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SCHNITZER STEEL HAWAII CORP.

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

For a New Special Use Permit To Supersede
Existing Special Use Permit To Allow A 92-5-
Acre Expansion And Time Extension For
Waimanalo Gulch Sanitary Landfill,
Waimanalo Gulch, O'ahu, Hawai'i, Tax Map
Key: 9-2-03: 72 And 73,

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special Use
Permit No. 2008/SUP-2 (also referred to as
Land Use Commission Docket No. SP09-403)
which states as follows:

"14. Municipal solid waste shall be allowed at
the WGSL up to July 21, 2012, provided that
only ash and residue from H-POWER shall be
allowed at the WGSL after July 31, 2012."

FILE NO. 2008/SUP-2
LUC DOCKET NO. SP09-403

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
DECISION AND ORDER; CERTIFICATE
OF SERVICE

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

COMES NOW Intervenor Schnitzer Steel Hawaii Corp., by and through the undersigned attorneys, and hereby submits these proposed Findings of Fact, Conclusions of Law, and Decision and Order pursuant to the oral order of the Planning Commission, City and County of Honolulu on October 12, 2016 and the Rules of Planning Commission, City and County of Honolulu § 2-74.

DATED: Honolulu, Hawaii, January 27, 2017.



IAN L. SANDISON
ARSIMA A. MULLER

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FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

This matter relates to two separate, but related, applications before the Planning Commission, City and County of Honolulu (the “Planning Commission”): (1) the Department of Environmental Services, City and County of Honolulu’s (“ENV”) December 3, 2008 Application for State Special Use Permit (“SUP”), seeking to supersede an existing SUP and allow a 92.5 acre expansion of the Waimanalo Gulch Sanitary Landfill (“WGS�” or the “Landfill”) and

extend its time of use (the “2008 Application”), being re-considered by the Planning Commission pursuant to an order of remand from the State of Hawaii Land Use Commission (“LUC”); and (2) ENV’s June 28, 2011 Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying the Land Use Commission’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 (the “2011 Application”).

The 2008 Application came on for a contested hearing before the Planning Commission on June 22, 2009, June 24, 2009, July 1, 2009, and July 8, 2009. After completion of the contested case hearing, on July 31, 2009, the Planning Commission recommended approval of the 2008 Application subject to ten conditions and set forth this approval in its Findings of Fact, Conclusions of Law, and Decision and Order, dated August 4, 2009 (“2009 PC Decision”). Although the 2008 Application is now before the Planning Commission again on remand from the LUC, none of the findings in the 2009 PC Decision were challenged or stricken on appeal. In addition, the record before the Planning Commission relating to the 2008 Application was not re-opened for new evidence. Therefore, unless otherwise indicated herein, the Planning Commission hereby incorporates the 2009 PC Decision into the following findings of fact, conclusions of law, and decision and order.

The 2011 Application came on for a contested case hearing before the Planning Commission on December 7, 2011, January 11, 2012, January 25, 2012, February 8, 2012, March 7, 2012, April 4, 2012, April 11, 2012, and April 23, 2012. Based on the record in this matter, including the evidence adduced at the contested case hearing, the credibility of the witnesses testifying at the hearing, and the proposed findings of fact, conclusions of law, and decisions and orders proposed by the parties and their respective responses thereto, the Planning

Commission hereby makes the following findings of fact, conclusions of law, and decision and order. Unless otherwise indicated herein, the following findings of fact, conclusions of law, and decision and order are intended to supplement the 2009 PC Decision.

FINDINGS OF FACT

I. DESCRIPTION OF THE PROPERTY

1. WGS� is located at 92-460 Farrington Highway, Honolulu, Ewa, Oahu (the "Property"). *See* Letter from David K. Tanoue, Director of the Department of Planning and Permitting, to Gayle Pingree, Chair of the Planning Commission, dated September 9, 2011 ("DPP Recommendation"), at 1.

2. WGS� is owned by the City and County of Honolulu (the "City") and managed by Waste Management of Hawaii, Inc. ("Waste Management). *See* Tr. 04/11/12, 162:22-24, 170:8-9.

3. The state land use district designation for the Property is Agricultural District. *See* DPP Recommendation, at 1.

4. The existing City zoning district for the Property is AG-2, General Agricultural District. *See* DPP Recommendation, at 1.

5. The Ewa Development Plan recognizes the existing landfill. *See* Ex. A35, §4.5.

6. Surrounding land uses include the Hawaiian Electric Company Kahe Power Plant to the west, single-family dwellings and Ko Olina Resort to the south, and vacant lands to the north and east. DPP Recommendation, at 2.

7. WGS� is the only licensed or permitted municipal solid waste ("MSW") landfill on the island of Oahu. *See* DPP Recommendation, at 2; Tr. 01/25/12, 59:6-9.

II. PRIOR PROCEEDINGS

8. WGS� received a SUP in 1987. *See* A5, at 9-10. The SUP covered 60.5 acres of land. *See id.*

9. WGS� began its operations in 1989. *See* Ex. A15, at 5. That same year, the site was expanded by an additional 26 acres to enable the construction of the administration building, weighing station, drainage structures, and access roads. *See* Ex. A6, at 9-10.

10. On January 17, 2003, ENV filed an application to amend its SUP in order to expand the Landfill by 21 acres. *See* Ex. A8, at 1.

11. On March 13, 2003, the Planning Commission granted ENV's application to amend its SUP. *See* Ex. A7, at 5-6. At that time, based on the WGS�'s then-existing capacity, the City anticipated that the Landfill would close in five years, so the Planning Commission recommended on March 13, 2003, that ENV submit an alternative landfill site or sites to the City Council by December 31, 2001, and close WGS� no later than May 1, 2008. *See id.*

12. Because ENV's application to amend its SUP was for greater than 15 acres, the application was also reviewed by the LUC. *See* Ex. A8, at 2. On June 9, 2003, the LUC issued a decision which also required the City Council to select a new site for a landfill, with the assistance of the Blue Ribbon Site Selection Committee, by June 1, 2004. *See* Ex. A8, at 7.

13. The City Council received an extension of the June 1, 2004 deadline set by the LUC, and by resolution dated December 1, 2004, selected the Waimanalo Gulch site as the City's future landfill site. *See* Ex. A11, at 1. The City Council determined that the Waimanalo Gulch site would satisfy Oahu's need for a landfill to manage MSW for the foreseeable future. The City Council concluded that:

- (1) Waimanalo Gulch site had at least 15 years of capacity left;

- (2) Waimanalo Gulch site is the most economical site for which all costs and revenues are known factors;
- (3) Other sites would require large amounts of money to acquire land and develop the site and infrastructure;
- (4) An operating contract is already in existence; and
- (5) The Landfill operator is committed to addressing community concerns.

See id. at 2.

14. On July 6, 2007, ENV filed an application to amend the 2003 Planning Commission decision by extending the deadline to accept waste at WGS� from May 1, 2008 to May 1, 2010, or until WGS� reached its permitted capacity, whichever occurred first. *See Ex. A14, passim.* ENV's request was deemed to be necessary in order to accommodate and implement the City Council's selection of WGS� as the City's future landfill site. The Planning Commission granted ENV's application on January 16, 2008, and also recommended that the LUC amend its 2003 decision to reflect the same deadline. *See Ex. A15, 7-8.*

15. The LUC adopted the Planning Commission's recommendation, but shortened the waste acceptance cutoff from May 1, 2010 to November 1, 2009, and required ENV to report to the LUC every six months on the actions taken to mitigate further use of WGS�. *See Ex. A16, at 18.*

III. 2008 APPLICATION

16. Unless otherwise indicated herein, the Planning Commission hereby incorporates the Findings of Fact from the 2009 PC Decision relating to the 2008 Application.

17. On November 23, 2006, the Office of Environmental Quality Control, State of Hawaii ("OEQC"), published notice in *The Environmental Notice* that the Environmental Impact Statement ("EIS") Preparation Notice for the expansion of WGS� was available for public review and comment. *See Letter from David Tanoue, Director of the Department of Planning and Permitting, to Karin Holma, Chair of the Planning Commission, dated May 1, 2009, at 6.*

18. On October 13, 2008, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003:072 and 073*, dated October 2008 (“2008 FEIS”), for the expansion of WGSL, was accepted on behalf of the Mayor by the Department of Planning and Permitting (“DPP”). *Id.*

19. On October 23, 2008, OEQC published notice of the 2008 FEIS Acceptance in *The Environmental Notice*, in accordance with the Hawaii Environmental Protection Act, Hawaii Revised Statutes (“HRS”) Chapter 343. *Id.*

20. On December 3, 2008, ENV filed the 2008 Application with DPP pursuant to HRS Section 205-6, Title 15-15 of the Hawaii Administrative Rules (“HAR”) (Rules of the Land Use Commission), and Section 2-49 of the Rules of the Planning Commission (“RPC”). The 2008 Application seeks a new SUP (File No. 2008/SUP-2) to supersede the existing SUP (State Special Use Permit No. 86/SUP-5) that would authorize ENV to use an additional 92.5 acres of the site and operate WGSL to capacity. *See Ex. A18, at 2-3.*

21. The State of Hawaii, Department of Land and Natural Resources, State Historic Preservation Division (“SHPD”) reviewed the 2008 Application to expand WGSL and ENV’s proposed mitigation and determined that there was no effect on historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD to David Tanoue, Director of DPP, dated April 2, 2009. *See Ex. A48.*

22. No native Hawaiian customary and traditional rights or practices at the Property were identified. *See Ex. A18.*

23. The Planning Commission conducted a contested case hearing on the 2008 Application on June 22, 2009, June 24, 2009, July 1, 2009, and July 8, 2009. The intervenors in that contested case hearing were Ko Olina Community Association, Maile Shimabukuro and

Colleen Hanabusa. Schnitzer Steel Hawaii Corp. was not a party to those contested case proceedings. *See* A18, at 3.

24. On July 31, 2009, the Planning Commission approved the 2008 Application subject to ten conditions and further recommended that all conditions previously placed on WGS� under SUP File No. 86/SUP-5 would be null and void. *See id.*, at 24-27.

25. In the 2009 PC Decision, the Planning Commission made the following significant findings:

- It would take more than seven years to identify and develop a new landfill site (other than WGS�).
- On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Waimanalo Gulch site as the site for the City's landfill.
- The proposed expansion of WGS� within the Waimanalo Gulch site was needed because WGS� is a critical part of the City's overall integrated solid waste management efforts.
- Continued availability of WGS� is required as a permit condition to operate HPOWER, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.
- Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.
- WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by HPOWER.
- WGS� is a critical portion of the City's overall ISWMP, which looks at all of the factors that make up solid waste management, including reuse and recycling, the HPOWER facility, and landfilling for material that cannot be recycled or burned for energy.
- Other items that cannot be recycled or burned at HPOWER are deposited at WGS�, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels.

See id. at 8, 18-19.

26. The Planning Commission also concluded as follows:

[T]he Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which the WGSL is located continues to be unsuited for agricultural purposes.

See id. at 24.

27. In the 2009 PC Decision, the Planning Commission did not impose an expiration date for the SUP or any deadline for the acceptance of waste at WGSL. Instead, the Planning Commission concluded that "[t]he term or the length of the new SUP shall be until the Waimanalo Gulch reaches its capacity as compared to a definite time period of 'X' number of years." *See Ex. A17*, at 2.

28. The ten conditions imposed by the Planning Commission were as follows:

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

2. The Applicant shall continue efforts to use alternative technologies to provide a comprehensive waste stream management program that includes HPOWER, plasma arc, plasma gasification, and recycling technologies, as appropriate. Applicant

shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

3. The Applicant shall provide, without writtent notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGS�'s operations, and Applicant's compliance with conditions imposed herein. The annual reports shall also address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission on June 1 of each year subsequent to the date of this Decision and Order.

4. Closure Sequence "A" for the existing landfill cells at WGS� as shown on Exhibit "A12" must be completed, and final cover applied by December 31, 2012.

5. WGS� shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.

6. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGS� with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

7. The operations of the WGS� under 2008/SUP-2 shall be in compliance with the requirements of Section 12-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.

8. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

9. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe there has been a failure to perform conditions imposed herein by this Decision and Order.

10. The Applicant shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

See Ex. A18 at 25-26.

29. On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision

and Order with Modifications (“2009 LUC Decision”). *See* Ex. A19. Despite adopting the Planning Commission’s findings, including that it would take more than seven years to identify and develop a new landfill site, the LUC issued the SUP subject to the following condition:

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

See id. at pgs 4, 8-9.

30. On November 19, 2009, ENV filed an appeal against the LUC, Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa in the Circuit Court of the First Circuit (Civil No. 09-1-2719-11). *See* Ex. 21. Among the issues appealed was the LUC’s imposition of Condition No. 14. *See id.* at 2.

31. On September 21, 2010, the Circuit Court affirmed Condition No. 14 of the 2009 LUC Decision. *See id.*

32. On November 12, 2010, ENV filed a Notice of Appeal to the Hawaii Intermediate Court of Appeals. *See* DPP Recommendation, Attachment B, at 10.

33. On July 14, 2011, ENV moved to transfer the appeal to the Hawaii Supreme Court, which was granted by the Supreme Court on August 1, 2011. *See* ENV’s Memo. in Opp. to Mot. to Dismiss, at 5.

34. On May 4, 2012, the Hawaii Supreme Court rendered its decision relating to the appeal of the LUC’s Condition No. 14. *See* ENV’s Notification of Supreme Ct. Decision or in the Alternative Mot. for Stay of Contested Case Hearing, Ex. A. In its decision, the Hawaii Supreme Court concluded that the record did not reflect the “substantial evidence” necessary to support the LUC’s Condition No. 14. *See id.* at 32. As the Court explained, however, Condition No. 14 was a “material condition to the LUC’s approval.” *Id.* Because a material condition of

the LUC's decision was not supported by "substantial evidence" and could not stand, the Court held that the LUC's decision to approve the SUP also could not stand. *Id.* Accordingly, the Court vacated the LUC's decision and remanded the proceedings to the LUC "for further hearings as the LUC deems appropriate." *Id.*

IV. 2011 APPLICATION AND CONSOLIDATED PROCEEDINGS

A. PROCEDURAL MATTERS

35. On June 28, 2011, while the appeal of Condition No. 14 of the 2009 LUC Decision was still pending, ENV filed the 2011 Application with DPP pursuant to HRS Section 205-6, HAR Title 15-15, and RPC Section 2-49. DPP Recommendation, at 7; *see also id.*, Attachment B, *passim*.

36. The 2011 Application specifically requests deletion of Condition No. 14 of the 2009 LUC Decision, which states:

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

No other changes were proposed in the 2011 Application. DPP Recommendation, at 2.

37. The following City agencies were requested to evaluate the 2011 Application: Board of Water Supply; Department of Emergency Management; Department of Design and Construction; Department of Facility Maintenance; Honolulu Fire Department; Honolulu Police Department; and Department of Transportation Services. DPP Recommendation, at 5-6.

38. The following State agencies were requested to evaluate the 2011 Application: Department of Agriculture; Department of Land and Natural Resources; Department of Business, Economic Development and Tourism, Land Use Commission; Department of Business, Economic Development and Tourism, Office of Planning; Department of Land and Natural

Resources, State Historic Preservation Division; Department of Health; and Department of Transportation. DPP Recommendation, at 6.

39. The following federal agencies were requested to evaluate the 2011 Application: Army Engineer District, Honolulu; and Department of the Interior, Fish and Wildlife Service. DPP Recommendation, at 6.

40. No objections were raised by the public agencies requested to evaluate the 2011 Application. DPP Recommendation, at 6.

41. Copies of the 2011 Application were transmitted to the Honokai Hale/Makakilo/Kapolei Neighborhood Board No. 34 and the Nanakuli Neighborhood Board No. 36. DPP Recommendation, at 6.

42. In a letter dated August 17, 2011, the Honokai Hale/Makakilo/Kapolei Neighborhood Board No. 34 stated that they voted to oppose the 2011 Application. DPP Recommendation, at 6.

43. DPP had received 15 letters (via postal delivery or email) opposing the 2011 Application. DPP Recommendation, at 6.

44. The Planning Commission's public hearing to consider the 2011 Application was scheduled for October 5, 2011. On September 4, 2011, notice of the hearing of the matter was published in the *Honolulu Star-Advertiser*.

45. On September 9, 2011, DPP recommended approval of the 2011 Application. DPP Recommendation, at 9.

46. On September 16, 2011, Schnitzer Steel Hawaii Corp. ("Schnitzer") filed a Petition to Intervene in the proceedings relating to the 2011 Application.

47. Also on September 16, 2011, Intervenor Ko Olina Community Association and Maile Shimabukuro (collectively, "KOCA") filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties or in the Alternative Motion to Intervene.

48. At the public hearing on October 5, 2011, at the Mission Memorial Auditorium, 550 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony on the 2011 Application. The Planning Commission heard and granted Schnitzer's Petition to Intervene. The Planning Commission heard and denied KOCA's Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties, but granted KOCA's Motion to Intervene as joint intervenors.

49. On October 12, 2011, the parties each filed their pre-hearing conference statements.

50. On October 26, 2011, the parties each filed their list of witnesses. ENV named five potential witnesses, Schnitzer named one potential witness, and KOCA named 24 potential witnesses.

51. On November 7, 2011, KOCA filed a Motion to Dismiss the proceedings, claiming that the Planning Commission did not have jurisdiction to hear the 2011 Application.

52. On November 9, 2011, the Planning Commission filed an Order Regarding Prehearing Conference.

53. On November 14, 2011, ENV and Schnitzer each filed Memorandums in Opposition to KOCA's Motion to Dismiss.

54. On November 29, 2011, the parties filed their Stipulation to Amend Briefing Schedule as Provided in the Planning Commission of the City and County of Honolulu's Order Regarding Prehearing Conference Dated November 9, 2011.

55. On December 7, 2011, the Planning Commission held a hearing on KOCA's Motion to Dismiss at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. The Planning Commission heard and denied the Motion to Dismiss. Tr. 12/07/11, 22: 20 - 24:4. After the Motion to Dismiss was denied, the contested case hearing on the 2011 Application commenced. The parties presented their opening arguments.

56. On January 6, 2012, KOCA filed a Subpoena Duces Tecum to the Custodian of Records of Waste Management.

57. On January 11, 2012, the contested case hearing resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. ENV presented its first witness in its case in chief: Timothy Steinberger. *See* Tr. 01/11/12, 11:10-11. KOCA offered, and the Planning Commission received into the record, Exhibits "K1" to "K161". *See id.* at 15:12 - 17:23. Schnitzer moved to admit the court reporter's transcript of the October 5, 2011 public hearing so as to allow the public testimony to be made a part of the record. *See id.* at 15:18-22. The Planning Commission granted Schnitzer's request. *See id.*, at 15:23.

58. On January 20, 2012, Waste Management filed its Response and Objection to the Subpoena Duces Tecum.

59. On January 25, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. KOCA offered, and the Planning Commission received into the record, Exhibit "K163". *See* Tr. 01/25/12, 6:10-12. ENV also offered, and the Planning Commission received into the record, Exhibits "A1" to "A33". *See id.*, at 6:13-20. ENV presented its second and final witness in its

case in chief: Steven Chang. *See id.* at 6:21. ENV offered no further witnesses and concluded its case-in-chief, but reserved the right to call rebuttal witnesses. *See id.*, 71: 23-25, 72:1.

Schnitzer then presented its first and only witness in its case in chief, Larry Snodgrass, and concluded its case-in-chief. *See id.* at 72: 4-5. KOCA offered, and the Planning Commission received into the record, Exhibits “K164,” “K165,” and “K168.” *See id.* at 38:14-19, 55:11-15.

60. On February 8, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. The issue of the Subpoena Duces Tecum served on Waste Management was considered by the Planning Commission. KOCA then presented four witnesses in its case in chief: Ken Williams, Beverly Munson, Cynthia Rezendes, and Paul Duke Hospodar. *See Tr.* 02/08/11, 14:4-5, 56:13-14, 72:18-19, 82:15-16. ENV offered, and the Planning Commission received into the record, Exhibits “A34” and “A35”. *See id.* at 29:25 - 30:2, 56:6-8.

61. On March 7, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. KOCA presented its fifth and sixth witnesses: Shad Kane and Dwight Miller, who was qualified as an expert in solid waste management. *See Tr.* 03/07/12, 5:20-21, 17:22-23, 18:8 –19. KOCA offered, and the Planning Commission received into the record, Exhibits “K170,” “K171,” and “K173” to “K179.” *See id.* at 152:20 – 153:4, 153:13, 155:4-5, 122:19-23.

62. On April 4, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. The parties agreed to take the remaining witnesses out of order due to scheduling difficulties. Schnitzer first presented its rebuttal witness, Tom Zelenka. *See Tr.* 04/04/12, 7:19-20. ENV then presented Janice Marsters as its first rebuttal witnesses. *See id.* at 30:4-5. ENV offered and

the Planning Commission received into the record, Exhibit "A36." *See id.*, 33: 4-16. KOCA then presented its seventh and eighth witnesses in its case in chief: Maile Shimabukuro and Maeda Timson. *See id.* at 123:18-19, 133:5-6. ENV then presented its second rebuttal witness, Gary Gill. *See id.*, 143:17. KOCA offered, and the Planning Commission received into the record, Exhibits "K215," "K217," "K218" and "K223" *Id.* at 101:15-19, 83:14-19, 143:4-10.

63. On April 11, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. ENV presented its third and fourth rebuttal witnesses: Hari Sharma, who was qualified as an expert in landfill design and permitting, and Timothy Steinberger. *See Tr.* 04/11/12, 6:14 - 9:10, 69:4-5. ENV offered, and the Planning Commission received into the record, Exhibits "A37" to "A50." *See id.* at 13:1-9, 15:21 - 16:1, 25:1-7, 36:10 - 37:20, 105:11-15, 138:1-5. KOCA offered, and the Planning Commission received into the record, Exhibits "K189", "K190", "K193", "K195", "K196," "K198", "K230," "K247" and "K251." *See id.* at 191:19-24.

64. On April 23, 2012, the contested case resumed at the Mission Memorial Conference Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. KOCA presented its rebuttal witnesses, Dwight Miller and Eddie Belluomini. *See Tr.* 04/23/12, 5:25 - 7:13, 35:15. KOCA then rested its case. *See id.*, 4:4-5, 35:15. KOCA offered, and the Planning Commission received into the record, Exhibits "K255," "K257," "K192," "K220," "K256" and "K258." *See id.* at 12:13-17, 15:16-21, 47:17 - 48:23. The parties then presented their closing arguments.

65. On April 27, 2012, KOCA filed an *Ex Parte* Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence After the Hearing Closed. KOCA seeks to offer Exhibits "K259" and "K260" into the record.

66. On May 1, 2012, ENV filed a Memorandum in Opposition to KOCA's Motion to Reopen the Contested Case Hearing.

67. On May 2, 2012, each of the parties submitted proposed findings of fact, conclusions of law, decision and order for the Planning Commission's consideration.

68. Two days later, on May 4, 2012, the Hawaii Supreme Court rendered its decision relating to the appeal of the LUC's Condition No. 14, in which it vacated the LUC's decision and remanded the proceedings to the LUC "for further hearings as the LUC deems appropriate." See ENV's Notification of Supreme Ct. Decision or in the Alternative Mot. for Stay of Contested Case Hearing, Ex. A.

69. Meanwhile, on May 14, 2012, each of the parties filed their responses to the other parties' proposed findings of fact, conclusions of law, decision and order.

70. On May 15, 2012, ENV filed a Notification of Supreme Court Decision or in the Alternative Motion for Stay of Contested Case Hearing. ENV asserted that because the Hawaii Supreme Court had struck down Condition No. 14 of the 2009 LUC Decision, which was the sole focus of the 2011 Application and the ensuing contested case, the Planning Commission now lacked jurisdiction to hear the 2011 Application inasmuch as the 2011 Application was moot. Alternatively, ENV sought a stay of the contested case proceeding during the pendency of the remand to the LUC.

71. On May 22, 2012, Normand Lezy, Chair of the LUC, wrote a letter to Gayle Pingree, Chair of the Planning Commission, in which Chair Lezy urged the Planning Commission to stay its contested case hearing until the LUC had remanded File No. 2008/SUP-2 to the Planning Commission for consolidation with the present Application. Chair Lezy

indicated that consolidation of the proceedings was consistent “with the spirit and intent of the [Hawaii Supreme Court’s] decision.” See Letter dated May 22, 2012.

72. On May 22, 2012, KOCA filed a Memorandum in Opposition to ENV’s Notification of Supreme Court Decision or in the Alternative Motion for Stay of Contested Case Hearing.

73. On May 23, 2012, Schnitzer filed its own Memorandum in Opposition to ENV’s Notification of Supreme Court Decision or in the Alternative Motion for Stay of Contested Case Hearing.

74. On May 24, 2015, ENV filed a Notice Regarding Procedure for *Department of Environmental Services v. Land Use Commission*, Civil No. 09-1-2719-11. The Notice related to the procedure for remand of the LUC decision.

75. On May 25, 2012, the Planning Commission held a hearing in this matter. At that time, the Planning Commission ordered a stay of the proceedings for a period of 6 months. Tr. 05/22/12, 11:14 -13:5.

76. On May 29, 2012, Chair Pingree sent a response letter to Chair Lezy, notifying him that the proceedings had been stayed for 6 months. She also indicated that there was no necessity to remand the records contained in File No. 2008/SUP-2 for consolidation with the 2011 Application as the Planning Commission had already rendered its decision on the 2008 Application based on the records in File No. 2008/SUP-2.

77. On October 8, 2012, the LUC ordered that File No. 2008/SUP-2 be remanded to the Planning Commission for the express purpose of consolidating it with the 2011 Application. See KOCA’s Mot. to Effect Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by State Land Use Comm’n, Ex. 3.

78. On December 19, 2012, the Planning Commission ordered a continuance of the proceedings until January 2013.

79. On January 15, 2013, KOCA filed a Motion to Effect the Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by the State Land Use Commission on October 8, 2012.

80. On January 23, 2013, ENV filed a Memorandum in Opposition to KOCA's Motion to Effect the Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by the State Land Use Commission.

81. The Planning Commission scheduled a hearing for this matter for February 20, 2013.

82. On February 20, 2013, the parties filed a Stipulation to continue the February 20, 2013 hearing. The Planning Commission ordered that the hearing be continued until April 17, 2013.

83. On May 25, 2016, the Planning Commission sent a letter to the parties seeking a status report.

84. On June 15, 2016, ENV submitted a status report to the Planning Commission.

85. On June 22, 2016, ENV filed a Motion to Stay Proceedings to April 22, 2017.

86. On July 5, 2016, KOCA filed a Joinder to Department of Environmental Services, City and County of Honolulu's, Motion to Stay Proceedings to April 22, 2017.

87. On July 8, 2016, Schnitzer filed a Joinder to Department of Environmental Services, City and County of Honolulu's Motion to Stay Proceedings to April 22, 2017.

88. At its hearing on August 17, 2016, the Planning Commission granted KOCA's Motion to Effect the Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by the

State Land Use Commission on October 8, 2012, filed January 15, 2013, and denied ENV's Motion to Stay Proceedings to April 22, 2017, filed June 22, 2016. The Planning Commission also ordered the parties to re-submit proposed findings of fact, conclusions of law, decision and order by October 21, 2016.

89. On September 22, 2016, Intervenor Colleen Hanabusa ("Hanabusa") filed her (1) Position Statement on Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence to Correct an Error That Was Discovered After the Hearing Closing, Filed on April 27, 2012; and (2) Statement of Non-Appearance at the Hearing on Said Motion.

90. On September 30, 2016, ENV filed a Motion to Reopen the Contested Case for the Limited Purpose of Taking Official Notice of Facts. The Motion sought to introduce ENV's Sixth Annual Report dated June 15, 2016, relating to the status of operations at the Landfill. The Report was submitted to the LUC on June 20, 2016.

91. On October 5, 2016, ENV filed a Motion for Extension of Time in which it requested that the Planning Commission extend the time for parties to file their proposed findings of fact, conclusions of law, and decision and order in this matter.

92. On October 6, 2016, Schnitzer filed a Joinder to Department of Environmental Services, City and County of Honolulu's Motion for Extension of Time.

93. On October 6, 2016, KOCA filed its Response to Department of Environmental Services, City and County of Honolulu's Motion for Extension of Time.

94. On October 7, 2016, Hanabusa filed her Statement Re: (1) Submission of Proposed Findings of Fact, Conclusions of Law, and Decision and Order; (2) Various Parties' Submissions of Requests for Extensions of Time to Submit Proposed Findings of Fact,

Conclusions of Law, and Decision and Order; (3) Department of Environmental Services, City and County of Honolulu's Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts, Filed on September 30, 2016.

95. Also on October 7, 2016, KOCA filed its Responses to Department of Environmental Services, City and County of Honolulu's Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts.

96. At its hearing on October 12, 2016, the Planning Commission denied ENV's Motion to Reopen the Contested Case for the Limited Purpose of Taking Official Notice of Facts, and granted an extension of time until January 27, 2017, for the parties to submit their proposed findings of fact, conclusions of law, decision and order.

B. EXHIBITS AND WITNESSES

97. ENV offered, and the Planning Commission received into the record, Exhibits "A1" to Exhibit "A50". "A43" to "A46" were received into the record over objection.

98. Schnitzer requested that the court reporter's transcript of the October 5, 2011 public hearing so as to allow the public testimony to be made a part of the record. *See* Tr. 01/11/12, 15:18-22. The Planning Commission granted Schnitzer's request. *See id.*, at 15:23. The Planning Commission also received into the record, Exhibits "S1" to "S4."

99. KOCA offered, and the Planning Commission received into the record, Exhibits "K1" to "K171," "K173" to "K176," "K178," "K179," "K189" to "K196," "K198," "K208," "K215," "K217," "K218," "K220," "K222," "K223," "K226," "K227," "K230," "K247," "K251," "K255," "K256," "K257" and "K258." "K1" to "K169" were received into the record over objection.

100. ENV called the following witnesses: Timothy Steinberger, Steven Chang, Janice Marsters, Gary Gill, and Hari Sharma, who was qualified as an expert in the fields of landfill design and permitting.

101. Schnitzer called the following witnesses: Larry Snodgrass and Tom Zelenka.

102. KOCA called the following witnesses: Ken Williams, Beverly Munson, Cynthia Rezentes, Paul Duke Hospodar, Beverly Munson, Cynthia Rezentes, Paul Duke Hospodar, Shad Kane, Maile Shimabakuro, Maeda Timson, Eddie Bellumini, and Dwight Miller, who was qualified as an expert in the field of solid waste management.

C. INTERVENORS' INTERESTS IN PROCEEDINGS

1. Schnitzer Steel Hawaii Corp.

103. Schnitzer is a scrap metal recycling company that has been operating on Oahu since 1949. *See* Tr. 01/25/12, 73:1-4.

104. Schnitzer is the largest scrap metal recycler in the State. *See id.* at 73:5-6. It also organizes the Aloha 'Aina recycling events on Oahu. *See* Tr. 04/04/12, 13:15-17; Ex. K227. At these events, various vendors and companies gather to accept different recyclable products from the public. *See* Tr. 04/04/12 13:21-24; 20-25.

105. Schnitzer processes metal products at the end of their life, from automobiles to washers, dryers, refrigerators, freezers, demolition debris, and other scrap metals. *See* Tr. 01/25/12, 73:6-11.

106. On average, Schnitzer recycles about 800 tons of scrap metal a day or about 120,000 tons a year. *See id.* at 73:15-16, 74:3-4.

107. At its Oahu facility, Schnitzer has a 4,000 horsepower shredder that can reduce a full-sized automobile to fist sized pieces in 30 seconds. *See id.* at 73:19-21.

108. As a consequence of its recycling operation, Schnitzer generates about 20,000 tons of residual waste a year. *See id.* at 75:4-6. The residue is composed of plastics, glass, carpeting, rubber and other primarily non-metallic residual. *See id.* at 75:23-25. This residue cannot be recycled. *See* Tr. 03/07/12, 98:6-10.

109. At the time that this contested case commenced, Schnitzer's then-current solid waste management permit required that it dispose of its residual waste at a State of Hawaii, Department of Health ("DOH") permitted solid waste management facility. *See* Ex. S2.

110. Schnitzer was subsequently issued a new solid waste management permit, which now requires that it dispose of its residual waste at a DOH-permitted solid waste management facility or at an out-of-state disposal facility. *See* Ex. S5.

111. The only solid waste management facility on Oahu that can accept Schnitzer's residual waste is WGSL. *See* Tr. 01/25/12, 75:19-20.

112. PVT Landfill cannot accept the shredder residue. *See id.* at 76:8-11, 80:6-8.

113. It would not be economical or otherwise feasible for Schnitzer to ship the shredder residue to the mainland. *See id.*, 75:14-15, 85:8-16.

114. Schnitzer was also informed by Honua Power, a proposed waste-to-energy gasification facility in Kapolei, that it would not be able to accept Schnitzer's residue. *See* Written Testimony of Larry Snodgrass, at 5.

115. While DOH does not preclude H-POWER from disposing of shredder residue, H-POWER has been unwilling to agree to processing this waste because, due to its composition, it could cause problems for the equipment at H-POWER. *See* Tr. 01/25/12, 11:2-8. Specifically, H-POWER is concerned that Schnitzer's shredder residue might clog the in-feed equipment; that left-over glass from automobiles in the shredder residue might melt and damage the refractory in

H-POWER's boilers; and that the emissions associated with burning shredder residue might damage H-POWER's equipment or cause exceedances of H-POWER's air emissions limitations. *See* Written Testimony of Larry Snodgrass, at 4. Thus, H-POWER will not accept Schnitzer's shredder residue, even with the third boiler in operation. *See* Tr. 04/04/12, 12:16 – 13:1.

116. No waste-to-energy facility in the United States currently burns auto shredder residue. *See* Tr. 04/04/12, 22:6 – 23:24.

117. In other states, shredder residue has been used as alternative daily cover ("ADC") at landfills. *See* Tr. 01/25/12, 75:6-12; Tr. 03/07/12, 106:21-25; Tr. 04/04/12, 16:17 – 17:19. This allows the landfills to use alternatives to virgin materials, like dirt. *See id.* at 17:5-14. DOH does not currently allow Schnitzer to use shredder residue as ADC. *See* Tr. 04/04/12, 27:4-6.

118. Schnitzer has supported a bill in the State legislature, which would allow shredder residue to be used as ADC. *See* Tr. 04/04/12, 17:20-24; Ex. K222. The bill did not move out of the State Senate. *See* Tr. 04/04/12, 29:13-20.

119. Schnitzer supports the 2011 Application. *See* Tr. 12/07/12, 34:2-5.

2. **Ko Olina Community Association and Maile Shimabukuro**

120. Ko Olina Community Association represents Ko Olina Resort property owners, hotels, time shares, residential projects and commercial business, including retail centers and shops, the golf course and marina. *See* Tr. 02/08/12, 14:24 – 15:3.

121. Ko Olina Community Association opposes the 2011 Application. *See id.* at 15:4.

122. The bases for Ko Olina Community Association's opposition to the 2011 Application are as follows: 1) the Landfill is a danger to public health and safety; 2) operational deficiencies in the Landfill's long track record of violations, punctuated by the December 2010 and January 2011 contaminated run-off catastrophes; 3) promises not kept; and 4) the Landfill

jeopardizes Ko Olina Community Association's economic benefits to the community, the City and the State. *See id.* at 15:5-17.

123. Senator Shimabukuro has been a long-time resident of the Waianae coast. *See Tr.* 04/04/12, 124:13-14.

124. Senator Shimabukuro has also been a long-time legislator representing the Waianae coast. *See id.* at 124:17-19.

125. Senator Shimabukuro opposes the 2011 Application. *See id.* at 132:17-20.

126. KOCA requested that Condition No. 14 be modified to allow MSW up to January 1, 2013, when the third boiler at H-POWER was expected to be online. *See Tr.* 04/23/12, 78:6-10. As part of this request, KOCA asked that all medical waste, sewage sludge, and other putrescible waste be banned from WGS� except in emergencies and in H-POWER down time. *See id.* at 78:10-12. It also asks that non-putrescible waste, including, but not limited to, auto shredder residue, ash and residue from H-POWER and construction and demolition debris, can continue to go to WGS� beyond January 1, 2013. *See id.* at 78:14-17.

127. KOCA has also requested that the City must have a new landfill site developed by November 1, 2017. *See id.* at 78:22-23.

128. KOCA's final request was for the City to report to the Planning Commission every six months starting in September 1, 2012 until there is a new landfill. *See id.* at 79:4-7.

V. COMPLIANCE WITH PLANNING COMMISSION CONDITIONS

A. ALTERNATIVE SITE SELECTION EFFORTS

129. Condition No. 1 of the 2009 PC Decision (Condition No. 4 of the 2009 LUC decision) states:

On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either

replace or supplement the WGS�. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu.

See Ex. A18, at 25.

130. By March 2010, ENV had appropriated the funds to start the process of identifying an alternative landfill site. *See* Tr. 01/11/12, 54:24 – 55:6. ENV also drafted the scope of services and framework that would be required for the Site Selection Committee. *See id.* at 55:12-15.

131. The role of the Site Selection Committee is to come up with a list of sites that could be used as a landfill to replace WGS�, and to rank those sites according to the criteria that the Committee decides is most important to them as a group. *See* Tr. 04/04/12, 35:1-8. The Site Selection Committee would not select one site, but would rank numerous sites according to criteria that it determines most appropriate for landfill sites to accommodate the three different waste streams (MSW, ash and residue, and C&D debris). *See* Written Testimony of Timothy E. Steinberger, at 12.

132. ENV also contracted with R.M. Towill Corporation ("RMTC") in June 2011 to assist the Site Selection Committee with this process, specifically to research and provide the information required or requested by the Committee members. *See id.*

133. The Site Selection Committee held its first meeting on January 20, 2011. *See* Ex. K27.

134. The Site Selection Committee began with an initial set of sites that were considered by the 2003 Blue Ribbon Committee. *See* Tr. 04/04/12, 52:13-16; 78:1-3.

135. The Site Selection Committee initially started with the screening criteria used by the 2003 Blue Ribbon Committee, and came up with its own criteria. *See* Tr. 04/04/12, 40:25 - 41:23, 89:17-21. The screening criteria was used to reduce the number of sites from thousands to a more workable number. *See id.* at 41:18-21.

136. At its fourth meeting, the Site Selection Committee members were asked if they would like to recommend any additional potential landfill sites to the existing list. *See id.* at 79:24 – 80:3; Ex. 31, at 3. One suggestion was received, the windward side of the Waianae mountains, west of Kunia. *See* Tr. 04/04/12, 80:4-8; Ex. 31, at 3.

137. At its fifth meeting, held on May 12, 2011, the Site Selection Committee rejected the additional proposed site west of Kunia, and was back to the original number of sites. *See id.* at 81:12 – 83:5; Ex. K33, at 1.

138. At its sixth meeting, held in July 2011, the Site Selection Committee asked RMTC to expand the list of sites to include those above the underground injection control (“UIC”) line and no-pass line. *See* Tr. 04/04/12 84:3-16; Ex. K218, at 22.

139. At the seventh meeting of the Site Selection Committee, held on November 8, 2011, two sites were added as a result of the broadened search. *See* Tr. 04/04/12, 87:16 – 88:5; *see also* Ex. K152, at 2. At that meeting, the Site Selection Committee asked RMTC to look into lands owned by the State. *See* Tr. 04/04/12, 89:25 – 90:12. The Site Selection Committee also asked RMTC to look into sites at least 90 acres in size. *See id.* at 90:13-21.

140. At the eighth meeting of the Site Selection Committee, held on February 1, 2012, two more sites were added. *See id.* at 92:23 – 95:20; Ex. K170, 3-4. At that meeting, the Site Selection Committee also asked RMTC to drop the screening for lands that were rated Class C

agricultural lands, for lands with structures on them, and for lands that were only partly conservation lands. *See id.* at 96:17-22, 98:3-18.

141. At its ninth meeting, held on March 16, 2012, the Site Selection Committee met to weigh the community criteria. *See id.* at 100:19-23; 105:14-16.

142. As its tenth meeting on April 20, 2012, the Site Selection Committee came up with a list of recommended alternative sites. *See Tr.* 04/23/12, 53:13-15.

143. Once the City selects a site or sites, it will take more than seven years to acquire to acquire, permit, design and construct the new landfill site or sites. *See Tr.* 01/11/12, 38: 8-12; Testimony of Timothy E. Steinberger, at 15-16; *see also*, Ex. A18, at 8.

B. CITY'S WASTE DIVERSION EFFORTS

144. Condition No. 2 of the 2009 PC Decision (Condition No. 5 of the 2009 LUC decision) states:

The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

See Ex. A18.

145. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on Oahu. Of the 1,214,904 tons, the Landfill received 163,736 tons of MSW and 179,946 tons of ash and residue from H-POWER. This amount reflects a decrease since 2009. In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. *See Ex.* A27.

146. The 2010 disposal rate represents a total diversion of MSW from the Landfill of 71.7%. *See id.* This rate puts Hawaii in the top 10 states in the nation with regards to landfill diversion. *See Ex. A29.*

147. The City has now implemented curbside recycling for residential mixed recyclables on an island-wide basis. *See Written Testimony of Timothy E. Steinberger, at 20; Tr. 01/11/12, 126:10-17.*

148. Currently, all of the green waste that is deposited in green bins, which are 94-gallon bins, are composted. *See Tr. 04/11/12, 114:11-18.* Food wastes in smaller amounts are sent to H-POWER to be used as refuse-derived fuel. *See id.* at 114:21-115:5.

149. During fiscal year 2011, the curbside collection system recovered 18,000 tons of mixed recyclables and 53,000 tons of green waste for a total of 71,000 tons recycled. This contributes to a full six (6) percent to the overall reduction of MSW going to the Landfill. *See Written Testimony of Timothy E. Steinberger, at 20.*

150. Currently, the City does not accept scrap metal at either WGSL or at H-POWER. *See Tr. 01/11/12, 12:6-9.* Almost 100% of the ferrous and nonferrous metal in the MSW processed at H-POWER is recovered for recycling. *See Testimony of Timothy E. Steinberger, at 18.* These materials are recycled by private vendors like Schnitzer. *See Tr. 04/11/12, 38: 10-14, 169:18-23.*

151. Currently, some treated medical wastes go to the H-POWER facility. *See id.* at 146:16-18. However, medical sharps cannot be accepted at H-POWER because of worker safety issues. *See id.* at 146:1-8; *Tr. 01/25/12, 11:22-24.*

152. Currently, businesses and governments are banned from disposing of e-waste at WGSL. *See Tr. 01/25/12, 45:11-15.*

153. Currently, the largest sewage treatment plant on Oahu is Sand Island treatment plant. *See* Tr. 04/11/12, 78:10-11. That treatment facility treats biosolids into a Class A pellet used as a growth enhancer. *See id.*, 78:11-14. Ninety-two (92) percent of this is distributed for beneficial re-use at nurseries and some for fodder for cattle. *See id.*, 78:15-17.

154. At the time of the contested case, H-POWER was processing over 600,000 tons of MSW per year. *See* Tr. 04/11/12, 170:21-22.

155. At the time of the contested case, the City was in the process of adding a third boiler at H-POWER. The third boiler is expected to be a mass burner, which does not require as much pre-preparation as the existing boilers. *See* Tr. 01/11/12, 66:8-9. The third boiler is expected to accommodate an additional 300,000 tons of combustible MSW. *See id.* at 126:18-21.

156. With the third boiler in operation, the City anticipates that eighty (80) percent of the island's waste stream will be diverted from landfill operation. *See id.* at 80:11-13. The remaining twenty (20) percent of waste are what are called "special waste," which will still need to be landfilled until other disposal methods are available. *See id.* at 67:9-18. This includes: materials separated from water, such as from car and equipment washes; off-specification and outdated products; underground storage tanks; resins; petroleum contaminated soil; diesel fuel debris; used oil debris; gasoline and jet fuel debris; sandblast grit; baghouse dust; dried paint waste; inorganic filter cake; treated utility poles; and empty containers. *See id.* at 76:9-16; Tr. 04/11/12, 121:1-21.

157. At the time of the contested case, the third boiler was expected to be fully operational in January 2013. *See* Tr. 01/11/12, 33:18-21.

158. At the time of the contested case, the City had also issued four Request for Proposals (“RFP”). *See id.* at 126:22. The first RFP was for the green waste, sludge and food waste composting or reuse; the second was for re-use of bottom ash and fly ash from the H-POWER facility; the third was re-use of residue from H-POWER; and the fourth was for demonstration of other alternative technologies for dealing with MSW. *See id.* at 126:22 – 127:6.

159. At the time of the contested case, the City did not receive any responses to the latter three RFPs, even though they had extended the submittal date. *See id.* at 9-11.

160. The City did receive a response for the first RFP, and it has issued the contract. *See id.* at 127:8-9, 14.

161. The contract is for a Green Waste, Food Waste and Wastewater Bio-Solids, In-Vessel Conversion Facility to process some 100,000 tons per year of these wastes to beneficial use such as biofuels, energy or compost materials. This facility would handle the remaining sewage sludge that is not currently being diverted, except for the sewage sludge coming out of Waianae and Hawaii Kai. *See id.* at 71:14-18; Tr. 04/11/12, 79:3-6. The sludge from the Waianae treatment plant cannot be accepted at the facility because its salt content is so high and would be detrimental to being used in compost. *See* Tr. 01/11/12, 70:20-23. The Hawaii Kai treatment plant is a privately-owned facility and is not a party to the contract. *See id.* at 71:18-20, 199:6-11; Tr. 04/11/12, 89:21-24. The Hawaii Kai treatment plant takes all of its bio-solids to the Landfill. *See* Tr. 01/11/12, 71:19-20; Tr. 04/11/12, 89:3-5.

162. The in-vessel conversion facility was anticipated to be fully operational by 2013. *See id.* at 72:9-22.

163. The City was also looking into using the third boiler at H-POWER as a backup means for incinerating and converting bio-solids into energy. *See id.* at 73:4-11.

164. The screenings from the sewage treatment plants will still have to go to the Landfill because they cannot be combusted. *See* Tr. 04/11/12, 81:24 – 82:6. H-POWER, as currently permitted, is a waste-to-energy facility, not just an incineration facility. *See id.*, at 198:3-7. This means that whatever is combusted by H-POWER should be producing energy. *See id.*

165. The City had also looked into shipping the waste to other states. *See* Tr. 01/11/12, 194:13 – 196:13. This option did not succeed. *See id.* at 197:23 – 198:5.

166. A plasma arc facility was also built by Hawaii Biowaste Group. *See* Tr. 04/11/12, 97:12-17. That facility eventually closed. *See id.* at 98:6-7. A plasma arc facility would not be needed once H-POWER has the ability to burn medical waste. *See* Tr. 04/11/12, 197:13-17.

167. Even with the City's diversion efforts, there are still wastes that have no value as far as energy generation or as being able to be composted or re-used. *See* Tr. 01/11/12, 67:13-18, 141:5-8. This includes the shredder residue produced at Schnitzer's scrap metal recycling facility. *See id.*, 141: 8-11.

168. The process of recycling also creates a residual that cannot be recycled. *See id.* at 137:19-21, 141:8-11; Tr. 04/11/12, 201:18-19.

C. LANDFILL OPERATIONS

169. By law, the Landfill's stormwater management system is supposed to be designed and constructed to manage runoff from a 25-year, 24-hour storm. *See* Tr. 01/11/12, 99:9-15; Tr. 03/07/12, 38:13-15; Tr. 04/11/12, 31:17-18.

170. In 2006, Waste Management had prepared a design for a diversion channel to capture the flow off the west side of the Landfill, including for cells E6 and E5. *See* Tr. 01/11/12, 150:3-5; Tr. 04/11/12, 32:13-15. This design was approved by DOH: *See* Tr. 04/11/12, 32:17-18. Waste Management then applied for a SUP to cover construction of this diversion channel. This SUP got delayed because of archaeological issues, and Waste Management was not allowed to commence construction of the diversion channel. *See id.* at 32:18-25. In the meantime, the Landfill was running out of capacity in its permitted cells. *See id.* at 33:1-14; Tr. 04/23/12, 75:6-12.

171. DOH issued a permit in which it allowed Waste Management to construct a new cell, cell E6, concurrently with the construction of the diversion ditch. *See* Tr. 01/11/12, 112:18 – 113:3, 151:8-13; Tr. 04/04/12, 157:24 – 158:15.

172. Waste Management designed an inlet above the working face of the E6 cell where trash was being put. Waste Management had a berm built with a 36-inch drain pipe, the purpose of which was to divert rain into the drain pipe to pass under the cell and in turn pass into the drainage canal or the drainage ditch. *See* Tr. 01/25/12, 70:8-16.

173. In December 2010 and January 2011, Oahu was hit by a series of heavy rains. The rains were equivalent to a 100-year storm. *See* Tr. 04/11/12, 33:24 – 34:4.

174. In the course of the storm, boulders and other debris from the mauka properties blocked the inlet to the drain pipe. When the heavy rains came in, they overflowed the berms, entering into the E6 cell. *See* Tr. 01/25/12, 70:17-22. This caused contaminated stormwater to be discharged into the Pacific Ocean. *See* Tr. 01/11/12, 105:23 – 106:6.

175. This caused the lagoons at the Ko Olina Resort area to be closed for about ten (10) days. *See* Tr. 02/20/12, 49:20-22, 94:22-23.

176. The December 2010 and January 2011 storm events were catastrophic beyond the 25-year, 24-hour storm the landfill was engineered to withstand. *See* Tr. 03/07/12, 170:18-22.

177. Waste Management contends that flooding of the E6 cell and the resultant release of MSW was not due to any operational error on the part of Waste Management but was due to the sheer force and magnitude of the storms. Waste Management asserts that at all times it was acting in compliance with the WGS� permit, which allowed for simultaneous construction of the cell and the drainage system. Waste Management asserts that it exercised best management practices in responding to the storms because it believes its actions avoided the flooding of the neighboring Kahe Power Plant owned by Hawaiian Electric Company. Written Testimony of Timonth E. Steinberger, at 26.

178. Waste Management and the City worked with the U.S. Environmental Protection Agency (“EPA”) and the DOH in the aftermath of the storms, entering into an Administrative Order on Consent with EPA that outlined the remedial actions needed to address the MSW release and steps needed to reopen the Landfill. The EPA recently issued a Notice of Violation (“NOV”) concerning the MSW release. EPA did not impose any penalties as part of the NOV and continues to monitor the WGS� operations closely. *See id.*, at pgs. 26-27.

179. In September 2011, Waste Management notified the City, EPA, and DOH that it identified significant irregularities with the landfill gas data that had purportedly been collected and recorded by its landfill gas technician at WGS�. Further investigation by Waste Management revealed that a rogue Waste Management employee had fabricated some wellhead gas parameter measurements instead of collecting the data through verifiable measurements. The employee failed to collect actual data from mid-2010 until August 2011. *See id.* at 27.

180. As a result of Waste Management's initial investigation, Waste Management hired an environmental consultant to perform a detailed assessment of (1) the current status of the wellfield and gas collection and control system to determine whether the fabricated data has concealed adverse changes in the wellfield, and (2) the past status of the wellfield based on verifiable data. Based upon the detailed assessment, Waste Management concluded that the wellfield and gas collection control system is performing within the expected range of monitored parameters at the facility and that there is no evidence that the wellfield has undergone any adverse changes in the last two years. *See id.*

181. Despite these events, the DOH, Solid and Hazardous Waste Branch, the branch that regulates the solid waste operations at WGS�, is not intending to take enforcement action relating to operations at the WGS�. The DOH, Solid and Hazardous Waste Branch is currently satisfied with the operations at WGS�. *See Tr. 1/25/12, 59:19-25, 60:1-25, 61:1-12.* The DOH, Solid and Hazardous Waste Branch is concerned about the imposition of the July 31, 2012 deadline for MSW because there are no disposal options for certain types of waste, which may potentially threaten human health or the environment. *See id.* at 12:15-19. DOH's Solid and Hazardous Waste Branch did not seek any enforcement actions based on the storm events in December 2010 and January 2011. *See id.* at 01/25/12, 64:24 – 65:3.

VI. PURPOSE AND NEED

182. WGS� is the only permitted public MSW facility on the island of Oahu. *See Tr. 01/25/12, 59:6-9.*

183. Continued availability of WGS� is necessary because an alternative landfill site was not available on July 31, 2012, the deadline set by Condition No. 14. *See Tr. 01/25/12, 62:19-23.*

184. Continued availability of WGS� is necessary because there was no shipping option available to the City on July 31, 2012, the deadline set by Condition No. 14. *See* Tr. 04/11/12, 110:17-19.

185. Continued availability of WGS� is required as a permitting requirement for H-POWER. *See id.* at 125:1-6.

186. Continued availability of WGS� is required because there is material that cannot be combusted, recycled, reused or shipped. *See* Tr. 01/25/12, 12:5-7. Even recycled products themselves create a residual that cannot be recycled. *See* Tr. 01/11/12, 137:19-21, 141:8-11. The shredder residue produced at Schnitzer's scrap metal recycling facility is one of the materials that cannot be combusted, recycled, reused, or shipped. *See id.* at 141:8-11.

187. Continued availability of WGS� is also necessary as a backup in the event of natural disasters and emergencies. *See* Tr. 01/11/12, 141:14-17; Tr. 01/25/12, 63:16-20.

188. Therefore, a permitted landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. *See* Tr. 01/25/12, 65:14-20; Tr. 04/04/12, 149:24 – 150:5.

189. WGS� is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. *See* Ex. K144. One theme of the ISWMP is to minimize landfill disposal. *See id.*

190. In Calendar Year 2010, the Landfill received 163,736 tons of MSW. This amount reflects a decrease since 2009. In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. *See* Ex. A27.

191. Other items that cannot be recycled or burned at H-POWER are deposited at WGSL, including: materials separated from water, such as from car and equipment washes; off-specification and outdated products; underground storage tanks; resins; petroleum contaminated soil; diesel fuel debris; used oil debris; gasoline and jet fuel debris; sandblast grit; baghouse dust; dried paint waste; inorganic filter cake; treated utility poles; and empty containers. *See* Tr. 01/11/12, 76:9-16; Tr. 04/11/12, 121:1-21.

192. The City is actively reducing waste volume that is directed to the Landfill. In addition, when H-POWER's third boiler is operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent to be landfilled at WGSL. *See* Tr. 01/11/12, 33:18-21, 34:8-25, 64:21 – 65:2, 67:9-18.

193. The City has also engaged the Site Selection Committee to come up with recommendations on an alternative landfill site. *See* Tr. 01/11/12, 54:24 – 55:6, 55:12-15.

194. The Site Selection Committee held its first meeting on January 20, 2011. *See* Ex. K27.

195. At its meeting on April 20, 2012, the Site Selection Committee came up with a list of recommended alternative sites. *See* Ex. K260.

196. Once the City selects a site or sites, it will take more than seven years to acquire to acquire, design, construct and permit the new landfill site or sites. *See* Tr. 01/11/12, 38: 8-12; Written Testimony of Timothy E. Steinberger, pgs. 15-16; *see also* Ex. A18.

LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the

following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

In addition to the Conclusions of Law relating to the 2008 Application set out in the 2009 PC Decision, the Planning Commission hereby concludes as follows:

1. The Planning Commission has authority to hold public hearings and make recommendations on all proposals to adopt or amend the general plan, development plans and zoning ordinances, and to approve special use permits for unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in accordance with the RPC. *See* Section 6-1506(b), Revised Charter of the City and County of Honolulu 1973 (2000 Edition); *see also* HRS § 205-6(a).

2. HRS § 91-10(5) provides that:

[T]he party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

ENV has the burden of proof to show by a preponderance of the evidence that the 2008 Application and the 2011 Application meet the provisions of RPC § 2-45.

3. ENV has met the provisions of RPC § 2-45 in obtaining SUP No. 2008/SUP-2 and now applies anew for a modification of SUP No. 2008/SUP-2 pursuant to RPC §§ 2-18 and 2-29 and HAR § 15-15-70.

4. As the 2011 Application does not change the operations of the Landfill, the Planning Commission concludes that the same unusual conditions, trends, and needs that existed at the time SUP No. 2008/SUP-2 was granted continue to exist.

5. Based on the findings set forth above, the Planning Commission concludes that ENV has shown good cause to amend SUP No. 2008/SUP-2.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the Decision and Order of the Planning Commission to APPROVE the 2008 Application for a New Special Use Permit to Supersede Existing Special Use Permit No. to Allow a 92.5 Acre Expansion For Waimanalo Gulch Sanitary Landfill, Waimanalo Gulch, Oahu, Hawaii, Tax Map Key Nos. (1) 9-2-3: 072 and 073, and to APPROVE the 2011 Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009, by deleting Condition No. 14, subject to the following conditions:

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

2. ENV shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER and recycling technologies, as appropriate. ENV shall continue its efforts to seek beneficial reuse of stabilized,

dewatered sewage sludge. ENV is also encouraged to explore the use of auto shredder residue as alternative daily cover at its landfill site.

3. MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGSL up to December 31, 2026, provided H-POWER or another facility is capable of processing such MSW, including sewage sludge under the control of the City. After December 31, 2026, and until WGSL reaches capacity, only MSW that cannot reasonably be processed at H-POWER or another facility, including auto shredder residue and residue from H-POWER, shall be allowed at WGSL.

4. During periods of H-POWER scheduled maintenance when the facility may shut down one or more of its boilers, MSW, including sewage sludge, that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL.

5. Under emergency circumstances, as reasonably determined by the Director of the Department of Environmental Services, MSW, including sewage sludge, that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL.

6. ENV shall provide, without any prior notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations, and ENV's compliance with the conditions imposed herein. The annual reports shall also address the ENV's efforts to seek beneficial re-use of stabilized, dewatered sewage sludge, to utilize auto shredder residue as alternative daily cover, and to use other alternative technologies, as appropriate. The annual reports shall be submitted to the Planning Commission on June 31 of each year subsequent to the date of this Decision and Order.

7. WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.

8. The operations of WGSL under 2008/SUP-2 shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.

9. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

10. Enforcement of the conditions of the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

11. ENV shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

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DATED: Honolulu, Hawaii, this _____ day of _____, 2017.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By _____
Dean I. Hazama, Chair

By _____
Cord D. Anderson, Vice Chair

By _____
Arthur B. Tolentino, Member

By _____
Daniel S. M. Young, Member

By _____
Wilfred A. Chang, Jr., Member

By _____
Kaiulani K. Sodaro, Member

By _____
Steven S. C. Lim, Member

By _____
Ken K. Hayashida, Member

By _____
Theresa C. McMurdo, Member

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To Modify SUP No. 2008/SUP-2 by
Modifying the State Land Use Commission's
Order Adopting the City and County of
Honolulu Planning Commission's Findings of
Fact, Conclusions of Law, and Decision and
Order with Modifications, Dated October 22,
2009

FILE NO. 2008/SUP-2

LUC DOCKET NO. SP09-403

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served
upon the parties identified below by hand delivery on the date set forth below:

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