OHIGASHI: If an estimate for  
19 how long a capacity will be?

20 MS. CHAN: If I may back up just a little  
21 bit.

22 COMMISSIONER OHIGASHI: I'm just asking if  
23 there was a study done that provides those estimates  
24 that the City has done in the record that we have?

25 MS. CHAN: A study? I don't believe so.

1 But there are figures in there about rates of land  
2 filling at that time.

3 COMMISSIONER OHIGASHI: And those are based  
4 upon what? Has any new capacity studies been done?

5 MS. CHAN: There are constant evaluations  
6 of capacity at the landfill.

7 COMMISSIONER OHIGASHI: Okay. And when you  
8 say "constant evaluation," does that mean capacity  
9 study or does that mean that you are -- were you  
10 looking at all the numbers that were done on previous  
11 capacity?

12 MS. CHAN: Those are two different things.

13 COMMISSIONER OHIGASHI: That's why I'm  
14 asking what evaluations.

15 MS. CHAN: Right. Sure, sure. So if I may  
16 respond to that question.

17 Every county has to put together an  
18 integrated solid waste management plan, and part of  
19 that is looking at the kinds of wastes that are being  
20 generated and the method for dealing with that, and  
21 in achieving certain goals that the State has in  
22 place, for example, source reductions is at the top  
23 of that.

24 And, you know, things like recycling are  
25 viewed more favorably. So that's something that the

1 State undertakes every ten years to do a full report  
2 and need to update every five, so they do look at  
3 that.

4 COMMISSIONER OHIGASHI: When was the last  
5 report?

6 MS. CHAN: They are -- I'd have to ask the  
7 department if -- they're actually due to release the  
8 update soon, so I would imagine it's been at least  
9 five years since --

10 COMMISSIONER OHIGASHI: And would that  
11 indicate the estimated capacity and the time it would  
12 take to fill that capacity for the Waimanalo Gulch?

13 MS. CHAN: It includes capacity, yes.

14 COMMISSIONER OHIGASHI: Your answer is yes?

15 MS. CHAN: Yes. But because that report is  
16 only submitted, you know, once every five years for  
17 the update or ten years for full report, the number  
18 that I think really should -- that we should be  
19 looking at is the one that's being submitted as part  
20 of our reporting to DOH.

21 COMMISSIONER OHIGASHI: Now, you're  
22 throwing me off on my questioning.

23 MS. CHAN: Sorry.

24 COMMISSIONER OHIGASHI: I want to keep to  
25 my questioning.

1           Now, so if one is due today -- pretty soon,  
2   2019, then it would be safe to assume that the  
3   five-year update was done five years ago which would  
4   be 2015; would that be correct?

5           MS. CHAN:   Based on that math, yes.

6           COMMISSIONER OHIGASHI:   Yes.   Was that  
7   updated capacity review and study, that would give us  
8   timelines that included in the record before us  
9   today?

10          MS. CHAN:   No, it is not part of this  
11   record.

12          COMMISSIONER OHIGASHI:   And would that  
13   assist you in determining whether or not to support  
14   the timelines indicated in the Findings of Fact,  
15   Conclusions of Law?

16          MS. CHAN:   No, it would not, because based  
17   on the evidence, as I mentioned in my statement --

18          COMMISSIONER OHIGASHI:   I'm not asking if  
19   the evidence -- I'm asking would the inclusion of  
20   such evidence support the Findings of Fact,  
21   Conclusions of Law?

22          MS. CHAN:   Would the report -- I'm sorry,  
23   what is the question again?

24          COMMISSIONER OHIGASHI:   It was simple.

25          Every five years.   You answered yes.   Is

1 the supplemental report up to capacity? And  
2 estimates of how long it would take to fill it so the  
3 landfill, et cetera, et cetera, it was done in 2015.

4 I'm asking if it was part of the record.  
5 You said, no, that was not made part of the record.

6 I'm asking if it was made part of the  
7 record, would there be -- would that support a  
8 determination of what the Findings of Fact, The  
9 conclusions of Law would lead to capacity and time of  
10 closure?

11 MS. CHAN: I don't think it would change  
12 the conditions if they're in the --

13 COMMISSIONER OHIGASHI: That's not the  
14 question. The question is: Would it support or  
15 would it not support?

16 MS. CHAN: I think it would support.

17 COMMISSIONER OHIGASHI: Okay. So if  
18 following on that line, so if we remand and ask the  
19 Planning Commission to reopen its records, you have  
20 no problem with including that as part of the record,  
21 would you, that report?

22 MS. CHAN: If it were limited on that  
23 basis, I mean, just to include that report.

24 COMMISSIONER OHIGASHI: No further  
25 questions, Mr. Chair.

1           CHAIRPERSON SCHEUER: Thank you,  
2 Commissioner Ohigashi.

3           Commissioner Cabral, and then we'll  
4 probably take a break.

5           VICE CHAIR CABRAL: It came up with our  
6 public testimony earlier, but also I deal in space  
7 sometimes in real estate space and deal with people  
8 that are hoarders sometimes. So I've come to realize  
9 there's a big difference between how many square feet  
10 you fill up and how many cubic feet you can fill up.

11           So as referenced earlier, so you're talking  
12 initially 60 acres that got expanded to 200 acres.  
13 Included in that 200 acres there is a buffer zone.

14           So how many -- do you have any idea of how  
15 many cubic acres of land you've been consuming?

16           MS. CHAN: I would have to check with the  
17 Department on that. I don't know offhand.

18           VICE CHAIR CABRAL: Okay, thank you.

19           CHAIRPERSON SCHEUER: Okay, it is 10:09.  
20 We are going to take a ten-minute break, meaning we  
21 will be back here again at 10:19.

22           (Recess taken.)

23           CHAIRPERSON SCHEUER: We're continuing with  
24 the Commissioners questions of Ms. Chan and the City  
25 Department of Environmental Services.



1 Commissioner Okuda.

2 COMMISSIONER OKUDA: Thank you very much,  
3 Mr. Chair. Thank you.

4 Just backing up a bit, Ms. Chan. Even  
5 though annual reports have been submitted to the Land  
6 Use Commission, the annual reports do not provide a  
7 basis for the other parties to cross-examine what's  
8 being submitted in the annual report, correct?

9 MS. CHAN: Correct.

10 COMMISSIONER OKUDA: And even though annual  
11 reports are being submitted, there really is no  
12 process such as what's set out in contested case  
13 proceedings for parties who might disagree with  
14 certain things in a report, to basically present  
15 their contrary positions by evidence or other things  
16 which would be considered admissible under the  
17 Administrator Procedures Act, correct?

18 MS. CHAN: Correct.

19 CHAIRPERSON SCHEUER: Speak right into the  
20 microphone, Ms. Chan.

21 COMMISSIONER OKUDA: And isn't it true that  
22 when, or after this matter was remanded back to the  
23 City, KOCA -- that's, K-O-C-A -- I believe Mr.  
24 Chipchase's client, did ask for reopening of the  
25 evidence, correct?

1 MS. CHAN: Correct.

2 COMMISSIONER OKUDA: And ENV and the City  
3 opposed that reopening, correct?

4 MS. CHAN: Correct. Are you talking about  
5 just one of the times that --

6 COMMISSIONER OKUDA: Right.

7 MS. CHAN: -- the City has filed on KOCA.  
8 I believe the City has filed at least twice if I'm  
9 not mistaken.

10 COMMISSIONER OKUDA: Okay. And now we have  
11 the record that we have, true?

12 MS. CHAN: Correct.

13 COMMISSIONER OKUDA: And just so that we're  
14 clear about what we as the Land Use Commission, you  
15 know, have to do in this case, we basically are  
16 operating quasi-judiciously, for lack of a better  
17 term. Do you agree with that?

18 MS. CHAN: Yes.

19 COMMISSIONER OKUDA: And because of that,  
20 the Commission can only consider what's part of the  
21 record? And when I say "the record", it's the record  
22 that the City and ENV transmitted as part of the  
23 record of the Planning Commission, correct?

24 MS. CHAN: Almost correct. The City,  
25 through DPP and Planning Commission, not ENV.

1                   COMMISSIONER OKUDA: `Okay. I'm sorry,  
2                   you're correct about that. So in other words, we're  
3                   limited to what's in the record that's transmitted  
4                   for our review, true?

5                   MS. CHAN: Yes.

6                   COMMISSIONER OKUDA: Okay. And just so  
7                   that we're clear about what everybody has to do here,  
8                   it's the City that bears or has the burden of proof  
9                   in this proceeding whether or not the special permit  
10                  should be granted or approved by the Land Use  
11                  Commission or not approved; is that correct?

12                  MS. CHAN: That's correct.

13                  COMMISSIONER OKUDA: And because -- let me  
14                  ask this.

15                  Would you agree that the City also has the  
16                  burden of coming forth with any evidence to support  
17                  the granting of the special permit?

18                  MS. CHAN: Yes. While the contested case  
19                  proceeding is still going. There's reasons that  
20                  this -- there has been a delay in this case that were  
21                  beyond the applicants control and certainly beyond  
22                  any party's control. But while the case is being  
23                  heard, yes, that's our --

24                  COMMISSIONER OKUDA: Yeah, okay. I just  
25                  want to make it clear that the burden of proof is

1 with the City. And at least during some of these  
2 parts of these proceedings below, the burden of  
3 coming forward with the evidence rests with the City.  
4 Do you agree with that?

5 MS. CHAN: I'm sorry, could you repeat the  
6 second part?

7 COMMISSIONER OKUDA: Yeah. At least part  
8 of the underlying contested case proceeding, the  
9 burden of coming forward with the evidence rests with  
10 the City, correct?

11 MS. CHAN: Yes.

12 COMMISSIONER OKUDA: And just so that we  
13 can place this in context, and I'm not suggesting  
14 that Mr. Chipchase or members of his law firm are  
15 incompetent or not that smart. But just to make the  
16 point clear, even if Mr. Chipchase were to present  
17 the most outrageous, unbelievable, unsupported  
18 opposition to the City's position, if the City  
19 doesn't meet its burden of proof, the Land Use  
20 Commission must deny the petition, correct?

21 MS. CHAN: I believe that's correct, yes.

22 COMMISSIONER OKUDA: Okay. Now, in looking  
23 at the record that's, you know, presented to us,  
24 would you agree that the Land Use Commission must  
25 independently evaluate whether or not the record is

1 sufficient to support a finding whether or not the  
2 City has met its burden of proof?

3 MS. CHAN: I believe that that  
4 responsibility rests with the Planning Commission as  
5 sort of the trier of fact in this case, and that this  
6 body sits more I guess in the role of an appellate  
7 body.

8 COMMISSIONER OKUDA: Okay. Yeah. I  
9 understand your position. And as we evaluate this  
10 case somewhat like an appellate body, we have to be  
11 cognizant or aware of the fact that some other  
12 appellate body, namely the Hawai'i supreme court, as  
13 it's already demonstrated in this case, it's going to  
14 evaluate whether or not we, the Land Use Commission,  
15 has properly applied the standards which the Hawaii  
16 supreme court has laid out that we have to follow,  
17 correct?

18 MS. CHAN: Correct.

19 COMMISSIONER OKUDA: Now, looking at what  
20 standards that we have to follow or apply, I'd like  
21 to read a section from Hawaii supreme court case in  
22 re: Iao, I-A-O, Groundwater Management Area, High  
23 Level Source Water Use Permit Application, which is  
24 found at the 128 Hawai'i 228 at 283. The Pacific 3d  
25 citation is 287 Pacific 3d, 129 184 a 2012 Hawai'i

1 supreme court case, and I'm going to ask you whether  
2 or not what I read out here, without the intervening  
3 case citations, because that's just going to run this  
4 thing too long, whether or not what I read is an  
5 accurate statement of the law. Okay.

6 And I quote:

7 "An administrative agency's findings and  
8 conclusions must be, (1) reasonably clear to enable  
9 the parties and the reviewing court to ascertain the  
10 basis of the agency's decision.

11 (2) sufficient to enable the reviewing  
12 court to track the steps by which the agency reached  
13 its decision.

14 (3) expressly set out to assure reasoned  
15 decision making by the agency took place."

16 Do you believe, or do you disagree that  
17 what I read is an accurate statement of the law as  
18 far as what the standards are that we are to review  
19 what the Planning Commission did specifically, the  
20 Planning Commission's Findings of Fact and  
21 Conclusions of Law?

22 MS. CHAN: I would defer to this Commission  
23 on that point. I trust that what you're reading is  
24 the law.

25 COMMISSIONER OKUDA: Well, do you know of

1 any authority which indicates that what I just read  
2 out from the Iao case is not an accurate statement of  
3 the law?

4 MS. CHAN: As I sit here today, I don't  
5 believe so. I don't disagree with that.

6 COMMISSIONER OKUDA: And as part of the  
7 Land Use Commission's duty to review the record and  
8 be limited by the record, do you agree that the Land  
9 Use Commission has an affirmative obligation to  
10 determine whether or not the evidence that was used  
11 to form the Findings of Fact and Conclusions of Law,  
12 for lack of a better term, whether the evidence was  
13 stale or not stale?

14 MS. CHAN: I believe that this Commission  
15 has already asked the Planning Commission to take a  
16 look at that, and so I -- and I believe that they've  
17 looked at that and responded to that in their most  
18 recent decision.

19 COMMISSIONER OKUDA: Yeah, but that's  
20 not my question -- that's not my question, because  
21 that response might go to whether or not certain  
22 actions complied or not complied with the standard.  
23 I just want to first get either an agreement or  
24 disagreement with what is the applicable standard or  
25 what is the applicable duty that the Land Use

1 Commission must take.

2 Does the Land Use Commission have a duty to  
3 independently determine whether or not evidence that  
4 was being considered or which formed the basis of the  
5 underlying Findings of Fact and Conclusions of Law  
6 are stale or not stale?

7 MS. CHAN: I believe this Commission can  
8 consider that. I think in the context of this  
9 procedural history of this case, so it's a unique set  
10 of circumstances that has brought us to where we are  
11 today and the passage of time that's, you know,  
12 lapsed.

13 And going back to comments that I provided  
14 earlier. At some point, the proceeding does need to  
15 close, and we do need to determine when to draw that  
16 line.

17 COMMISSIONER OKUDA: I understand that.  
18 But all I'm trying to do now is to get clear what  
19 standards and what rules we have to follow before we  
20 get into the issue of, you know, how we follow these  
21 standards or whether we haven't followed these  
22 standards.

23 So this is simply questions about what  
24 standards we have to follow up, and let me preface it  
25 by saying this, please don't read anything into the



1 questions I'm asking. It doesn't indicate any  
2 determination one way or the other. I just want to  
3 be sure that we're all, you know, have a -- whether  
4 or not we have an understanding of what the standards  
5 are, and if I'm wrong about what I think the standard  
6 is, you know, I hope people can educate me because I  
7 don't claim to be, you know, the all seer of  
8 standards here, you know. That's why I'm asking the  
9 question.

10 Let me ask you this. Just so that we're  
11 clear about, you know, stale or not stale evidence.  
12 Do you believe -- and if you can just bear with me  
13 when I read this quote. This is from a concurring  
14 opinion of Justice Simeon Acoba in the Unite Here!  
15 Local 5 v. City and County of Honolulu case which is  
16 found at 123 Hawai'i Reports 150 at 183. And because  
17 it's a concurring opinion, I'd like to ask you  
18 whether or not you believe what Justice Acoba said in  
19 its concurring opinion is an accurate statement of  
20 the law? Okay.

21 And what Justice Acoba wrote was, and I  
22 quote:

23 Supportive of this view, Hawai'i  
24 Administrative Rules, HAR Section 11-200-13(c) limits  
25 an agency's ability to utilize previous material in

1 making a determination to approve or deny an action.

2 (c) agency shall not, without considerable  
3 preexamination and comparison, use past  
4 determinations and previous statements to apply to  
5 the action at hand. The action for which a  
6 determination is sought shall be thoroughly reviewed  
7 prior to the use of previous determinations and  
8 previously accepted statements. Further, when  
9 previous determinations and previous statements are  
10 considered or incorporated by reference, they shall  
11 be substantially similar to and relevant to the  
12 action then being considered" and close quote.

13 And that quote was actually a quotation  
14 that Justice Acoba placed in his concurring opinion.

15 Do you believe the statement that I read  
16 from Justice Acoba's concurring opinion that Justice  
17 Acoba accurately stated the rule of law there?

18 MS. CHAN: I apologize. Without having the  
19 benefit of actually seeing what you're reading, I  
20 believe that that's correct.

21 COMMISSIONER OKUDA: Now, following up with  
22 I believe a question that you were asked by some of  
23 the Commissioners. What is the most recent date of  
24 the evidence in the record which supported any of the  
25 findings of the Planning Commission?

1 MS. CHAN: In other words, when did the  
2 evidence close?

3 COMMISSIONER OKUDA: No.

4 MS. CHAN: No.

5 COMMISSIONER OKUDA: Let me put it -- let  
6 me ask it this way.

7 The Findings of Fact and Conclusions of  
8 Law, but primarily the findings, after each finding  
9 was made, there was a reference to a transcript or  
10 declaration or some other piece of evidence, correct?

11 MS. CHAN: Correct.

12 COMMISSIONER OKUDA: And the reason why  
13 these references were being placed after each  
14 specific finding was to show where in the record each  
15 finding would find evidentiary support, correct?

16 MS. CHAN: Correct.

17 COMMISSIONER OKUDA: And I notice because I  
18 went through these findings, and I can show you later  
19 if you want, I highlighted it on my iPad in green,  
20 there are various dates. What is the most recent  
21 date that appears on any of the findings, was it 2011  
22 or 2012?

23 MS. CHAN: 2012.

24 COMMISSIONER OKUDA: Okay. So the findings  
25 are supported by evidence which the most recent piece

1 of evidence supporting any of the findings would be  
2 in 2012, correct?

3 MS. CHAN: That's correct.

4 COMMISSIONER OKUDA: And that fact is shown  
5 on the face of the Findings of Fact and Conclusions  
6 of Law itself, correct?

7 MS. CHAN: Yes.

8 COMMISSIONER OKUDA: Is there anything in  
9 the record which indicates why the City and County of  
10 Honolulu on remand, after the Land Use Commission  
11 remanded this matter to the City, why more recent  
12 information could not have been provided?

13 MS. CHAN: Why it could not be provided?

14 COMMISSIONER OKUDA: Yes. Can you point to  
15 anything in the record which indicates or shows why  
16 more recent information could not have been provided?

17 MS. CHAN: I would respond to that by  
18 saying, yes, that that's addressed in Conclusions of  
19 Law No. 6. They address it in that fashion.

20 COMMISSIONER OKUDA: Yes, you're correct.  
21 Okay. So because -- I'll come back to that. Okay.

22 So you have -- you point to Conclusion of  
23 Law No. 6. Is there anything else in the record that  
24 you can point to besides Conclusion of Law No. 6  
25 which shows or indicates the reason why more recent

1 information or evidence could not have been provided?

2 MS. CHAN: If you're asking for an  
3 explanation for what the Planning Commission was  
4 thinking when it made that determination, no,  
5 that's -- I don't believe that that's part of the  
6 decision, and not included in that.

7 COMMISSIONER OKUDA: No, no, that -- my  
8 question was: Looking at the record as a whole, can  
9 you point to anything in the record -- and let's put  
10 Conclusion No. 6 on the side -- so can you point to  
11 anything else in the record or anywhere else in the  
12 record besides Conclusion of Law No. 6, which  
13 indicates or shows or provides evidence why no  
14 evidence more current than 2012 could not have been  
15 provided to supplement or provided to present to the  
16 Land Use Commission?

17 MS. CHAN: I think the only other place  
18 that would be addressed would be in the context of  
19 the arguments relating to the motion to reopen.

20 COMMISSIONER OKUDA: Yeah, well --

21 MS. CHAN: I mean, that would be it.

22 COMMISSIONER OKUDA: Well, generally  
23 argument of counsel is not considered evidence,  
24 correct?

25 MS. CHAN: Right.

1           COMMISSIONER OKUDA:   So my question is --  
2   let's put aside arguments of counsel because that is  
3   not evidence.   Can you point to anything else in the  
4   record which indicates -- evidence in the record  
5   which indicates why the City could not provide  
6   information with respect to any of the Findings of  
7   Fact that were submitted, information which is more  
8   current than 2012?

9           MS. CHAN:   I'm not sure if I'm understanding  
10   your question.   If I am understanding it correctly, I  
11   would respond by stating that it's the date that the  
12   record was actually closed which I think was  
13   April 23rd of 2012 was the cut off.   I mean, there is  
14   nothing else evidentiary-wise that would have been  
15   added into the record since that date.   So, no,  
16   there's nothing else in there.

17           COMMISSIONER OKUDA:   Okay.   And when you  
18   look and read at Condition No. 6, and correct my  
19   paraphrasing if I'm paraphrasing it wrong because I  
20   don't want to misstate anything in the record.  
21   Conclusion of Law No. 6 basically says that the  
22   Planning Commission decided that it really did not  
23   need any further evidence or updated evidence,  
24   correct?

25           MS. CHAN:   Yes, that's correct.

1           COMMISSIONER OKUDA: Well, was there  
2 evidence or an explanation in the record that you can  
3 point to which shows that the Planning Commission, in  
4 making that conclusion, actually followed the  
5 admonitions of the Hawai'i supreme court in the Iao  
6 Groundwater Management case by, for example, you  
7 know, setting out the steps by which the Planning  
8 Commission came to that conclusion?

9           Is there anything in the record that shows  
10 the steps that the Planning Commission came to in  
11 reaching that conclusion that, frankly speaking, we  
12 don't need to see anything else.

13           MS. CHAN: Only through arguments that were  
14 made in the motions and responses that were filed by  
15 the parties.

16           CHAIRPERSON SCHEUER: Commissioner Okuda,  
17 sorry, did you already site the Iao Groundwater case?  
18 Okay.

19           COMMISSIONER OKUDA: Yes, I did.

20           And then, you know, just to ask one final  
21 question. Can you point or show us where in the  
22 record the Planning Commission specifically addressed  
23 and provided evidence which answered Item No. 3 in  
24 the remand which is, and I quote:

25           "Clarify whether the record needs to

1 include updated information on the operation of the  
2 WGSJ, the landfill site selection process and the  
3 waste diversion effects of the City and County of  
4 Honolulu."

5 MS. CHAN: You've ask for me to point to  
6 where in the record it shows -- I'm sorry?

7 COMMISSIONER OKUDA: Where in the record  
8 shows evidence that that request by the Land Use  
9 Commission -- I think it's more than a request. I  
10 think it's a direction -- was satisfied or answered?

11 MS. CHAN: I don't know that they're -- I'm  
12 not too sure. I'd need time to look through that.

13 COMMISSIONER OKUDA: Do you disagree with  
14 the fact that given this landfill, and I've read all  
15 the underlying documents, I assure you, seems to be  
16 an issue that has impact on the Waianae Community  
17 that we as the Land Use Commission should give it the  
18 same level of scrutiny and review called for by the  
19 law as if this landfill was located in Kahala or  
20 Portlock?

21 MS. CHAN: Should this Commission review it  
22 the same regardless of where the location would be,  
23 yes.

24 COMMISSIONER OKUDA: Okay. Thank you.

25 I have no further questions, Mr. Chair.



1                   CHAIRPERSON SCHEUER: Thank you,  
2 Commissioner Okuda.

3                   Commissioner Chang.

4                   COMMISSIONER CHANG: Yes. And I hope you  
5 can clarify. My understanding is the evidentiary  
6 proceedings were closed in 2012?

7                   MS. CHAN: That's correct.

8                   COMMISSIONER CHANG: That's correct. So  
9 the Findings of Fact and Conclusions of Law were  
10 based upon the findings in 2012?

11                  MS. CHAN: It is a combination of the  
12 findings from the 2009 application proceeding and the  
13 2012. That's correct.

14                  COMMISSIONER CHANG: My recollection in  
15 2017 when we came before the Land Use Commission,  
16 when this matter came, the Land Use Commission had  
17 some very specific questions that we wanted the  
18 Planning Commission to respond to. And I'm going to  
19 ask you, I'm going to sort of do it the opposite way  
20 from Commissioner Okuda.

21                  No. 2, clarify the basis of the Planning  
22 Commission's proposed additional Condition No. 3  
23 which specifies a December 31st, 2022 date by which  
24 the Applicant is to identify an alternative site that  
25 will be used upon the WGSL reaching its capacity and

1 the implications it has on the closure date of the  
2 landfill.

3 Could you please clarify for me the basis  
4 upon which, in the record, that was made in 2012 that  
5 supports that, or that responds to that?

6 MS. CHAN: I can give ENV's position based  
7 on, you know, the -- our review of the Planning  
8 Commission's decision. It would be taking a guess as  
9 to anything more.

10 The Planning Commission has pointed back to  
11 its discussion in the 2017 hearing as the basis for  
12 that date.

13 COMMISSIONER CHANG: Okay. So you -- your  
14 statement was the Planning Commission is referring  
15 back to its discussion in 2017 to support that date,  
16 but that discussion is beyond the 2012 evidentiary  
17 hearing; is that correct?

18 MS. CHAN: I apologize, to clarify the  
19 Planning Commission states that it's based on the  
20 evidence and the discussion at that subsequent  
21 hearing.

22 COMMISSIONER CHANG: So the Planning  
23 Commission in 2017 said that their decision is based  
24 upon the evidence in 2012? Is that what you're  
25 saying?

1 MS. CHAN: In the consolidated record for  
2 both the 2009 and 2012.

3 COMMISSIONER CHANG: So, again, can you  
4 clarify for me where in the record it supports that  
5 date?

6 MS. CHAN: I am not able to clarify.

7 COMMISSIONER CHANG: Isn't that what the  
8 planning -- the Land Use Commission specifically  
9 remanded the matter back to the Planning Commission  
10 to provide the Land Use Commission the basis upon  
11 which that this date was made? Wasn't that --

12 MS. CHAN: Yes, that was one of the items,  
13 correct.

14 COMMISSIONER CHANG: Okay. So are you  
15 telling me now that you cannot clarify for me the  
16 basis of that date?

17 MS. CHAN: Not beyond what's in the  
18 decision, no.

19 COMMISSIONER CHANG: So what's in the  
20 decision that supports that?

21 MS. CHAN: Just the statement from the  
22 Planning Commission as to what they were referring --  
23 or what they were relying on in selecting that date.

24 COMMISSIONER CHANG: And I guess it would  
25 be fair to say that the Land Use Commission was aware

1 of the 2012 proceeding, but we still had questions as  
2 to that date. And that they're -- and the Planning  
3 Commission felt that notwithstanding the Land Use  
4 Commission's inquiry, that there was sufficient  
5 evidence in 2012 to support that date. That's what  
6 you're saying?

7 MS. CHAN: What I was referring to was just  
8 that when the Planning Commission took that and  
9 looked at what the LUC had remanded to it, that they  
10 had examined, you know, the record and provided that  
11 consolidated decision.

12 There were changes outside of this which I  
13 understand you're not asking about, but I think in  
14 that they've also attempted to address this Item No.  
15 2 in the list that the LUC provided.

16 COMMISSIONER CHANG: So the Planning  
17 Commission was a -- made the determination that there  
18 was -- that the 2012 -- that their decision based  
19 upon the record in 2012 was sufficient, that there  
20 was nothing new to be added?

21 MS. CHAN: Correct. Right, that they could  
22 make a decision based on the record that had already  
23 been formed and closed in 2012.

24 COMMISSIONER CHANG: Okay. The third  
25 question the Planning Commission -- the Land Use

1 Commission, clarify whether the record -- and I think  
2 this is what Commissioner Okuda was asking -- clarify  
3 whether the record needs to include updated  
4 information above the operation of the landfill and  
5 the landfill site selection.

6 And is it the Planning Commission's  
7 position that the record did not need to be updated?

8 MS. CHAN: To clarify, yes, that's ENV's  
9 understanding that the Planning Commission did not  
10 believe that it needed to.

11 COMMISSIONER CHANG: No further questions  
12 at this time.

13 CHAIRPERSON SCHEUER: Thank you,  
14 Commissioner Chang.

15 Commissioners? Commissioner Cabral.

16 VICE CHAIR CABRAL: Thank you. I assure  
17 you these questions are hard for us as well as  
18 perhaps for you. I try and read ahead of time. I'm  
19 not a lawyer. I'm probably a pretty practical  
20 person, and I really was having a hard time figuring  
21 out who was on first and what is on second when I was  
22 reading all of this stuff ahead of time. And I'm not  
23 much clearer now.

24 And so I'm wondering is -- obviously a  
25 whole lot of lawyers spent a whole lot of time. A

1 whole lot of people and a whole lot of meetings had  
2 spent a lot of time talking about this. 2022 it  
3 seems like things are supposed to be making a change.

4 Has anything come any closer? You know,  
5 that's really soon. I mean really, really soon. Are  
6 you guys preparing to do anything? I mean, what  
7 would happen if you just can't take your rubbish  
8 there any more? You know, where are you going to go?

9 Okay. I'm concerned about what the future  
10 holds because pushing more papers around for three  
11 years ain't going to solve anything.

12 Do you have any options? I mean, is  
13 somebody planning for the future, or just more  
14 lawyers to fight it.

15 MS. CHAN: Sure. Your question about what  
16 is being done in advance of the 2022 date that's in  
17 the Planning Commission's decision. That is  
18 something that ENV looks at and takes into  
19 consideration as well.

20 That condition obligates it to identify a  
21 landfill site, so that is something that they have  
22 been working on. There have been different phases of  
23 that work, most recently that there was some work  
24 done by a consultant hired by ENV to further look at  
25 sites that had been selected, and so a report was

1 issued in November of 2017, I believe, that  
2 identifies sites, that included a review of the more  
3 technical and things that ENV is looking at in terms  
4 of what it needs in a landfill and where it should be  
5 located.

6 So that's something that they've been  
7 looking at in conjunction with, as we were talking  
8 about before, the capacity of the landfill, and so  
9 the timing of when it would be needed.

10 So to further clarify that point, the  
11 amount of space in a landfill that's clearly  
12 quantifiable and fixed. That number does not change.  
13 So there -- I apologize, I found out that they -- the  
14 annual reports compute that in cubic yards not feet,  
15 but there is some figure that they're able to  
16 calculate. So that number is -- that's just what it  
17 is; we can't change that. No amendment to permit  
18 would ever change that aspect.

19 What changes the date that we reached that  
20 capacity though is, you know, efforts to further  
21 divert waste from the landfill. So if we're not  
22 filling it up as fast, then we would take longer to  
23 get there.

24 VICE CHAIR CABRAL: Okay. Maybe I'm  
25 getting some clarification. So the word to identify

1 a parcel, I was thinking that meant have it ready,  
2 but that's not what's going to happen. You guys are  
3 just going to identify one like a dart on the board.  
4 You're going to have one somewhere on the Island of  
5 Oahu, don't bring it to Hilo, thank you.

6 So in other words, there's really no major  
7 effort in having it ready by 2022. It's just like  
8 we're going to identify it, and then we're going to  
9 start the five or ten or 20-year process to be able  
10 to actually start using it?

11 MS. CHAN: So what's been included in that  
12 condition is that Waimanalo Gulch would be used to  
13 that finite capacity, and the work to identify a  
14 landfill site would be done in 2022. And what ENV  
15 would be doing is, you know, keeping track of when or  
16 how much is being put into the landfill, what that  
17 remaining space is, and start the process to be able  
18 to acquire a site and do all of the necessary work.

19 You know, an EIS, all of the planning that  
20 we need to involve in design work into constructing  
21 and building out that space for a landfill.

22 VICE CHAIR CABRAL: And if it is  
23 agriculture land, you'd probably have to come before  
24 us again?

25 MS. CHAN: That's correct.



1           VICE CHAIR CABRAL:   Okay.   My other  
2   question:   Are people in your agency talking about or  
3   realizing or considering the fact that, I don't know,  
4   maybe you on Oahu you have more options, but the fact  
5   that global recycling parameters have changed a lot,  
6   so a lot of our efforts on -- in the Big Island we  
7   can't recycle things we used to recycle and send them  
8   to China or Indonesia anymore, so is that being -- is  
9   that going to fill up your landfill faster?

10           MS. CHAN:   No.   We have additional asset  
11   here with H-Power, so -- I mean, that is an option  
12   for processing things that are combustible.   Not all  
13   recyclable materials are, so we are in a similar  
14   situation with needing to figure out how to address  
15   that.

16           VICE CHAIR CABRAL:   Okay.   Well, good luck.

17           CHAIRPERSON SCHEUER:   Commissioners?

18           Commissioner Giovanni.

19           COMMISSIONER GIOVANNI:   Thank you, Chair.

20           So I'm relatively new to this matter, so my  
21   questions are a little bit more simplistic.

22           First of all, I do want to thank you for  
23   your testimony.   It's very helpful to me.   It's clear  
24   that we have a dynamic situation in which the rates  
25   that you're filling up the landfill has changed, and

1 can continue to change. I accept that as being a  
2 reality.

3 It also speaks that a lot has changed  
4 already since 2012 when the evidence closed. But my  
5 question for you very simplistically is: Based on  
6 what you know now, and the assumptions that you're  
7 using now, when do you project that you will reach  
8 capacity?

9 MS. CHAN: So the most recent annual  
10 calculation that was done, it projected 20 years  
11 provided that cells are reallocated. We have  
12 dedicated cells for MSW and ash, and I believe a few  
13 years ago ENV started a process in working -- cement  
14 its permit to allow reallocation of what those cells  
15 are dedicated to accept, so we better match up in  
16 what we're actually --

17 COMMISSIONER GIOVANNI: 20 years from when?

18 MS. CHAN: From right now.

19 COMMISSIONER GIOVANNI: So in other words,  
20 you're saying that even if you identify an  
21 alternative site by 2022, you don't expect to have it  
22 operational until 2039 or about 2039, so the  
23 Waimanalo site will be used until then.

24 And furthermore, if you make additional  
25 dynamic changes as you're seeking, it could even

1 extend beyond that?

2 MS. CHAN: That would be a possibility,  
3 yes.

4 COMMISSIONER GIOVANNI: Thank you.

5 CHAIRPERSON SCHEUER: Commissioners?  
6 Commissioner Chang.

7 COMMISSIONER CHANG: I appreciate  
8 Commissioners Giovanni's point, and I think that was  
9 the concern -- at least that was my concern when the  
10 matter came before LUC in 2017. Because based upon  
11 what you just said -- and similar testimony was  
12 provided at that time, with the technology even  
13 though there's a finite capacity, you actually could  
14 have the Waimanalo Gulch existing for the next  
15 50 years?

16 MS. CHAN: If technology would provide for  
17 that, yes. And to clarify, with less usage, so, you  
18 know, in terms of trucks traveling in and out of the  
19 landfill and actual landfilling activity. ENV's goal  
20 would be to reduce that reliance on landfill to a  
21 point where we wouldn't need it for, you know, those  
22 every day type of uses, and we would only be using it  
23 if we had to.

24 So if we didn't have any other way to deal  
25 with waste while H-Power is undergoing maintenance

1 then, yes, it would have to be landfill, but the hope  
2 is it would get to a point where that's not even  
3 necessary.

4 COMMISSIONER CHANG: And I think similar  
5 testimony might have been provided. So what is the  
6 basis of the 2022 date that you have in the order  
7 when it's only, what is it, I guess it would be two  
8 years from now, that the relevancy of that date given  
9 the current conditions, and the fact that now that  
10 the Planning Commission has decided that they did not  
11 need to reopen the contested case hearing or take no  
12 new evidence, how valid and relevant is that date  
13 given what you're just saying?

14 MS. CHAN: As I understand it, the Planning  
15 Commission had added -- my recollection is that they  
16 added that in in 2017 and that they had based that  
17 off -- upon the amount of time it takes to identify  
18 and site a landfill, and inserted that number based  
19 on that evidence.

20 CHAIRPERSON SCHEUER: Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Chair, so a  
22 follow-up to Commissioner Chang's question.

23 But if it's possible now that this landfill  
24 might be operating for another 50 years, and possibly  
25 even more depending on technology, doesn't the case

1 Neighborhood Board No. 24 Waianae Coast v Land Use  
2 Commission which is 64 Hawai'i 265 a 1982 Hawaii  
3 supreme court case suggest that the proper procedure  
4 then is not a special permit but a boundary  
5 amendment.

6 MS. CHAN: We would disagree with that as  
7 the nature of what we're requesting is not permanent.  
8 And the 50-year figure, I mean, what we're talking  
9 about 20 years from now, as sort of the projection  
10 based on what is available to us. You know,  
11 that's --

12 COMMISSIONER OKUDA: You see this is the  
13 problem when an inadequate record is -- now we start  
14 seeing that we might have to apply these other cases.  
15 Would you agree that it's not totally out of question  
16 that were we to approve this special permit  
17 application, there's a reasonable likelihood that  
18 somebody, maybe Mr. Chipchase, would appeal this to  
19 the Hawaii supreme court and hope there's at least a  
20 possibility the Hawaii supreme court relying on the  
21 Waianae Neighborhood Board Case which I just cited,  
22 may say, yeah, this thing is not a matter for special  
23 permit. Because of the impacts and the potential  
24 length of time, it should have been a boundary  
25 amendment petition.

1           In other words, that ultimate result,  
2       that's not far-fetched, you would agree, right? You  
3       might disagree that's not your position, but it's a  
4       possible outcome of this case.

5           MS. CHAN: I mean, sure, partly finding a  
6       basis for appeal and something to appeal it, sure.  
7       We would disagree with the underlying argument there,  
8       yes.

9           COMMISSIONER OKUDA: But it's not totally  
10      unreasonable to believe that the Hawaii supreme court  
11      citing the Waianae Neighborhood Board case which I  
12      cited here, the supreme court might reverse the  
13      granting of a special permit based on the record and  
14      based now on, you know, these representations about  
15      the potential life span of the landfill, correct?

16          MS. CHAN: I would disagree, because based  
17      on the evidence, it supports the condition as its --  
18      as the Planning Commission has drafted it.

19          COMMISSIONER OKUDA: Okay.

20          MS. CHAN: Decided the case.

21          COMMISSIONER OKUDA: Okay. Thank you.

22          CHAIRPERSON SCHEUER: Commissioners?

23          I have a number of questions as well.

24          Well, first with your forbearance, I'm just  
25      going to start with a small statement re: -- I'm

1     sadly lost.  Aaron Mahi resigned from the Commission,  
2     and so we're lacking our cultural person on the  
3     Commission.

4             But I just want to flag that one of your  
5     examples -- to start off with, I want to flag one of  
6     your examples was -- of why we need the landfill for  
7     whale carcasses, what do we do when we have  
8     carcasses?

9             THE COURT REPORTER:  Could you slow down a  
10    little bit, please?

11            CHAIRPERSON SCHEUER:  One of your examples  
12    that you flagged of why we need a landfill is to  
13    dispose of whale carcasses.

14            And I just have to note for the record that  
15    that is a very contentious issue among many native  
16    Hawaiian practitioners who actually strenuously  
17    object to the landfilling of whale carcasses.

18            So from a certain Native Hawaiian cultural  
19    perspective having -- needing a landfill to do  
20    something that is wrong in the first place is not a  
21    good excuse for having a landfill.

22            MS. CHAN:  If I may apologize, that was a  
23    poor choice of an example of large animals that they  
24    deal with at the landfill.

25            CHAIRPERSON SCHEUER:  Okay.  I just wanted

1 to make sure that that was brought up in the room  
2 that for at least some practitioners, it's a very  
3 objectionable practice.

4 MS. CHAN: Understood.

5 CHAIRPERSON SCHEUER: I have a whole series  
6 of questions, some of which have been touched on by  
7 my other Commissioners. I think I want to start off  
8 with where Commissioner Okuda was.

9 I understand the record shows that at one  
10 point the Department of Environmental Services did  
11 seek to do a district boundary amendment to move the  
12 land out of the Agricultural District but then  
13 withdrew that; is that correct?

14 MS. CHAN: That's my understanding,  
15 correct.

16 CHAIRPERSON SCHEUER: Okay. Is that in the  
17 record before us?

18 MS. CHAN: Yes, it was discussed in I  
19 believe the 2009 proceeding.

20 CHAIRPERSON SCHEUER: Is it in the record  
21 why Environmental Services chose to not pursue a  
22 district boundary amendment any more, why it withdrew  
23 its petition?

24 MS. CHAN: I believe it was addressed in  
25 the 2009 proceeding.



1           CHAIRPERSON SCHEUER: Can you recount for  
2 us why that was done?

3           MS. CHAN: I believe that they looked at  
4 what would be the appropriate options given the use  
5 of the land and determined that a Special Use Permit  
6 was the more appropriate way to proceed given the  
7 temporary nature of what they were requesting.

8           CHAIRPERSON SCHEUER: So, okay, related to  
9 that. I might go back to that for a moment.

10           But when you say it's a temporary use  
11 are -- when Environmental Services is pursuing it as  
12 a temporary use. You're not suggesting it's  
13 temporary in the sense that like a building will be  
14 put up, have a 50-year life plan and then be removed,  
15 so the landfill and all the waste therein will remain  
16 after the Special Use Permit expires, correct?

17           MS. CHAN: Correct.

18           CHAIRPERSON SCHEUER: So in what sense is  
19 it -- you mean an active operation is temporary?

20           MS. CHAN: It's the land filling activity,  
21 yes. That's why even going back to 1980s, and that  
22 was the types of permits that they sought for the  
23 landfill.

24           CHAIRPERSON SCHEUER: So in the court case  
25 that Commissioner Okuda referred to that discussed

1 the issue of uses being temporary, do you believe  
2 that applies to only the active portion or the  
3 permanent changes to the land?

4 MS. CHAN: I believe it applies to the  
5 activity that ENV is engaging in to the landfilling.

6 CHAIRPERSON SCHEUER: So even though the  
7 land is now permanently changed and probably  
8 permanently unsuited to agriculture, regardless of  
9 how suited to agriculture it might have been prior,  
10 you believe that despite its permanent alteration the  
11 Special Use Permit is just for the activity, not the  
12 changes to the property itself?

13 MS. CHAN: Right. And, yes. And in part  
14 because this particular site, as you pointed out or  
15 were alluding to, may not have been suited for  
16 agriculture purpose given the type of soil and the  
17 topography there. You know, I think those were all  
18 considerations in terms of siting a landfill there  
19 even originally.

20 CHAIRPERSON SCHEUER: But those are also  
21 criteria for moving land out of agriculture via  
22 district boundary amendment, correct?

23 MS. CHAN: Yes.

24 CHAIRPERSON SCHEUER: Are you familiar with  
25 HAR 15-15-95(c) that gives us the criteria we are

1 supposed to review in whether to approve or deny a  
2 Special Use Permit?

3 MS. CHAN: Yes.

4 CHAIRPERSON SCHEUER: I mentioned to one of  
5 the testifiers earlier part two, that the proposed  
6 use would not adversely affect surrounding property.  
7 I think partly due to the length of time you've had  
8 on this docket, it's hard to -- well, I'm struggling  
9 with how we properly apply this provision of the  
10 administrative rules, because I think it's certainly  
11 unquestionable based on the record that has been  
12 transmitted to us by the Planning Commission that  
13 over the course of its life the Waimanalo Gulch  
14 Sanitary Landfill has adversely effected surrounding  
15 property.

16 Notably the 2011 heavy rainfall, medical  
17 waste event, correct?

18 MS. CHAN: You're saying that -- yes. Does  
19 that --

20 CHAIRPERSON SCHEUER: Has the landfill  
21 adversely affected surrounding property?

22 MS. CHAN: We would --

23 CHAIRPERSON SCHEUER: Or are you suggesting  
24 that landfill has not ever adversely affected  
25 surrounding property based on the record?

1 MS. CHAN: Based on the record and the long  
2 history of the landfill, we recognize that the  
3 flooding event and the spill that occurred in 2010,  
4 you know, occurred due to the unique circumstances  
5 and the amount of rain that the landfill sustained at  
6 that point in time. We wouldn't disagree with that.

7 But, you know, as far as other impacts on  
8 the area, you know, those are things that the  
9 department strives to ensure does not occur, so, you  
10 know, dust control measures are in place, litter  
11 control. Those are things that are part of the  
12 operations there so that it minimizes the impact on  
13 both the community as well as on the environment.

14 CHAIRPERSON SCHEUER: I agree that you are  
15 seeking to having procedures in place, and there's  
16 evidence on the record that you have procedures in  
17 place but seek to minimize the impact. But that's  
18 not criteria two, is it? What does criteria two ask  
19 us to consider?

20 MS. CHAN: Right. Whether or not the  
21 proposed use would adversely affect the surrounding  
22 property.

23 CHAIRPERSON SCHEUER: Correct. So is there  
24 evidence, do you believe, in the record that  
25 essentially warrants by the City that there will be

1 going forward no adverse affect on surrounding  
2 property from the activities as they are ongoing, and  
3 the continued alteration of the landscape post  
4 landfill closing?

5 MS. CHAN: So to get the context for what  
6 occurred in 2010, we were finishing up construction  
7 on the diversion channel. It was not fully  
8 operational at that point in time, but it -- those  
9 are -- we built those things out to ensure that it's  
10 meeting its design capacity to ensure that things of  
11 that nature do not occur.

12 That was catastrophic flooding at the  
13 landfill. They sustained an unusually large amount  
14 of rain in a very short period of time. Those are  
15 not regular occurrences at the landfill. It's  
16 typically dry in that area. And so they do plan for  
17 those events, but what occurred then was a very  
18 unique situation, just to provide the context of what  
19 had occurred then.

20 CHAIRPERSON SCHEUER: Okay. And we're  
21 trying to stick to what's on the record in front of  
22 us, and I'm not asking for necessary explanation of.

23 MS. CHAN: But that is part of the record  
24 in the proceeding in 2012.

25 CHAIRPERSON SCHEUER: So if you could

1 reference the record then in your responses.

2 MS. CHAN: Sure.

3 CHAIRPERSON SCHEUER: Because I am  
4 struggling with on the one-hand we have a procedure,  
5 a legal procedure for issuing special use permits,  
6 but it has a very high standard to it. And  
7 alternately we have a procedure, this Commission, to  
8 issuing district boundary amendment where we get to  
9 say things like, you know what, we're permanently  
10 adversely taking away agricultural land, prime  
11 agricultural land. It will go away forever, but  
12 we're doing it for a reason because we need housing,  
13 we need more land for housing, we will permanently  
14 adversely negatively do this.

15 So we have that procedure to say, listen,  
16 things will be negative. They'll be permanent, but  
17 we're -- with making this choice as a society, as a  
18 state through this Commission to do that. Then we  
19 have these other kinds of procedures, some in  
20 Agricultural District, some in the Conservation  
21 District where we say, you know, we can allow certain  
22 things to happen under certain very, very narrow  
23 circumstances.

24 In the Conservation District, you may not  
25 have any significant adverse impact to get a CDUP,

1 and here you may not adversely affect surrounding  
2 property.

3 So my two parts of this question is, since  
4 we're doing this consolidated proceeding revisiting  
5 something that started in 2009, how is it possible  
6 for us thinking that in essence we are issuing this  
7 permit as effective from before the flooding event to  
8 say, yes, it's not going to have any adverse impact  
9 even though we actually know for a fact that it had a  
10 significant impact on the surrounding property? How  
11 do we address that as a Commission based on the  
12 record?

13 MS. CHAN: How does the Commission address  
14 that?

15 CHAIRPERSON SCHEUER: Yes.

16 MS. CHAN: I believe that you can look to  
17 the record from both of the proceedings in order to  
18 reach those determinations.

19 CHAIRPERSON SCHEUER: We can look to the  
20 record to determine that the event that negatively  
21 adversely affected surrounding property somehow does  
22 not pertain to meeting the criteria for issuing of  
23 the Special Use Permit?

24 MS. CHAN: I see a distinction going back  
25 to the adverse effect. There is a distinction

1 between the ongoing landfilling activities and the  
2 event that you're referring to. And certainly that  
3 is not in ENV's interest to ever have something like  
4 that happen again, and so they continue to address  
5 all the things necessary to ensure that there are no  
6 adverse impacts.

7 CHAIRPERSON SCHEUER: Okay. Moving onto a  
8 separate issue relating to the fact that the  
9 extremely heavy rainfall event is something that  
10 falls within some kind of projection of like a one in  
11 a hundred year or one in thousand year event, but we  
12 don't know that it's going to happen at any given  
13 year.

14 Part of the record in this case addresses  
15 what we do with significant debris from natural  
16 disaster. And one of the arguments, if I understood  
17 correctly, is that ENV argues for going with this  
18 decision from the Planning Commission is that we need  
19 Waimanalo Gulch available for future potential  
20 natural disasters for the debris; is that correct?

21 Ms. CHAN: That would be one of the uses.

22 CHAIRPERSON SCHEUER: Are there in the  
23 record any estimates, even range of estimates from  
24 the volume of debris that might be produced by a  
25 range of natural disasters that would say, for



1 instance, a hurricane hitting the south shore of Oahu  
2 from the --

3 MS. CHAN: I don't believe that that's part  
4 of the record. Those things are very difficult to  
5 determine based upon, you know, exactly where it's  
6 going to hit.

7 CHAIRPERSON SCHEUER: But there is no --  
8 nothing in the record with an estimation of the  
9 volume of debris?

10 MS. CHAN: Specific to disaster debris, I  
11 don't believe so.

12 CHAIRPERSON SCHEUER: So is there anything  
13 in the record then that shows that the available  
14 space in Waimanalo Gulch would be sufficient to  
15 handle that debris? Or alternatively that it could  
16 handle that debris but would potentially shorten the  
17 available life for regular municipal use of the  
18 landfill by a certain amount? Is there anything in  
19 the record to that?

20 MS. CHAN: No. That would be very  
21 difficult to determine in --

22 CHAIRPERSON SCHEUER: Even within broad  
23 ranges, is there anything in the record, because I'm  
24 trying to understand the assertion that we need it  
25 for this natural disaster but a lack of any

1 estimation that it is sufficient to do so?

2 MS. CHANG: No. It comes up in the concept  
3 of, you know, the amount of waste that's generated as  
4 well as what can be processed, whether or not H-Power  
5 is operating and whether we can take care of those  
6 needs.

7 CHAIRPERSON SCHEUER: I appreciate there is  
8 a wide range of factors that will effect the amount  
9 of debris generated from a natural disaster. But my  
10 question is: Is there anything in the record that  
11 relates -- that has any estimate of that and relate  
12 it to the claim that the gulch is necessary and  
13 sufficient to address that need?

14 MS. CHAN: No. Because the record in that  
15 proceeding was focused on addressing the issue at  
16 that -- in that proceeding which was whether or not  
17 that condition at close -- would have closed the  
18 landfill in 2012 should be removed or not, so didn't  
19 get into that detail, no.

20 CHAIRPERSON SCHEUER: Okay. And with the  
21 forbearance of my fellow Commissioners, I want to  
22 also ask you about some of the language in the Hawaii  
23 supreme court case of Environmental Services versus  
24 Land Use Commission.

25 If I understand the briefing in the record

1 correctly, it is ENV and the City's take that the  
2 only Condition 14 was struck down by the Hawaii  
3 supreme court, but that the LUC's decision continued  
4 to be effective, the issuance of the permit?

5 MS. CHAN: Correct.

6 CHAIRPERSON SCHEUER: Okay. Can you help  
7 me understand your perspective in the face of the  
8 language in that case that says based on all of the  
9 evidence in the record, it would appear that  
10 Condition 14 was a material condition to the LUC's  
11 approval, having held that Condition 14 cannot stand  
12 because it is inconsistent with the evidence shown in  
13 the record, and is not supported by substantial  
14 evidence. The LUC's approval of SUP-2 also cannot  
15 stand because Condition 14 was a material condition  
16 to LUC's approval.

17 So plainly is the stance of ENV in direct  
18 contradiction to what the supreme court directed in  
19 the paragraph?

20 MS. CHAN: No, I believe it follows the  
21 supreme court's acknowledgement of the importance of  
22 the landfill.

23 CHAIRPERSON SCHEUER: Did it go further,  
24 because I don't understand that?

25 MS. CHAN: No, that it wouldn't have

1 intended to essentially close the landfill when it  
2 acknowledges that it's a much needed facility for the  
3 community.

4 CHAIRPERSON SCHEUER: That the issue of the  
5 need for the landfill, which I think everybody on  
6 Oahu would agree that we need a landfill at least at  
7 this time. That's not what the supreme court said in  
8 that paragraph, though. They were not addressing  
9 that, correct? They were addressing whether or not  
10 that permit was still -- was vacated or not.

11 MS. CHAN: I understand what you're saying,  
12 yes.

13 CHAIRPERSON SCHEUER: I don't have anything  
14 else at this time.

15 Commissioners?

16 Commissioner Giovanni.

17 COMMISSIONER GIOVANNI: I'd like to follow  
18 up on your statement that for normal operations, you  
19 do not currently have any understanding that you're  
20 adversely affecting the surrounding properties.

21 MS. CHAN: That's correct. That in the  
22 day-to-day operations, the landfill operates to  
23 ensure that it does not impact the community. And  
24 that's not to say that things don't occur and they  
25 correct them, but --

1 COMMISSIONER GIOVANNI: Yeah.

2 MS. CHAN: Right, it's to have that minimal  
3 impact on people and on the environment.

4 COMMISSIONER GIOVANNI: Well, I'd just  
5 like, just to get an update on one thing that I  
6 understood previously was a problem and whether it  
7 still is, and that is that the landfill attracted an  
8 unbelievable number of pigeons that were housed  
9 there. As a consequence there was a significant  
10 problem with pigeon guano on the surrounding  
11 properties.

12 Has that been taken care of?

13 MS. CHAN: I have not heard of pigeons at  
14 the landfill specifically, but given that the types  
15 of waste that would attract things like that are  
16 primarily processed at H-Power. I think over time  
17 that condition has changed. Really it's very few  
18 waste streams that are currently landfilled, the bulk  
19 of it being ash to the end result of the processing  
20 at H-Power. Everything else that can be burned, ENV  
21 takes to H-Power. So it would reduce, you know,  
22 attractive -- attracting those kinds of things.

23 CHAIRPERSON SCHEUER: Okay. It's 11:21.  
24 We've been going just over an hour. We will take a  
25 ten-minute break.

1 (Recess taken.)

2 CHAIRPERSON SCHEUER: We're back on the  
3 record. Commissioners, are there any further  
4 questions for Ms. Chan? We will have a chance at the  
5 end to direct any questions to her.

6 If you have not had enough yet, don't  
7 worry. There is more to come. Don't lose hope.

8 MS. CHAN: Happy to answer any additional  
9 questions you may have.

10 CHAIRPERSON SCHEUER: If there's nothing  
11 further, then we were going to move onto KOCA and  
12 Maile Shimabukuro, but I understand, Mr. Chipchase,  
13 you have a suggested change in the order?

14 MR. CHIPCHASE: I do. I apologize for not  
15 thinking of it earlier, but I would suggest that we  
16 move to Schnitzer Steel, because they're also  
17 proponent of the Application -- Applicant, and so we  
18 have the proponent side goes, and then the opposing  
19 side goes. I spoke to Mr. Sandison. He has no  
20 objection to changing that order.

21 CHAIRPERSON SCHEUER: Okay. Do any of the  
22 other Parties have an objection to changing the  
23 order?

24 MS. CHAN: No.

25 MS. WONG: No.

1           MR. YEE:   No.

2           MR. SANDISON:   I concur with Mr. Chipchase,  
3   so that we're happy to proceed at this time.

4           CHAIRPERSON SCHEUER:   Okay.   Well, why  
5   don't you go ahead.   Thank you very much.

6           CHAIRPERSON SCHEUER:   We represent  
7   Schnitzer Steel, Hawai'i, which is an Intervenor, and  
8   I'm a proponent of the permit initiative.

9           I'm sure you've seen this by reviewing the  
10   record.   It's the single largest private user of the  
11   Waimanalo Gulch landfill.   Schnitzer is the largest  
12   single private user of the landfill.   The record  
13   shows that it places approximately 20,000 tons of  
14   automobile shred and residue in the landfill on an  
15   annual basis.

16           Those are in essence the plastic parts of  
17   vehicles that are ground up in Schnitzer's automobile  
18   shredder.   The record would also show that the  
19   Waimanalo Gulch landfill is the only permitted  
20   disposal site for that waste stream on Oahu.

21           And I will represent that if the record  
22   were opened up again, it would continue to show that.

23           Therefore, it is in the interest of  
24   Schnitzer Steel that the landfill continue to exist.

25           So we support the Special Use Permit, and

1 we believe that it is appropriate to proceed with  
2 issuance of that permit as conditioned by the  
3 Planning Commission, and as further conditioned by  
4 the letter that was distributed this morning with an  
5 agreement between the Office of State Planning and  
6 the City and County regarding the modifications to  
7 those conditions. So that is our position.

8 I'd like to briefly respond to some of the  
9 questions that were raised in connection with Ms.  
10 Chan.

11 First, I'd like to ask for an opportunity  
12 to brief the standard of review that is applicable in  
13 this circumstance where there's a continuing  
14 operation. The evidence that is the subject of the  
15 permit was closed a long time ago. And that this  
16 body now is considering that evidence, I think it  
17 would be appropriate to allow the parties to brief  
18 the standard of review and the cases.

19 I know they were cited several -- there are  
20 probably some others, and this is an important topic.  
21 So I ask to have an opportunity to brief that  
22 question.

23 The second thing I would like to briefly  
24 touch on is the permanence of the use of the land  
25 over a landfill. In other words, simply point out it



1 is my own personal knowledge that many former  
2 landfills are farmed over or have been farmed over in  
3 plantation context. And so that the -- while the use  
4 of the landfill and the material that is deposited in  
5 a landfill may continue to exist in perpetuity, the  
6 use certainly can revert back to agricultural use. I  
7 think there's many examples of that. With that, I  
8 would be happy to entertain questions.

9 CHAIRPERSON SCHEUER: Commissioners?

10 Commissioner Chang.

11 COMMISSIONER CHANG: Thank you.

12 Good morning. I would like to ask you, and  
13 maybe this is a follow-up to the standard of review,  
14 but are you of the opinion that the Land Use  
15 Commission is limited to the record before the  
16 Planning Commission or that the Land Use Commission  
17 can take new evidence?

18 MR. SANDISON: My understanding, and I  
19 would like the opportunity to research this further,  
20 but my understanding is that the Land Use Commission  
21 is limited to the evidence that was adduced before  
22 the Planning Commission that is supplemented by  
23 public testimony, but that the Land Use Commission  
24 cannot itself take new evidence or offer  
25 cross-examination and take into consideration

1 exhibits and so forth.

2 So that if new facts were to be -- are  
3 considered by the Land Use Commission, that it would  
4 have to either come in through public testimony or it  
5 would come in through the existing record, and, of  
6 course, you could choose to remand it to demand that  
7 the Planning Commission reopen the testimony. It  
8 chose not to last time.

9 COMMISSIONER CHANG: What is your  
10 understanding based on? Is there a rule, is there a  
11 statute or case law?

12 MR. SANDISON: My understanding, it's my  
13 general understanding of the law, and I'm not going  
14 to cite specifics, but I'm happy to do so and will do  
15 so.

16 COMMISSIONER CHANG: Okay. Thank you.

17 CHAIRPERSON SCHEUER: Commissioners,  
18 anything more for Mr. Sandison at this time? No,  
19 okay.

20 Mr. Chipchase, are you prepared?

21 MR. CHIPCHASE: Yes, Chair. Actually, no,  
22 Chair, we have to set up a screen.

23 CHAIRPERSON SCHEUER: Okay.

24 MR. CHIPCHASE: We'll do that right now.

25 CHAIRPERSON SCHEUER: Go ahead, but I dare

1 not, with the behavior of all of you and my fellow  
2 Commissioners, call recess, you'll run away.

3 And sorry, Mr. Chipchase, if I can just  
4 clarify from you before you begin, keeping in mind  
5 that this is not a proceeding in which we accept new  
6 evidence, I'm trusting that the presentation you wish  
7 to provide is based -- is argument.

8 MR. CHIPCHASE: It is argument and  
9 citations to the existing record, things that are  
10 indisputably part of the record with exhibit  
11 references and appropriate transcript references as  
12 needed.

13 CHAIRPERSON SCHEUER: Thank you very much.  
14 Please proceed.

15 MR. CHIPCHASE: Thank you, Chair. I  
16 believe now I can say, yes, we are ready.

17 And where I wanted to start was a question  
18 came up -- Commissioner Cabral, I believe, asked  
19 having trouble understanding who's on first. And so  
20 I wanted to start there and sort of explain who we  
21 are and what our position is, and then get into some  
22 of the details.

23 I represent the Ko Olina Community  
24 Association and Senator Shimabukura. Many members of  
25 the association and Senator Shimabukura testified at

1 the Planning Commission proceeding back in 2012. The  
2 community has been heavily involved in the landfill  
3 proceedings for a number of years.

4 I personally represented the association  
5 and the senator for eight years. Their involvement  
6 in one form or another substantially predates that.  
7 Ms. Rezentes testified at the Planning Commission  
8 proceeding. As she explained to you, she's been  
9 involved for many, many years more than that.

10 Our position today is that the landfill  
11 should have closed a long time ago. It should have  
12 closed a long time ago, because that is the nature of  
13 a special use. It doesn't keep get -- keep being  
14 extended in this piecemeal fashion for years and  
15 years and years until they finally say, okay, we have  
16 extended it for all of these years, now we just want  
17 it to fill capacity.

18 That should have been the procedure at the  
19 beginning of the process. That should have been the  
20 request through a DBA at the beginning, not 30 years  
21 into it, to say, okay, well, now there are only maybe  
22 20 years left. We don't know. It always should have  
23 closed a long time ago, or there should have been a  
24 different procedure.

25 We recognize, as the Chair alluded, that

1 you can't close it today. The City can't simply shut  
2 the doors today because there is no other operational  
3 landfill. That is the City's fault. That is the  
4 City decade-long inaction that has led to that  
5 situation that has put us in the position where we  
6 can't simply say, close it tomorrow.

7           We bear, the community bears the  
8 consequence of the City's inaction, the City's  
9 refusal to identify a new landfill even when ordered.  
10 The City's refusal to close the landfill even when  
11 ordered, the City's refusal to develop a new landfill  
12 even when it just began a couple of times these  
13 anemic site selection efforts. We all bear that  
14 consequence.

15           We recognize the order cannot be closed  
16 today. And so what we have asked, what we have asked  
17 for eight years, is to structure a reasonable and  
18 appropriate closure deadline, so that it actually  
19 does end at a defined date, not some indeterminate  
20 point in the future that no one today can say.  
21 Something that takes into account how long it has  
22 been there. Something that takes into account that  
23 it is indeed a special use and not a boundary  
24 amendment. That is our position.

25           And from there, I wanted to talk a little

1 bit about, to me, what are the important things to  
2 understand in this proceeding. One is the history.  
3 The second is how we got to where we are today. And  
4 the third is, the Chair's alluded to a couple of  
5 times, what are the criteria? What is the framework  
6 for a decision at this point?

7           The history Ms. Rezentes talked some about,  
8 and there is an extensive record on that history, it  
9 does involve exactly what I said at the beginning,  
10 this piecemeal development of the landfill, a limited  
11 number of acres for a limited number of time, coming  
12 in for a slightly bigger expansion for again a  
13 limited number of time.

14           And then promises to the community that it  
15 will close, that this use will end. Don't oppose us  
16 this time because we will close it, we won't be back  
17 here for further expansion. And we'll look at some  
18 of the those quotations from the City as we go along  
19 through our discussion today.

20           That history, that process for how we got  
21 here, does involve this Commission's decision in  
22 2009. And in 2009, the Commission with a full  
23 support of the Office of Planning, recognized a  
24 closure condition is necessary for a Special Use  
25 Permit and is consistent with the representations

1 that the City made for years to the community.

2 And so ordered it to be closed in 2012,  
3 that's the condition. The last time this body made a  
4 decision it was to order the landfill to be closed.  
5 The City appealed that decision, and the Chair has  
6 talked about that opinion. The supreme court did  
7 exactly what was quoted, recognized That Condition 14  
8 may not have been supported by the record, at least  
9 not in any articulated way, the closure condition,  
10 where three years to close came from, wasn't  
11 supported by the record that the court could  
12 identify.

13 The court did not reverse as to that  
14 condition. It did not say so it's struck, you don't  
15 have that condition.

16 The court further recognized that that  
17 condition was material to the approval. That without  
18 the condition the body would not have approved the  
19 permit which is consistent with the nature of special  
20 use, consistent with representations, and consistent  
21 with the harm and the impact on the community that  
22 there would be a closure of an end date.

23 So the court vacated. That's exactly the  
24 language the court used, vacated not the condition  
25 but the circuit court order affirming the grant of

1 the permit. The circuit court order affirming SUP-2  
2 was vacant. A vacatur means the decision goes away.  
3 The decision approving SUP-2 went away.

4 That is the current status. There is no  
5 permit, there is no approval, there are no existing  
6 conditions. There's nothing. The City is simply  
7 continuing to operate.

8 That decision came down in 2012. In 2012  
9 we were in a new proceeding before the Planning  
10 Commission on the City's application to amend the  
11 permit to delete Condition 14. We had closed the  
12 evidence in April 2012. We had submitted proposed  
13 Findings of Fact, Conclusions of Law, Decision and  
14 Order, and we had argued before the Planning  
15 Commission.

16 When that decision came down, it was on the  
17 verge of the Planning Commission making its  
18 recommendation on the application to modify.

19 That changed everything. The Planning  
20 Commission stopped acting. It sent the matter up  
21 here. It was sent back down. The Planning  
22 Commission adopted the decision. Sent it up here.  
23 This Commission sent it back down. The Planning  
24 Commission adopted essentially the same decision and  
25 sent it back up here again, and that's where we are



1 today.

2           So I've been at it for eight years, but  
3 almost nothing has happened in seven. There's been  
4 almost no progress on this proceeding, on the permit,  
5 on reaching a final decision. And in all that time,  
6 two things have happened: The landfill has continued  
7 to operate, and the City has continued not to site a  
8 new landfill.

9           And so when we come here today and say  
10 finally, we need a decision closing it. It is after  
11 eight years trying to get a decision to close it. If  
12 we had gotten a decision in 2012, it would have been  
13 closed by now, we believe, the appropriate seven-year  
14 closure condition.

15           At this point, at some point enough has to  
16 be enough, not only to the landfill but to this  
17 process that hasn't moved anywhere in seven years.

18           In that time as we put on the screen all of  
19 the action happened in 2012. Nothing has happened  
20 since. And we as KOCA and the Senator have moved to  
21 reopen evidence. Not on a limited basis but to say  
22 these things matter, right. What the continued  
23 impact of the landfill has been since 2012, the times  
24 that we have moved to open it matter.

25           We have said that the outcome of those

1 proceedings that the EPA started, and we have records  
2 of that, regarding those floods in 2010 and 2011  
3 matter. Without exception the City has opposed our  
4 motions. Without exception the Planning Commission  
5 has refused to reopen evidence.

6 If the Applicant does not want a complete  
7 record, if the Applicant does not want updated  
8 information on capacity, on site diversion, on  
9 impact, it is the Applicant's decision. The existing  
10 record does not support what the applicant requests.  
11 And if that is the applicant's position, this  
12 Commission's duty is actually to deny the permit  
13 because the application that they want is not  
14 supported by the existing record.

15 Why has the community spent all of this  
16 time in all of these efforts on this? Because it  
17 matters to them. Because they are affected by it.  
18 Because they live this now for 30 years. That's why  
19 they testified at the hearings. That's why they  
20 testified about the environmental justice of  
21 burdening this community with this use for this long,  
22 that's why they talked about the former community  
23 benefit package. And by the time we were having  
24 these hearings in 2012 it had already gone through,  
25 had already stopped, all burden, no benefit.

1           That's why they've been involved; that's  
2           why they come out and continue to testify today.

3           There's been some discussion of the  
4           procedural problems the last time we were here. And  
5           the last time we were here, there were issues with  
6           the record. Our motion to remand or our motion to  
7           reopen had been denied, and our issues with the  
8           procedure that the Commission had followed in  
9           adopting its decision. This Commission sent it back  
10          for those two reasons.

11          And there was also the issue that the Chair  
12          at the time had said on the record and to a reporter  
13          that the Commission needed to get the City to permit  
14          as soon as possible, and so there are questions about  
15          prejudgment. And this body did not decide those  
16          questions. They're certainly presented to this body  
17          and they're certainly part of the record that we  
18          have.

19          The case went back down. On these, among  
20          other instructions, clarified the basis for this  
21          December 22 date to site a new landfill. Where does  
22          that come from? What does that mean in the context  
23          of this permit?

24          And then clarify for the record needs to be  
25          updated to include this information of the operation,

1 the landfill site selection and the waste diversion  
2 efforts.

3 In response to that, and earlier we did ask  
4 to reopen, both times those motions were denied. The  
5 record did not change, and there's nothing new on  
6 operations, on diversion, on capacity. The City  
7 opposed it. The City opposed reopening. The City  
8 opposed any other answers to those questions. It  
9 stuck with the record. It's just stuck with it.

10 When it went back down, the City continued  
11 to follow -- the Planning Commission continued to  
12 follow the poor procedure. The record, an old record  
13 like this requires that as new Commissioners come on  
14 they have to read it and all the testimony and attest  
15 to that that they have. An attestation before they  
16 adopt a proposed decision.

17 Here the decision was functionally  
18 identical to the one that they had previously  
19 circulated. It was just recirculated. That adoption  
20 occurred before even one member of the Commission was  
21 actually confirmed to the Commission. Planning  
22 Commission continued to follow these improper  
23 procedures even after remand.

24 And you've heard me say if you've been to  
25 any of the proceeding for awhile, and I've said it to

1       them a thousand times, just do it the right way,  
2       reach a decision but do it on a complete record, do  
3       it the right way.

4               Time after time the Commission has failed  
5       to do that. And what that does, the effect of that,  
6       is to reduce public confidence in the decision-making  
7       process and the decision that is rendered, and that  
8       is particularly powerful when the Applicant is both  
9       the City -- the City is both the Applicant and the  
10      body at least at the Planning Commission level making  
11      the decision.

12             Public confidence in that process is  
13      essential. But there's no way to have public  
14      confidence in the procedures that have been followed.  
15      The refusal to reopen, even when direct instructions  
16      from the Land Use Commission would indicate that  
17      reopening is appropriate. In the face of motions to  
18      reopen, in the face of now a seven year -- seven and  
19      a half year lapse between the close of evidence and  
20      our proceedings today. The repeated failure to  
21      follow the basis attestation requirements, and then  
22      finally in this proceeding, absolutely no explanation  
23      or understanding of the reasons for the decision  
24      reached.

25             The decision came up before the Commission

1 in February of this year, and came up after the  
2 parties had briefed their objections to proposed  
3 Findings of Fact, Conclusions of Law, Decision and  
4 Order. We went in for a hearing. At that hearing  
5 only five Commissioners were present. You need all  
6 five votes to make any kind of decision from the  
7 Commission.

8 Four of those Commissioners were clearly  
9 prepared to adopt a closure condition. All five of  
10 those Commissioners were prepared to adopt the  
11 additional protective conditions that KOCA had  
12 proposed that would ameliorate, not eliminate, but  
13 ameliorate the adverse impacts of the landfill while  
14 it remains open for this now final period.

15 One Commissioner, Commissioner Hayashida,  
16 said that he would have to refresh his memory of the  
17 evidence. He would have to look at it again before  
18 he could be comfortable that the closure timeline  
19 that we had set out was supported by the record. So  
20 that's what we've put up on the screen.

21 Those are our Conditions 3.a, 3.b, 3.c.  
22 They deal with waste diversion and closure. That was  
23 the one condition, all that we had proposed that one  
24 Commissioner had questions on, does the record  
25 support this condition.

1           So the Commission recessed, continued the  
2           hearing for two months to address that one question  
3           whether the record supports closure. We came back in  
4           April, and Vice Chair Anderson, acting as the Chair  
5           of the Commission, confirms that there is consensus  
6           on a broad range of our protective conditions, and  
7           we'll, go through them as we progress.

8           And that the one condition that there was a  
9           question on, the one issue that needed a further  
10          review was closure on 3.a, 3.b, 3.c. Vice Chair  
11          Anderson acting as the Chair, explained that our  
12          sequencing, and what we proposed, as we'll look at  
13          it, is waste diversion.

14          The waste diversion condition that is based  
15          on the exact proposal ENV made for the diversion of  
16          waste in 2012. That would be our phase one. ENV's  
17          own proposal, without explanation, since rejected.  
18          Followed by a partial closure of the landfill to most  
19          forms of waste, leading aside the two that are the  
20          most difficult to relocate, ash, reused ash and  
21          residue.

22          Followed in a third phase by complete  
23          closure of the landfill when we proposed this slightly  
24          more than seven years, again, after being involved in  
25          this for eight.

1           Despite having taken a recess and spent two  
2 months to review the evidence, Commissioner Hayashida  
3 said that somebody would have to present evidence  
4 indicating that closure is necessary. There are two  
5 things wrong with that. The first is it is not the  
6 Intervenor's burden to show that closure is  
7 necessary. It's the Applicant's burden to show that  
8 no closure is appropriate. That it's consistent with  
9 the decision making that leaving the landfill open  
10 until capacity is consistent, not only with the  
11 standard, the basic concepts of a Special Use Permit,  
12 but with the adverse effects on the community and  
13 with the length of time it has already been opened.

14           So the burden was shifted to us to prove  
15 that a special use should end at some defined point.

16           The second problem is that I tried to  
17 present the evidence that the Commissioner requested.  
18 I offered to pull it up on the screen, as I can do  
19 now, showing extensive evidence of the  
20 appropriateness of closure and timeline that we have  
21 proposed. The Chair said, okay, but the City  
22 objected to it. The City did not want me to show the  
23 Commission the evidence that Commissioner Hayashida  
24 said he would need to see before he could support  
25 closure. This colloquy went on with the commissioner



1 repeating, show me the evidence. And Vice Chair  
2 Anderson saying, okay. My response to that, okay,  
3 was okay, Chris, Mr. Goodin, pull up the evidence.  
4 This time Mr. Hayashida -- Commissioner Hayashida  
5 says no, that has to come from our Commissioners.  
6 You can't show me what I've spent two months looking  
7 for, and you're prepared to introduce now.

8 At that point Commissioner McMurdo voiced,  
9 am I the only one who feels there should be a  
10 timeline? Commissioner Hayashida responds, does the  
11 record support that, the third time he asked. And  
12 this time having been shut down twice, I don't  
13 answer. The Commissioners do. Commissioner McMurdo,  
14 I believe so. Commissioner Goo, the timeline was a  
15 long time ago, but it's in the records.

16 And that's right. The evidence closed in  
17 April 2012, that's when the timeline closure schedule  
18 was set out in the evidence, but it's still there.  
19 The same schedule is still available to the  
20 Commission, the same evidence is still available.  
21 Commissioner Goo was exactly right.

22 And then the Chair expressing that he  
23 believes there's evidence on both sides. Evidence  
24 which supports the closure conditions in his view  
25 though he doesn't explain where. Evidence it may

1 not.

2 All of this goes to what I said is so  
3 essential that the public trust in government, this  
4 is the Office of Planning explaining to this body in  
5 2009 when this was before the body for  
6 decision-making the last time, how important public  
7 trust in government in the processes that we follow  
8 is, especially when the government is the applicant  
9 and the decision maker. There is nothing about that  
10 process I recounted that creates public trust in the  
11 decision rendered.

12 Following that colloquy, the Commission  
13 went into executive session. When it came out, it  
14 had a decision. That's it. We don't know why. We  
15 don't know on what basis. We don't know anything on  
16 the record about that decision. And we don't know  
17 why, as part of that decision, they not only rejected  
18 closure which three members on the record say, yes,  
19 the evidence supports it, and all four were prepared  
20 to adopt it in February.

21 We don't know why they rejected it. We  
22 don't know why they refused to adopt or failed to  
23 adopt any of the protective conditions that KOCA had  
24 proposed, and on which at two hearings there was  
25 consensus. Not a single statement explaining why

1 those conditions are inappropriate. Why we've  
2 changed our minds. Why we won't do these things that  
3 the community is asking to do to protect it better  
4 than it has been protected over limited time asking  
5 the landfill to remain open.

6 So we come here today before this body,  
7 what ENV wants is extraordinary in the context of a  
8 special use. 200 acres, all MSW and ash and  
9 residues, so no limitations, whatever they can do  
10 with the permit. No restriction and no closure  
11 deadline.

12 I submit that if ENV had come with this  
13 proposal in the '80s when it got its first Special  
14 Use Permit, the Land Use Commission would not have  
15 exceeded it, would not have said that special use of  
16 200 acres with no closure deadline at some distant  
17 point in the future a minimum now of 50 years from  
18 when -- now, it's not that it is in the record.  
19 There's no 20-year period in the record. But based  
20 on representations today, 50 years from when we first  
21 come to you, and it might be longer, and we hope not.  
22 We need a landfill, so we might never site anything  
23 else ever. If this body would adopt it as a special  
24 use, how is that request appropriate piecemeal  
25 through the years to get to the point where they say,

1 well, we need it now. We need it, so you have to  
2 give it to us. You wouldn't have done it then. It's  
3 not appropriate to do it now.

4           The standards are essential to the  
5 framework. The use must be unusual and reasonable.  
6 And clearly under the rules, the party initiating the  
7 proceedings is sitting here, has the burden of proof.  
8 That burden comes in two forms. It's absolutely the  
9 burden of production, the duty to come forward with  
10 evidence as Commissioner Okuda suggested. It's also  
11 the duty of persuasion to persuade you that the  
12 standards by which you grant this unusual and  
13 reasonable use have been met. Very different  
14 standards on a boundary amendment. We're here on  
15 special use because that's the procedure the City  
16 chose. And by the way, to answer the Chair's  
17 question about why -- or maybe it was Commissioner  
18 Chang's question -- why that procedure was followed  
19 in 2009.

20           The City absolutely did submit an  
21 application of a boundary amendment. At the same  
22 time, it submitted an application for a new SUP, and  
23 it said quite clearly we're going to take whichever  
24 one we get first. It got the special use permit from  
25 the Planning Commission, and so it just abandoned the

1 DBA because the Special Use Permit, because it's just  
2 easier to do. It requires less review, it requires  
3 less time. There's less that it needs to show. It  
4 has these standards, and they're important, but it's  
5 very different from a permanent change in land use.  
6 The City got the easier one and dropped the other.

7 That's exactly what Waianae Board says you  
8 can't do. You can't use the Special Use Permit to  
9 subvert the more rigorous, more detailed, more  
10 difficult boundary amendment process. But that's  
11 what the City did, and they did so openly, and we can  
12 cite to the order from 2009 referencing the  
13 application. We can cite the application and put it  
14 up on the screen if we need to, if anyone has any  
15 questions.

16 That's the program structure the City  
17 followed. They took the easier one and dropped the  
18 harder one.

19 The standards for this easier path are not  
20 meaningless, though. The standards include that the  
21 use shall not be contrary to the objectives sought to  
22 be accomplished by the State and Land Use law and  
23 regulation. What the state tries to do is be  
24 consistent with it in its unusual and reasonable use.  
25 Importantly for us the desired use would not

1 adversely effect surrounding property, not -- would  
2 not have significant effect, not -- would not have  
3 correctable effects, but would not adversely affect  
4 the surrounding property. That's the standard for  
5 granting a Special Use Permit.

6 And if we look at some of those state  
7 planning goals, what the state intends for its land  
8 use that this permit must meet, they're focused so  
9 heavily, heavily on avoiding environmental damage, on  
10 preserving the desired quality of our water. On  
11 reducing the threat to people and property from  
12 erosion and flooding and manmade or induced hazards  
13 and disasters.

14 Because this bar, these things that the  
15 department needs to show to be entitled to a Special  
16 Use Permit require those kinds of examinations,  
17 require that there not be an adverse effect on the  
18 surrounding community. This body and the Planning  
19 Commission are empowered to impose conditions of  
20 approval, say if you're going to grant this, you need  
21 to do these things so that there is not an adverse  
22 effect on the community; so that there is not a  
23 threat to our environment; so that our coastal waters  
24 and other water quality measures are maintained so  
25 that we don't have a risk of flooding, and these

1 other standards that are expressed throughout our  
2 Land Use laws.

3 The other component of it, and this comes  
4 from Neighborhood Board, is inherent in special use,  
5 as I said, is this idea that unlimited use of a  
6 special use permit is effectively a boundary  
7 amendment. And they're getting around the boundary  
8 amendment rules by following special use permit.

9 And so because we have recognized that  
10 because of the City's actions and inactions, we are  
11 put in this position that we can't come before the  
12 body today and say close it down. If this were an  
13 application for a new project, if this were the first  
14 time it was coming up, we would absolutely say this  
15 is not the right process. And even if it were the  
16 right process, this record does not support the  
17 proposed use. There's no question about it.

18 Because we've been put in this position,  
19 the City did not close the landfill as it promised,  
20 did not open a new landfill as it promised, waited  
21 until the last minute to come up with an application  
22 to modify the closure conditions. When there  
23 wouldn't have been remotely enough time site a new  
24 landfill, the closure condition had been denied. And  
25 it continued to operate the landfill even though it

1 doesn't have a permit for seven years since the  
2 supreme court's decision, or put in a position where  
3 I cannot say to you, close it today, even though  
4 that's absolutely the right result.

5           What I can say is attached conditions that  
6 mean something to the approval so that not only is  
7 there a final and finite end to the landfill in this  
8 community, but that the community is protected until  
9 we reach that final and finite end.

10           And so we've divided the conditions into  
11 four categories, operation, things that deal with the  
12 daily operation of landfill, but just help the  
13 landfill be a better neighbor, be a good neighbor to  
14 the community.

15           Reporting and enforcement conditions,  
16 because as we'll see and as the record is replete,  
17 this landfill in the words of the chief of the Solid  
18 and Hazardous Waste branch of DOH had more violations  
19 in the five years preceding 2012, preceding its  
20 application for a Special Use Permit or to modify it,  
21 than any other landfill in the state. So reporting  
22 and enforcement matter. How those are done, matter.

23           Community involvement in the oversight of  
24 the landfill and the community's ability to bring its  
25 concerns for real redress now. We will talk about



1     that.

2             Diversion of waste. The frequency and the  
3     use of the landfill impact the community, the more  
4     it's used and the more that goes in there, the  
5     greater the impact is. And so, for example, it's not  
6     on the record. I'm not asking you to consider it as  
7     part of the testimony, but Mr. Williams, who  
8     represents the association, testified before,  
9     responded to the colloquy earlier saying, well, is  
10    the landfill still impacting the community? What is  
11    the impact? He says, hey, the third boiler is down  
12    now.

13            It went down, and because of that, they had  
14    to landfill the sewage sludge, and on Sunday the  
15    odors were overwhelming. So, yes, it does continue  
16    to impact the community. And if the evidence had  
17    been reopened, all of those things would be part of  
18    the record that you have.

19            But what you have on impact is extensive,  
20    and that includes or justifies the need to divert as  
21    much waste as possible until the landfill closes and  
22    that's our final category. Closure of the landfill.

23            As I said, we say three-phased closure,  
24    each phase amply supported by the record before you.

25            And so if we began with operations, I'm

1 going to focus on the first condition, Condition 2c.  
2 This is a condition that the acting chair of the  
3 Planning Commission specifically said, there's  
4 consensus on it, yet inexplicably was not adopted by  
5 the Planning Commission. And this Condition 2c is  
6 patterned after an existing condition, or condition  
7 in the order that the supreme court vacated requiring  
8 compliance with both revised ordinances of Honolulu  
9 and the state Department of Health. All we've done  
10 is to say that's great that your operations have to  
11 comply with these regulatory bodies, and we think  
12 that's important, but there are other regulatory  
13 bodies that are important, too, like the U.S. EPA and  
14 other state agencies and departments that have  
15 reference to the operation and the impact on the  
16 community.

17           You should have to comply with all of those  
18 as part of this Decision and Order because this  
19 Decision and Order contemplates no adverse effect on  
20 the community. If you're not operating in compliance  
21 with all the relative regulatory bodies, then you're  
22 not insuring that you don't have an adverse impact on  
23 the community, so include this condition.

24           It's based on, as I said, extensive  
25 testimony about the violations this landfill has

1 racked up over its history. Closing, as I said, in  
2 2012 because that's when they closed evidence and  
3 refused to take any further evidence.

4 The violations include actually falsifying  
5 gas readings for a long period of time. And in  
6 pending enforcement -- this was from then Deputy  
7 Director of Department of Health Gary Gill who is for  
8 environmental management, filing a pending  
9 enforcement case in 2012 when we were still taking  
10 evidence.

11 This is the quote that I mentioned from  
12 Steven Chang the chief of Solid and Hazardous Waste  
13 branch, confirming for me that no landfill in the  
14 state has had as many violations in five years as  
15 Waimanalo.

16 This is the last quote is from Dwight  
17 Miller of Parametrix who was an expert witness in the  
18 case, the only expert admitted on the subject of  
19 siting a new landfill. And he's worked all over the  
20 country. And he testified under oath that he's never  
21 worked on a site that has anywhere near violations of  
22 this size. It's not a good operation.

23 In response to this evidence and response  
24 to the flooding event in particular, ENV in its  
25 filings to this body, its most recent filings says

1 that our claim in that the proceedings showed that  
2 waste and leachate was released from the landfill is  
3 not supported by them. That statement, the siting  
4 event, that there was waste and leachate release is  
5 not supported by the evidence. With respect, I do  
6 not know how ENV makes that claim.

7           These are photographs that are in evidence  
8 from that flooding event. This is down -- this is  
9 makai of the landfill, groundwater. The debris  
10 spread along the beach, along the lagoons. Debris  
11 included an extensive amount of needles and other  
12 medical waste. These are all in the record. This is  
13 the evidence before the Planning Commission and the  
14 evidence before you.

15           And that evidence was confirmed by the then  
16 director, acting director of ENV when he testified in  
17 his direct written statement, this is the declaration  
18 that the City prepares and submits. This is not me  
19 even crossing. These are his words prepared and  
20 vetted by a lawyer that the active cell was inundated  
21 with stormwater, an enforcement quantity of  
22 stormwater breached the cell causing a release of  
23 municipal solid waste including treated medical waste  
24 into the stormwater and into the ocean. That's what  
25 the ENV in its own declaration put before the

1 Planning Commission.

2 That's what the EPA confirmed identifying  
3 at least three occasions, not one event but three  
4 events in December and January 2011 where the  
5 operator, ENV as an operator, failed to present  
6 runoff of surface water that had contacted waste.  
7 That's the EPA's determination.

8 It's important in light of all of this, in  
9 light of the standards to ensure that the operation  
10 complies with all state and federal requirements.

11 On the same subject of operational  
12 conditions, Condition 2d, again, the Vice Chair  
13 confirming that the Planning Commission, there's  
14 consensus on this condition. And, again, it's not  
15 adopted and no explanation is given.

16 All this condition requires, and its  
17 patterned after an existing or former condition, the  
18 former condition requires that the City obtain  
19 certain necessary approvals and identifies them in  
20 relation to access, storm drainage, leachate control  
21 water and well construction and wastewater. We  
22 agree. It's important that the City or the ENV  
23 obtain all necessary approvals from those agencies  
24 for those things.

25 But why are we limiting the condition to

1 one subject and a handful of agencies? If we're  
2 going to ensure that there's no adverse on the  
3 effect -- adverse effect on the community, we should  
4 require that it obtain all necessary approvals from  
5 all necessary agencies for any onsite or off-site  
6 work, and it has to be part of the order because this  
7 body's duty in granting a Special Use Permit is to  
8 ensure there's no adverse effect and to adopt  
9 appropriate conditions to make sure there aren't.  
10 And if those conditions were violated and there is an  
11 adverse effect, then they're in violation of a permit  
12 not some regulation somewhere from DOH, from EPA, but  
13 they're actually in violation of a permit, because  
14 they're not supposed to have an adverse effect. And  
15 this is just one small way.

16 The same subject of operational conditions,  
17 Condition 2e. Again, consensus on this condition but  
18 not adopted. There was some discussion of the dust  
19 control plan. There is in part of the prior decision  
20 a requirement that the City adopt a dust mitigation  
21 plan. All we've done is to say that that plan should  
22 be part of the order because it doesn't do us any  
23 good if they adopt a plan and then they don't follow  
24 it, and we have absolutely no remedy for it because  
25 it's not part of the order.

1           That doesn't do anything to protect the  
2 community. And there's no question that dust is an  
3 issue for the community. It was in the testimony.  
4 The lanais are going to be covered with dirt. Dirt,  
5 debris and odors generated by the landfill are a real  
6 problem. The condition is amply supported by the  
7 record.

8           Condition 2f. Condition 2f, is again an  
9 operational condition, was not one of the ones on  
10 which there was consensus, no explanation as to why.  
11 All we require here is a landscaping plan incorporate  
12 features of the surrounding landscape and reduces  
13 erosion. Reduction of erosion is a goal specifically  
14 called out in the State Land Use laws that we looked  
15 at earlier, part of what this body has to consider in  
16 granting a Special Use Permit.

17           Visual blight obviously has an adverse  
18 effect on the community. That's something to  
19 consider as well. And there was testimony about the  
20 visual blight.

21           This photograph is in the record showing  
22 the visual blight. All we ask for here is just a  
23 landscaping plan, no reason ever given for opposing  
24 that condition or rejecting it.

25           Condition 2g, also an operational

1 condition. There was consensus on this condition.

2 CHAIRPERSON SCHEUER: Mr. Chipchase, sorry,  
3 I should have asked before you started. About how  
4 long?

5 MR. CHIPCHASE: I probably have another 20  
6 minutes, Chair. I won't be offended if you interrupt  
7 my flow to take a recess.

8 CHAIRPERSON SCHEUER: Lunch would be --  
9 that we have that, I'm thinking of. Sorry, I didn't  
10 appreciate the length of your presentation.

11 Briefly, Commissioners?

12 COURT REPORTER: If that's possible, I'd  
13 love a break.

14 CHAIRPERSON SCHEUER: Okay. Are we at or  
15 near a good breaking spot for you?

16 MR. CHIPCHASE: There probably are a couple  
17 of other operational conditions but I --

18 CHAIRPERSON SCHEUER: Why don't we do that,  
19 and then we'll take a recess for lunch.

20 MR. CHIPCHASE: Okay. Very good, Chair.

21 Condition 2g, there was consensus on this  
22 as well. And this deals with some things that we  
23 heard about today from Ms. Rezentes and from others  
24 throughout the proceeding that the cuing of vehicles  
25 along the highway has an impact on the community



1 coming in and going out of this area. There's one  
2 way in, one way out, and the community uses it.

3 All we ask in this condition was to  
4 schedule or implement and maintain a schedule for the  
5 City and commercial waste collections. We recognize  
6 you can't do it for all the private users of the  
7 landfill, the individuals who go there, but for the  
8 City and for commercial users you can. Why oppose  
9 maintaining a schedule so that you reduce the impact  
10 of that traffic on the community?

11 Condition 2i deals with operations as well.  
12 Evidence is replete of 2i and 2j replete with  
13 evidence windblown debris from both the landfill  
14 itself and from the trucks entering the landfill.  
15 These two conditions simply attract those impacts to  
16 reduce the burden, reduce the adverse effect on the  
17 community. Ample testimony in the record supporting  
18 or showing the harm that windblown litter has on the  
19 surrounding community.

20 Condition 2h, mitigating the noise and  
21 odors. Prepare and maintain a plan to minimize the  
22 emission of noise and odors from the landfill. Noise  
23 and odor are adverse community effects from this  
24 unusual and special use, unusual and reasonable use.  
25 Come up with a plan to minimize the impact because,

1 again, the record is replete with evidence of the  
2 impact from noise and odors on the surrounding  
3 community. All we've asked is that you mitigate  
4 that, never any reason for opposing it. Never any  
5 reason for refusing to adopt it.

6 That would be the end of my operational  
7 conditions that I wanted to review, Chair.

8 CHAIRPERSON SCHEUER: Thank you very much,  
9 Mr. Chipchase. We plan to have only a brief lunch.  
10 We had our food brought in for us, but if we can  
11 reconvene at 1:00 o'clock, which would be 36 minutes.  
12 Does that work for the parties?

13 (Noon recess taken.)

14 CHAIRPERSON SCHEUER: Aloha, we're back on  
15 the record. And we were about halfway through with  
16 the presentation from KOCA.

17 MR. CHIPCHASE: Yes, Chair.

18 CHAIRPERSON SCHEUER: Are you ready to  
19 resume?

20 MR. CHIPCHASE: I am, Chair.

21 CHAIRPERSON SCHEUER: Thank you. Please  
22 do.

23 MR. CHIPCHASE: Thank you, Chair.

24 Commissioners, we left off, and I closed  
25 out the operational conditions. The things that

1 we've asked for to mitigate the adverse effects on  
2 community, to make the land for a better neighbor for  
3 the limited time that it should remain. And along  
4 with operational conditions and enforcement, public  
5 disclosures, notices and enforcement.

6 And so that brings us to our next grouping  
7 of conditions. And Condition 1 asks, which is  
8 patterned after an existing condition that requires  
9 reporting, all that we've asked to be included or  
10 added to that condition is that ENV provide us a copy  
11 of the report that it would already agree it needs to  
12 prepare for reasons that remain utterly unbelievable  
13 to me.

14 ENV is opposed providing a copy of its  
15 report to KOCA even though we've been in the  
16 proceeding for eight years now, and the Planning  
17 Commission refused to adopt it without giving any  
18 reason.

19 The next reporting and enforcement  
20 condition is very similar in 1.g. It mirrors what is  
21 existing right now the order that was vacated was  
22 existing condition that ENV have a public hearing  
23 every three months to report on their status of the  
24 efforts to either reduce or continue the use of  
25 Waimanalo. We have proposed that that could be

1 extended to every six months. It didn't need to be  
2 every three months for a public hearing, but we  
3 simply asked for notice, a written notice 14 days  
4 before that hearing so then folks who care about it  
5 in the community can be there, hear the information  
6 and participate in the hearing.

7           Again, for reasons that I can't fathom, the  
8 committee has opposed that condition and the  
9 Commission did not adopt it or give any reasons for  
10 not adopting it.

11           And as we talked about earlier, and you  
12 heard from the community who testified to you  
13 throughout these proceedings, they've been involved  
14 heavily. The Waimanalo Neighborhood Board has  
15 consistently voted to close the landfill. There's  
16 nothing in the record contrary to robust community  
17 opposition. No one from the community came out and  
18 testified that the landfill does good things for  
19 them. They like having it in the community. This is  
20 a benefit in any way to the community. It's always  
21 been opposition for it. So give notice to the folks  
22 who care before you hold the hearing.

23           Our Condition 1e deals with enforcement.  
24 The enforcement rules available to this body under  
25 the standard Hawai'i Administrative Rules are unclear

1 to what extent that they apply to a Special Use  
2 Permit and the ability of a party to a Special Use  
3 Permit proceeding to initiate a request for  
4 enforcement.

5 The Planning Commission rules allow the  
6 Planning Commission to initiate enforcement but  
7 provide no mechanism for a party to request it. All  
8 we've asked of this Commission is for the ability to  
9 ask the Planning Commission to issue an order to show  
10 cause. We believe within a defined period following  
11 the publication of the reports that the City is not  
12 complying with the conditions of approval.

13 If the City is not complying with  
14 conditions of approval, whether they are closure or  
15 waste diversion or operation or reporting, then  
16 they're not operating a true special use. They're  
17 not operating a use that does not adversely affect  
18 the community and respect water quality and  
19 environment and all those things that they need to  
20 respect. If that happens, there should be some  
21 opportunity for the people who have been heavily  
22 involved for years to request enforcement of the  
23 order.

24 The third category that we talked about was  
25 diversion of waste, and that relationship again is

1 directly to the conditions of approving a Special Use  
2 Permit, avoiding an adverse effect on the community.  
3 The more that goes in, the more it's used, the more  
4 kinds of waste, the more impact the landfill has.  
5 There's a direct relationship to them.

6           So the condition in the existing order,  
7 proposed order that you have before you direct the  
8 City to continue its efforts to use alternative  
9 technologies to provide comprehensive waste stream  
10 management, and that's great, but it's meaningless, a  
11 direction to continue your efforts with no  
12 specificity, measurement, final values, does nothing  
13 to help the community and does nothing to hold the  
14 City accountable.

15           If the City is very interested in pursuing  
16 alternative technologies, it will. If a different  
17 administration is not, it won't.

18           What we propose to add to that is some  
19 definition, some contour, if you will, and that is  
20 that the applicant shall use alternative  
21 technologies, not continue their efforts but actually  
22 shall use them to the extent reasonably practicable  
23 in to divert waste from the landfill.

24           And we set out specific examples of that.  
25 We didn't make up those examples. It came from prior

1 agreement on continuation between City and KOCA the  
2 kind of things City was doing or committed to doing  
3 to divert waste. We believe that those efforts  
4 should be reflected in the order so that there are  
5 specific things the community can say the ENV is  
6 doing. And if it fails to do them, specific  
7 benchmarks for ways the community can say, you are  
8 not doing what you said you would do when you were  
9 ordered to do to minimize the effects.

10           Along with those general conditions, what  
11 we proposed in Condition A, we would label waste  
12 diversion, would be the first of our phase closure,  
13 but it really is a diversion condition. And what it  
14 directs is from daily order, so now whenever the  
15 order comes out until March, 1, 2024, which would  
16 have been more than five years from when we proposed  
17 it the last time, it would be more than 12 years from  
18 when we proposed it the first time, that the City  
19 cannot use Waimanalo if there is another means of  
20 disposing of the waste.

21           So if there's something else, some other  
22 technology that it has, it can't use Waimanalo with  
23 two exceptions. The first is boiler shut down, a  
24 scheduled maintenance which Ms. Chan talked about.  
25 The second is in the event of emergencies as

1 reasonably determined by the director. So even  
2 there, pretty flexible with the standard. We're not  
3 requiring that we agree, whether it be a  
4 governor-announced state of emergency, reasonably  
5 determined by the director that there's an emergency;  
6 we need to use Waimanalo, then okay.

7           We did not make up these conditions. As I  
8 alluded to earlier, that condition is patterned  
9 exactly after the condition that ENV proposed be  
10 imposed on itself in 2012, and so we put up on the  
11 screen ENV's own proposed findings.

12           This was its condition in 2012 that it  
13 presented to the Planning Commission, that it was  
14 willing to accept that restriction. It could not use  
15 Waimanalo if waste could go somewhere else.  
16 Beginning on January 1, 2014, almost six years ago,  
17 ENV was prepared to accept for itself this kind of  
18 limitation on the use of Waimanalo. Inexplicably,  
19 the City refuses to agree to such a condition today,  
20 six years after it was prepared to adopt it. And the  
21 Planning Commission, without comment, refused to  
22 adopt something that the City itself had proposed six  
23 years earlier.

24           This is basic to protecting the community  
25 from the harm caused by the landfill and consistent



1 with not only what the City said in its own proposed  
2 findings, but what it says are its goals to divert as  
3 much waste from the landfill as it can, yet it  
4 refuses to accept the condition today.

5           Onto our final category, and that is  
6 closure. Because none of this means anything unless  
7 we finally close the landfill. And so what the  
8 Planning Commission has presented to you, and ENV and  
9 OP proposed to modify it in a letter that I received  
10 late yesterday. We didn't have an opportunity to  
11 respond to it, of course, but I appreciate getting a  
12 copy of the letter and I will respond to it at the  
13 end of my comments today, but the effect of it is no  
14 different.

15           December 31st, 2022 to identify an  
16 alternative site. That's it. That date doesn't come  
17 from anywhere. If you look back at the 2017  
18 discussion of this date, it was referenced in 2019 at  
19 some point. It has no relationship, it just sort of  
20 generally there was some timeline and so, you know,  
21 take some time to select a site. Well, as we'll see  
22 in a little bit, the City, on the most recent round,  
23 was ordered to begin the site selection process in  
24 November 2010.

25           So in 2017, how do you pick five years,

1     okay, finally have a site 12 years after your order  
2     to begin it. There's nothing in the record that  
3     would reflect a 12-year justification just for  
4     identifying a site. Then once that site is  
5     identified, nothing else happens. It just sits  
6     there. And we can go through OP's -- and we will  
7     talk about the little bit of detail that they seek to  
8     add -- but it's meaningless for the community.

9             It's meaningless for a couple of reasons.  
10    It's meaningless because it doesn't require them to  
11    develop this site, which the current conditions do,  
12    existing conditions in the order that hadn't been  
13    vacated required the development of the site and even  
14    the Planning Commission's proposed conditions  
15    required development. This does none of that in  
16    itself.

17            It's meaningless for the second reason. We  
18    have no idea when Waimanalo will actually close.  
19    There's nothing in the record to reflect the 20-year  
20    gain to capacity that you heard today, nothing. But  
21    even if that were in the record, what you also heard  
22    today is that date is not firm and fixed, that date  
23    is going to move. And if they change technologies or  
24    they reuse cells. And it's no comfort to say on  
25    that, that, well, we've reached the end of what we

1 could do with this site anyway.

2           There's some figure on the mass capacity,  
3 because this is the third time they've expanded it as  
4 you heard from Ms. Rezentes. Previously we were  
5 under the impression you couldn't go as deep as they  
6 thought, and they figured out a way to engineer  
7 around that. So no confidence to say that, and  
8 there's nothing in the record that would indicate  
9 this site would ever close, that it is the City's  
10 intention to ever close this site.

11           The LUC and the OP in 2009 unequivocally  
12 recognized that closure condition is necessary or  
13 this is not a Special Use Permit; it is a boundary  
14 amendment. And we've briefed that extensively in our  
15 response to the OP comments.

16           What we've put up on the screen are just  
17 two quotes, the first is from the LUC's counsel in  
18 his statements to the court in 2009 of the appeal  
19 from the 2009 approval, that if you give the county  
20 unfettered discretion, unfettered, indefinite use of  
21 an SUP for the refuse placement, what you've done is  
22 what that Neighborhood Board 24 decision says you  
23 cannot do. And the LUC counsel, not a closure  
24 condition on the SUP, it's a boundary amendment, and  
25 you can't do that.

1           Quote below it is also from the LUC's  
2           counsel, Russell Suzuki at the time:

3           Without a closure condition, you have  
4           violated Chapter 2005. What is the LUC's position in  
5           2009? The rules haven't changed, Neighborhood Board  
6           hasn't changed. It's the same law, and it needs to  
7           be the same condition.

8           The OP in 2009 agreed. This is from the OP  
9           submission to this body in 2009, specifically  
10          informing this body that the Planning Commission,  
11          down there at the bottom, overstepped the bounds of  
12          its authority in issuing an SUP without a firm time  
13          limit for operations.

14          OP is quite clear in 2009, you can't do  
15          that. The law hasn't changed. Same rules, same  
16          cases, same standards. In fact, it's the same  
17          application since they've been consolidated. But ten  
18          years later on the same application, the same law has  
19          to apply. You can't issue a SUP without a firm and  
20          definite end.

21          And what we've proposed is exactly that.  
22          So beginning on March 2, 2024, which, again, when we  
23          proposed these the last time would have been slightly  
24          more than five years that the Waimanalo Gulch would  
25          close to always accept ash and automobile shredder

1 residue, and this closely tracks your Condition 14  
2 imposed in 2012. You had effectively three years in  
3 2012, we've extended it to five, because we think the  
4 evidence supports that a new landfill could be  
5 developed within five years.

6 And we phase it so that if there is  
7 difficulty in either reusing or in landfilling these  
8 two forms of residues, they have little more time.  
9 In five years, you should be able to have a general  
10 purpose landfill up and running.

11 Beginning in March 2, 2027, the landfill  
12 closes, finally. 2027, so almost 40 years, 38 years  
13 since it opened, since this temporary special use of  
14 60 acres opened. 40 years later, almost 40 years  
15 later, we finally close it. And consistent with that  
16 ENV submits a closure plan one year prior to the  
17 closure date.

18 These kinds of conditions are consistent  
19 with the way this body has treated special use  
20 Permit, this Special Use Permit over the years.  
21 There's always been some form of an end date. There  
22 needs to be today. The end date that we proposed is  
23 not invented. It is solidly based on the evidence.

24 Mr. Miller, again, the only witness  
25 admitted as an expert in landfill site selection,

1 testified that it would take three to five years to  
2 site and develop a landfill to replace Waimanalo.  
3 His estimate is consistent with the City's own  
4 representations made in prior proceedings about the  
5 length of time it would take to site and develop.

6 This is then Acting Director Doyle  
7 explained why they'd asked for a five-year extension  
8 so that they could site a new landfill. That's why  
9 it takes three, probably four to do, ask for a five  
10 cushion site and develop a new landfill.

11 At closure condition, and without it, this  
12 siting and identifying another site is meaningless.  
13 This condition is from the prior order that on or  
14 before November 1, 2010, ENV is to identify and  
15 develop one or more new landfill sites that you'll  
16 either replace or supplement Waimanalo. And ENV was  
17 ordered to proceed with reasonable diligence in doing  
18 this, not just siting but developing with reasonable  
19 diligence when the record closed in 2012. We'll look  
20 at that in a little more detail in a minute.

21 They were still in the identification  
22 process. We don't have anything in the record  
23 indicating what happened after that because the  
24 record hasn't been reopened. There's certainly  
25 nothing before this body, and you heard from Ms. Chan

1 today, they're still in the site selection process  
2 that they've engaged a consultant to review the sites  
3 that were supposed to be done now almost ten years  
4 ago. It doesn't take ten years to identify a site.  
5 That is not reasonable diligence. Forget about  
6 development, no efforts toward development, nothing  
7 in the record and nothing that anybody would tell you  
8 about today. This condition means nothing without a  
9 real closure deadline.

10           The ENV responded to that by saying there's  
11 nothing in the record that justifies closing  
12 Waimanalo before it reaches capacity. With respect,  
13 that is again an inversion of the burden. The burden  
14 of production and persuasion is to persuade you that  
15 under the law and the standards an indefinite use SUP  
16 is appropriate. But even if the burden were on me,  
17 there is ample evidence in the record to support  
18 closing it before it reaches capacity, a clear,  
19 adverse effect on the community.

20           The inconsistent view with the State Land  
21 Use planning, and for many, many promises that the  
22 City made to the community throughout the years.  
23 These are questions from the Commission, this  
24 Commission.

25           At the bottom, Commissioner Copa: Do you

1 honestly think that we will have a site, another site  
2 picked for the landfill? And if so, do you think  
3 that you could commit that without a doubt that this  
4 landfill will close?

5 The City responds: We have made that  
6 commitment, yes.

7 Those are the City's representations made  
8 to the body approving a special use permit in return  
9 for getting the permit. You wouldn't allow that from  
10 a private party. If a private party came before you  
11 on one permit and said I represent these things,  
12 please give me my permit and I will do these things,  
13 and then didn't do them. When the party came back  
14 for another permit or an expansion and extension of  
15 the first one, you would say no, you didn't do what  
16 you said the last several times. You haven't been a  
17 good operator in the time we've given you. We're not  
18 going to give you another permit. Certainly one that  
19 has no end.

20 The City shouldn't be treated differently,  
21 and that goes back to what we talked about in the OP  
22 comments at the last time on the importance of public  
23 trust and faith in the decision-making process.  
24 Government is the applicant and the decider at least  
25 at the City level. It shouldn't be treated better



1 than a private party would, and a private party would  
2 never get away with these things, and that's what I  
3 put up.

4 The process of allowing the City simply to  
5 amend or eliminate conditions when they become too  
6 onerous to comply with the risks undermining the  
7 meaning and integrity of our land use entitlement  
8 processes. Those aren't my words, those are OP's  
9 words in 2009. And it's exactly right.

10 And that's what the City has done for years  
11 in refusing to comply with the closure deadlines and  
12 asking for extensions. And now simply saying, well,  
13 we have to keep it open forever, and there's no basis  
14 for closing it before. That's not true. That's not  
15 standard. And at some point, we do have to say  
16 enough is enough.

17 I had mentioned that we didn't have a  
18 chance to comment in writing to City's letter and  
19 OP's joint response on the issues, and I'd like to do  
20 that. And I'd like to talk about a couple of things  
21 that the Commissioners addressed because I think they  
22 were important questions, and I hope to be able to  
23 help with some of them.

24 The first question that came up from a  
25 number of Commissioners was what has happened with

1 the site selection process? What does the record  
2 show? Again, closing on April 2012. What does the  
3 record show about site selection?

4 The Commission, the order you have, simply  
5 declares the City's efforts to identify have been  
6 performed with reasonable diligence.

7 On what basis does the Planning Commission  
8 make that finding? It was supposed to begin on  
9 November 1, 2010. It didn't begin until  
10 January 2011, okay. It did not include the site  
11 selection process, did not include anyone from Ko  
12 Olina or Kapolei.

13 On the site selection committee, there's no  
14 one from the communities most impacted by the  
15 landfill. This is all testimony in the record. It  
16 didn't follow the City's Integrated Solid Waste  
17 Management Plan. It failed to exclude sites that  
18 aren't to be considered. It didn't follow the  
19 detailed site selection procedures, for instance, not  
20 considering negation factors from potentially  
21 effected neighborhoods. And contained, as the  
22 testimony is replete in the record, with significant  
23 errors including double counting of criteria.

24 It didn't move in any recognized way.  
25 Again, the testimony of the only site selection

1 expert in all of the proceedings.

2 And it used the same sites that in many  
3 instances have been considered and rejected for a  
4 variety of reasons.

5 This is from the Chair of that site  
6 selection committee, even they weren't happy with the  
7 process that was followed.

8 And as it stands today, there is no  
9 evidence in the record that the site selection  
10 process has finished, that there's a deadline for it  
11 to finish or that there's any schedule for the  
12 development of a new site. So how does the Planning  
13 Commission find that they proceeded with reasonable  
14 diligence? There's nothing in the record to support  
15 that finding.

16 The other question that came up and it --  
17 and one of the other questions that came up dealt  
18 with the need for Waimanalo, and that is the City's  
19 reframe that we need Waimanalo. We need Waimanalo.  
20 That's not true. We presently need a landfill.  
21 There's nothing in the record that says we need this  
22 landfill. And so all of the evidence that the City  
23 relies on, the need for the landfill is simply the  
24 need for a landfill that we have to comply with our  
25 DOH permit, that we have to have a place to dispose

1 of waste that we can't to recycle, that we need a  
2 place to put ash.

3 We're not here contesting that, but there's  
4 no linkage between those findings, those statements,  
5 that evidence, and the need for Waimanalo. There is  
6 nothing in the record that supports any finding that  
7 Waimanalo is the only site for these items that no  
8 other landfill site could be developed.

9 There's not even anything in the record  
10 that developing a new site would be wasteful or  
11 overly expensive or unnecessary, nothing. It's  
12 simply that there's a need for a landfill. Okay.  
13 But does it need to be this landfill especially after  
14 40 years which would be the end of our closure time?  
15 Nothing supports that conclusion.

16 There was a discussion about the LUC's role  
17 in this proceeding. And while it's true that the LUC  
18 reviews the record that the Planning Commission has  
19 developed and reviews the proposed findings and  
20 conclusions, you don't sit purely as an appellate  
21 body, or really as an appellate body. You sit as the  
22 body making the findings and conclusions. And for  
23 that reason, you're empowered under 15-15-96 to  
24 adopt, to modify or reject what has been proposed by  
25 the Planning Commission.

1           So there's no deference to the findings or  
2           determination that the Planning Commission has  
3           proposed. There's no deference to the legal  
4           conclusion that the Planning Commission has reached.  
5           They held the evidentiary hearings, that's true, but  
6           you make the findings, and you impose the conditions.  
7           And you're empowered to agree with their conditions,  
8           you're empowered to reject their conditions, and  
9           you're empowered to impose new conditions because  
10          that's the role that you sit in. Effectively a  
11          quasi-judicial body, as Commissioner Okuda mentioned.

12                 A few other things I wanted to cover in  
13          response to questions primarily from the  
14          Commissioners, and there was a long discussion  
15          about -- with Ms. Chan, about the need for a closure  
16          deadline. Do we need one? Is capacity enough? And  
17          I think we can see that from the record it is not,  
18          from its history that a limited size of the landfill  
19          had not been enough. From the evidence that  
20          indicates the City's intent to divert more waste  
21          means the landfill continues for more time.

22                 There's a direct relationship and that kind  
23          of indefiniteness is flatly contrary to everything  
24          this body has decided with respect to the landfill  
25          and everything that the law would require.

1           There was a question about -- Commissioner  
2 Chang, I believe, talked about -- maybe it was  
3 Commissioner Okuda -- talked about Conclusion of Law  
4 6. And the reasons for not responding to the  
5 questions to clarify by reopening the record to  
6 address operation, diversion, site selection efforts.  
7 Those three important points, as you can all agree,  
8 and you did all agree two years ago. The simple  
9 answer is they didn't want to. Right?

10           Nobody came forward and said, oh, it's not  
11 important where our site selection efforts have been  
12 in the last seven years. They couldn't have a  
13 specific condition requiring them to proceed with  
14 reasonable diligence. They didn't come forward and  
15 say, it doesn't matter what our diversion efforts  
16 have been. They couldn't. They have a specific  
17 condition requiring them to continue their diversion  
18 efforts, and they couldn't come forward and say, it  
19 doesn't matter what the timeline is for capacity  
20 because it's a special permit, and you need the  
21 finite use. The short answer is they didn't want to.  
22 That was the Planning Commission's choice. That's  
23 what the ENV asked them to do. That's the record  
24 they're stuck with today.

25           The last thing I wanted to say, and I

1 appreciate the Commission's indulgence, is to bring  
2 us back to where we began, where Ms. Rezentes took  
3 us, and that is to have an understanding of where we  
4 came from. This is in the record, and this is the  
5 history of the landfill, 1987, 60 acres.

6 The purpose, the stated purpose was not to  
7 serve the entire island but to serve the Leeward  
8 community. The projected life was eight years. So  
9 maybe in 1987, a Special Use Permit for eight-year  
10 active use. Honestly, the refuse remains. Eight  
11 years of active use for a landfill serving primarily  
12 the Leeward communities, that might have been  
13 appropriate. Operations began in 1989. The same  
14 time was expanded an additional 26 acres.

15 When it approached capacity, the ENV wanted  
16 to extend it another 15 years. The community  
17 objected, and went back on what they had been  
18 promised even by then that the landfill won't be  
19 there forever, it won't be this dumping ground for  
20 Oahu forever. It will close.

21 And so as a compromise, as an agreement, as  
22 a deal between the City and the community, the City  
23 said, don't oppose this, and we will close it by  
24 2008. That's our commitment to you. In exchange --  
25 and this is from Ms. Rezentes in the Planning

1 Commission proceeding, community backed off, held up  
2 its end of the deal because they believed the City  
3 would holdup theirs.

4 Those commitments were then repeated to the  
5 approving bodies. And as Acting Director Steinberger  
6 recognized at the time we were in the proceedings in  
7 2012, long after commitment had been breached, there  
8 was a compromise between the community and the City  
9 to keep it open for five years and no more.

10 Consistent with that compromise, the City  
11 was directed to select a new site by 2004 and close  
12 the existing site by 2008. People relied on that  
13 compromise, relied on those promises, and all of this  
14 is in the record. There's nothing to the contrary in  
15 the record.

16 New sites were recommended, and  
17 representations in doing that were that the new site  
18 would not be Waimanalo. City Council ignored those  
19 commitments, ignored those promises, ignored that  
20 compromise and re-selected Waimanalo as the new site.  
21 The City came in in 2008 with the application we're  
22 still wrestling with in 2019.

23 That's the history of the landfill. And,  
24 in fact, if the history had been known to the  
25 commissioners in 1987, it wouldn't be eight years,



1 and it wouldn't only be for the Leeward Coast. I  
2 submit to you it would not approved a special use  
3 permit for its operation.

4 Knowing the history today, 2019 where the  
5 City has piecemealed things, breaking promise after  
6 promise and violating deadline after deadline. It  
7 can't be rewarded with a new SUP or an amended SUP of  
8 indefinite life.

9 We've come to a point where we need to  
10 close it. What we proposed for closure conditions  
11 until then are both reasonable and amply supported by  
12 the record.

13 Thank you.

14 CHAIRPERSON SCHEUER: Thank you, Mr.  
15 Chipchase.

16 Can we get the lights?

17 Commissioners, questions for KOCA?

18 Commissioner Chang.

19 COMMISSIONER CHANG: Counsel, thank you  
20 very much. We really appreciated the presentation  
21 and the clarification both procedural and  
22 substantially. I just have two questions.

23 One, is all of KOCA's proposed conditions  
24 supported by the record? I know you have citations,  
25 and I just want to have that confirmed for the

1 record. Are all of them part of the original  
2 proceedings -- well, the proceedings back in 2012?

3 MR. CHIPCHASE: Yes, Commissioner, they are  
4 supported by the record. And when the proceedings  
5 were consolidated, we made sure they were supported  
6 not only by the record developed in 2012 but by the  
7 record developed in 2009 as well.

8 COMMISSIONER CHANG: Second question, would  
9 you agree that there is nothing to preclude the City  
10 from filing a boundary amendment?

11 MR. CHIPCHASE: I would agree.

12 COMMISSIONER CHANG: All right. Thank you  
13 very much.

14 CHAIRPERSON SCHEUER: Thank you,  
15 Commissioner Chang.

16 Commissioners?

17 Commissioner Okuda.

18 COMMISSIONER OKUDA: Thank you, Mr. Chair.

19 Mr. Chipchase, do you agree or disagree  
20 that the record as it stands is really based on stale  
21 or old evidence?

22 MR. CHIPCHASE: I agree that it is based on  
23 old evidence in the sense that it has been seven  
24 years, and if you just indulge me for 30 seconds to  
25 add to that.

1           Some of that evidence is perfectly relevant  
2 to all of the issues that you're considering. The  
3 flooding event, the history of violations, those  
4 don't become outdated. Right? They happened, and  
5 they're part of your considerations.

6           The evidence lacks other things that would  
7 be relevant to granting indefinite life of the  
8 landfill like what is the diversion today? What is  
9 the capacity of the landfill? What are the current  
10 impacts on the community? But the City has made the  
11 decision it doesn't want that evidence. In response  
12 to not wanting it, it does not get what it asks for.

13           COMMISSIONER OKUDA: So would you object or  
14 do you see any detriment to the clients that you  
15 represent if the Land Use Commission simply denies  
16 this permit application?

17           MR. CHIPCHASE: I think that that is an  
18 utterly respectable decision, and if it happens, we  
19 don't object to it. What we would do then is seek  
20 redress in court to enforce an illegal operation, and  
21 the court would be in charge of properly structuring  
22 on the phase closure of it.

23           COMMISSIONER OKUDA: Now, do you see a risk  
24 that if we -- if the Land Use Commission were to  
25 approve the special permit with conditions that you

1 might, you have suggested here, that this might just  
2 result in another round of appeals. And, in fact,  
3 one of the grounds for appeals ironically might be  
4 that the City might claim or ENV might claim that the  
5 conditions are not supported by the record because  
6 the record is insufficient because it just has stale  
7 evidence and nothing as far as what's transpired in  
8 the last, let's say, five to eight years.

9 MR. CHIPCHASE: And so if I could take your  
10 question in two parts.

11 COMMISSIONER OKUDA: Sure.

12 MR. CHIPCHASE: The first part is if  
13 conditions were imposed closing landfill as we have  
14 suggested, would ENV appeal? Probably. I think an  
15 appeal from this proceeding is inevitable one way or  
16 the other.

17 Could they appeal on the ground that the  
18 conditions are not supported because the evidence is  
19 stale? I would submit, Commissioner, no, because the  
20 ENV has repeatedly opposed our request to reopen the  
21 proceedings. It made one limited request of its own  
22 years ago, but on the most recent remand from the  
23 Planning Commission it did not seek to add any of  
24 that evidence. As I, say opposed to our efforts, and  
25 it would be very difficult to say we appeal because

1 the evidence is old when they wanted old evidence.

2 COMMISSIONER OKUDA: Final question. Yeah,  
3 and this is not to, you know, insist that people do  
4 things one way or the other. But, you know, me  
5 personally, I would hate to just waste people's time  
6 and, you know, waste people's time by trying to avoid  
7 a hard decision. We got to make a hard decision just  
8 got to make it.

9 But would it be a waste of time, if, for  
10 example, the Land Use Commission were to deny the  
11 City's application for the permit, but stay the entry  
12 of the order for specific period of time to see if  
13 maybe the parties here could make one final Herculean  
14 effort to resolve this case in a way that perhaps not  
15 everybody would be satisfied? But, for example,  
16 would meet the municipal needs of the City, but at  
17 the same time, respecting the burdens of the  
18 residents of the Leeward Coast who I believe, having  
19 looked at the record, including testimony, seem to  
20 historically bear a lot more negative burden for the  
21 rest of Oahu.

22 Would it be a waste of time to, for  
23 example, deny the permit but enter a stay for an  
24 appropriate period of time to see if reasonable  
25 people can try to do something to deal with the

1 situation?

2 MR. CHIPCHASE: I appreciate the  
3 suggestion, and I'll answer with a little bit of my  
4 own philosophy. I never think it's a waste of time  
5 to try to settle a dispute with someone, to try to  
6 talk, even if efforts to date have proved  
7 unsuccessful.

8 I will say that we have tried to talk, and  
9 we have been in discussions for at least six of the  
10 seven years since the proceedings ended including  
11 high level discussion, not just counsel to counsel.  
12 And while there have been times I felt progress, they  
13 have never materialized into anything, so I wouldn't  
14 attach a great deal of hope that something more would  
15 come out of these discussions, but I would never call  
16 them a waste of time.

17 COMMISSIONER OKUDA: Thank you very much.  
18 I have no further questions.

19 CHAIRPERSON SCHEUER: Commissioner  
20 Ohigashi.

21 COMMISSIONER OHIGASHI: I'd like to move to  
22 go into executive session regarding the board's  
23 authority, powers, rights, privileges and immunities  
24 specifically to the consequences on a vote to deny.

25 CHAIRPERSON SCHEUER: Specifically on the

1 consequences of a vote to deny.

2 COMMISSIONER WONG: Mr. Chair, I second  
3 that.

4 CHAIRPERSON SCHEUER: Okay. There is a  
5 motion. This did come up in discussions just  
6 recently as a question to one of the parties.  
7 There's a motion to go into executive session. Is  
8 there discussion on the motion? If not, all in favor  
9 say "aye". Anyone opposed? The Commission will go  
10 into executive session.

11 (Executive session.)

12 CHAIRPERSON SCHEUER: We are back on the  
13 record. And the Commissioners were asking questions  
14 of counsel for KOCA.

15 Commissioners, are there further questions  
16 for Mr. Chipchase?

17 Commissioner Wong.

18 COMMISSIONER WONG: Regarding the timeline  
19 foreclosure that you showed on the presentation,  
20 where did you get those dates? I mean, how was it  
21 got?

22 MR. CHIPCHASE: Yes, absolutely, I'm happy  
23 to address that. So I'll start with the beginning of  
24 it, right, and that would be the waste diversion  
25 condition. As I said, that comes directly from ENV.

1 That was its proposal in 2012 that it would begin its  
2 commitment to diversion by 2014. We have begun that  
3 diversion requirement immediately. It's been six  
4 years since ENV committed to doing it, so we think  
5 that's utterly reasonable.

6 The second phase is the five years to limit  
7 it to ash and automobile shredder residue. Those  
8 dates come from the testimony of Dwight Miller who  
9 was a power expert, but he was the only expert  
10 admitted in landfill site selection.

11 And so he testified that a three-year  
12 timeframe to site and develop a new landfill would be  
13 reasonable. That same day coincides with the  
14 testimony of Frank Doyle, the ENV's then acting  
15 director, in an earlier proceeding where he said  
16 three to four years, five years of cushion, so it was  
17 consistent there. And it was also consistent plus  
18 time for this Commission's prior order directing them  
19 to limit the waste in the same way, a very similar  
20 way in 2009 to be completed by 2012. So all of those  
21 things aligned.

22 And then the full closure seven years was  
23 both consistent with Mr. Miller. We're exceeding  
24 that time period, and we're exceeding what the  
25 Commission had previously done. But also then



1 consistent with all of the other testimony, the ENV  
2 no question began to say at least seven years, at  
3 least seven years, but no one could credibly say  
4 longer than seven years. And so by us giving them  
5 seven years -- and seven years, ignoring all of the  
6 work they had done at, least preliminarily, on site  
7 selection is more than enough time to site and  
8 develop landfill, and I think the record supports  
9 that.

10 COMMISSIONER WONG: So the follow-up to  
11 that is -- the question is the dates, what you gave  
12 us, is that using today's date or, you know, back  
13 then or --

14 MR. CHIPCHASE: We used March 2024. We  
15 used March as the benchmark, so March would be a  
16 little less than five years from today. I would  
17 certainly see it being reasonable to modify that  
18 given that we moved seven months to say October 2024  
19 and October, what did I say, 2027, something like  
20 that, whatever those two dates were. I could see  
21 that being very reasonable.

22 COMMISSIONER WONG: So nothing more than  
23 that five years -- I mean, more than that five years  
24 so seven years. You talked about seven years away.

25 MR. CHIPCHASE: We do for closure, for the

1 final portion is -- actually, it might have been  
2 eight, correct, in 2027, eight years. So for us,  
3 that's right.

4 So for a complete closure, we took the  
5 longest date that anybody had given us that, you  
6 know, seven years, and said, okay, we'll add a year  
7 for that for complete closure. We don't feel that  
8 any further extension of that is supported by the  
9 record.

10 And, for example, there's no evidence that  
11 it would take ten years or that 10 years is a  
12 reasonable time to site and develop a new landfill.  
13 We believe that we've stretched it to the maximum  
14 extent that would be reasonable.

15 COMMISSIONER WONG: With the function that  
16 the City has done some work on its site selection and  
17 all that, correct?

18 MR. CHIPCHASE: Actually, under our  
19 timeframe, you could assume the City is starting  
20 today and hasn't done anything, so giving them the  
21 benefit of what they've done is more than enough  
22 time.

23 COMMISSIONER WONG: Thank you.

24 CHAIRPERSON SCHEUER: Commissioner Cabral?

25 VICE CHAIR CABRAL: Yes.

1           In your proposal, you would like to have  
2   them have that site closed to --

3           CHAIRPERSON SCHEUER:   Somebody's mic is  
4   still on that I think doesn't need to be on.   We're  
5   getting some feedback.

6           VICE CHAIR CABRAL:   You would be closed to  
7   regular rubbish, but you would still allow for the  
8   ash to come in and for the car -- shredding of the  
9   car plastic.   Is that what you would do?

10           So you're saying then -- are you looking at  
11   then the Waimanalo Gulch staying open indefinitely  
12   for those two things?

13           MR. CHIPCHASE:   No, Commissioner.   So the  
14   way we structured it is in that phased way where in  
15   2024 under our timeline, it would close to everything  
16   except that action.   But then in 2027, it would be  
17   closed completely.

18           VICE CHAIR CABRAL:   Okay.   Thank you for  
19   the clarification.

20           MR. CHIPCHASE:   You're welcome.

21           CHAIRPERSON SCHEUER:   Commissioners,  
22   further questions?

23           COMMISSIONER GIOVANNI:   Quick question.

24           CHAIRPERSON SCHEUER:   Commissioner  
25   Giovanni.

1           COMMISSIONER GIOVANNI: This may go also to  
2 Ms. Chan if that's more appropriate. But can you  
3 point me to anywhere in the record, you know, of  
4 evidence, if and when there is closure that there is  
5 a remediation plan to enable future use of the  
6 property for agricultural reasons?

7           MR. CHIPCHASE: So to my recollection,  
8 there is no evidence of a remediation plan. What  
9 we've proposed as a condition associated with closure  
10 is that there be a closure plan, and that would  
11 necessarily involve remediation of the site.

12           COMMISSIONER GIOVANNI: Ms. Chan?

13           MS. CHAN: I don't believe that there's  
14 evidence to that effect based on my recollection.

15           COMMISSIONER GIOVANNI: Thank you.

16           MS. CHAN: Thank you.

17           CHAIRPERSON SCHEUER: Commissioners,  
18 further questions for Mr. Chipchase?

19           Mr. Chipchase, I've spoken a couple times  
20 about 15-15-95(c)(2), the criterion that there be no  
21 adverse effect on neighboring property with the  
22 issuance of a Special Use Permit. I guess I'm have a  
23 hard time on -- I'm trying to reconcile your --

24           You're projector is still on.

25           On the one hand, you're saying that we have

1 all of this evidence on the record of hazardous  
2 effects on neighboring property, yet on the other  
3 hand somehow conditions could somehow obviate the --  
4 or make it possible to meet that criteria.

5 Could you explain further?

6 MR. CHIPCHASE: I'll do my best, Chair, and  
7 I think one way we could conceive of that is if we  
8 thought about a quarrying operation that may involve  
9 the generation of dust. I mean, there's no doubt  
10 that dust could adversely affect surrounding  
11 communities. And if they don't mitigate it, if  
12 there's no plan to address it, to ensure that that  
13 does not go into community, then you couldn't  
14 approve -- you shouldn't approve today the Special  
15 Use Permit, at least not looking at those things in a  
16 vacuum.

17 In our case, there's no question that a  
18 landfill has potential to harm the community.  
19 There's just no question about it, and a landfill of  
20 this size that accepts the kind of waste it does,  
21 that potential is magnified.

22 We have benefit of history that they didn't  
23 have in 1987 knowing that landfill has, in fact,  
24 adversely affected the community in a number of ways  
25 that were presented on the record. Some of which,

1 not all of which we discussed here today and heard  
2 from public testifiers continuously.

3 And so if those adverse effects are not  
4 mitigated such that they are effectively eliminated,  
5 then I agree with you. You're in a difficult  
6 position because the standard would say you can't  
7 grant the Special Use Permit. It has an adverse  
8 effect. If they're mitigated then I think you can  
9 grant.

10 The challenge we have here, and I recognize  
11 that it is a challenge, is if we were coming here  
12 today and we knew these effects would happen, I would  
13 say you have to deny the Special Use Permit. You  
14 can't possibly grant it for any period of time  
15 because you're never going to be able to eliminate  
16 all the adverse effects.

17 That would be my position. I have to  
18 recognize some degree of reality.

19 And while I have no objection to a closure  
20 condition, and I think it's -- or a closure,  
21 immediate closure I think is amply supported by the  
22 conduct on the record. I also recognize there are  
23 findings to the effect and evidence to the effect in  
24 that today we need a landfill.

25 And so what I have tried to do through my

1 conditions both mitigation and condition of closure,  
2 is to balance that. That we need one today. It's  
3 not our fault we don't have a different one. It's  
4 not our fault it is where it is. But when we accept  
5 that it is, how do we do everything we can to  
6 mitigate effect that landfill has -- will have going  
7 forward in recognizing the effects that it has had  
8 being directing it to close, and that's where I come  
9 out.

10 And I recognize, Chair, it's not a perfect  
11 compromise under the rules, I do, but it is the best  
12 one in all these years that we've been able to  
13 develop.

14 CHAIRPERSON SCHEUER: Thank you.

15 Anything further?

16 Okay. Mr. Wurdeman, are you ready to  
17 proceed for Hanabusa?

18 MR. WURDEMAN: Yes, thank you. My  
19 arguments are pretty brief this afternoon. A lot of  
20 it has been discussed and questions also raised by  
21 some of the Commissioners.

22 But back in 2009, it was Intervenor  
23 Hanabusa's position and request of this Commission to  
24 deny the permit. It was based on the record  
25 supported it but, more significantly, and as

1 discussed today and raised by Commissioner Okuda in  
2 citing the Waianae Coast Neighborhood Board case, is  
3 that the appropriate mechanism for this matter given  
4 the history and the piecemeal approach to the use of  
5 the landfill dating back to 1986 and getting  
6 extensions.

7           And then in 2009, after coupled with the  
8 fact that they had made all these promises along the  
9 way to close it as was discussed, but in 2009 there  
10 was this new application that was before this  
11 Commission, and it was again another piecemeal  
12 attempt or approach to continuing the use of the  
13 landfill.

14           And the City and the Police Commission back  
15 in '09 really didn't have too much difference in  
16 their opinion from where they are ten years later  
17 today, and that's to just keep going until it reaches  
18 capacity.

19           And back in '09, this Commission had  
20 ordered the City, as part in Condition 4 in its order  
21 to use reasonable diligence to start locating an  
22 alternative site. It's been ten years, and even with  
23 that pronouncement, which we would submit and was  
24 also discussed, I don't think that there is a current  
25 valid permit in place for the operation of the



1 landfill. There hasn't been one for seven years.

2 And so the City, we would submit, has been  
3 illegally operating this landfill now for  
4 approximately seven years. And what the City should  
5 have done, and I think their approaches to date with  
6 the piecemeal attempts and based also on them being  
7 the Applicant, them being what -- they're the ones  
8 asking for the relief that they're asking for. And  
9 that is, and they conceded on the record today, what  
10 could be construed very reasonably as a permanent  
11 use.

12 I think 50 years was thrown out given the  
13 technology that was used. And I think given that  
14 piecemeal approach that they have taken historically  
15 at the landfill and given the permanent nature of the  
16 request that they're asking for, I think it flies  
17 right in the face of Waianae Coast Neighborhood  
18 Board. And I think that the only remedy under the  
19 law, given the circumstances, is denial of the  
20 permit, and force the City to apply for the  
21 appropriate boundary amendment that's required under  
22 the law, and that the supreme court talked about on  
23 the Waianae Coast Neighborhood Board.

24 So that's our position. And we don't think  
25 that -- I commend Mr. Chipchase for trying to find a

1 reasonable compromise to all of this. But I think  
2 given that the history, given what the City has  
3 requested, given their concessions today in the  
4 record when asked by Commissioner Okuda and others, I  
5 think that the district boundary amendment is the  
6 only mechanism by which the landfill can continue to  
7 operate.

8 So that's our position. We respectfully  
9 ask the Commission to deny the permit.

10 CHAIRPERSON SCHEUER: Commissioners,  
11 questions for the counsel for Intervenor Hanabusa?

12 Commissioner Chang.

13 COMMISSIONER CHANG: Good afternoon, Mr.  
14 Wurdeman. Just a few questions.

15 You mentioned that the City, you believe  
16 they're illegally operating?

17 MR. WURDEMAN: Yes.

18 COMMISSIONER CHANG: Okay. But you  
19 participated in these proceedings. What would have  
20 been the alternative? It would have been to file an  
21 enforcement action?

22 MR. WURDEMAN: The alternative, and we've  
23 raised this on the record in the past, would have  
24 been the State Department of Health to start  
25 enforcement actions and to start imposing daily fines

1 upon the City which the Department of Health has  
2 apparently refused to do. But that is the agency, I  
3 believe, that has that sort of ability to deal with  
4 the City not operating with a valid permit.

5 COMMISSIONER CHANG: So your relief is a  
6 denial?

7 MR. WURDEMAN: Yes.

8 COMMISSIONER CHANG: Would the denial in  
9 effect be the same as illegally operating -- I mean,  
10 what would be the conditions that they would operate  
11 under a denial? They would just not be able to  
12 operate?

13 MR. WURDEMAN: Well, I think they would  
14 continue to operate illegally. They're trying to  
15 remedy it now with these requests for a Special Use  
16 Permit. But in thinking ahead about that question,  
17 you know, it may require, and that's subject to  
18 further litigation and objections, it may require an  
19 emergency proclamation by the executive in order for  
20 them to continue to operate without a permit, and  
21 while they submit an application for a boundary  
22 amendment.

23 COMMISSIONER CHANG: Have you had an  
24 opportunity to review KOCA's proposed conditions?

25 MR. WURDEMAN: Yes.

1           COMMISSIONER CHANG: Do you have any  
2 objections to those proposed conditions?

3           MR. WURDEMAN: We object in the sense that  
4 we, again, believe that it is the Applicant that is  
5 seeking the remedy or the relief, or the permit, I  
6 should say, and that they made it clear that the --  
7 they've taken this piecemeal approach like I talked  
8 about.

9           They made it clear it's pretty permanent in  
10 nature, the Application that they're seeking, and I  
11 think the boundary amendment is the only mechanism  
12 supported by the law for the request at this point.

13          COMMISSIONER CHANG: About how long do you  
14 think the boundary amendment would take, a year?

15          MR. WURDEMAN: I'm not sure. That would  
16 certainly have to come before this Commission for  
17 review once the City would act expeditiously, I would  
18 hope. But in the meantime I think it would be, if,  
19 and that's assuming that the Department of Health was  
20 even going to get moving on imposing fines, that, you  
21 know, it may require, like I said, an emergency  
22 proclamation by the executive branch.

23          COMMISSIONER CHANG: Okay. Thank you.

24          CHAIRPERSON SCHEUER: Commissioner  
25 Ohigashi.

1           COMMISSIONER OHIGASHI: From what I  
2 understand, Mr. Chipchase and yourself, Mr. Wurdeman,  
3 you're both in a sense saying that the -- I guess the  
4 temporal requirement of closure makes it more  
5 applicable to be a boundary amendment; is that right?

6           MR. WURDEMAN: I believe, based on what  
7 they're asking for, and what their arguments have  
8 been in our sessions, that's the only mechanism  
9 provided for by law.

10           COMMISSIONER OHIGASHI: So that means that  
11 Mr. Chipchase's clients are seeking a closure  
12 eventually of the Waianae landfill, my question is:  
13 Is your client seeking closure?

14           MR. WURDEMAN: Well, denial would certainly  
15 be consistent with a closure, because they couldn't  
16 operate without a permit.

17           COMMISSIONER OHIGASHI: Okay. If you get a  
18 boundary amendment, then wouldn't that be a permanent  
19 use for that area? Wouldn't that result in a  
20 permanent use?

21           MR. WURDEMAN: Well, there would be a lot  
22 of -- I mean, they can -- I can't say that they won't  
23 do like they've done in the past, and I'm talking  
24 about the City, and come in and file a new  
25 application for a Special Use Permit four years from

1 now and start this whole process again, and, you  
2 know.

3 COMMISSIONER OHIGASHI: My question was:  
4 If you were seeking a -- if you are forcing them to  
5 seek boundary amendment, aren't you saying that if  
6 they're successful, that this area should remain as a  
7 landfill?

8 MR. WURDEMAN: Well, I think that there are  
9 more extensive procedural protection that this Land  
10 Use Commission can apply, and it would have to be  
11 presented for this Land Use Commission to consider,  
12 but I think that, like I said, that it's the only --  
13 given the history and the concessions included that  
14 were made today by the City, that it's really the  
15 only legal mechanism available.

16 COMMISSIONER OHIGASHI: I don't have any  
17 questions.

18 CHAIRPERSON SCHEUER: Further questions?  
19 Commissioner Wong.

20 COMMISSIONER WONG: I got a question, sir.  
21 So you said special permit, so right now do they have  
22 a special permit?

23 MR. WURDEMAN: No. That's our position.  
24 They do not have a valid special permit.

25 COMMISSIONER WONG: So they are open

1 without a special permit meaning they're doing  
2 something illegal?

3 MR. WURDEMAN: We believe that they have  
4 not been operating the landfill with a valid special  
5 permit that's required, and that the State Department  
6 of Health should have been taking enforcement  
7 measures which they haven't to date, but that's the  
8 position that we have.

9 COMMISSIONER WONG: So the question I have  
10 for you is: Could you or your client take this to  
11 court saying they don't have a special permit?

12 MR. WURDEMAN: Well, I mean, I haven't  
13 thought that far ahead, but I think that certainly  
14 the State Department of Health is the appropriate  
15 body with the authority to take the measures that are  
16 required to be taken.

17 It's like if anyone else was operating  
18 there was some discussion about a private party  
19 operating something without the valid permits. I  
20 mean, I believe the Department of Health would be all  
21 over them in a situation like that. But for whatever  
22 reason, the Department of Health hasn't taken  
23 enforcement measures that it has the jurisdictional  
24 authority to take.

25 COMMISSIONER WONG: So if we deny today,

1 they will still be running without a special permit,  
2 as you were thinking that they would have to come  
3 back for a district boundary amendment that means  
4 they still will be running for a continuing --  
5 have -- running without a special permit until they  
6 do get a DBA, correct?

7 MR. WURDEMAN: Yes, and like I alluded to,  
8 you know, maybe one thing, and it's subject to  
9 arguments later on, but one thing that may be  
10 explored is an emergency proclamation by the  
11 executive branch.

12 COMMISSIONER WONG: Thank you. No other  
13 questions.

14 CHAIRPERSON SCHEUER: Further questions for  
15 Mr. Wurdeman?

16 I have a couple. Sorry if they're somewhat  
17 overlapping with what my fellow Commissioners have  
18 previously asked.

19 Can you articulate a harm to your client or  
20 your client's interest that would occur from granting  
21 the proposed modifications that KOCA had offered,  
22 rather than the denial which you seek?

23 MR. WURDEMAN: I think you, Chair, have  
24 referenced some of that, and some of the public  
25 testimony as well that was brought up today



1 references that, that there will be whether it's  
2 litter going out into the community, soot that falls  
3 on the surrounding area, whatever. There is harm, no  
4 doubt, by the continued use of the landfill.

5 CHAIRPERSON SCHEUER: Thank you.

6 My second question is, so there's, you  
7 know, discussion of the, you know, the DOC said we  
8 should deny. The proper remedy is for the City and  
9 County to persuaded what it had initially started and  
10 then withdrew a district boundary amendment.

11 Do you believe that there's any citable  
12 authority for this Commission to compel the County to  
13 seek a district boundary amendment?

14 MR. WURDEMAN: I can't say that the Land  
15 Use Commission has that authority, but it can  
16 certainly deny it. Their request for a Special Use  
17 Permit, consistent with the authorities cited and the  
18 rationale behind that, and force them to do what's  
19 required by law.

20 CHAIRPERSON SCHEUER: Thank you.

21 Anything further, Commissioners?

22 COMMISSIONER CHANG: Just one question.

23 CHAIRPERSON SCHEUER: Commissioner Chang.

24 COMMISSIONER CHANG: So, Mr. Wurdeman, I  
25 guess I'm trying to look at what are the potential --

1 let me just ask you this question.

2 Would you have any objections to the  
3 adoption of KOCA's proposed order in -- during  
4 this -- in the period that if the City decides to  
5 pursue a DBA, at least there's some kind of  
6 safeguards in -- that there are some conditions  
7 attached to their continued use rather than being  
8 operational illegally?

9 MR. WURDEMAN: I certainly understand and  
10 appreciate your question, Commissioner. Such a  
11 proposal, and any action by the Commission along  
12 those lines would respectfully be over our  
13 objections.

14 COMMISSIONER CHANG: Okay. Thank you.

15 CHAIRPERSON SCHEUER: Anything further,  
16 Commissioners?

17 Okay. In the order of seeing DPP is not  
18 planning to --

19 MS. WONG: No questions.

20 CHAIRPERSON SCHEUER: I didn't think you  
21 were about to jump in.

22 Office of Planning.

23 MR. YEE: Thank you.

24 CHAIRPERSON SCHEUER: Good to have you  
25 back.

1           MR. YEE: Thank you, good to be back.

2           The Office of Planning supports the  
3 Planning Commission's Decision and Order subject to  
4 certain conditions which ENV and Office of Planning  
5 have stipulated to, and we've submitted those  
6 conditions to you today.

7           We were only able to reach an agreement  
8 yesterday, so that explains why it was so late.

9           The conditions are intended by the Office  
10 of Planning because it was important to us that the  
11 planning for the next site be done without rushing  
12 the Land Use Commission, which quite frankly, was  
13 anticipated to be through a special permit.

14           Because the last time this came to us in  
15 2009, it was clearly presented to us as we need  
16 another Special Use Permit. If we do not get the  
17 Special Use Permit, there are major public health  
18 safety problems that occur, and we agreed that if you  
19 shutdown the landfill today, there are major public  
20 health and safety problems that will occur.

21           So while that was a correct statement, we  
22 think proper planning would allow decision makers  
23 more time to reflect upon all the possible  
24 considerations and as well as the alternatives to  
25 allow everyone to make a decision at a more

1 appropriate pace.

2           Having said that, the issue before you  
3 substantively I think is choices -- are three  
4 choices.

5           One, allow the landfill to operate until  
6 its capacity is reached. That's the position the  
7 Office of Planning has agreed with, that is the  
8 position ENV is asking for, that's the position that  
9 the Planning Commission has opted for.

10           Two, close the Waimanalo Gulch Sanitary  
11 Landfill as soon as you can find another landfill.  
12 That's the position that KOCA is essentially asking  
13 for, as well as some additional conditions in the  
14 interim.

15           And three, simply shutdown the Waimanalo  
16 Gulch Sanitary Landfill by denying the permit.  
17 There's some talk about, well, somebody else could  
18 issue an emergency proclamations and other things  
19 could happen, but if they don't happen, the legal  
20 effect would be to shutdown Waimanalo Gulch Sanitary  
21 Landfill, or alternatively the City and ENV will have  
22 to decide to operate it illegally. That is an unfair  
23 choice, I think, to give a government agency to  
24 choose between illegality and public health. So the  
25 department of -- the office of Planning would not

1 support a denial of the Special Use Permit today.

2 In addition, we don't think that there is a  
3 sufficient basis in the record to deny. If nothing  
4 else, this record has demonstrated the need for a  
5 landfill. It's hard for me to imagine anyone  
6 seriously disagreeing that a landfill is needed  
7 somewhere, and it's clear that the result of refusing  
8 this Special Use Permit immediately would be to  
9 result in a public health and safety hazard.

10 So if you do that, if you move in the  
11 direction of denying, we do urge you very strongly to  
12 be very clear about the paces. What did you find  
13 missing in the record? What is the reason?

14 We frankly think it would be appealed and  
15 overturned, and we're going to have to come back all  
16 over and do it again. But if you do it, that would,  
17 you know, that is what you would need to do to be  
18 very clear and specific about the reasons you found,  
19 in light of the record, why the special permit should  
20 be denied rather than remanded for further  
21 consideration.

22 The Office of Planning also looked at the  
23 unusual and reasonable use guidelines. So different  
24 words have been used to describe these, criteria  
25 standards, et cetera. The Office of Planning looked

1 at the rules which uses the term "guidelines." And  
2 one of the guidelines is adverse effect on the  
3 surrounding properties. The Office of Planning views  
4 this not as a checklist.

5 So in other words, it is not that every use  
6 which has an adverse effect on surrounding properties  
7 must be denied. If that was the way you interpreted  
8 it, you would never grant a Special Use Permit  
9 because all activities will have some adverse effect  
10 on the surrounding property. It's impossible to  
11 avoid some impact.

12 We think the guideline is more properly  
13 used as consideration as to what mitigation efforts  
14 should be imposed upon the use in order to mitigate  
15 the impacts on surrounding properties. So, for  
16 example, you have issued quarrying, permits for  
17 quarrying activities, and you may, within that,  
18 provide requirements to mitigate for dust, but you  
19 don't prohibit a Special Use Permit because quarrying  
20 activities may cause dust to surround the properties.  
21 You simply consider that as one of the guidelines,  
22 one of the factors that you look at in deciding  
23 whether or not to grant.

24 So in this particular case, you certainly  
25 can look at what the impacts are to surrounding

1 properties. But if there is a negative or adverse  
2 impact, that does not necessarily mean that you must  
3 deny the permit. That is, I think, simply an  
4 incorrect legal determination.

5           You also look at issues regarding the  
6 boundary amendment and whether or not this should be  
7 a boundary amendment proceeding. You would ask,  
8 could you file a boundary amendment anyway?  
9 Certainly you could file a boundary amendment. The  
10 Office of Planning certainly would not necessarily  
11 agree that a boundary amendment should be granted for  
12 this location, and that's because a boundary  
13 amendment is permanent.

14           And after things like foreign activities or  
15 landfills are done, there is a use to be made of the  
16 property after that. And the Office of Planning does  
17 not necessarily agree that that use should be Urban.  
18 The Office of Planning does not necessarily agree  
19 that you should urbanize this area after it's done,  
20 any more than we agree to any of the other landfills  
21 permits have come to us or quarrying activities that  
22 have come to us.

23           I understand that there may be a longer  
24 activity to this than some of the activities to look  
25 at, a longer term for this. But you, for example,

1 grant special permits for solar facilities by law, by  
2 statute, and those have life spans of 30 years or  
3 more. The 50 years was thrown out, but that is not  
4 in the record as being the appropriate lifetime of  
5 this landfill.

6 So if you are inclined to deny on a basis  
7 of a boundary amendment requirement that because it  
8 takes 50 years to do so, that number is not in the  
9 record as far as we can tell. So if you were going  
10 to do that, you would certainly at the very least  
11 need to remand it back for determination as to  
12 capacity.

13 Related to that, but not related to the  
14 boundary amendment, because capacity was an issue  
15 that the Office of Planning is also concerned about  
16 insofar as it relates to when the planning and  
17 development of the new landfill facility must  
18 be (indecipherable).

19 We know that we did insert within the  
20 proposed conditions a requirement to provide a  
21 semi-annual report of the capacity for both ash and  
22 MSW, so separately so that's available to you, ENV,  
23 Department of Planning and the public as to what the  
24 capacity is. We understand that that number will  
25 change over time. That you can have an estimate



1 today which may be perfectly accurate today, and in  
2 five years, that number is no longer correct.

3           You have to look it over and re-evaluate  
4 and re-evaluate both because technology changes,  
5 circumstances change. We don't know if the  
6 population is going to have a significant jump or  
7 reduction.

8           And, of course, there are recycling  
9 diversion efforts that affect the lifetime capacity  
10 of any landfill.

11           So while we certainly think it's important  
12 to do that capacity analysis, it's not necessarily a  
13 study, and I don't think we want to require them on a  
14 semi-annual basis to decide to -- well, we think they  
15 can do that estimate on a semi-annual basis, to make  
16 sure they're monitoring and everyone else can monitor  
17 what the capacity of the landfill is currently so  
18 that planning, appropriate planning can be done with  
19 sufficient time to ensure that the next landfill site  
20 is up and running before the capacity is reached at  
21 the Waimanalo Gulch Sanitary Landfill.

22           Let me come back briefly to the boundary  
23 amendment question. Or when I said, if you wanted to  
24 decide on the boundary amendment question, you need  
25 to remand it. The issue of remand came up as well,

1 is there sufficient information in the record to make  
2 the decision? And it's interesting because both  
3 KOCA -- KOCA has sort of two different views. One is  
4 on the one hand, you think you have enough  
5 information to grant its conditions, but then on the  
6 other hand doesn't note to you it objected to the --  
7 a refusal of the Planning Commission to open the  
8 record.

9           So all I can say is when Commissioner Okuda  
10 mentioned that this is a quasi-judicial proceeding,  
11 he was absolutely correct. And quasi-judicial  
12 proceedings rely upon an adversarial basis, so that  
13 is you have multiple parties who are opposed to each  
14 other, and you rely upon them to bring forward the  
15 information to the decision maker. And the decision  
16 maker rules upon the issues brought to that person,  
17 to that decision maker.

18           This is not to say that you as a decision  
19 maker cannot interpose additional issues. And say  
20 nobody raised this question, but I want to raise this  
21 question. But when you do that, the Office of  
22 Planning would suggest that you give the parties an  
23 opportunity to reply.

24           So KOCA asked to open the record for I  
25 think three specific issues. If you want the record

1 to be opened up for something else, be very specific,  
2 because otherwise the only thing the Planning  
3 Commission can do is to hear what the parties are  
4 telling them and then to react to whether or not that  
5 particular information is necessary for a decision.

6 If you have a different view -- so in other  
7 words, let us suppose you're thinking, I don't know  
8 why September of 2022 to make -- to identify another  
9 site. Maybe there is a good reason, but I don't know  
10 why. If KOCA or one of the parties don't raise it,  
11 the Planning Commission won't raise it either. And  
12 so be very specific when you say, I'm looking for  
13 this particular issue, or I'm looking for how long it  
14 would take to do a boundary amendment, or I want to  
15 here evidence on how long it takes to -- for a new  
16 site to be up and running if you begin, you know, on  
17 day one, how much time.

18 Whatever the issue, if you want to remand  
19 it for that purpose, then be very clear about why  
20 you're remanding it. Because otherwise it is  
21 difficult I think for the Planning Commission to sort  
22 of glean what the thought is and to anticipate what  
23 your purpose is to remand.

24 Finally, I just want to note that the  
25 Office of Planning -- you're certainly restricted to

1 the evidence you have in the record. The Office of  
2 Planning is not, so we can make our decisions, of  
3 course, on a variety of issues and a variety of  
4 information.

5 We believe there are many good reasons why  
6 Waimanalo Gulch Sanitary Landfill was picked by the  
7 City and ENV to be the site of the continuing  
8 operation, maybe you don't. But if you think that  
9 it's not, if you disagree with that conclusion, if  
10 you decide that the role of the Land Use Commission  
11 is more than just yes or no, does it or does it not  
12 meet the requirements, and more into I want to see  
13 what the alternatives were, and I want to agree that  
14 of the various alternatives that were looked at, yes,  
15 I think this location is the best one to use. If you  
16 want to look at whether or not the management  
17 operations are appropriate, if you want to go that  
18 deep into the operations of the special use being  
19 granted, then I think you need to be very clear about  
20 the remand and allow the parties to argue that  
21 question, either to the Planning Commission or to  
22 you.

23 And in particular I think the reason why  
24 Waimanalo Gulch Sanitary Landfill was chosen as the  
25 site for the continued operation, if that is what

1 you're disagreeing with, then I think you need to  
2 give the City an opportunity to fill the record with  
3 those reasons why.

4 I'd be happy to answer any questions on why  
5 the Office of Planning stands in support as outlined  
6 in our letter. Thank you.

7 CHAIRPERSON SCHEUER: Commissioner Okuda?

8 COMMISSIONER OKUDA: Thank you, Mr. Chair.  
9 Thank you, Mr. Yee, for appearing.

10 You do agree that the City had the burden  
11 and the responsibility to be sure that the record on  
12 appeal was complete for purposes of our review and  
13 decision; correct?

14 MR. YEE: They have the burden of proof to  
15 demonstrate their case. But if another person comes  
16 forward and says, I want an additional condition,  
17 it's not necessarily clear that it is the office  
18 of -- that it's the ENV's responsibility to look at  
19 every possible condition that might be imposed and  
20 say, we don't need this.

21 COMMISSIONER OKUDA: Okay. Well, my  
22 question is more fundamental.

23 Who was responsible to be sure we had a  
24 sufficient record, however you define the  
25 sufficiency, and we can use whatever definition you

1 have in your mind. Who had the responsibility to be  
2 sure the record that was brought up here for us to  
3 look at was sufficient?

4 MR. YEE: I think it depends on the party  
5 who wants the information.

6 COMMISSIONER OKUDA: So if I wanted the  
7 information, it's my responsibility to make sure the  
8 record is sufficient?

9 MR. YEE: If you are a party, rather than a  
10 Commission member, and you think the record should  
11 have additional information in it to make your case,  
12 then it's your responsibility to introduce that  
13 information.

14 COMMISSIONER OKUDA: Let's say -- and this  
15 is the same question I asked some of the other  
16 parties.

17 Let's say all the parties here are frankly  
18 just incompetent attorneys. If the City presented a  
19 record that did not have information which the  
20 supreme court has held to be material and necessary  
21 for an agency to make a decision, I mean, whose  
22 responsibility is it that that record is so  
23 incomplete?

24 MR. YEE: I think the initial  
25 responsibility to make the case for the grant for the

1 special permit is ENV. I think given the fact that  
2 this is a landfill, the responsible activity of the  
3 Land Use Commission is, if you think that there is  
4 insufficient information, you should remand it to  
5 allow for that information to be developed under the  
6 importance of the health and safety of the community.

7 COMMISSIONER OKUDA: And what happens if  
8 the Land Use Commission makes that determination that  
9 information or decision-making was insufficient, we  
10 remand it back to the underlying agency, and they  
11 don't answer our question?

12 Are we supposed to remand it again and say,  
13 hey, you know what, what we said, we're serious.  
14 You'd better answer the questions and provide the  
15 information or else. Is that what we're supposed to  
16 do if it comes back again not answering a question,  
17 we got to send it back down again?

18 MR. YEE: So it's a hypothetical is my  
19 belief, because I think we all take responsibility  
20 for what --

21 COMMISSIONER OKUDA: I don't mean to  
22 interrupt you, but I don't think that's a  
23 hypothetical. I think the record here shows that it  
24 was remanded. And I asked questions of the City's  
25 counsel, and I think the responses indicated that all

1 the items that we asked on remand in a specific order  
2 which I've stayed up many nights reviewing. They  
3 weren't responded to, or is it your -- is it the  
4 Office of Planning's position that the City answered  
5 and responded completely to all the issues that they  
6 were ordered to deal with on remand?

7 MR. YEE: I think it's my view that the  
8 Planning Commission felt that they had the  
9 information they wanted, but may not have given you  
10 the information you wanted. And so I think it would  
11 be helpful to explain to the Planning Commission  
12 here's what I want. And maybe the Land Use  
13 Commission thinks we weren't clear enough the first  
14 time, but obviously that's apparently not what the  
15 Planning Commission's view is.

16 COMMISSIONER OKUDA: Well, let me ask: Is  
17 there anything in the record, because we're only  
18 talking about the record like you said.

19 Is there anything in the record where any  
20 attorney, including the City's attorney, ever stated  
21 that the remand order from the Land Use Commission  
22 was unclear, confusing or, hey, we just plain can't  
23 understand that order?

24 MR. YEE: I'm certainly not aware of that,  
25 but I'm not sure if I was an attorney I'd ever say



1 that on the record.

2 COMMISSIONER OKUDA: Well, no. I mean, I  
3 think our practice of more, a little bit since being  
4 licensed in 1981, I file motions with judges and  
5 included asking for informal status conference if the  
6 judge is not clear or if I don't understand the  
7 order, it's my obligation as the trial lawyer in  
8 service to my client to make sure I raise that  
9 question and ask for clarification.

10 I mean, you've seen motions for  
11 clarification, haven't you?

12 MR. YEE: I certainly have. I will say,  
13 though, if the plan -- if the parties and the  
14 Planning Commission have not done what you have  
15 wanted to do, it is not because they are unwilling.  
16 I think if they did so, it would have been a mistake,  
17 and if you give them another opportunity, I think  
18 they will fill the record as long as you're clear  
19 with what you want the record to be.

20 COMMISSIONER OKUDA: Okay. Well, you know,  
21 in the end everybody is going to decide whether the  
22 remand order was clear or not, and I might be in a  
23 minority position regarding that.

24 Let me ask you another question which I  
25 asked the other attorneys here.

1           Is it proper for an administrative agency  
2           or a Commission like ours to make a decision based  
3           simply on stale evidence, and you can put whatever  
4           definition you want for the word "stale."

5           MR. YEE: You have to make sure there's  
6           sufficient evidence. Whether or not evidence is  
7           stale or not is -- I mean, it's a fact-dependent  
8           question. So...

9           COMMISSIONER OKUDA: Well, in this case,  
10          what in the record shows what has happened to this  
11          landfill in the last five years?

12          MR. YEE: And why would that -- I don't  
13          want to ask you a question.

14          COMMISSIONER OKUDA: Oh, no, go ahead and  
15          ask, everyone asks me questions. I mean, my wife is  
16          always asking me questions. So go right ahead. I  
17          don't take any offense here.

18          MR. YEE: Okay. Thank you.

19          COMMISSIONER OKUDA: Because we want to lay  
20          all the cards on the table here, so ask whatever you  
21          want to ask.

22          MR. YEE: It would not be clear to me as to  
23          what they were supposed to do. So well, I -- let me  
24          apologize. Maybe if you could phrase the question to  
25          me. Will you rephrase the question to me?

1 COMMISSIONER OKUDA: Okay.

2 Do you believe -- would it be unreasonable  
3 for any of us Commissioners to believe that it would  
4 be relevant for us to know what has taken place with  
5 the landfill in the last six-and-a-half years?

6 MR. YEE: I think if you want to know, I  
7 would advise ENV to go ahead and let you know  
8 through -- by submitting the evidence to the Planning  
9 Commission.

10 Having said that, if I was ENV, I could  
11 understand why they would say, it doesn't really  
12 matter what's happening to the landfill. We need the  
13 landfill, and we need a special permit to allow its  
14 continued use. What's the relevance of the current  
15 status?

16 COMMISSIONER OKUDA: Well, okay. Maybe I'm  
17 not understanding the response.

18 If any of us came to the conclusion that  
19 because the record here does not address what has  
20 taken place in the last six years regarding the  
21 landfill, would that be a clearly erroneous finding  
22 on our part using the term "clearly erroneous" as the  
23 supreme court uses in determining whether or not an  
24 agency decision or finding should be affirmed or not  
25 affirmed?

1           MR. YEE: I think the Office of Planning is  
2 not trying to phrase our positions in terms of what  
3 is pursuable successfully. We try to phrase what  
4 would be the better decision for you to make. So, I  
5 mean, could you issue a decision which will resist,  
6 you know, a successful appeal because it's not  
7 reasonable, it's not clearly erroneous? You know,  
8 maybe you could, but it doesn't mean really that's  
9 the best decision to make.

10           So if I could just take issue a bit with  
11 what we are trying to say, for example, is if you  
12 said tell me what happened in the last six years.  
13 Really are you trying, for example, to find out what  
14 are your diversion programs that have changed over  
15 the last six? Or tell me the total number of ash by  
16 cubic feet or cubic acres and MSW that is still in?  
17 Tell me over the last six years, how many days has  
18 H-Power been down?

19           I mean, these are the specific issues that  
20 I think would be helpful for the Planning Commission  
21 to know rather than to seek what has happened over  
22 the last six years.

23           COMMISSIONER OKUDA: Okay. I don't want to  
24 belabor the point because in the end commissioners  
25 individually will decide who had the burden to bring

1 up that evidence or those issues.

2 But let me ask this final series of  
3 questions, and it follows up with your statement  
4 about the type of decision that the Office of  
5 Planning is trying to advise us to make.

6 The Office of Planning's job is to look at  
7 broad issues or statewide concern. Is that a fair  
8 statement?

9 MR. YEE: It is a fair statement, although  
10 I think it's incomplete.

11 COMMISSIONER OKUDA: Okay. Well, many  
12 things I say oftentimes are incomplete, but I want to  
13 see about the general framework here.

14 CHAIRPERSON SCHEUER: Commissioner Okuda,  
15 just one moment. I just want to find where we are  
16 timewise.

17 I think, due to the return to neighbor  
18 island of two of our neighbor island Commissioners  
19 and then they're coming back, we're going to adjourn  
20 for the day at 3:45. My inclination is to push  
21 through to that point.

22 COMMISSIONER OKUDA: Yes, okay.

23 CHAIRPERSON SCHEUER: Please continue.

24 COMMISSIONER OKUDA: I'm going to try to  
25 finish in the next --

1           MR. YEE: We have both broad and specific  
2 responsibilities, so you asked about broad issues.  
3 We do look at broad issues. We also look at  
4 specifics.

5           COMMISSIONER OKUDA: Okay. And, you know,  
6 I really feel fortunate and honored to be on this  
7 Commission. And one of the things that makes it  
8 fortunate is the state has sent me to professional  
9 planning seminars and meetings which I assure  
10 everyone in the room that I don't do any of the  
11 touristy stuff. I actually go to these seminars and,  
12 you know -- and since we're talking about things  
13 along the line of broad policy issues that the Office  
14 of Planning is involved in, you know, I've been  
15 impressed by many of the speakers at these  
16 conferences have talked about how planners can bring  
17 social justice, about the fact that planners should  
18 try to work so that people's life expectancies aren't  
19 determined by the zip code that they live in, about  
20 how certain communities seem too bear certain burdens  
21 which other communities don't face.

22           You know, in making these recommendations  
23 that's the Office of Planning has propounded and  
24 enunciated it here in this hearing today, has there  
25 been any consideration given to whether or not the

1 Waianae community seems to bear the burden of a lot  
2 of these types of public facilities which I think we  
3 could, based on our common sense and common  
4 experience and life experience in the state, many  
5 other communities at Portlock, Kahala, Kaimuki,  
6 Lanikai, they wouldn't tolerate that.

7 I don't want to use the word "social  
8 justice" because that's a loaded term, but has the  
9 apparent disproportionate sitings of like a landfill,  
10 has that been taken into account by the Office of  
11 Planning, because I don't hear any of that in the  
12 recommendation or the presentation to us; or is that  
13 something that we shouldn't take into account at all,  
14 if we -- if we're told, hey, don't take that into  
15 account, then I guess maybe we got to look at not  
16 taking it into account.

17 But after attending these presentations  
18 over several years, paid for by the State of Hawai'i,  
19 so I'm assuming the state wants me to try to learn a  
20 little bit about this, that seems to be the  
21 instruction that planners should start paying  
22 attention to disproportion at negative impacts on  
23 communities.

24 Did that negative or potential negative  
25 impact on communities factor into any of the Office

1 of Planning's recommendation? Because frankly I  
2 don't hear any of it right now.

3 And that's my final question, Mr. Chair.

4 MR. YEE: The Department of Planning and  
5 the planners generally have a broad and specific  
6 obligation. Issues of social justice are certainly  
7 important to look at when you're coming up with  
8 community development plans, and you're looking at  
9 larger pictures of where things should be developed  
10 in a large geographic area.

11 When you come down to individual pieces of  
12 property, it's a much more difficult analysis to  
13 identify. Because it's not to say that any one  
14 particular property development of it would be a  
15 violation of social justice.

16 So what we do is we look at the consistency  
17 with community development plans that are created by  
18 the county quite frankly across-the-board.

19 So when it occurs probably more often on  
20 district boundary amendments, when you come across  
21 district boundary amendment should you keep it in  
22 agriculture, should you move it into industrial and  
23 urban, and urban uses, and you look for a balance in  
24 the state and a reason as to why the county's have  
25 proposed these for their community development plan



1 and the process that they followed because it gets  
2 you the input.

3 From a larger perspective, certainly the  
4 Office of Planning has had other issues in which  
5 they've discussed these kind of things but in a much,  
6 much larger analysis rather than as applied to any  
7 particular project. It is difficult to apply to one  
8 project to say that project is a violation of social  
9 justice because the issues really are looking at a  
10 much broader outlook, and you can't get that broader  
11 outlook just by looking at one project.

12 CHAIRPERSON SCHEUER: Commissioner  
13 Giovanni.

14 COMMISSIONER GIOVANNI: I was going to be  
15 quiet, but I need to follow up on that response. I  
16 interpret your response to Commissioner Okuda's last  
17 question to be a very generic high level response. I  
18 interpreted the question to be more specific to this  
19 particular use and project in the Waianae area, and  
20 the question is:

21 Did the Office of Planning take into  
22 account in developing its position and its  
23 recommendations in any way whether there was any  
24 consideration of social injustice for the Waianae  
25 community?

1           MR. YEE: I think the Office of Planning's  
2 view would be that this is an existing landfill, and  
3 that the issues of social justice are really best  
4 determined through existing structures by looking at  
5 conditions.

6           CHAIRPERSON SCHEUER: Commissioner Chang.

7           COMMISSIONER GIOVANNI: I have a follow up.  
8 Different question.

9           CHAIRPERSON SCHEUER: Commissioner  
10 Giovanni.

11           COMMISSIONER GIOVANNI: I'm going to shift  
12 a little bit.

13           My question is from a planning perspective.  
14 We have a situation here in which we have a date  
15 which is identified for identifying the next in a  
16 series of landfills for the Island of Oahu which is  
17 2022.

18           We heard today that at a minimum the  
19 current estimate is that the Waimanalo Gulch landfill  
20 will continue operations to 2039 or longer.

21           From a planning perspective, when would you  
22 get serious about developing any site that is  
23 identified in 2022, knowing you wouldn't need to have  
24 it operational until 2040 or beyond?

25           MR. YEE: I'm going to have to defer to

1 ENV. I don't know.

2 CHAIRPERSON SCHEUER: Commissioner Chang.

3 COMMISSIONER CHANG: Thank you, Mr. Yee. I  
4 just have a couple of questions. You stated -- well,  
5 let me ask you the question.

6 On remand the LUC had some very specific  
7 questions, and I think part of your testimony was  
8 that we should be very specific when we remand  
9 something back to the Planning Commission, perhaps  
10 they didn't understand our question.

11 I guess I'm looking at question No. 2:

12 Clarify the basis of the Planning  
13 Commission's proposed additional Condition No. 3  
14 which specifies a December 31st, 2022, date by which  
15 the Applicant is to identify an alternative site that  
16 will be used upon the WGSJ reaching its capacity and  
17 implications it has on the closure date of the  
18 landfill.

19 I cannot imagine how much more specific we  
20 could have been. So, I mean, how would you have  
21 suggested we alter that?

22 MR. YEE: I would have cut it up into  
23 multiple requirements. I would say, accepted  
24 evidence as to the amount of time that would be  
25 necessary to identify an alternative landfill sites,

1 and then take each part of that paragraph and make  
2 that into a separate request, not to clarify, because  
3 clarify is just explain, but to accept evidence of,  
4 whatever it is each part of that paragraph is asking  
5 for.

6 COMMISSIONER CHANG: And I guess the Land  
7 Use Commission, we were in the position of wanting to  
8 understand the basis upon which the Planning  
9 Commission made its decision. So asking them to  
10 clarify for the Land Use Commission, how did you  
11 choose December 31st, 2022? We didn't make up that  
12 number. That was a number that they were proposing,  
13 and we just wanted to understand where in the record  
14 is that supported.

15 MR. YEE: I think if that's the only issue  
16 that you would have wanted, I wouldn't have been so  
17 concerned about the specificity of your request. I  
18 will say that I think as I heard multiple questions  
19 from multiple people, my sense, my concern was the  
20 way all of that was then communicated may have been  
21 general in its explanation.

22 I am going to guess that ENV understands at  
23 this point what paragraph 2, what you're looking for,  
24 but it doesn't necessarily mean there're going to  
25 send everything else that was discussed today.

1           COMMISSIONER CHANG: Let me ask you another  
2 question:

3           You also, when you talked about I guess it  
4 was the burden, that if -- you know, it may shift to  
5 whoever may want to -- whoever is asking for the  
6 information.

7           So procedurally as I understand it, KOCA  
8 did ask the Planning Commission to reopen the hearing  
9 on specific issues, and the Planning Commission  
10 refused to open the hearing.

11          What more could KOCA have done?

12          MR. YEE: If that's the information you  
13 want that they listed in there, then I would simply  
14 remand it back and require the Planning Commission to  
15 allow those issues.

16          COMMISSIONER CHANG: And you also -- part  
17 of OP's testimony was that a boundary amendment would  
18 not be appropriate for this particular use because  
19 you saw this as potentially at the end of the use of  
20 the landfill, it could go back to agricultural use.  
21 Is that what OP's position is?

22          MR. YEE: Well, you're making me take one  
23 step further than I wanted to go. That is if it  
24 comes up as a district boundary amendment, I don't  
25 want to bind the Office of Planning to support or

1     oppose, but I do want to express a concern that just  
2     because we think that a landfill is appropriate does  
3     not mean that we think the district boundary  
4     amendment is appropriate because there may be future  
5     uses. And we may not agree that urbanization of the  
6     project is appropriate and maybe a park, which is  
7     within the agricultural district, on uses may be a  
8     better use for this location.

9             COMMISSIONER CHANG: So from OP's  
10    perspective going from 60 acres to 100 acres to  
11    200 acres under Special Use Permit, does OP believe  
12    that that was the more appropriate process versus a  
13    doing a DBA for the entire property?

14            MR. YEE: We do because landfill, it's not  
15    unusual for landfills to have special permits. The  
16    fact that it has had multiple special use permits was  
17    something we've accepted as sufficient under the  
18    existing system.

19            COMMISSIONER CHANG: Okay. We have heard  
20    from both KOCA and from Mr. Wurdeman that it is their  
21    opinion that based upon the supreme court decision  
22    that the City's continued use of the landfill is  
23    illegal, that there is no permit. What is OP's  
24    position?

25            MR. YEE: I think OP is not taking a

1 position on this. We'll let the parties argue that  
2 question.

3 I might take one issue and that is,  
4 although I don't represent the Department of Health,  
5 whether or not a person is operating in violation of  
6 the Special Use Permit is not a DOH function. It is  
7 a -- frankly a Department of Planning function. It's  
8 a County function, and if the County is not properly  
9 enforcing its County land use special permit laws,  
10 then the supreme court has been very clear that  
11 individual parties may file an action in circuit  
12 court to enforce those County requirements.

13 COMMISSIONER CHANG: But do you think  
14 operating -- that the landfill, if it was not  
15 operating with appropriate conditions, could be a  
16 public health issue that would fall under the  
17 jurisdiction of the Department of Health?

18 MR. YEE: Yes and no. The violation of the  
19 Special Use Permit is not a Department of Health  
20 violation, but the Department of Health has a  
21 separate permit which is granted.

22 So a violation of the Department of Health  
23 permit would be something certainly the Department of  
24 Health would enforce. But if you're violating a  
25 Special Use Permit which is issued through the County

1 and LUC, the Department of Health doesn't enforce  
2 those conditions even if those conditions are related  
3 to public health.

4 COMMISSIONER CHANG: I guess as I  
5 understand KOCA's position and Hanabusa's position,  
6 is that there is no permit, so it's not as if there's  
7 a violation. There just is no permit in light of the  
8 supreme court's decision.

9 MR. YEE: The Office of Planning doesn't  
10 take a position.

11 COMMISSIONER CHANG: So finally, KOCA has  
12 proposed some additional conditions. Does Office of  
13 Planning object to those additional conditions?

14 MR. YEE: The Office of Planning isn't  
15 taking position on KOCA's proposed conditions. I  
16 think as a general matter the question of those  
17 conditions relate to:

18 One, do you think that the landfill should  
19 close as soon as you can find a new one, that's a  
20 policy choice.

21 And two, how deeply does the Land Use  
22 Commission believe it wants to be involved in the  
23 operation and maintenance of a landfill?

24 Other special permits frankly are less  
25 involved in those kinds of details, but -- so but I



1 believe that to the Land Use Commission's discretion,  
2 as to how deeply or how much detail it wants to get  
3 into regarding management and operation. The land  
4 use process is a complicated one. There are a lot of  
5 different players in it, and we all try to stay in  
6 our lane and do what we're supposed to do and then  
7 let other people do what they're supposed to do.

8           So let me just draw one example of a  
9 district boundary amendment case. There was a case  
10 in which there was an argument whether or not we  
11 should include violations of another law into the  
12 requirements for the developer, and the issue there  
13 involved as to whether or not the land use process  
14 was the appropriate enforcer of those requirements.

15           In other words, their requirements, other  
16 people have to enforce them, should you also make the  
17 land use entities the enforcer of these requirements  
18 as well, because otherwise these other requirements  
19 are enforced by other entities. So that I think  
20 would be the kind of question you could ask yourself  
21 about that.

22           COMMISSIONER CHANG: As I understood KOCA's  
23 recommendation, it wasn't necessarily to have the  
24 Land Use Commission be the enforcer but that these  
25 would just be conditions similar to other conditions

1 that we have on other permits or boundary amendments.  
2 We would not necessarily be enforcing, but they would  
3 be a, you know, they would be the management theme  
4 upon which the operations would be permitted to  
5 conduct itself.

6 MR. YEE: But presumably you create a new  
7 remedy. So in other words, if you have a land use  
8 permit, either a District Boundary Amendment or a  
9 Special Use Permit, and you say, compliance with EPA  
10 requirements -- you shall comply with EPA  
11 requirements. EPA looks at it and says, can you fix  
12 it. Yes. Fine, I'm good with it. Someone else can  
13 go to the appropriate land use enforcer and say, but  
14 it was also a violation of the Land Use permit, and  
15 therefore I want you to enforce this violation as  
16 well because it's not just a violation of the EPA  
17 requirement. It is now, because you incorporated it  
18 into the permit, also a land use violation, and so  
19 now I want you to fill in the blanks.

20 I want you to take away the special use  
21 permit. I want you to take away district boundary  
22 amendment. I want you to hold an Order to Show  
23 Cause, you know, whatever the issue is. And so then  
24 the question comes to the Land Use Commission, how --  
25 what kind of things do we want to incorporate into

1 our land use permit to be the new enforcer?

2 I say enforcer and I should correct myself  
3 a little bit. The Land Use Commission is not the  
4 enforcer, right. It's the counties that are always  
5 the enforcer of special use permits and district  
6 boundary amendment proceedings. But if someone  
7 doesn't then, of course, as I said before, an  
8 individual can file a lawsuit for failing to enforce.

9 COMMISSIONER CHANG: Thank you.

10 CHAIRPERSON SCHEUER: Commissioners?

11 Commissioner Wong.

12 COMMISSIONER WONG: Mr. Yee, question. So  
13 I have questions about a special permit versus a DBA.  
14 Okay. Now, shouldn't a special permit have a set  
15 amount of time?

16 MR. YEE: I don't think it's required to  
17 have a set amount of time. And in this particular  
18 case, it is not -- well, let me -- if I could draw  
19 you a couple examples to show what the differences  
20 could be. You could issue a permit to say you can  
21 operate a school. And there's just no cut off date  
22 for that school. That school can operate forever.  
23 Quarries, landfills, cannot operate forever. They  
24 necessarily have sort of a physical end date.

25 So because of that, the Office of Planning

1 views that it falls within the things that you could  
2 have -- could be allowed to have as a special permit.  
3 And, in fact, the Land Use Commission has approved  
4 quarries and landfills.

5 COMMISSIONER WONG: I have a question. I  
6 tried to ask Ian what is the conservative time  
7 instead of capacity for this landfill, and they said  
8 they didn't really -- they just said pretty much to  
9 my knowledge, there was no time, because due to the  
10 changing technology, you know, it could be short, it  
11 could be long, dependent upon what happens  
12 catastrophic and/or technology, you know, changes, et  
13 cetera. Okay.

14 So when we go with capacity, if let's say  
15 nothing happens, hopefully no catastrophic events and  
16 technology increases the capacity or the timing could  
17 be a hundred years. I mean, I'm being facetious in  
18 that respect.

19 But, I mean, if you think about it, the  
20 capacity could be, not like a ten-year window, it  
21 could be 20 years or 30 years, et cetera.

22 MR. YEE: 20 years is not I think  
23 unreasonable. But if that information is important  
24 to you, that information makes a difference to you as  
25 to whether or not a Special Use Permit should be

1 granted, that you know the current estimated capacity  
2 of the Waimanalo Gulch Sanitary Landfill, I'm afraid  
3 you'd have to remand it, and they would have -- and  
4 ask the Planning Commission to introduce evidence  
5 into the record as to the current capacity of the  
6 Waimanalo Gulch Sanitary Landfill for ash and MSW.

7 With respect to the response that you got  
8 from ENV, let me provide this clarification. Yes,  
9 the estimate can change, yes. There are a lot of  
10 things that can affect it.

11 That doesn't mean you can't get estimates.  
12 It does mean the estimates can change over time, but  
13 you can get a current estimate of what it is. So as  
14 long as you understand that that number could change  
15 as time moves on and it could get longer or shorter,  
16 and that -- and you accept that, you can get a number  
17 if that's what you want.

18 COMMISSIONER WONG: So when my son asks,  
19 Dad, can I borrow money? I only need 100 today, but  
20 I'd rather than asking tomorrow for another 300. I  
21 mean, there's a point in time request, right?

22 MR. YEE: Yes.

23 COMMISSIONER WONG: So it could change  
24 depending upon what he needs or what happens, if he  
25 has a girlfriend that he has to spend money on,

1 right?

2 MR. YEE: Maybe that's not exactly the  
3 example, but that's essentially correct.

4 COMMISSIONER WONG: Thank you.

5 CHAIRPERSON SCHEUER: Commissioners? I  
6 have more questions that can be asked and answered in  
7 the next four minutes. So I think it's probably just  
8 an appropriate time that we will recess until  
9 9:00 a.m. tomorrow morning in this room.

10 MR. WURDEMAN: Mr. Chair, excuse me.  
11 Unless the Commission has anything further from  
12 Intervenor Hanabusa, we would ask to -- that we be  
13 allowed to submit on what we presented and be excused  
14 from tomorrow's proceedings if that's acceptable.

15 CHAIRPERSON SCHEUER: Honestly I cannot.  
16 The way our procedure goes is that after we're done  
17 with questioning from -- with the Office of Planning,  
18 we have a final round where the Commissioners are  
19 able to ask questions of any of the parties.

20 It's at your client's own risk if you don't  
21 show up.

22 MR. WURDEMAN: Very well, thank you.

23 MS. CHAN: May I ask for some clarification  
24 about procedure?

25 CHAIRPERSON SCHEUER: Yes.

1 MS. CHAN: Are the parties allowed to  
2 essentially provide more comments in rebuttal to  
3 things that were presented by the Intervenors that  
4 went after me? There were a number of things that  
5 were stated by other parties that would need to be  
6 addressed.

7 MR. SANDISON: I would also like to second  
8 that. I yielded time for the purposes of procedure.  
9 If we go, he responds, we should have chance to  
10 rebut.

11 CHAIRPERSON SCHEUER: One moment.

12 I'm inclined to grant that request, but I  
13 want to keep in mind that we have to, due to the  
14 45-day deadline, and the Commission's sort of very  
15 significant other duties on a whole bunch of other  
16 dockets, too. We're going to have to make a decision  
17 on this docket or try to move to it tomorrow, so be  
18 very -- prepare to be very concise in anything  
19 further addressing the matters to Commission.

20 So the procedure is tomorrow we'll conclude  
21 with questioning of Mr. Yee. I will then offer for a  
22 reasonable amount of time from each party for sort of  
23 closing before we open up to further questions of any  
24 of the parties, ten minutes per party.

25 MS. CHAN: If I could ask for 15, just to

1 be given that --

2 MR. YEE: OP will go five if that will  
3 help.

4 CHAIRPERSON SCHEUER: Yes, 15, five for OP.

5 MR. CHIPCHASE: Very good, Chair, as long  
6 as it's even, we have no objection.

7 CHAIRPERSON SCHEUER: Okay. So procedures  
8 for tomorrow, we'll start at 9:00. We'll finish  
9 questioning with Mr. Yee. Each party will have ten  
10 minutes or otherwise traded up or down with their  
11 fellow parties.

12 We will have final questions from the  
13 Commissioners for the parties, and then we will begin  
14 deliberation. With that we're in recesses until 9:00  
15 a.m. tomorrow.

16 (The proceedings recessed at 3:45 p.m.)

17

18

19

20

21

22

23

24

25



## CERTIFICATE

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF HONOLULU            )

I, JEAN MARIE McMANUS, do hereby certify:

That on October 9, 2019, at 9:40 a.m., the  
proceedings contained herein was taken down by me in  
machine shorthand and was thereafter reduced to  
typewriting under my supervision; that the foregoing  
represents, to the best of my ability, a true and  
correct copy of the proceedings had in the foregoing  
matter.

I further certify that I am not of counsel for  
any of the parties hereto, nor in any way interested  
in the outcome of the cause named in this caption.

Dated this 9th day of October, 2019, in  
Honolulu, Hawaii.

/s/Jean Marie McManus  
JEAN MARIE McMANUS, CSR #156