DONNA Y. L. LEONG, 3226
Corporation Counsel
KAMILLA C. K. CHAN, 9184
(808) 768-5168
kamilla.chan@honolulu.gov
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawaii 96813
Facsimile: (808) 768-5105

Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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 No. (1) 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

FILE NO. 2008/SUP-2

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S RESPONSE TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; CERTIFICATE OF SERVICE

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."

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S RESPONSE TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (the "Applicant" or "ENV"), by and through its attorney, KAMILLA C. K. CHAN, Deputy Corporation Counsel, and respectfully submits its Response to the Intervenors Ko Olina Community Association and Maile Shimabukuro's (collectively referred to as "Intervenor KOCA") Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on January 27, 2017, pursuant to the Rules of the Planning Commission ("RPC") § 2-74.

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS

To prevent judicial reversal or modification of administrative findings of fact under Section 91-14(g), Hawaii Revised Statutes ("HRS"), the Planning Commission ("Planning Commission") should, upon review of the record, reverse or modify findings that are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In re Gray Line Hawaii Ltd., 93 Hawaii 45 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the Planning Commission is left

with the definite and firm conviction that a mistake has been made. Kienker v. Bauer, 110 Hawaii 97, 105 (2006).

Similarly, conclusions of law should be reversed or modified where the Planning Commission finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. Id.

II. DISCUSSION

This matter is a consolidation of two contested case hearings before the Planning Commission. The first proceeding involves ENV's application for a new special use permit ("SUP") for the expansion of the Waimanalo Gulch Sanitary Landfill ("WGSL" or the "landfill") and the withdrawal of County Special Use Permit File No. 86/SUP-5 ("2008 Application"). The 2008 Application for a new SUP was filed on December 3, 2008, and is designated as County SUP File No. 2008/SUP-2. This matter came on for a contested case hearing on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009.

The second proceeding involves ENV's 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 ("2011 Application"), which was filed on June 28, 2011. See 2011 Application. The 2011 Application specifically seeks the deletion of Condition No. 14. Id. This matter came on for a contested case hearing 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.

On January 15, 2013, Intervenor 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.

On January 23, 2013, ENV filed its Memorandum in Opposition to Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Effect the Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by the State Land Use Commission.

On August 17, 2016, the Planning Commission convened a hearing at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii, and considered Intervenor KOCA's motion to consolidate. On that same date, the Planning Commission ordered the consolidation of County Special Use Permit File No. 2008/SUP-2 and the proceedings on ENV's 2011 Application so that it may issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order to the State Land Use Commission ("LUC").

On January 27, 2017, Applicant, Intervenor KOCA, and Intervenor Schnitzer Steel Hawaii Corp. filed their Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

Applicant's specific exceptions to Intervenor KOCA's Proposed Order, with regard to the following proposed Findings of Fact, Conclusions of Law and Decision and Order, are detailed in the paragraphs below.

A. OBJECTIONS TO CERTAIN OF INTERVENORS FINDINGS OF FACT

Paragraph 60. Intervenor KOCA fails to state that the Planning Commission decision dated August 4, 2009 ("2009 PC Decision") also approved the withdrawal of Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and ordered that all conditions previously

placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void. 2011 Contested Case Hearing Exhibit ("2011 Exhibit") "A18" at 27.

Paragraphs 134 and 135. Intervenor KOCA fails to identify Janice Marsters as one of ENV's rebuttal witnesses and to cite the fact that they did not object to her testimony.

Paragraph 158. The facts referenced in paragraph 158 are not part of the record in this contested case proceeding and should be stricken.

Paragraph 197. Intervenor KOCA mistakenly states that on April 10, 2013, the Planning Commission continued the hearing. As Intervenor KOCA accurately notes in Paragraph 196, the Planning Commission previously continued the hearing to April 17, 2013. The April 17, 2013 hearing was subsequently cancelled due to lack of quorum.

Paragraphs 198 – 202. The facts referenced in paragraphs 198 through 202 are not part of the record in this contested case proceeding and should be stricken.

Paragraph 233. Intervenor KOCA misstates what is contained in the referenced transcript. The transcript states that, "[the Planning Commission] and ultimately the LUC has ultimate oversight over ag land[,]" not that the PC and LUC have *oversight for the Landfill* as Intervenor KOCA represents. Transcript ("Tr.") 04/11/12, 185:15-18.

Paragraph 234. Paragraph 234 mischaracterizes the LUC's April 20, 1987 decision in SP87-362. In its Findings of Fact, the LUC noted that the Applicant "proposes the new landfill to initially serve the Leeward Communities for disposing raw refuse and is projected to have an eight year life and a capacity of 6.65 million cubic yards. [Applicant] anticipates that when the proposed H-POWER (Honolulu Resource Recover[y] Project) facility becomes operational in 1988, most of the raw refuse will be diverted to this facility and the Property will be used for the disposal of ash from H-POWER and other non-combustibles." 2011 Exhibit "A5" at 4. The

LUC further noted that "the current sanitary landfills at Kapaa, Kawailoa and Waianae are rapidly approaching capacity. Even with a resource recovery project, the ash waste from H-POWER will still need a site for final disposal. However, with a resource recovery facility in place, the useful life of the proposed landfill may be doubled." Id. Thus, contrary to Intervenor KOCA's contention, Applicant did not represent that the WGSL would be limited to serving the Leeward communities for disposal of raw refuse. Moreover, the LUC acknowledged that the diversion of municipal solid waste ("MSW") to HPOWER could increase the useful life of the landfill, which was initially projected to be eight years.

Paragraphs 247 and 266. Paragraph 247 mischaracterizes the sequence of development in Ko Olina relative to the WGSL, and paragraph 266 is an outright misstatement of the facts. Ko Olina underwent "significant development and revitalization" from 1998, prior to any representation in 2003 that the landfill would be closed. Tr. 02/08/12, 27:16-25, 28:1-19. Further, the Ewa Development Plan of August 1997 clearly stated that the WGSL will run out of capacity within ten to 25 years (until 2007 or up to 2022) and that the WGSL was identified as having potential for expansion. Id., at 30:17-25, 31:1-18, see also 2011 Exhibit "A35." The developers of Ko Olina should have been aware of the Ewa Development Plan of August 1997. Tr. 02/08/12 at 36:15-20. Therefore, Ko Olina was developed and revitalized in 1998 with the knowledge that WGSL was operational until at least 2007 but as long as until 2022 and that it could be further expanded. Id.

Paragraph 251. Intervenor KOCA fails to provide the bases for the City Council not following the blue ribbon committee's recommendation and in doing so fails to give an accurate picture of what transpired. In Resolution No. 04-348, CD1, FD1, the City Council explained that while the blue ribbon committee recommended four possible sites for a new landfill (Maili,

Makaiwa, Nanakuli B, and Ameron Quarry), the state office of information practices ("OIP") concluded, in an opinion dated January 13, 2004, that the committee's final report was void, due to violations of the state's sunshine law. Since the committee's report was merely advisory, and because OIP found the committee's report to be void, the Council concluded that it was not restricted to selecting a new landfill site from the committee's list of recommended sites, and thereby picked WGSL as the site for the City's landfill because (1) the Waimanalo Gulch site had at least 15 years of capacity left, (2) the Waimanalo Gulch site was the most economical site for which all costs and revenues are known factors, (3) other sites would have required large amounts of money to acquire land and develop the site and infrastructure, (4) an operating contract was already in existence, and (5) the landfill operator was committed to addressing community concerns. Resolution No. 04-348, CD1, FD1 (December 1, 2004). See 2011 Exhibit "A11."

Paragraph 271. The record does not support the conclusion that continued operation of the landfill will jeopardize business development and economic profits generated by Ko Olina. On the contrary, the record evidences that despite the fact that the landfill predated Ko Olina and the other businesses in the area, Ko Olina has been successful in attracting and creating building opportunities. Tr. 02/08/12, 39:3-19, 40:4-10; see also 2011 Exhibit "K22" (report citing Ko Olina's business growth and economic benefits derived while WGSL has been operating).

Paragraphs 281 - 288. Intervenor KOCA repeats the various circumstances of the past enforcement actions against the WGSL, notes an ongoing and pending enforcement cases, and cites to Mr. Miller's conclusions that "[t]he failure to monitor gas readings was a threat to public health and safety[,]" and "[t]hese violations and deviations . . . have had great consequences and increased the risk of harm to health and safety, public health and safety." However, these

conclusions are not supported by facts in the record. Nowhere in the record is there evidence, other than these unfounded statements, of an actual threat to public health and safety.

On the contrary, with regard to the gas readings, ENV Director Timothy Steinberger ("Director Steinberger") testified that Waste Management of Hawaii ("WMH") "performed 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, WMH 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." Written Direct Testimony of Timothy E. Steinberger dated December 13, 2011 ("Steinberger Written Testimony") at p. 27, ¶ 83. Mr. Miller did not perform a detailed assessment to prove the existence of a threat to public health and safety and fails to point to any evidence to contradict Director Steinberger's testimony.

Intervenor KOCA also cites to Director Steinberger's statement that "one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire." However, nowhere in the record is there evidence of a subsurface fire, and pursuant to WMH's detailed assessment referenced above, there appears to continue to be no actual subsurface fire.

Mr. Miller goes on to conclude that all of the violations have had great consequences and increased the risk of harm to public health and safety, but he again fails to provide evidence to support these statements. Steven Chang of the Department of Health, Solid and Hazardous Waste Branch, the agency that is "responsible for ensuring that the Waimanalo Gulch Sanitary Landfill complies with all laws applicable to municipal solid waste landfills so as to protect

human health and the environment," directly disputed Miller's conclusion when he stated that the past enforcement actions were resolved to his satisfaction, that he was "satisfied with the operations at Waimanalo Gulch Sanitary Landfill at the present" and there are no current enforcement actions against WGSL. Tr. 01/25/12, 8:22-25, 9:1-3, 61:4-12.

Paragraphs 290 – 295, 300. These paragraphs refer to an investigation that the State of Hawaii, Department of Health ("DOH") had not yet concluded at the time the evidentiary portion of this contested case hearing was conducted. Thus, the statements were not substantiated by DOH and cannot stand as independent findings of fact.

Paragraph 301. Mr. Williams' statements are not supported by the evidence. He did not conduct or point to any testing of the stormwater to prove that sewage sludge and leachate had been released into the ocean. Therefore, Mr. Miller's statements are pure supposition. As evidenced by the investigation report, DOH was careful **not** to state that sewage sludge and leachate had been released into the ocean without proof. 2011 Exhibit "K52" at pg. 2.

Paragraphs 314 – 325. Contrary to the assertion made in paragraph 161, Director Steinberger testified that despite ENV's best estimates and not because of inadequate planning, the SUP process took longer than expected. Tr. 04/11/12, 149:10-23. Further, the LUC in its March 14, 2008 Order, recognized the lengthy and time consuming steps needed for the expansion of WGSL when it recognized the following: (1) as a result of the City Council's selection of WGSL as the municipal landfill to serve the needs of Oahu, ENV had been preparing an application to amend the existing SUP to expand the WGSL by an additional 92.5 acres of land, (2) an environmental impact statement ("EIS") was being prepared for this expansion, (3) due to the discovery of stone uprights in the proposed expansion area, the completion of the EIS had been delayed pending resolution of the matter with the State Historic

Preservation Division, and (4) concerns that the expansion could not be completed by May 1, 2008, prompted ENV to file the application for an extension of the deadline. See 2011 Exhibit "A16."

Further still, DOH recognized the delay in WMH's ability to start construction, so it allowed for the concurrent construction of cell E6 and the diversion channel by referencing such construction in the WGSL solid waste management permit. Tr. 01/11/12, 151:8-13 (Steinberger), Tr. 04/04/12 at 158:7-25 (Gill), see also 2011 Exhibit "A4."

Dr. Hari Sharma (Dr. Sharma) testified that the regulatory standard for surface waste drainage systems for landfills is that the system must be able to handle a 24-hour, 25-year storm. At the time that WMH was simultaneously constructing cell E6 and the diversion channel, WMH had already constructed a temporary surface water drainage system that could handle a 24-hour, 25-year storm. Tr. 04/11/12, 33:15-21. The planned diversion system that could handle a 100-year, 24-hour storm was beyond what was required by the law to construct. Tr. 04/11/12, 31:16-22. Because WMH and ENV were compliant with the regulatory standard, were dealing with limited landfill space, and had obtained the approval of DOH to simultaneously construct the diversion channel and cell E6, ENV and WMH had appropriately planned for and responded to the relevant circumstances and were still constructing the expansion consistent with the engineering report and design plans. Id. at 31:7-25, 32:1-8.

Paragraphs 331 and 332. Intervenor KOCA criticizes ENV's recycling efforts contrary to Mr. Miller's own testimony. In his "Waimanalo Gulch Landfill Alternatives Analysis Technical Memorandum," Mr. Miller states:

> A 52 percent capture rate for mixed recyclables and a 77 percent capture rate of greenwaste indicate that the City's residential recycling program is already achieving a high participation and recovery level. In the case of greenwaste, this recovery rate suggests a 90 percent participation at an 85 percent recovery level or vice versa. This is consistent with participation and recovery rates realized at comparable locations in California and Washington. Further, the items collected in the curbside recycling programs are consistent with those collected in comparable curbside recycling programs.

See 2011 Exhibit "K148," p. 3.

Paragraph 340. The citations referenced in this paragraph do not establish that ENV studies on sewage sludge management recommend incineration.

Paragraph 341. Mr. Miller could not establish the bases for what he claimed were "best practice" or "national standard" other than stating that these were his standards. Tr. 03/07/12, pgs. 124-126, pg. 154. ENV has in fact contracted for the processing of sewage sludge in the form of biosolids with HPOWER and an in-vessel conversion facility. Tr. 04/11/12, 87:1-22, 90:1-23.

Paragraph 342. Intervenor KOCA erroneously criticizes ENV for its food waste recycling efforts because its own witness, Mr. Miller, mistakenly testified that food waste needs to be diverted from the landfill. Tr. 03/07/12, 98:23-25, 99:1, 102:1-12. In actuality, the majority of food waste does not go to the landfill. Tr. 04/11/12, 116:7-10.

Paragraph 344. Intervenor KOCA's contention that green waste that is not composted can be disposed of at HPOWER is not supported by the record. Paragraph 344 erroneously infers that green waste is currently disposed of at the landfill. Applicant provided substantial evidence that the majority of green waste is recycled. For fiscal year 2011, the green waste capture rate was 77%, which indicates high participation at a high recovery level, either 85% participation at 90% recovery level or vice versa. Steinberger Written Testimony at p. 19; see also 2011 Exhibit "A30" at 8. All green waste is delivered to a private vendor contracted by the

City to produce mulch and other products from the waste. Id. at 20. Further, State law requires the diversion of green waste from HPOWER and the landfill. (HAR § 11-58.1-65; see also HRS §§ 342G-3, 342G-13.) ENV's green waste recycling program supports its efforts to ensure compliance with this requirement.

Paragraph 365. This contention is not supported by the evidence. ENV is in the top ten in the nation for landfill diversion. It is not behind most municipalities in its landfill alternative efforts. See 2011 Exhibit "A29." Moreover, as stated by Director Steinberger, DOH Deputy Director Gill, and Mr. Chang, Honolulu still needs a landfill to dispose of MSW that cannot be burned, recycled, or reused. Tr. 01/11/12, 137:19-25, 138:1-25, 141:1-11, Tr. 04/11/12, 121:1-25, 122:1-5, Tr. 04/04/12, 149:20-25, 150:1-15, Tr. 01/25/12, 11:2-25, 12:1-14.

Paragraph 365 and 369. Mr. Miller postulates on reasons to remove green waste and food waste from the landfill when both of these waste streams are already currently diverted from the landfill. Tr. 04/11/12, 114: 2-25, 115:1-25, 116;1-20. Therefore, because the underlying premise – diverting these waste streams from the landfill – is erroneous, these observations are not relevant to the present proceeding.

Paragraph 356. Intervenor KOCA again refers to outdated materials to try to establish false facts. Director Steinberger clearly testified in this proceeding that ENV's goal is 80% diversion from the landfill with 20% of the waste still going to the landfill. Tr. 01/11/12, 140:10-25, 141:1-11. Director Steinberger also points out that this is not an absolute number but a goal that would reinforce ENV's desire to minimize use of the landfill. Id.

Paragraph 358. This conclusion is not supported by the evidence because it does not take into account MSW that cannot be burned at HPOWER. Tr. 01/11/12, 78:4-16.

Paragraphs 362 and 377. Director Steinberger was not definitive as to the date the third boiler would be operational. He stated that the third boiler would be able to burn biosolids by late fall of 2012 but "whether or not they run into delays on this, you know, is anybody's guess." Tr. 04/11/12, 90:9-23. Director Steinberger also stated that HPOWER's operator, Covanta, "recently came in and asked for an extension of time to 2013. Originally, it was targeted for 2012. Again, it's a target." Tr. 01/11/12, 80:15-18. Thus, there is insubstantial evidence to support a firm deadline of after January 1, 2013 for the burning of all sewage sludge, treated medical waste and combustible general MSW at HPOWER.

Paragraph 364. The citations to the record from Director Steinberger's testimony do not support the fall 2012 deadline. Id. Moreover, Director Steinberger made it clear that Covanta would not accept medical sharps for incineration so this waste would still have to go to the landfill. Tr. 04/11/12, 119:1-10.

Paragraph 374. Mr. Miller fails to provide the basis for this statement, and he was not qualified as an expert in waste-to-energy facilities.

Paragraph 385. Intervenor KOCA misrepresents the time required to site and develop a new landfill by taking Mr. Doyle's statement out of context. Intervenor KOCA claims that Mr. Doyle testified that it would take "about two-and-a-half years" to identify, permit, and have the landfill operational but they fail to mention that this estimate was applicable in 1987. See 2011 Exhibit "K220." The date is significant because, as Dr. Sharma pointed out, the laws regulating landfills in 1987 were not as stringent as the laws that were enacted in October 1993. Therefore, in 1987, one could site and build a landfill very quickly as compared to that same process today. Tr. 04/11/12, 51:22-25, 52:1-14. In any regard, this time estimate is not relevant to the present proceeding.

Paragraph 386. Intervenor KOCA misstates the directive in the Planning Commission's August 4, 2009 decision regarding "a new landfill site for MSW." Condition No. 1 of the Decision and Order states 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**." See 2011 Exhibit "A19" (emphasis added).

Paragraph 389, 391-402. Intervenor KOCA tries to make Mr. Miller's estimate as to the time needed to develop a landfill more reasonable by citing his example of a 3 to 5 year goal. Tr. 03/17/12, 202:14-25, 203:1-6. However, Mr. Miller did not conclude that it would take 3 to 5 years to develop a landfill. In fact, he definitively stated that it would take 18 months to two years to design and develop a landfill once a site is selected. Tr. 03/07/12, 199:13-25, 200:1-5. He added one year to 18 months of additional time for the environmental review process, concluding that the entire landfill development through the end of construction would take "about three years." Tr. 03/07/12, 201:1-25, 202:1-2.

Intervenor KOCA contends that based on the evidence, no more than five years is needed to site and develop a landfill if the ENV proceeds with reasonable diligence. This statement is not supported by substantial evidence or for that matter by the length of time of even the present proceeding. As Ms. Marsters, Dr. Sharma, and Director Steinberger established, a minimum of seven years is required and more likely longer to take a landfill from selection to operation.

As an environmental engineer who has worked in Hawaii and the Pacific for over 20 years, mostly in the area of environmental planning and permitting for construction projects, Ms. Marsters is familiar with the permitting and environmental review process and is aware of

how long it takes to develop a site. Tr. 04/04/12, 55:10-25, 56:1-2, see also 2011 Exhibit "A36." Ms. Marsters concluded that the permitting and environmental review process, land acquisition, and the landfill design itself, which is a very rigorous process because you have to design the liners and the leachate collection systems and the groundwater monitoring systems and so forth, would take five to seven years. Ms. Marsters further concluded that it would take additional time to build the infrastructure necessary for the landfill and to construct the landfill. Tr. 04/04/12, 56:1-25, 57:1-25, 58:1-17. Ms. Marsters further opined that three years to complete the development of a new landfill was not enough time and that especially in Hawaii, because we have a very inclusive environmental review process that allows for a lot of opportunity for public input, more time is needed for the development of a new landfill. Tr. 04/04/12, 58:18-25, 59:1-11.

Dr. Sharma, who was qualified as an expert in landfill design and permitting, and who was the principal in charge of permitting and construction of the expansion cells in WGSL, observed the development of new landfills in the 80's and 90's and stated that it took about seven to ten years to complete development of new landfills at that time. Dr. Sharma further stated that in the 2000s and now, there are very few if any completely new landfill sites being approved because most landfill work is in expansion of existing landfills. Therefore, he believes that development of a new landfill would take even longer than seven to ten years. Tr. 04/11/12, 41:2-25, 42:1-6. Dr. Sharma also stated that for just the latest expansion of WGSL, it took 3-4 years, so it is not possible for a completely new landfill in Hawaii to be developed in 3-4 years. Tr. 04/11/12, 42:7-19.

Director Steinberger pointed out that even after the Site Selection Committee ("SSC") makes its recommendation, ENV will need more than seven years to complete the tasks

necessary to start operations at a new site(s). These tasks include, but are not limited to: (1) the preparation and processing of an EIS in full compliance with HRS Chapter 343 and related administrative rules for Oahu's next landfill site or sites (*e.g.*, conducting site surveys and investigations, analyzing alternatives including alternative sites and technologies, obtaining public and governmental agency input, analyzing direct, secondary, and cumulative impacts, developing appropriate mitigation measures, and ensuring the opportunity for public participation and comments); (2) the acquisition of landfill sites, which may require an appraisal of the land value, a determination by the City regarding the funding source for the acquisition, and approval for the expenditure of public funds by the Honolulu City Council; and (3) detailed engineering studies, construction and bid documents, and other approvals. Steinberger Written Testimony at pgs. 15-16.

The detailed engineering studies are also needed to support the landfill design. These studies will include, but are not limited to: land surveys; geotechnical soils and structural investigations; hydrology and hydrogeological investigations. The completion of these studies is required so that the landfill construction drawings can incorporate civil design requirements, such as the provision of drainage, access roadways, and infrastructure, to support the use of the site. Coordination with governmental agencies, utilities, and adjoining landowners, consistent with mitigation measures identified in the EIS, will also be required to minimize disturbance to nearby property owners and utilities. The length of time required for the completion of detailed engineering studies, construction drawings and bid documents, and the processing of procurements for the design and construction contractors (which could include the selection of a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as a SUP or district boundary amendment, depending on where the site(s) is located, and

other necessary approvals, is estimated to be between one and three years. That is before the City even breaks ground on a new site. Id. at 16.

Based on the foregoing, and the fact that Ms. Marsters, Dr. Sharma, and Director Steinberger have direct experience with the land use process in relation to WGSL, a new landfill is more than likely to take more than seven years to develop. Consequently, taking seven or more years to develop a landfill is not only reasonably diligent but realistic.

Paragraph 390. Yet again, Intervenor KOCA misrepresents the facts of the case by taking statements out of context. In the proceeding relevant to the present matter, the 2009 SUP Application to expand WGSL, the Planning Commission and the LUC relied upon Mr. Doyle's testimony provided in the proceeding relating to the present SUP to establish the length of time needed to develop a landfill. Specifically, Planning Commission member Kerry Komatsubara asked Mr. Doyle,

> How long does it take for the whole process, identification of the new site, blue ribbon commission hearings, EIS, site selection, hiring the contractors, going through the procurement process, going through the protest process, building, construction and opening the doors? How long does it take? . . . . And the reason why I ask it that **I want to make sure no one has the impression that in two years we're going to have a new landfill**.

Tr. 04/11/12, 72:11-21 (emphasis added). Mr. Doyle responded, "No, no, absolutely not. We're looking at seven plus." The Planning Commission and LUC relied on this testimony in finding that it would take more than seven years to identify and develop a new landfill site. Tr. 04/11/12, 73:19-25, 74:1-5, see also Exhibit "A18" at pg. 8, see also Tr. 04/11/12, 122:6-25, 123:1-12.

Paragraphs 403 – 423. Condition No. 1 of the 2009 PC Decision (Condition No. 4 of the 2009 LUC Decision) requires the City, on or before November 1, 2010, to **begin** to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL.

See Exhibit "A18" at pg. 25. As part of preparing the updated Integrated Solid Waste Management Plan ("ISWMP"), the City allotted funds in the Fiscal Year 2010 budget to conduct a site selection study for a secondary landfill on Oahu in satisfaction of Condition No. 1. Thus, the Mayor's Landfill Site Selection Committee ("Site Selection Committee") was formed. See Steinberger Written Testimony at p. 11.

The Mayor chose 12 members to serve on the Landfill Advisory Committee based upon numerous criteria including technical expertise and experience, community involvement, and availability to serve. The members are: David Arakawa, Thomas Arizumi, John Goody, Joe Lapilio, Tesha H. Malama, Janice Marsters, Richard Poirier, Chuck Prentiss, and George West (Bruce Anderson, David Cooper, and John DeSoto were originally appointed, but have stepped down). Id. at pgs. 11-12

The Mayor tasked the Site Selection Committee to provide the City with advisory recommendations concerning the selection of a future site for a landfill to replace or supplement WGSL by accepting MSW, ash and residue from facilities such as HPOWER, and construction and demolition debris waste (C&D) for the Island of Oahu. Id. at pg. 12.

The Committee would not select one site, but would rank numerous sites according to criteria that it determines most appropriate for landfill sites to accommodate all three waste streams (MSW, ash and residue, and C&D debris). Id.

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

At the time of the 2011 contested case hearing, the Landfill Advisory Committee had held meetings on January 20, February 10, March 10 and 31, May 12, June 19, July 21, 2011, March 16, 2012, and April 20, 2012. See 2011 Exhibits "A31," "A47," and "K258."

Over the course of multiple meetings, the Committee discussed numerous criteria for a new landfill, including, but not limited to the following:

- Location relative to identified disamenities
- Location relative to HPOWER
- Effect of precipitation on landfill operations
- Landfill development operation and closure costs
- Displacement costs
- Precipitation
- Ground water contamination
- Design issues
- Access issues
- Proximity to other land uses (residences, institutions etc.)
- Traffic impacts on residential neighborhoods
- Infrastructure availability
- "Those criteria impacting people that live here 365 days a year"
- Feasibility and cost issues
- Infrastructure, engineering and sustainability issues
- Wind direction issues related to closeness to other activities
- Impact on agricultural lands

Id. at pgs. 12-13, see also 2011 Exhibit "A31."

The Committee began by working with potential landfill sites identified by the City in previous studies. However, at the sixth meeting, the Committee requested that RMTC research and provide information on and analyses of additional sites to ensure a thorough vetting of appropriate sites on Oahu. Specifically, they tasked RMTC to research and include for consideration sites that are above or cross the no-pass or underground injection control ("UIC") line. The City previously did not consider these sites because of its policy not to site landfills above the no-pass or UIC line to protect the island's drinking water sources. The Committee also asked RMTC to review the Board of Water Supply capture zone maps and identify if there were any 100 acre or larger parcels that could be included on the list of potential landfill sites,

even if the sites were above the no-pass or UIC line. Id. at pgs. 13-14, see also Tr. 04/04/12, 40:1-25, 41:1-14.

The Committee also developed exclusionary criteria or factors for sites above the no-pass or UIC line based on the following information:

- State Land Use Districts (Conservation, Agricultural, and Urban; there are no Rural Districts on O'ahu);
- Groundwater Resources (Board of Water Supply and Others);
- Land Ownership (Federal, State, City, and Private);
- U.S. Fish & Wildlife Service (USFWS) Critical Habitats;
- State Natural Area Reserve System (NARS);
- Impaired Water Bodies (per Department of Health and U. S. Environmental Protection Agency);
- Agricultural Land Ratings (Land Study Bureau (LSB) and Agricultural Lands of Importance to the State of Hawai'i (ALISH));
- Commission on Water Resource Management (CWRM) Well Data; and
- Criteria protecting airports and airfields with a 10,000 linear foot buffer.

Id. at 14, see also Tr. 04/04/12, 42:1-25, 43:1-25, 44:1-25, 45:1-25.

Upon applying the above exclusionary criteria, RMTC presented the Committee with two additional sites for consideration: (1) the Kahe Point Power Generating Station owned by Hawaiian Electric Company; and (2) the Makaiwa Hills subdivision owned by the James Campbell Trust Estate, which is part of a much larger parcel of land already under development. In addition, the second site was found to border the USFWS designated critical habitat of the *Isodendrion pyrifolium* (critically imperiled Hawaiian shrub). RMTC noted that both sites should be considered as "non-sites" due to either existing or pending land uses. Id. Mr. Miller criticized the selection process for coming up with only two sites. Tr. 03/07/12, 26:7-12, 72:7-12. The two sites referenced by Miller were not the only two sites that the Committee was presented with at this stage of the proceeding but were sites added to the original list of 40 sites provided to the Committee. Tr. 04/04/12, 39:21-24, 52:11-25.

After discussion of these results, the Committee asked RMTC to undertake another review of potential sites, including the following land areas:

- Parcels that are 90 acres or more, but less than 100 acres in size;
- Land that is owned by the State of Hawai'i, including agricultural district land, conservation district land, and land that is within a critical habitat; and,
- Land that is outside of well capture zones and well buffer zones, but within the no-pass or UIC line.

Id. at 14-15, see also 2011 Exhibit "A31."

The Committee reasoned that it is important that RMTC conduct this additional review because the Committee sought to understand the availability of sites only slightly smaller than 100 acres. Certain Committee members also expressed that this further consideration will provide for more comprehensive review of potential sites. This additional request delayed final application of the criteria and its recommendations. Id.

Mr. Miller stated that "the City and the consultants have done a disfavor to the Committee by not taking their desires and their criteria and applying them in such a manner that allows for a rigorous evaluation of the sites that are out there." Tr. 03/07/12, 24:10-17. However, Ms. Marsters, as a member of the Committee, asserted that she disagreed with Mr. Miller's conclusion and that the consultant had been open to the desires of the Committee and the screening criteria has been applied in a manner that the Committee has favored. Tr. 04/01/12, 47:14-25, 48:1-25, 49-1.

Ms. Marsters asserted that the Committee has engaged in a rigorous process as evidenced by their desire to be as inclusive as possible in their consideration of possible landfill sites. Tr. 04/04/12, 54:21-25. Further, Ms. Marsters stated that she did not feel that the process was a waste of time or that it had taken too long. She reasoned that the length of time it took for the

SSC to act reflected the committee's sincere desire to be as inclusive as possible to ensure a rigorous process. Tr. 04/04/12, 54:16-25.

Ms. Marsters explained that Mr. Miller criticized the SSC's selection process because he had a different opinion as to how the committee should operate and that did not mean that the process they utilized was wrong but instead that it was different from what Mr. Miller preferred. Tr. 04/04/12, 37:18-25, 38:1-25. She also noted that certain of his criticisms resulted from his misunderstanding of the process and were contradictory and a little disorganized. Id. Finally, Ms. Marsters pointed out that the SSC's focus was on community concerns and these concerns drove the ranking of the criteria to be applied to potential landfill sites. Tr. 04/04/12, 51:14-20.

Based on the foregoing, particularly in light of Ms. Marsters' testimony in support of the SSC's process and actions, there is substantial evidence to support the determination that ENV's efforts to identify and develop one or more landfill sites to replace or supplement WGSL have been performed with reasonable diligence contrary to Intervenor KOCA's findings.

Paragraph 428. There is no evidence to support the premise that ENV directed the SSC to "find one site" and conspicuously Intervenor KOCA fails to cite to any evidence in the record that would support this unfounded contention. Intervenor KOCA jumps to conclusions in inferring from the SSC's identifying a site that could accept all forms of waste as indicative of ENV limiting its options to one landfill site. This is simply not supported by the record and is pure supposition.

Paragraphs 429 – 431. Again, there is no evidence to support closing WGSL once the new landfill site opens, that this decision is in the best interest of the community, or that it is in the best interest of mitigating the impact of WGSL, including but not limited to the impact on native Hawaii traditional practices. The 2009 PC Decision directs ENV to begin to identify and

develop one or more new landfill sites that shall **either replace or supplement** the WGSL. The 2009 PC Decision does not limit ENV's options in determining how best to manage the City's waste and there is no evidence in the record to show that ENV would elect to so restrict itself. See 2011 Exhibit "A19." Intervenor KOCA makes these assertions without evidentiary support and by citing a letter from the State Historic Preservation Division that makes the opposite point. See 2011 Exhibit "A48."

B. OBJECTIONS TO INTERVENORS' CONCLUSIONS OF LAW

Applicant objects to Intervenor KOCA's Conclusion of Law ("COL") 3 because it is inappropriate. HRS Section 91-10(5) should be quoted in its entirety:

> Except as otherwise provided by law, the 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.

Applicant objects to COL 6, to the extent that it "specifically consider[s] the mitigating effect of and subject to the conditions imposed below . . . ." A "conclusion of law" is defined as an "inference on a question of law, made as a result of a factual showing, no further evidence being required; a legal inference." As more addressed below, the proposed conditions are not appropriate and not supported by the record and for these reasons, should be rejected by the Planning Commission. Accordingly, COL 6 should not be part of the Planning Commission's conclusions of law.

Applicant also objects to specific subparts of COL 6. COL 6(a) – (c) are inappropriate because it limits, without basis, the "continued operation of the Landfill for a specific period." The 2009 PC Decision did not place an expiration date on 2008/SUP-2 or any deadline for the acceptance of waste at WGSL because it recognized the futility of setting unrealistic deadlines for closure. Steinberger Written Testimony at p. 27. Planning Commission member

Komatsubara stated that Applicant had "demonstrated that we [people of the City and County of Honolulu] need a landfill . . . we need a landfill on this island for us to move forward . . . it would not be in the community's best interest if we were to close this landfill before we find another landfill." 2011 Exhibit "A17" at 3. Commissioner Komatsubara further explained, "[s]o what this proposal does is, it says look, [Applicant] can keep [WGSL] open until your [*sic*] full, until you've reached capacity, but you have an obligation starting from next year [2010] to start looking for a new site." Id. at 4. Applicant has provided substantial evidence that the continued use of the landfill should be allowed to capacity.

Contrary to Intervenor KOCA's COL 6(d), there is nothing in the record to support "the relocation of the City landfill for a specific period." The Applicant provided substantial evidence that the same unusual conditions, trends and needs that existed at the time the original SUP was granted continue to exist and that the land on which the WGSL is located continues to be unsuited for agricultural purposes.

COL 6(f) is not supported by the record. The record is clear that despite all of the progress made to divert waste from the landfill through recycling, burning waste for energy, and reuse, a landfill is still needed on Oahu. See Tr. 01/25/12, 12:7-14; 03/07/12, 99:22-100:1; 04/11/12, 117:5-121:5. The continued availability of WGSL to dispose of MSW is needed because there will always be material that cannot be combusted, recycled, reused, or shipped. See Tr. 04/11/12, 117-122:5; 2011 Exhibit "A18."

COL 7 states that ENV has met its burden of proof "subject to the conditions imposed" in Intervenor KOCA's proposed Decision and Order. As set forth below, Applicant objects to Intervenor KOCA's proposed Decision and Order. Thus, to the extent that COL 7 is subject to

the conditions proposed by Intervenor KQCA, Applicant objects and urges the Planning Commission to reject this conclusion of law.

COL 9 is not supported by the record. In contrast to Intervenor KOCA's contention, the record is clear that the continued operation of the landfill is necessary to protect the public health, safety and welfare of the people of the City and County of Honolulu. See Steinberger Written Testimony at p. 30. Further, the conditions imposed in Intervenor KOCA's proposed Decision and Order are not appropriate, are not necessary to protect the public health, safety and welfare, and are not material to the approval of the Application.

C. OBJECTION TO INTERVENORS' PROPOSED DECISION AND ORDER

Many of the conditions in Intervenor KOCA's proposed Decision and Order are not appropriate. As the record and the instant objections to certain of Intervenor KOCA's Findings of Fact and Conclusions of Law indicate, the application for a SUP for the existing and proposed expansion of WGSL and for continued operation of WGSL should be granted because Applicant has established good cause. Thus, Applicant requests that Intervenor KOCA's proposed Decision and Order be rejected.

III. CONCLUSION

Applicant has shown by a preponderance of substantial evidence that the proposed use meets the test to be applied under RPC Section 2-45. See HRS § 91-10; see generally, Applicant's Proposed Order. Therefore, the Planning Commission should find that the proposed use is an "unusual and reasonable" use within the State Agricultural District. Intervenors, despite their efforts, have failed to present any substantial evidence on the record that would refute the evidence submitted by the Applicant. Applicant has met the test established under RPC Section 2-45, which guides the Planning Commission's decision making in this matter.

For the foregoing reasons, Applicant respectfully requests that Intervenor KOCA's Proposed Order be rejected to the extent that it conflicts with Applicant's Proposed Order, and requests that Applicant's Proposed Order be adopted.

DATED: Honolulu, Hawaii, February 10, 2017.

KAMILLA C. K. CHAN
Deputy Corporation Counsel
Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU

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 No. (1) 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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE **DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S RESPONSE TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER** was duly served by either hand-delivery or U. S. Mail, postage

prepaid, by certified mail, return receipt requested, to the following on the date below, addressed as follows:

	Mail	Delivery
IAN L. SANDISON, ESQ. DEAN H. ROBB, ESQ. TIMOTHY LUI-KWAN, ESQ. Carlsmith Ball LLP 1001 Bishop Street, Suite 2200 Honolulu, Hawaii 96813 Attorneys for Intervenor SCHNITZER STEEL HAWAII CORP.	X	
CALVERT G. CHIPCHASE, ESQ. CHRISTOPHER T. GOODIN, ESQ. Cades Schutte LLP 1000 Bishop Street, Suite 1200 Honolulu, Hawaii 96813 Attorneys for Intervenors KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO	X	
RICHARD N. WURDEMAN, ESQ. 1003 Bishop Street, Suite 720 Honolulu, Hawaii 96813-6419 Attorney for Intervenor COLLEEN HANABUSA	X	
DEPARTMENT OF PLANNING AND PERMITTING City and County of Honolulu 650 South King Street, 7th Floor Honolulu, Hawai'i 96813		X

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

KAMILLA C. K. CHAN
Deputy Corporation Counsel

16-09965/553626