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KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

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 Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72
And 73

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
RESPONSE TO INTERVENOR
SCHNITZER STEEL HAWAII
CORP.'S JANUARY 27, 2017
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

EXHIBITS 1-2

CERTIFICATE OF SERVICE

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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**INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO'S RESPONSE TO INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S JANUARY 27, 2017 PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

Pursuant to Honolulu Planning Commission Rule § 2-74, Intervenors Ko Olina Community Association (“**Association**”) and Maile Shimabukuro (“**Senator Shimabukuro**”) and together with the Association, “**KOCA**”) submit their Objections to Intervenor Schnitzer Steel Hawaii Corp.’s (“**Schnitzer**”) Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed January 27, 2017 (“**Schnitzer’s Findings**”).

I. INTRODUCTION

In substance, Schnitzer’s Findings are in substance indistinguishable from the Proposed Findings of Fact, Conclusions of Law, and Decision and Order submitted by the Honolulu Department of Environmental Services (“**ENV**” and “**ENV’s Findings**”). *Compare* Schnitzer’s Findings (Conditions 1-11) *with* ENV’s Findings (Conditions 1-12).

II. INTRODUCTION

The Decision and Order that the Planning Commission enters in this matter will cover the following four issues: (1) the diversion of waste from the Waimanalo Gulch Sanitary Landfill (the “**Landfill**” or “**WGSL**”); (2) the mitigation of the Landfill’s effects on the community; (3) the ENV’s reporting obligations and the enforcement power; and (4) the final closure of the Landfill.

There should be no disagreement among the parties regarding the diversion of waste from the Landfill, the mitigation of the Landfill’s effects on the community or

the ENV's reporting obligations and the related enforcement right. The ENV admits that it wants "maximum diversion" from the Landfill. *See* 2011AP 1/11/12 Tr. at 157:23–25 (Steinberger); 2011AP 4/11/12 Tr. at 94:7–9 (Steinberger). Consistent with that admission, the ENV and Schnitzer proposed in their findings of fact filed on May 2, 2012 that by **January 1, 2014**, the Landfill would close to most municipal solid waste. *See* Ex. 1 at 31 (5/2/12 Schnitzer's proposed findings: "MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGSF up to January 1, 2014, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City."). After that date, MSW was only to be allowed at the Landfill under limited circumstances. *See id.* Although Schnitzer's and the ENV's current proposed findings seek to postpone the closure of the Landfill to most MSW until **December 31, 2026**, the community has already waited three years longer than the ENV promised in 2012. It is past time to hold the ENV to its proposal and close the Landfill to most forms of municipal solid waste. The record supports imposition this condition.¹

With respect to reporting requirements and enforcement rights, KOCA proposes retaining certain conditions from the prior order and expanding other conditions.

¹ By January 1, 2013, the third boiler was expected to be operational. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger). There is no basis for routinely sending combustible waste to the WGSF after that date. The third boiler has the capability to burn all putrescible wastes, including all sewage sludge, medical waste, and food waste. 2011AP 1/11/12 Tr. at 71:7–10, 75:13–22, 90:3–20, 114:25–115:5, 123:23–24, 174:1–6, 203:25 (Steinberger); 2011AP 4/11/12 Tr. at 163:12–16, 171:16–172:10, 196:20–24 (Steinberger).

For example, KOCA has proposed notification requirements to the surrounding community in the event that the Landfill releases leachate or waste, as happened in December 2010 and January 2011 to the detrimental impact on the community. It is important that this Commission, the Land Use Commission and the public are better informed so that they may exercise oversight for the protection of the community. The ENV and Schnitzer should not have any objection to increased transparency and accountability.

With respect to mitigation, KOCA proposes to retain certain conditions from the prior order and expand other conditions. For instance, KOCA has proposed that the ENV implement and maintain a landscaping plan for the Landfill so that it is less of a visual blight on the community. This Commission must consider the adverse effects on surrounding property. As an arm of our City government, the ENV should not have any objection to reducing the impact of the Landfill on the community to the greatest extent possible.

The only issue that could be in dispute is the full closure of the Landfill. On this point, the ENV has repeatedly disregarded its promises and the orders imposed on it to close the Landfill. *See* KOCA's Proposed Findings of Fact, Conclusions of Law, and Decision and Order ("KOCA's Findings") Findings of Fact 240-45 (filed 1/27/17). It is time to stop kicking the can down the road. All parties, **including the ENV**, propose that the Commission order the ENV to "**identify and develop**" a new landfill with "reasonable diligence." It is impossible to identify and develop a new landfill with reasonable diligence, as the ENV agrees it will do, if WGSL remains

open forever. Consistent with the obligation to develop a new landfill with reasonable diligence, the prior promises and orders and the record in this matter, KOCA proposes a staged approach to the closure of WGSL:

a. From the date of the Commission's order until **March 1, 2024**, MSW should not be allowed to be deposited at the WGSL unless it cannot be disposed of within the City by means other than landfilling, provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL. This condition is based on the ENV's findings of fact filed May 2, 2012. *See Ex. 1 at 33.* The record demonstrates that, by March 1, 2024, the ENV should have its new landfill identified and developed if it proceeds with reasonable diligence. *See 2011AP 3/7/12 Tr. at 17:25–19:25, 199:24–201:24 (Miller). 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle).*

b. From March 2, 2024 until March 1, 2027, the WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER; and (2) automobile-shredder residue. This three-year period provides time during which the ENV can transition sending H-POWER ash and residue and automobile-shredder residue from the WGSL to the new landfill.

c. Following the three-year transition period, the WGS� must close. The ENV has stated that it only wants one landfill to accept all waste streams that require landfilling. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). With a new site developed and operational, the ENV will no longer need the WGS�. At that point, after the community has endured the Landfill’s problems for decades and given the ENV’s broken promises, it will be in the best interests of the community for the WGS� to close.

KOCA responds and objects to Schnitzer’s Findings in the following paragraphs.

III. UNOBJECTIONABLE FINDINGS OF FACT

KOCA does not object to, and would incorporate in its own findings, **Findings of Fact 41, 73, 117 and 118.**

In part, KOCA does not object in part to, and would incorporate the unobjectionable part in its own findings, **Finding of Fact 74** as to the filing of the notice by ENV. The finding incorrectly refers to “May 24, 2015,” but should instead refer to May 24, 2012.”

IV. OBJECTIONS TO SCHNITZER’S FINDINGS OF FACT

KOCA objects to specific paragraphs in Schnitzer’s Findings. The objections are organized according to the headings and subheadings used in Schnitzer’s Findings.

I. DESCRIPTION OF THE PROPERTY

Finding of Fact 7 states, the “WGS� is the only licensed or permitted municipal solid waste (“MSW”) landfill on the island of Oahu.” The finding is false. The Department of Health (“DOH”), Solid and Hazardous Waste Branch, Chief Stephen Chang (“**Branch Chief Chang**”) testified that “[t]he Kaneohe Marine Corps Air

Station landfill accepts waste from the naval facility there and that's comprised of solid – municipal solid waste from their operation.” 2011AP 1/25/12 Tr. at 58:22–59:3 (Chang).

II. PRIOR PROCEEDINGS

Finding of Fact 11 states in part, “At that time, based on the WGSL’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 WGSL no later than May 1, 2008.” The finding is false.

The ENV originally proposed the Landfill be expanded by 60 acres and extended “for another fifteen years.” 2011AP Ex. K85 at 96:18–20 (3/27/03 Tr.: Doyle). Based on opposition from the community, however, the ENV committed to seek only a five-year extension. In 2003 SUP proceedings before the Land Use Commission, Former Acting ENV Director Frank Doyle explained, “[W]e had originally thought that we would have this landfill operate for another 15 years [to 2008]. And then as part of our discussions with the community and in trying to take a look at their concerns it was reduced to a five-year operation.” 2011AP Ex. K85 at 96:18–22 (3/27/03 Tr.: Doyle). Indeed, Director Doyle repeatedly expressed the ENV’s “commitment” to close the Landfill in 2008. 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.). Consistent with the compromise made with the ENV, the community made no request for intervention, and no adversarial hearing was held. *See* 2011AP Ex. K2 (6/9/03 LUC order). In the current contested case proceedings, Director

Steinberger confirmed that “it was a compromise with the community that drove the five-year deadline” 2011AP 1/11/12 Tr. at 32:3–7 (Steinberger).

Finding of Fact 13 states in part that the City Council “selected” the WGS� as the “new” landfill. The statement is false. City Council passed a non-binding resolution to select the existing site as the “new” landfill. 2011AP 1/11/12 Tr. at 52:6–15 (Steinberger); 2011AP 4/4/12 Tr. at 138:23–139:1 (Timson). This resolution was not binding on the City. *See also Wemple v. Dahman*, 103 Hawai‘i 385, 396 n.13, 83 P.3d 100, 111 n.13 (2004) (“We also note that County Council Resolution No. 81-252 is a resolution, not an ordinance, and therefore does not have the binding effect of an ordinance . . .”).

Finding of Fact 14 states in part, the “ENV’s request was deemed to be necessary in order to accommodate and implement the City Council’s selection of the WGS� as the City’s future landfill site.” The finding is false and not supported by the record. First, as discussed above, the City Council merely passed a nonbinding resolution. Second, there was no evidence submitted to the effect that the “ENV’s request was deemed necessary accommodate and implement” the City Council’s action.

Finding of Fact 16 states, “Unless otherwise indicated herein, the Planning Commission hereby incorporates the Findings of Fact from the 2009 PC Decision relating to the 2008 Application.” Relatedly, **the first paragraph** of Schnitzer’s Findings states, “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.”

First, these incorporation provisions are contrary to the Land Use Commission’s remand order filed October 8, 2012, which remanded 2008 Application to the Planning Commission “in order that the Planning Commission may issue and transmit a **single, consolidated** Findings of Fact, Conclusions of Law, and Decision and Order on the matter to the LUC” (Emphasis added.) Consistent with this directive, KOCA and the ENV have each submitted a single, consolidated set of findings.

Second, the Planning Commission’s 2009 Decision was adopted as by modified by the Land Use Commission in its 2009 Order. The Land Use Commission’s 2009 Order was invalidated by the Hawai’i Supreme Court on appeal. Given that the Land Use Commission’s 2009 Order incorporated the Planning Commission’s 2009 Decision, and the Land Use Commission’s Order was vacated on appeal, the Planning Commission should enter a new decision with respect to the 2008 Application. That is precisely what the Land Use Commission contemplated in its remand order.

Third, the wholesale incorporation of the findings from the Planning Commission’s 2009 Decision is erroneous. In the 2011 Application Proceeding, additional evidence was taken that render the findings in the 2009 Decision erroneous.

For example, in the 2009 Decision, Findings of Fact 60 and 61 state that Waste Management of Hawaii, Inc. (“**Waste Management**”) responded to complaints regarding the Landfill in 2007, 2008, and 2009, and that in 2009 the General Man-

ager of Ihilani Hotel at Ko Olina testified that he had not submitted any complaints to Waste Management regarding the Landfill in 2009. These findings regarding complaints submitted to the Landfill are based solely on the 2008 Application proceeding. The evidence in the 2011 Application Proceeding showed that in January 2011 the Landfill's release of waste and leachate into the coastal waters, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report); that the waste washed up in Ko Olina's lagoons, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 44); and that Waste Management sent workers for only one day to assist in the cleanup efforts, even though waste continued to wash ashore in the area, 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). The evidence from 2011 Application Proceeding also showed that Ko Olina's residents, workers and visitors have expressed concerns regarding the odors, noise, dust, blasting, visual blight, truck traffic and flying litter from the Landfill. 2011AP Williams Written Direct Testimony at 9 (¶ 29).

Likewise, in the 2009 Decision, Finding of Fact 75 stated that “[l]eachate does not come into contact with storm water.” This finding based on evidence from the 2008 Application Proceeding is no longer accurate, given that storm water plainly came into contact with leachate during the discharges from the Landfill that occurred in December 2010 and January 2011. *See* KOCA's Findings of Fact 290-301. For example, in the January 2011 incident, the Landfill's drainage system failed

and allowed storm water to flow “like a waterfall” into Cell E6. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5).

Finally, in the 2009 Decision, Findings of Fact 77 to 81 discuss the Landfill’s gas collection and control system and a Notice of Violation issued by the U.S. Environmental Protection Agency on April 4, 2006. These findings are based solely on the 2008 Application Proceeding. The evidence in the 2011 Application Proceeding established that on September 5, 2008, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations, including the failure to submit written notification of the exceedance and verification of methane gas monitoring results. 2011AP Ex. K82 at 2 (9/5/08 warning letter). Further, in 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. 2011AP Steinberger Written Direct Testimony at 27 (¶ 82). The failure to monitor gas readings was a threat to public health and safety. 2011AP 3/7/12 Tr. at 131:23–132:10 (Miller); 2011AP 1/11/12 Tr. at 91:1–92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).

III. 2008 APPLICATION AND CONSOLIDATED PROCEEDINGS

A. PROCEDURAL MATTERS

Finding of Fact 27 states in part, “[T]he Planning Commission concluded that [t]he term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of “X” number of years.’ See Ex. ‘A17’ at pg. 2.” The finding is false. The Planning Commission made no such

finding. The quoted statement was made by a single Commissioner during a hearing in the 2009 SUP proceedings. 2011AP Ex. A17 at 2 (7/31/09 HPC Tr.: Komatsubara).

IV. 2011 APPLICATION AND CONSOLIDATED PROCEEDINGS

Finding of Fact 35 states in part that the ENV filed an SUP Application pursuant to Section 2-49 of the Planning Commission Rules. The finding is misleading.

While the ENV invoked Section 2-49, Section 2-49 concerns the modification of conditions imposed by the Planning Commission. The section does not allow the Planning Commission to modify conditions that were imposed by the Land Use Commission. See Planning Commission Rules §§ 1-5(f), 2-49.

Finding of Fact 50 states in part that KOCA named 24 potential witnesses on October 26, 2011. The finding is false. KOCA named 31 potential witnesses in its Witness List filed on October 26, 2011 and 32 potential witnesses in its First Amended Witness List filed on October 28, 2011.

Finding of Fact 56 states in part that KOCA filed a Subpoena Duces Tecum to the Custodian of Records of Waste Management. This finding is misleading and materially incomplete. On January 3, 2012, KOCA filed a Request for Issuance of a Subpoena Duces Tecum to the Custodian of Records of Waste Management of Hawaii, Inc. On January 6, 2012, the Planning Commission signed and issued the Subpoena Duces Tecum.

Finding of Fact 57 is materially incomplete because it fails to acknowledge that Exhibit K162 was admitted into evidence without objection during the January 11, 2012 hearing. 2011AP 1/11/12 Tr. at 96:2–4.

Finding of Fact 59 is materially incomplete because it fails to acknowledge that Exhibits K166, K167 and K169 were admitted into evidence without objection during the January 25, 2012 hearing. 2011AP 1/25/12 Tr. at 51:8–13, 85:22–86:5.

Finding of Fact 61 states in part that Dwight Miller was accepted “as an expert in solid waste management” at the March 7, 2012 hearing. This finding is materially incomplete. Mr. Miller was accepted as an expert in “solid waste management, including landfill siting and design and comprehensive solid waste management.” 2011AP 3/7/12 Tr. at 18:8–10.

Finding of Fact 62 is materially incomplete because it fails to acknowledge that Exhibits K191, K194, K208, K222, K226, and K227 were admitted into evidence without objection during the April 4, 2012 hearing. 2011AP 4/4/12 Tr. at 15:18–22 (Ex. K227), 18:24–19:4 (Ex. K191), 19:5–19 (Ex. K222), 23:25–24:16 (Ex. K194), 168:22–169:5 (Ex. K208), 122:20–25 (Ex. K226).

Finding of Fact 84 states that the ENV submitted a status report on “June 15, 2016.” The ENV’s status report was, however, submitted by letter dated “June 3, 2016.”

B. EXHIBITS AND WITNESSES

Finding of Fact 98 states in part that Schnitzer's Exhibits S1 through S4 were received into the record. This finding is false. None of Schntizer's exhibits were offered or received into evidence.

Finding of Fact 99 states in part that Exhibits K1 to K169 were received into the record over objection. This finding is partially false. As to KOCA's Exhibits K1 to K161, no objection was stated as to "the exhibits that are referenced in the written testimony of KOCA and Shimabukuro's witnesses." 2011AP 1/11/12 Tr. at 16:1-3. Moreover, Exhibits K162 to K169 were admitted into evidence without objection. 2011AP 1/11/12 Tr. at 95:23-96:16 (Ex. K162), 2011AP 1/25/12 Tr. at 6:1-12 (Ex. K163), 38:13-20 (Exs. K164 & K165), 51:8-13 (Exs. K166 & K167), 55:10-16 (Ex. K168), 85:22-86:5 (Ex. K169). Accordingly, only ENV objected and only to an unspecified portion of Exhibits K1-K161.

Finding of Fact 102 states in part that Mr. Miller was "qualified as an expert in the field of solid waste management." This finding is materially incomplete. Mr. Miller was accepted as an expert in "solid waste management, including landfill siting and design and comprehensive solid waste management." 2011AP 3/7/12 Tr. at 18:8-10.

C. INTERVENORS' INTERESTS IN PROCEEDINGS

1. Schnitzer Steel Hawaii Corp.

Finding of Fact 104 discusses the Aloha 'Aina events organized by Schnitzer. This finding is materially incomplete. Schnitzer scheduled twenty-seven Aloha 'Aina events for 2012 and at these events, accepted from the public various types of

e-waste, free of charge, including cell phones, printer cartridges, batteries, computers, printers, scanners and one television per car. 2011AP Ex. K227; 2011AP 4/4/12 Tr. at 13:18–25 (Zelenka).

Finding of Fact 111 states that the Landfill is the only solid waste management facility on O’ahu that can accept Schnitzer’s residual waste. The finding is misleading. DOH does not prohibit H-POWER from burning the residual waste or prohibit Schnitzer from disposing of the waste at H-POWER. 2011AP 1/25/12 Tr. at 42:1–3 (Chang); 2011AP 4/4/12 Tr. at 19:21–25 (Zelenka).

Finding of Fact 115 states that H-POWER “has been unwilling to agree to processing [automotive shredder residue] See Tr. 01/25/12, 11:2-8.” The cited portion of the transcript does not state that H-POWER was unwilling to agree. It states that “H-POWER has expressed **reservations** about processing [automotive shredder residue]” 2011AP 1/25/12 Tr. at 11:2-5 (emphasis added). Finding of Fact 115 also cites to the written testimony of Larry Snodgrass, which was unsigned and is thus inadmissible.

Finding of Fact 119 contains an error in that the citation should read “Tr. 12/07/11, 34:2–5” and not “Tr. 12/07/12, 34:2–5.”

V. COMPLIANCE WITH PLANNING COMMISSION CONDITIONS

A. ALTERNATE SITE SELECTION EFFORTS

Finding of Fact 130 states in part, “By March 2010, ENV had appropriated the funds to start the process of identifying an alternative landfill site.” Finding of Fact 118 also states in part that the “ENV also drafted the scope of services and

framework that would be required for the Site Selection Committee.” The finding is misleading. Condition 1 directs in part that “[o]n 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” 2011AP Ex. A18 at 25 (¶ 1). The ENV cannot satisfy its obligation to begin to “identify” one or more new landfill sites by “appropriating funds.” The site identification process did not begin until the ENV’s site selection committee (“SSC”) began meeting in January 2011. 2011AP 4/4/12 Tr. at 54:14–16 (Marsters). Accordingly, the ENV did not meet the November 1, 2010 deadline in Condition 1 of the Planning Commission’s 2009 order.

Finding of Fact 134 states in part that the SSC “began with an initial set of sites that were considered by the 2003 Blue Ribbon Committee.” This finding is misleading. The ENV’s consultant directed the SSC to start with the old list of sites, some of which were no longer viable options. 2011AP 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

Finding of Fact 135 states in part that the SCC “came up with its own [screening] criteria.” This finding is false. The exclusionary criteria or factors were not developed by the SCC. The exclusionary criteria were developed the SSC’s consultant without prior discussion or authorization from the SSC. Accordingly, the committee had to have “the consultant go back” and “[r]emove screens that [the SSC] had not either previously discussed or authorized.” 2011AP 4/4/12 Tr. at

105:1–4 (Marsters). For this and other reasons, the SSC was “not happy” with the process. 2011AP 4/4/12 Tr. at 104:20–23 (Marsters: “[W]e weren’t happy with the process that had happened. . . . We just wanted to get the process right.”).

Finding of Fact 139 states in part, “[T]wo sites were added as a result of the broadened search.” The finding is materially incomplete. In the seventh meeting in November 2011, the SSC’s consultant made a presentation regarding potential sites within the UIC and no-pass lines. 2011AP Ex. K152 at 1 (11/8/11 SSC group memory). However, the consultant applied a number of exclusionary criteria that eliminated many sites from consideration. 2011AP 4/4/12 Tr. at 87:13–15 (Marsters); 2011AP Ex. K144 at 11-6 (10/08 integrated solid waste management plan update). After application of the exclusionary criteria, only two sites above the UIC and no-pass line remained. Neither of those sites could be used. 2011AP 4/4/12 Tr. at 88:1–17 (Marsters); 2011AP Ex. K152 at 2 (11/8/11 SSC group memory).

Finding of Fact 140 states in part, “[T]wo more sites were added.” This finding is materially incomplete. In the eighth meeting in February 2012, after dropping certain screens, the consultant identified 464 potential sites. 2011AP Ex. K170 at 2 (2/1/12 SSC group memory). But the consultant applied nine screening factors to the 464 sites. 2011AP 4/4/12 Tr. at 93:10–13 (Marsters); 2011AP Ex. K170 at 2 (2/1/12 SSC group memory). After applying the screening factors, only six sites remained. 2011AP 4/4/12 Tr. at 93:18–21 (Marsters); 2011AP Ex. K170 at 3 (2/1/12 SSC group memory). The SSC eliminated four of those sites, which left only two potential sites. 2011AP Ex. K170 at 3 (2/1/12 SSC group memory).

Finding of Fact 141 states in part that the SSC “met to weight the community criteria.” This finding is materially incomplete. In the ninth meeting in March 2012, after dropping the exclusionary criteria for class C agricultural land and structures, the consultant identified seven potential sites. 2011AP Ex. A47 (3/16/12 SSC group memory at 2). However, the consultant added an exclusionary criterion for parcels upgradient of parcels in or planned for residential use. 2011AP 4/4/12 Tr. at 102:23–103:2 (Marsters); 2011AP Ex. A47 (3/16/12 SSC group memory at 2). The SSC had not previously directed the consultant to use the upgradient screen. The SSC directed the consultant to eliminate the screen. 2011AP 4/4/12 Tr. at 103:3–10 (Marsters); 2011AP Ex. A47 (3/16/12 SSC group memory at 3). The SSC also directed the consultant to add federal lands to the pool of potentially suitable sites. 2011AP Ex. A47 (3/16/12 SSC group memory at 4).

Finding of Fact 142 states that that the SSC “came up with a list of recommended alternative sites.” The finding is materially incomplete. The SSC ranked the sites. 2011AP Ex. K258 (4/20/12 SSC meeting photographs). However, the SSC has yet to send a report to the Mayor.

Finding of Fact 143 states, “Once the City selects a site or sites, it will take more than seven years to acquire to acquire [sic], permit, design and construct the new landfill site or sites.” This finding is false. There is no credible evidence to support the ENV’s statement that it will take at least seven years from site selection. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). The ENV’s estimates keep increas-

ing. In 2003, the ENV admitted it would only take three to five years to identify and develop a new landfill. 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle).

In 2009, the ENV asserted that it would take seven years to identify and develop a new site. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order).

Now, the ENV claims it will take more than seven years **after** site selection. *E.g.*, 2011AP 4/11/12 Tr. at 122:25 (Steinberger).

Consistent with the ENV's admission in 2003, Mr. Miller testified that it would take three to five years to identify and develop a landfill. Mr. Miller was the only expert in landfill siting to testify in this proceeding. He explained, "[I]f you're putting out a number of seven years, it's somewhat of a self-fulfilling prophecy. If you're saying, Oh God, it's going to take us seven years, that's how long it's going to take you." 2011AP 3/7/12 Tr. at 202:20–24 (Miller). But if the ENV is willing to "put out" and "push a schedule," the timetable will be shorter. 2011AP 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV represents that it is "committed" to finding a new site. *See* 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). If the ENV's representations are true, no more than five years is necessary to develop a new site.

B. CITY'S WASTE DIVERSION EFFORTS

Finding of Fact 145 is misleading and materially incomplete. First, **Finding of Fact 145** states, "In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on O'ahu." This finding is false. The total waste generated on Oahu in Calendar Year 2010 was 1,510,593 tons. 2011AP Ex. A27 (Oahu MSW waste

stream). Of the 1,510,593 tons of waste generated, approximately 1,214,904 tons constituted MSW.

Second, Finding of Fact 145 states, "In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. *See Exhibit A27.*" The statements and supporting citation are incorrect. Exhibit A27 discusses the "Municipal Solid Waste Stream on Oahu" for the "CALENDAR YEAR" and not for the Fiscal Year. Further, Exhibit A27 shows that the Landfill received 233,065 tons of MSW in Calendar Year 2008, 178,512 tons of MSW in Calendar Year 2009 and 163,736 tons of MSW in Calendar Year 2010.

Lastly, Finding of Fact 145 states in part that the figures "reflect a decrease since 2009." This statement misleadingly implies that the ENV's waste diversion efforts improved from 2009 to 2010, which in turn led to a reduction in landfilling. In fact, the decrease in landfilling was caused by a reduction in the total MSW generated on O'ahu. MSW generation decreased from Calendar Year 2008 (1,313,253 tons) to Calendar Year 2009 (1,225,902 tons) and Calendar Year 2010 (1,214,904 tons). 2011AP Ex. A27. The reduction in waste generation reflects a slowing economy. 2011AP Ex. K91 at 3 (7/10 ENV status report: "The downward trend [in Landfill disposal] may be attributed to diversion of MSW to the off-island shipping project, the slowing economy, and the expansion of the City's curbside recycling program.").

Finding of Fact 150 cites "Tr. 04/11/12, 38:10-14, 169:18-23" for the finding that metal recovered from the MSW processed at H-POWER is recycled by private

vendors like Schnitzer. The citation is erroneous. The cited portions of the transcript address other subjects and do not support Finding of Fact 150.

Finding of Fact 152 is materially incomplete because it does not acknowledge that while businesses and the government are banned from disposing of e-waste at the Landfill, individuals may continue to dispose of e-waste at the landfill. 2011AP 1/25/12 Tr. at 44:23–45:16 (Chang).

Finding of Fact 156 states in part that when the third boiler is operational, the City anticipates that eighty percent of the waste stream will be diverted from the Landfill, with the remaining 20% being “special waste” that will still need to be landfilled. This finding is false. First, the ENV has publicly stated that with the third boiler, it expects to achieve a **90% Landfill diversion rate**. 2011AP Ex. K251 at 1–2 (5/5/11 ENV press release: “In response, the City implemented a number of initiatives: . . . expanding the [H-POWER] facility in line with both the population growth and the types of waste handled allowing the City to divert **90 percent** of all municipal solid waste from the landfill through the combination of recycling and energy recovery. . . . When complete in mid-2012, H-POWER will be capable of . . . diverting **nearly 90 percent** of our non-recyclable household opala from the landfill.” (emphasis added)); 2011AP 4/11/12 Tr. at 174:8–17 (Steinberger).

Second, there is no evidence to support a finding that the “remaining waste stream” is “special waste” that must be landfilled. On the contrary, Director Steinberger admitted the “special wastes” that cannot be burned are “probably a small percentage” of MSW. 1/11/12 Tr. at 77:11–12 (Steinberger).

Finding of Fact 157 states, “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.” This finding is false. First, during the April 11, 2012 hearing, Director Steinberger testified that H-POWER’s third boiler will be fully functional by October or November 2012. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger). Second, the portion of the record cited in support of Finding of Fact 105 dealt with discrepancy in Director Steinberger’s Written Direct Testimony. 2011AP 1/11/12 Tr. at 33:18–34:25 (Steinberger). At the end of the discussion, Director Steinberger confirmed that the third boiler is scheduled to be operational in the fall of 2012. 2011AP 1/11/12 Tr. at 34:21–25 (Steinberger) (“ . . . 2012 is the date that right now my schedule shows that we should be operational. Again, that would be fall of 2012.”).

Finding of Fact 159 contains an error in that the citation should read “*See id.* at 127:9–11” and not “*See id.* at 9–11.”

Finding of Fact 161 implies that the Waianae and Hawaii Kai wastewater treatment plants will need to continue to landfill the sewage sludge from its facilities because the In-Vessel Conversion Facility will not accept the sludge. The implication is false. With the third boiler, the ENV will have the ability to burn all biosolids, and the ENV has instituted a change order to allow for the burning of all biosolids. 2011AP 4/11/12 Tr. 90:7–16 (Steinberger). By October or November 2012, H-POWER’s third boiler was expected to be able to accept all of that sewage sludge. 2011AP 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger); 2011AP Steinberger Written Direct Testimony at 23 (¶ 71); 2011AP 4/11/12 Tr. at 90:3–21, 174:1–6

(Steinberger). There is no evidence to support the inference that the biosolids from Waianae and Hawaii Kai cannot be burned at H-POWER.

Finding of Fact 165 states in part that the option to ship the waste to other states did not succeed. The finding is misleading. After the ENV encountered problems in its plans to ship waste to Oregon and Washington, the ENV did not pursue other shipping options. 2011AP 4/11/12 Tr. at 109:21–110:19 (Steinberger).

Findings of Fact 167 and 168 are misleading and materially incomplete. While there may be certain wastes that have no energy value, these wastes may still be burned at H-POWER. 2011AP 1/11/12 Tr. at 68:16–17 (Steinberger); 2011AP 4/11/12 Tr. at 87:7–8, 173:1–174:2 (Steinberger). Moreover, Director Steinberger admitted that the waste that must be landfilled is “probably a small percentage” of MSW. 2011AP 1/11/12 Tr. at 77:11–12 (Steinberger).

C. LANDFILL OPERATIONS

Finding of Fact 170 states that the SUP for the construction of the diversion channel was delayed because of archaeological issues and that the Landfill was running out of capacity in the permitted cells. The finding is misleading and materially incomplete. The supposed permitting and processing delays—a challenge to the Final Environmental Impact Statement for the Landfill expansion project and opposition in the SUP approval process—were foreseeable. 2011AP 4/11/12 Tr. at 145:22–23 (Steinberger); 2011AP 4/11/12 Tr. at 145:24–146:14, 149:3–5 (Steinberger); 2011AP Ex. K2 (6/5/03 LUC order); 2011AP Ex. K155 at 3 (¶¶ 5–8) (3/14/08 LUC order); 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2 (3/27/03 Tr.: Doyle). Inadequate planning by the ENV and Waste Management caused the Land-

fill to run out of safely useable space before the diversion channel had been completed. 2011AP 3/7/12 Tr. at 186:4–21 (Miller). This inadequate planning forced the ENV and Waste Management to deviate from the Landfill’s design plans and the industry standard and to fill Cell E6 before the diversion channel was in place. 2011AP 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 2011AP 3/7/12 Tr. at 129:25–130:4 (Miller).

The finding also contains an error in that the citation should read “Tr. 4/11/12, 75:6–12” and not “Tr. 4/23/12, 75:6–12.”

Finding of Fact 171 states in part that the DOH issued a permit that allowed Waste Management to construct cell E6 concurrently with the diversion ditch. This finding is misleading and materially incomplete. The drainage system was designed to be in place before Cell E6 was filled with waste. 2011AP 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 2011AP 4/11/12 Tr. at 74:10–15 (Steinberger). Indeed, the industry standard is to have necessary drainage systems completed before filling cells at a landfill. 2011AP 3/7/12 Tr. at 39:25–40:4, 126:13–20, 128:14–129:13, 172:19–173:3 (Miller); 2011AP 4/11/12 Tr. at 31:24–32:10 (Sharma). As discussed above, inadequate planning forced Waste Management to deviate from the design and the industry standard.

Finding of Fact 174 states in part that the blockage of the drainpipe and heavy rains overflowing into cell E6 “caused contaminated stormwater to be discharged into the Pacific Ocean.” This finding is misleading and materially incomplete.

On December 23, 2010, the DOH Clean Water Branch documented the unauthorized pumping of leachate from Cell E6 into State waters. 2011AP Ex. K52 (12/23/10 DOH investigation report). According to the report, on December 19, 2010, after receiving heavy rains, there was a “failure in the Landfill’s [temporary] storm water bypass system,” such that the active “E6 cell was inundated with storm water.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report). On December 19 and 23, Waste Management “intermittently pumped storm water which [had] accumulated in the Landfill’s E6 cell into the Landfill’s storm water drainage system.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report). “The Landfill’s storm water drainage system discharges to the Pacific Ocean at a shoreline outfall of the Ko Olina resort.” 2011AP Ex. K52 at 1 (12/23/10 DOH investigation report). The storm water pumped out of active Cell E6 and into the ocean was “clearly in contact with and passed through solid waste” in the cell, rendering it “Landfill leachate.” 2011AP Ex. K52 at 2–3 (12/23/10 DOH investigation report); 2011AP Ex. K97 (1/11/11 DOH inspection report at 2).

On January 12, 2012, the Landfill received heavy rains. 2011AP Ex. K56 at 1 (1/12/11 and 1/13/11 station summaries from Palehua Hawaii). As a result of the heavy rains, the Landfill’s temporary drainage system failed again, which allowed storm water to flow “like a waterfall” into Cell E6. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5). The water dislodged unknown quantities of MSW, sewage sludge, leachate, and medical solid waste from Cell E6 into coastal waters. 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10

DOH investigation report: "Contents of the E6 cell include municipal solid waste such as general refuse, medical waste, as well as intermediate cover material."). The medical solid waste included sharps, chemotherapy wastes, and pathological wastes. K73 at 2 (1/27/11 Honolulu Civil Beat article); 2011AP Williams Written Direct Testimony at 18 (¶ 43).

Finding of Fact 175 states in part that the discharge caused the lagoons at Ko Olina Resort to be closed for about ten days. This is true. But the finding is materially incomplete.

By the morning of January 13, 2011, significant quantities of medical waste and other Landfill debris were washing up in the Ko Olina lagoons. 2011AP Williams Written Direct Testimony at 18 (¶ 44). The waste spread to beaches up the Leeward coast as far as Pokai bay, 2011AP Shimabukuro Written Direct Testimony at 7 (¶ 10.e), and east as far as Nimitz Beach, 2011AP Williams Written Direct Testimony at 18 (¶ 44). No one from the ENV or Waste Management called Ko Olina to warn it about the flood. 2011AP 2/8/12 Tr. at 94:12-19 (Hospodar).

For ten days, Ko Olina expended substantial time and resources to clean up the MSW that had washed up on Ko Olina's beaches. 2011AP Williams Written Direct Testimony at 22 (¶ 48); 2011AP Hospodar Written Direct Testimony at 7-11 (¶ 21); 2011AP 4/23/12 Tr. at 42:9-16 (Belluomini). The ENV and Waste Management did not provide any assistance in cleaning up Ko Olina's lagoons. 2011AP 2/8/12 Tr. at 85:22-86:8, 94:24-95:2 (Hospodar); 2011AP 4/23/12 Tr. at 42:4-6 (Belluomini). Waste Management sent a few temporary workers out for one day to clean one area

by the outfall after giving them 30 minutes of hazardous waste training and puncture-resistant gloves. 2011AP Ex. K133a (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini). The workers never came back to assist with the clean-up, even though the waste continued to wash ashore in the area. 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). And when Ko Olina redeposited the collected waste back at the landfill, Waste Management charged Ko Olina tipping fees. 2011AP 2/8/12 Tr. at 88:24–89:1 (Hospodar); 2011AP 4/23/12 Tr. at 69:6–8 (Belluomini).

Finding of Fact 177 recites certain “contentions” and “assertions” supposedly made by Waste Management regarding the December 2010 and January 2011 floods. This finding is false and unsupported by the record.

First, following the floods, no one from Waste Management testified before the Commission. There is no evidence of Waste Management’s “contentions” and “assertions.”

Second, the evidence conclusively showed that the supposed contentions and assertions of Waste Management are false. Waste Management only sent a few temporary workers out for one day to clean one area by the outfall. Waste Management gave these temporary workers 30 minutes of hazardous waste training and puncture-resistant gloves. 2011AP Ex. K133a (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini). After the one day, the workers never came back to assist with the cleanup, even though the waste continued to wash ashore in

the area. 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). The waste also continued to wash ashore at Ko Olina’s lagoons. 2011AP Hospodar Written Direct Testimony at 7–11 (¶ 21). But Waste Management and the ENV did not provide any assistance in cleaning up Ko Olina’s lagoons. 2011AP 2/8/12 Tr. at 85:22–86:8, 94:24–95:2 (Hospodar); 2011AP 4/23/12 Tr. at 42:4–6 (Belluomini).

Finding of Fact 178 makes certain representations about Waste Management’s efforts to work with the EPA. The representations are not supported by the record. No one from Waste Management testified before the Commission. No evidence was introduced regarding Waste Management’s efforts to work with the EPA.

Finding of Fact 181 states in part, “Despite these events, the DOH, Solid and Hazardous Waste Branch, . . . is not intending to take any enforcement action relating to operations at the WGSL” and “DOH, Solid and Hazardous Waste Branch did not seek any enforcement actions based on the storm events in December 2010 and January 2011. The finding is misleading and materially incomplete.

As DOH Deputy Director Eric Gill testified, DOH currently has a pending enforcement case against the Landfill based on the events surrounding the January 2011 flooding. 2011AP 4/4/12 Tr. at 156:20–22 (Gill: “There is a pending enforcement case which I can’t speak to in any detail regarding the handling of storm water runoff from the landfill.”); 2011AP 4/4/12 Tr. at 157:10–12 (Gill: “There is . . . , to be clear, potential enforcement action regarding the events around the flood event at the landfill.”).

VI. Purpose and Need

Findings of Fact 183 to 188 and 189 state in part that the “WGSL” is necessary and that the Landfill is a critical portion of the City’s overall Integrated Solid Waste Management Plan (“ISWMP”). These findings are false. While the continued availability of a landfill is necessary for a limited number of wastes, the landfill does need not be the WGSL. On the contrary, the ENV is compelled to develop a new landfill with reasonable diligence. 2011AP Ex. K15 at 6 (10/22/09 LUC order). The ENV has not contested that condition.

Condition 1 directs in part that “[o]n 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 WGSL.” 2011AP Ex. A18 at 25 (¶ 1). The ENV has stated that it plans to have only one landfill site that will accept all wastes. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). The new landfill will fulfill any needs that the WGSL served and will replace the WGSL as a critical portion of the ISWMP. The findings cannot be particular to the WGSL.

Finding of Fact 191 states in part that the items listed cannot be recycled or burned at H-POWER. The finding is partially false and materially incomplete. Director Steinberger’s testimony as to these items was only in reference to whether they could be burned at H-POWER and not whether they could be recycled. 2011AP 11/1/12 Tr. at 76:7–20 (Steinberger); 2011AP 4/11/12 Tr. at 121:1–122:5 (Steinberger). Moreover, Director Steinberger admitted that the waste that cannot be burned comprises “probably a small percentage” of MSW. 2011AP 1/11/12 Tr. at 77:11–12 (Steinberger).

Finding of Fact 192 states that the City is “actively” diverting waste and that when the third H-POWER boiler is operational, the City will divert 80% of the waste stream from the landfill. The finding is partially false and materially incomplete. First, the third boiler will be operational by October or November 2012. 2011AP 4/11/12 Tr. at 84:22–24, 176:7–10, 211:12–15 (Steinberger). Second, when the third boiler is operational, the landfill diversion will be 90%. 2011AP Ex. K251 at 1–2 (5/5/11 ENV press release). Third, the City is far behind other municipalities in non-incinerator diversion, particularly with respect to biosolids and food waste. 2011AP 4/4/12 Tr. Supp. at 12:5–6 (Gill); 2011AP Ex. K189 at 1 (Los Angeles biosolids webpage); 2011AP Ex. K190 at 2 (King County biosolids webpage); 2011AP Ex. K148 at 4, 10 (Parametrix alternatives memorandum); 2011AP 3/7/12 Tr. at 22:18–20, 96:4–7, 98:17–22, 139:11–140:4 (Miller).

Finding of Fact 195 states that the SSC has come up with a list of recommended sites. The finding is materially incomplete. The SSC has ranked a list of sites. 2011AP Ex. K258 (4/20/12 SSC meeting photographs). There is no evidence in the record that a site has been selected.

Finding of Fact 196 states that it will take more than seven years to design and develop a new landfill site or sites. The finding is false. First, the ENV has determined not to select and develop multiple sites. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). The ENV only wants one landfill site. 2011AP 4/4/12 Tr. at 72:13–24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory).

Second, there is no credible evidence to support the ENV's statement that it will take at least seven years to develop the new site after it has been identified (current estimate). 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). In 2003, the ENV admitted it would only take three to five years to identify and develop a new landfill. 2011AP Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle). In 2009, the ENV stated that it would take seven years to identify and develop a new landfill site. 2011AP Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). Now, the ENV claims it will take at least seven years to develop a landfill site after the site has been identified.

The constantly increasing estimates are nonsense. Consistent with the ENV's 2003 estimate, Mr. Miller, as the only expert in landfill siting to testify in this proceeding, testified that it would take three to five years to identify and develop a landfill. As Mr. Miller explained: "[I]f you're putting out a number of seven years, it's somewhat of a self-fulfilling prophecy. If you're saying, Oh God, it's going to take us seven years, that's how long it's going to take you." 2011AP 3/7/12 Tr. at 202:20–24 (Miller). The timetable is shorter if the ENV "put[s] out" and "push[es] a schedule." 2011AP 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV claims to be "committed" to finding a new site. See 2011AP Ex. K85 at 125:7–11, 128:2–5, 145:21–146:2, (3/27/03 Tr.: Doyle). The timetable is three to five years.

V. OBJECTIONS TO SCHNITZER'S CONCLUSIONS OF LAW

Conclusion of Law 3 states in part that the ENV applied for modification of a condition imposed by the Land Use Commission "pursuant to RPC §§ 2-18 and 2-49." The conclusion is wrong. Section 2-18 concerns meetings of the Planning Commission. At the December 7, 2011 hearing, the ENV conceded that the reference to

Section 2-18 was a "typo," as the reference "should be to 2-38." 2011AP 12/7/11 Tr. at 11:9-13.

Furthermore, Section 2-38 is irrelevant to the request for modification. Section 2-38 concerns the Planning Commission's rules governing special use permits. The section does not allow the Planning Commission to modify conditions imposed by the Land Use Commission.

Finally, Section 2-49 concerns the modification of conditions imposed by the Planning Commission. The section does not allow the Planning Commission to modify conditions that were imposed by the Land Use Commission. See Planning Commission Rules §§ 1-5(f), 2-49.

Conclusion of Law 4 states that the "same unusual conditions, trends, and needs that existed at the time SUP No. 2008/SUP-2 was granted continue to exist." This conclusion is wrong. The record is replete with evidence of changed conditions, trends and needs. Selecting just one example, the new H-POWER boiler has the capacity to burn 300,000 tons of MSW every year. 2011AP 4/11/12 Tr. at 84:22-24 (Steinberger). In 2010, the last year for which waste totals are available, the Landfill accepted 163,736 tons of MSW. 2011AP Ex. A26 (O'ahu waste stream table). When the third boiler becomes operational, it will add more capacity than is needed to dispose of all of O'ahu's remaining landfilled MSW. The only time any combustible MSW would need to go a landfill is (a) during times when H-POWER is down for maintenance and cannot accept waste or (b) when the Governor declares an emergency. 2011AP 4/11/12 Tr. at 118:9-15, 125:15-126:4, 189:13-17, 201:20-202:1

(Steinberger); 2011AP 3/7/12 Tr. at 24:23–23:7 (Miller). We refer the Commission to KOCA's Findings for the many other changed conditions, trends and needs.

VI. OBJECTIONS TO SCHNITZER'S DECISION AND ORDER

The conditions that Schnitzer proposes are inadequate to protect the community and are unsupported by the record.

Condition 2 provides:

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.

Upon identifying a viable alternative technology, the ENV should be required to use that technology to the extent practicable. Accordingly, the condition should further provide, "The Applicant shall use alternative technologies, to the extent reasonably practicable, to divert waste from the Landfill as set out in the ENV's proposed Stipulation to Continue Proceedings Until April 22, 2017 [(the 'Stipulation')]." That Stipulation, a copy of which is attached as Exhibit 2, stated in part:

During the continuation, ENV will work to divert all waste from the landfill that can be disposed of by a method other than by landfilling, except if (1) H-POWER cannot accept the landfill waste or there is an emergency, and (2) there is no reasonably available alternative disposal method for the waste, by the following means:

1. Municipal Solid Waste, specifically:

(a) Residue: ENV will divert residue resulting from the H-POWER waste-to-energy process through H-POWER equipment improvements that will enable H-POWER to better filter residue to capture more of the burnable material and reduce the disposable waste. ENV will also continue to evaluate ways, including boiler optimization, to capture more of the residue at H-POWER.

(b) Bulky waste: As of July 2015, ENV has diverted all bulky waste previously used to dispose of sludge from the landfill.

(c) Unacceptable waste or waste rejected for disposal at H-POWER such as long wires, car parts, cables, and other oversized items: ENV will divert these wastes through H-POWER equipment improvements, such as the addition of a new waste shredder that will further process unacceptable waste so that these wastes may be incinerated at H-POWER. ENV is also investing in additional staff training at the Waimanalo Gulch Sanitary Landfill ("WGSL") to enhance inspections of incoming waste loads such that waste that could be burned at H-POWER will be identified and screened out in the future.

2. Ash (residue from H-POWER waste-to-energy process): ENV will follow the progress of facilities in Pasco County, Florida, and York County, Pennsylvania, that are pioneering ash reuse and will seek the Department of Health's approval of ash reuse projects modeled after these programs.

3. Automotive Shredder Waste ("ASR"), which comprises the majority of the Miscellaneous Special Waste category: The Department of Health has approved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to enable H-POWER processing.

4. Wastewater Treatment Plant Waste: ENV has diverted all sewage sludge produced by the City and County of Honolulu from the landfill as of July 2015. For sewage sludge from the private wastewater treatment plant, ENV will determine if adding water to the sludge or combining it with loads at the City's wastewater treatment plants will enable processing at H-POWER. For bar screening waste, ENV will institute enhanced odor control protocol or equipment to enable processing at H-POWER.

5. Homeowner Waste: ENV will continue efforts to establish a new refuse convenience center in the Campbell Industrial Park so there is an alternative depository for homeowner waste loads currently going to the landfill.

6. Outdated Food Waste: ENV will evaluate the constituents to determine compatibility with the H-POWER system to enable burning.

7. Treated Medical Waste: As of the end of December 2015, ENV has diverted all treated medical waste except for treated medical sharps.

8. Rendering Waste: Currently, only approximately 1,700 tons of rendering waste is disposed of at the landfill each year, and a single company is responsible for producing this waste stream. ENV intends to work with this company to further evaluate the rendering waste to determine whether it can be diverted from the landfill to H-POWER. In the interim, ENV will require

this company to implement enhanced odor control measures for disposal at the landfill.

9. Animal Waste: ENV cannot divert large animal carcasses from the landfill because H-POWER does not have the ability to incinerate these large masses. However, ENV will work with the Department of Health to further characterize this waste, in particular the smaller animal carcasses, with the intent to burn this waste at H-POWER.

10. Petroleum Contaminated Soils and Asbestos-Containing Materials: These waste streams are already going to the PVT landfill instead of WGSL.

Ex. 2 at 2-3 (Stipulation). This Stipulation was signed by Schnitzer. Schnitzer offers no reason why these provisions were not included in its Findings.

Conditions 3 provides:

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.

This condition is objectionable for several reasons. First, the condition is contrary to Condition 3 in Schnitzer's Findings filed May 2, 2012, which read:

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 January 1, 2014, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.

Ex. 1 at 31. Accordingly, under Schnitzer's prior proposed Condition 3, by today the Landfill should have already closed to accepting municipal solid waste "provided HPOWER or other facility is capable of processing the MSW" Schnitzer provides no explanation why it has pushed its own proposed deadline to accept MSW from January 1, 2014, to December 31, 2026, for nearly 13 years. No new evidence

has been received since Schnitzer filed its Findings and proposed Condition 3 on May 2, 2012. Just like the ENV, Schnitzer's position in 2017 has become more aggressive and less consistent with the evidence than it was in 2012. The only plausible explanation for the 13-year slippage is that the ENV has not acted with reasonable diligence in identifying and developing a new landfill.

Second, Condition 10 is also contrary to the Stipulation quoted above that Schnitzer signed, including the ENV's commitment to "work to divert all waste from the landfill that can be disposed of by a method other than by landfilling" Ex. 2 at 2 (Stipulation). Schnitzer offers no explanation why the ENV should be able to freely accept waste at the Landfill until December 31, 2026, when such waste "can be disposed of by a method other than by landfilling"

Third, there is no reason to allow all forms of MSW to be accepted at the Landfill until December 31, 2026. Director Steinberger admitted the third boiler would be operational by October or November 2012. 2011AP 4/11/12 Tr. at 84:22-24, 176:7-10, 211:12-15 (Steinberger). When the third boiler is operational, the ENV will have the capacity to divert nearly all of the MSW that presently goes to the Landfill, including all sewage sludge, medical waste, and food waste. 2011AP Steinberger Written Direct Testimony at 23 (¶ 71); 2011AP 4/11/12 Tr. at 90:3-21, 174:1-6 (Steinberger). These and other putrescible wastes decompose and create the greatest health and safety concerns for the community. Ending the acceptance of putrescible waste will eliminate approximately 90% of the odor problems caused by the Landfill. 2011AP 3/7/12 Tr. at 206:6-10 (Miller). Schnitzer offers no justification

for forcing the community to bear the adverse effects of those wastes until December 31, 2026.

Condition 4 provides:

During periods of HPOWER scheduled maintenance when the facility may shut down one or more of its boilers, MSW, including sewage sludge, that would otherwise be processed at HPOWER or other facilities may be disposed of at WGS�.

This condition would conceivably allow the ENV to use the Landfill even after it sites and develops a new landfill "[d]uring periods of scheduled [H-POWER] facility maintenance" Once the ENV sites and develops a new landfill, the WGS� should close as soon as possible.

Condition 5 provides:

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 HPOWER or other facilities may be disposed of at WGS�.

This condition would conceivably allow the ENV to use the Landfill even after it sites and develops a new landfill if the ENV Director determines that there is an "emergency." Once the ENV sites and develops a new landfill, the WGS� should close as soon as possible.

Condition 6 provides:

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 WGS�'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.

The Planning Commission and Land Use Commission must exercise greater oversight of the site-selection process and the ENV's compliance with other conditions. KOCA's Findings provide for bi-annual reports to the Planning Commission and the Land Use Commission. With these reports, the regulatory bodies will be able to ensure that the ENV diligently develops a new site and complies with the other conditions.

Condition 11 provides:

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.

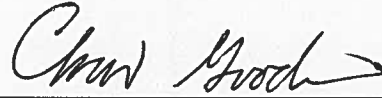
Mere notification is insufficient. The ENV should be required to file an approved closure plan for the Landfill with the Planning Commission one year prior to the closing of the Landfill to all forms of waste on March 2, 2027, or when a new MSW landfill opens on O'ahu, whichever first occurs.

VII. CONCLUSION

In light of the foregoing, Schnitzer's Findings should be rejected, except as noted above in Section II, and KOCA's Findings should be adopted.

DATED: Honolulu, Hawai'i, February 10, 2017.

CADES SCHUTTE
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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

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

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

Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer") 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 (the "Planning Commission") on April 23, 2012.

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CITY & COUNTY OF HONOLULU

3. ENV has met the provisions of Section 2-45 of the RPC in obtaining SUP No. 2008/SUP-2 and now applies anew for a modification of SUP No. 2008/SUP-2 pursuant to Sections 2-18 and 2-29 of the RPC and Section 15-15-70 of the Hawaii Administrative Rules (Rules of the Land Use Commission).

4. As the 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 DENY Intervenors' Ko Olina Community Association and Maile Shimabukuro's Motion to Dismiss. It is the further Decision and Order of the Planning Commission to APPROVE the Application and delete Condition No. 14 of Special Use Permit Application File No. 2008/SUP -2, to allow for the continued use of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health, 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 WGSF up to January 1, 2014, provided H-POWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.

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 WGSF.

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 WGSF.

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 WGSF'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. 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.

8. The operations of WGS� 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.

DATED: Honolulu, Hawaii, May 2, 2012.



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BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of)	FILE NO. 2008/SUP-2
)	
DEPARTMENT OF ENVIRONMENTAL)	STIPULATION AND ORDER TO
SERVICES, CITY AND COUNTY OF)	CONTINUE PROCEEDINGS TO APRIL 22,
HONOLULU)	2017; CERTIFICATE OF SERVICE
)	
For A New Special Use Permit To)	
Supersede Existing Special Use Permit)	
To Allow A 92.5-Acre Expansion And)	
Time Extension For Waimanalo Gulch)	
Sanitary Landfill, Waimanalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
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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 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.")	
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**STIPULATION AND ORDER TO
CONTINUE PROCEEDINGS UNTIL APRIL 22, 2017**

Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU ("ENV"), and Intervenors KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO, SCHNITZER STEEL HAWAII CORP., and COLLEEN HANABUSA request that the Commission continue the proceedings to April 22, 2017.

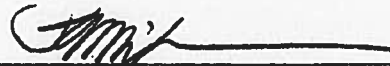
During the continuation, ENV will work to divert all waste from the landfill that can be disposed of by a method other than by landfilling, except if (1) H-POWER cannot accept the landfill waste or there is an emergency, and (2) there is no reasonably available alternative disposal method for the waste, by the following means:

1. **Municipal Solid Waste, specifically:**
 - (a) **Residue:** ENV will divert residue resulting from the H-POWER waste-to-energy process through H-POWER equipment improvements that will enable H-POWER to better filter residue to capture more of the burnable material and reduce the disposable waste. ENV will also continue to evaluate ways, including boiler optimization, to capture more of the residue at H-POWER.
 - (b) **Bulky waste:** As of July 2015, ENV has diverted all bulky waste previously used to dispose of sludge from the landfill.
 - (c) **Unacceptable waste or waste rejected for disposal at H-POWER such as long wires, car parts, cables, and other oversized items:** ENV will divert these wastes through H-POWER equipment improvements, such as the addition of a new waste shredder that will further process unacceptable waste so that these wastes may be incinerated at H-POWER. ENV is also investing in additional staff training at the Waimanalo Gulch Sanitary Landfill ("WGSL") to enhance inspections of incoming waste loads such that waste that could be burned at H-POWER will be identified and screened out in the future.
2. **Ash (residue from H-POWER waste-to-energy process):** ENV will follow the progress of facilities in Pasco County, Florida, and York County, Pennsylvania, that are pioneering ash reuse and will seek the Department of Health's approval of ash reuse projects modeled after these programs.

3. **Automotive Shredder Waste ("ASR")**, which comprises the majority of the **Miscellaneous Special Waste** category: The Department of Health has approved a pilot project for the City to evaluate the constituents of ASR to ensure it is compatible with the H-POWER system and/or determine what is needed to enable H-POWER processing.
4. **Wastewater Treatment Plant Waste**: ENV has diverted all sewage sludge produced by the City and County of Honolulu from the landfill as of July 2015. For sewage sludge from the private wastewater treatment plant, ENV will determine if adding water to the sludge or combining it with loads at the City's wastewater treatment plants will enable processing at H-POWER. For bar screening waste, ENV will institute enhanced odor control protocol or equipment to enable processing at H-POWER.
5. **Homeowner Waste**: ENV will continue efforts to establish a new refuse convenience center in the Campbell Industrial Park so there is an alternative depository for homeowner waste loads currently going to the landfill.
6. **Outdated Food Waste**: ENV will evaluate the constituents to determine compatibility with the H-POWER system to enable burning.
7. **Treated Medical Waste**: As of the end of December 2015, ENV has diverted all treated medical waste except for treated medical sharps.
8. **Rendering Waste**: Currently, only approximately 1,700 tons of rendering waste is disposed of at the landfill each year, and a single company is responsible for producing this waste stream. ENV intends to work with this company to further evaluate the rendering waste to determine whether it can be diverted from the landfill to H-POWER. In the interim, ENV will require this company to implement enhanced odor control measures for disposal at the landfill.
9. **Animal Waste**: ENV cannot divert large animal carcasses from the landfill because H-POWER does not have the ability to incinerate these large masses. However, ENV will work with the Department of Health to further characterize this waste, in particular the smaller animal carcasses, with the intent to burn this waste at H-POWER.
10. **Petroleum Contaminated Soils and Asbestos-Containing Materials**: These waste streams are already going to the PVT landfill instead of WGSL.

ENV shall file three reports with the Commission to update the status of the above-referenced objectives. These reports shall be submitted on June 22, 2016, September 22, 2016, and March 22, 2017.


DATED: Honolulu, Hawaii, _____.



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APPROVED AND SO ORDERED:

**Authorized Representative of the
Honolulu Planning Commission**

**FILE NO. 2008/SUP-2, In the Matter of the Application of DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU - Stipulation and
Order to Continue Proceedings to April 22, 2017**

09-01760/483350

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Application of the
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 Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72
And 73

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

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 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.”

CERTIFICATE OF SERVICE

The undersigned certifies that on this day a copy of the foregoing document was duly served on the following persons by hand delivery:

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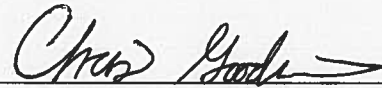
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DATED: Honolulu, Hawai'i, February 10, 2017.

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