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DEPT. OF PLANNING  
AND PERMITTING  
CITY & COUNTY OF HONOLULU

Attorneys for Intervenors

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

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 31,  
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

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

**CERTIFICATE OF SERVICE**

Contested Case Beginning:  
December 7, 2011

**KOCA 35**

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S RESPONSE TO INTERVENOR  
SCHNITZER STEEL HAWAII CORP.'S 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 May 2, 2012 (“**Schnitzer’s Findings**”).

**I. INTRODUCTION**

In substance, Schnitzer’s Findings are 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 of Fact 10, 11, 12, 14, 15, 16, 18, 19, 21, 22, 23, 38, 39, 40, 41, 43, 44, 45, 46, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 92, 93, 94, 95, 97, 130, 139, 140, 141, 142, 143, 144, 147, 148, 149, 150, 151, 152, 154 *respectively with* ENV’s Findings of Fact 30, 31, 32, 33, 35, 36, 39, 40, 41, 43, 45, 4, 6, 5, 7, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 79, 80, 80, 94, 95, 77, 114, 115, 116, 117, 118, 47, 49, 48, 50, 51, 52, 53, 59; *compare* Schnitzer’s Conclusions of Law 1, 2, 3, 5 *respectively with* ENV’s Conclusions of Law 1, 2, 3, 4; *compare* Schnitzer’s Conditions 3, 4, 5 *respectively with* ENV’s Conditions 1, 2, 3.

Like the ENV’s papers, Schnitzer’s findings of fact repeatedly misstate the record and ignore all evidence adverse to the ENV. The Commission spent five weeks

examining evidence. Yet Schnitzer’s proposed findings discard the testimony and exhibits in favor of verbatim recitations of the Written Direct Testimony of Director Timothy E. Steinberger (“**Director Steinberger**”). *Compare, e.g.*, Schnitzer’s Findings of Fact 97, 139, 140, 141, 142 *respectively with* Steinberger’s Written Direct Testimony ¶¶ 60, 80, 81, 82, 83. Predictably, materially deficient findings of fact lead Schnitzer to propose incorrect conclusions of law and to suggest an order that could not be sustained on appeal.

Despite these problems, Schnitzer and ENV concede that the WGSL should close to most forms of municipal solid waste (“**MSW**”). While Schnitzer’s and the ENV’s proposed to close Waimanalo Gulch Sanitary Landfill (“**Landfill**” or “**WGSL**”) to most MSW by January 1, 2014, the record establishes that additional conditions are necessary and appropriate.

The ENV claims to want “maximum diversion” from the Landfill. *See* 1/11/12 Tr. at 157:23–25 (Steinberger: “You know what, again -- and I’ll say it again, what I would like to see is as much waste diverted from that facility as possible.”); 4/11/12 Tr. at 94:7–9 (Steinberger: “I think I’ve indicated that the name of the game for us is diversion, maximum diversion.”). By January 1, 2013, the third boiler will be operational. 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger). There is no basis for sending combustible waste to the WGSL after this date. The third boiler will have the capability to burn all putrescible wastes, including all sewage sludge, medical waste, and food waste. 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); 4/11/12 Tr. at 163:12–16, 171:16–172:10,

196:20–24 (Steinberger). The Landfill must close to these wastes as soon as possible, which means January 2, 2013. As proposed by KOCA in its Proposed Findings of Fact, Conclusions of Law, and Decision and Order (“**KOCA’s Proposed Findings**”), beginning January 2, 2013, the ENV must end the practice of landfilling putrescible and all other combustible MSW at the WGSL, except (a) during times when H-POWER is down for maintenance and cannot accept waste or (b) when the Governor declares an emergency.

Furthermore, neither the ENV nor Schnitzer has challenged the current condition that the ENV must act with reasonable diligence to identify and develop a new landfill. *See* Ex. K15 at 6 (¶ 4) (10/22/09 LUC order). Dwight Miller, who was the only witness accepted as an expert in landfill siting, explained that a landfill may be sited and developed in three to five years. 3/7/12 Tr. at 17:25–19:25, 199:24–201:24 (Miller). Mr. Miller’s estimate is consistent with the estimate provided in 2003 by then-acting ENV Director Frank Doyle. Ex. K85 at 95:6–8, 100:23–25 (3/27/03 Tr.: Doyle). The only witnesses who testified that the process could take longer than five years were neither qualified nor experienced in landfill siting. 4/4/12 Tr. at 61:16–25 (Marsters); 4/11/12 Tr. at 41:10–15, 5:22–23 (Sharma); 4/11/12 Tr. at 122:25 (Steinberger). By November 1, 2017, the ENV will have had seven years to identify and develop a new landfill. The record does not support giving the ENV a day longer to accomplish the task.

Relatedly, 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 Proposed Findings provide for bi-annual reports to the Planning Commission and the Land Use Commission. KOCA's Proposed Findings also provide for the submission of a closure report one-year before the scheduled closure of the Landfill. 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.

When the new site is developed, the WGS� must close. The ENV has stated that it only wants one landfill to accept all waste streams that require landfilling. 4/4/12 Tr. at 72:13–24 (Marsters); Ex. K27 at 2 (1/20/11 SSC group memory). With a new site developed by November 1, 2017, the ENV will no longer need the WGS�. At that point, after having endured the Landfill's problems for decades, it will be in the best interests of the community for the WGS� to close.

The has not demonstrated good cause to delete Condition 14 of Special Use Permit ("SUP") File No. 2008/SUP-2 or to permit the continued operation of the WGS� to its capacity. KOCA's Proposed Findings reflect the full record developed in this case over nine hearing days and express the legal conclusions that necessarily follow from the facts. The Commission should adopt KOCA's Proposed Findings, including the conditions stated in the order.

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

## II. UNOBJECTIONABLE FINDINGS OF FACT

KOCA does not object to, and would incorporate in its own findings, **Findings of Fact 1, 2, 4, 26, 34, 35, 36, 37, 42, 65, 80 and 81.**

In part, KOCA does not object in part to, and would incorporate the unobjectionable part in its own findings, the following Findings of Fact:

**Findings of Fact 24 and 25** as to the substance of the paragraphs. The citation is incorrect. The citations for Findings of Fact 24 and 25 should reference “Ex. A21,” not “Ex. 21.”

**Findings of Fact 46, 48, 50, 51, 52, 53, 54 and 55** only as to as to the location of the hearing.

**Finding of Fact 53** only as to the finding: “The parties agreed to take the remaining witnesses out of order due to scheduling difficulties.”

### III. 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.

#### A. Description of the Property

**Finding of Fact 7** states, the “WGSL 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.” 1/25/12 Tr. at 58:22–59:3 (Chang).

#### B. Prior Proceedings

**Finding of Fact 10** states in part, “At that time, ENV anticipated that the Landfill with the expanded 21 acres would reach capacity in 5 years, so the Planning Commission recommended that ENV submit an alternative landfill site, or

sites, to the City Council by December 31, 2003, and close the 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.” 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.” 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. 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 contested case hearing was held. *See* 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 . . . .” 1/11/12 Tr. at 32:3–7 (Steinberger).

**Finding of Fact 12** states in part that the City Council “selected” the WGSL as the “new” landfill. The statement is false. City Council passed a non-binding resolution to select the existing site as the “new” landfill. 1/11/12 Tr. at 52:6–15 (Steinberger); 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 13** 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 WGSL 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 in part that on December 23, 2008, the ENV filed an application for a new SUP to expand the operating portion of the Landfill by approximately 92.5 acres. The finding is false. The ENV’s application was filed on December 3, 2008. Ex. A18 at 2–3 (¶ 5).

**Finding of Fact 21** 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 a finding. The quoted statement was made by a single Commissioner during a hearing in the 2009 SUP proceedings. Ex. A17 at 2 (7/31/09 HPC Tr.: Komatsubara).

**Finding of Fact 22**, in discussing Condition 1 in the Planning Commission’s 2009 order, states, “On or before November 1, 2010, begin to identify and develop



one or more new landfill sites that shall either replace or supplement the WGSL.” The finding is materially incomplete. Condition 1 further states, “The Applicant’s effort to identify and develop such sites shall be performed with *reasonable diligence* . . . .” Ex. A18 at 25 (¶ 1) (emphasis added).

**Finding of Fact 27** states in part that the appeal is still ongoing in the Hawai’i Supreme Court. Subsequent events have made this finding false. On May 4, 2012, the Hawai’i Supreme Court filed its Opinion vacating the circuit court’s judgment affirming the LUC’s approval of the SUP and remanding the matter to the circuit court with instructions to remand the matter to the LUC for further proceedings.

### C. Current Application

**Finding of Fact 28** 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 43** 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 47** states in part that KOCA filed a Subpoena Duces Tecum to the Custodian of Records of Waste Management of Hawaii, Inc. (“**Waste Manage-**

ment”). 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 48** is materially incomplete because it fails to acknowledge that Exhibit K162 was admitted into evidence without objection during the January 11, 2012 hearing. 1/11/12 Tr. at 96:2–4.

**Finding of Fact 50** 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. 1/25/12 Tr. at 51:8–13, 85:22–86:5.

**Finding of Fact 52** 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.” 3/7/12 Tr. at 18:8–10.

**Finding of Fact 53** 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. 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).

#### **D. Exhibits and Witnesses**

**Finding of Fact 59** 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 60** 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." 1/11/12 Tr. at 16:1-3. Moreover, Exhibits K162 to K169 were admitted into evidence without objection. 1/11/12 Tr. at 95:23-96:16 (Ex. K162), 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 61** is potentially false in stating that KOCA's Exhibits K259 and K260 "have not been received into the record by the Planning Commission." If the Planning Commission grants KOCA's motion to reopen filed April 27, 2012, this aspect of Finding of Fact 61 will be false.

**Finding of Fact 64** 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." 3/7/12 Tr. at 18:8-10.

## **E. Intervenor's Interests in Proceedings**

**Finding of Fact 67** 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. Ex. K227; 4/4/12 Tr. at 13:18–25 (Zelenka).

**Finding of Fact 74** 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. 1/25/12 Tr. at 42:1–3 (Chang); 4/4/12 Tr. at 19:21–25 (Zelenka).

**Finding of Fact 78** in part makes statements with respect to H-POWER's "concerns" regarding burning ASR. The statements lack evidentiary support. No one from H-POWER's operator, Covanta, testified in this contested case.

**Finding of Fact 82** 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."

**Finding of Fact 89** is materially incomplete because it fails to include KOCA's requested modification to Condition 14 requiring the Landfill to close to all forms of waste on November 2, 2017. 4/23/12 Tr. at 79:14–18.

**Finding of Fact 91** is materially incomplete. First, the finding fails to include KOCA's proposed modification to Condition 6, which would require the City to re-

port to the Commission in person and in writing every six months until there is a new landfill. 4/23/12 Tr. at 79:4–7.

Second, the finding fails to include KOCA’s proposed additional condition that the ENV file with the Planning Commission an approved closure plan one year prior to closing.

Third, the finding fails to include KOCA’s proposed additional condition that the ENV must immediately notify the surrounding community of any releases of waste or leachate and take remedial actions to clean up the waste and to keep the waste from spreading.

**Finding of Fact 93** is misleading and materially incomplete. First, Finding of Fact 53 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. 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 53 states, “In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. . . . See Exhibit ‘A27,’ see also Exhibit ‘A29.’” The statements and supporting citations are incorrect. First, Exhibit A29 provides a “Sustainable Solid Waste Management Ladder for the US” and does not disclose the amount of waste disposed at the Landfill in Fiscal Year 2009. Second, Exhibit A27 discusses the “Municipal Solid Waste Stream on Oahu” for the “CALENDAR YEAR” and not for the Fiscal Year. Finally, 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 53 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). Ex. A27. The reduction in waste generation reflects a slowing economy. 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 98** 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 98.

**Finding of Fact 100** 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. 1/25/12 Tr. at 44:23–45:16 (Chang).

**Finding of Fact 104** 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**. 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)); 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 105** states, “The third boiler is scheduled 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. 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. 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. 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 107** contains an error in that the citation should read “*See id.* 127:9–11” and not “*See id.* at 9–11.”

**Finding of Fact 109** 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. 4/11/12 Tr. 90:7–16 (Steinberger). By October or November 2012, H-POWER’s third boiler will be able to accept all of that sewage sludge. 4/11/12 Tr. at 176:7–10, 211:12–15 (Steinberger); Steinberger Written Direct Testimony at 23 (¶ 71); 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 113** 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. 4/11/12 Tr. at 109:21–110:19 (Steinberger).

**Findings of Fact 115 and 116** 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. 1/11/12 Tr. at 68:16–17 (Steinberger); 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. 1/11/12 Tr. at 77:11–12 (Steinberger).

#### **F. Alternative Site Selection Efforts**

**Finding of Fact 118** 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 WGSF. The Applicant’s effort to identify and develop such sites shall be performed with reasonable diligence . . . .” 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. 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 121** 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. 4/4/12 Tr. at 39:13–20, 77:25–78:20 (Marsters).

**Finding of Fact 122** 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.” 4/4/12 Tr. at 105:1–4 (Marsters). For this and other reasons, the SSC was “not happy” with the process. 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 126** 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. 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. 4/4/12 Tr. at 87:13–15 (Marsters); 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. 4/4/12 Tr. at 88:1–17 (Marsters); Ex. K152 at 2 (11/8/11 SSC group memory).

**Finding of Fact 127** 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. Ex. K170 at 2 (2/1/12

SSC group memory). But the consultant applied nine screening factors to the 464 sites. 4/4/12 Tr. at 93:10–13 (Marsters); Ex. K170 at 2 (2/1/12 SSC group memory). After applying the screening factors, only six sites remained. 4/4/12 Tr. at 93:18–21 (Marsters); Ex. K170 at 3 (2/1/12 SSC group memory). The SSC eliminated four of those sites, which left only two potential sites. Ex. K170 at 3 (2/1/12 SSC group memory).

**Finding of Fact 128** 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. 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. 4/4/12 Tr. at 102:23–103:2 (Marsters); 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. 4/4/12 Tr. at 103:3–10 (Marsters); 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. Ex. A47 (3/16/12 SSC group memory at 4).

**Finding of Fact 129** states that that the SSC “came up with a list of recommended alternative sites.” The finding is materially incomplete. First, the SSC ranked the sites. Ex. K258 (4/20/12 SSC meeting photographs). However, the SSC has yet to send a report to the Mayor.

Second, a subconsultant to the SSC disclosed that it had made an error in ranking the sites. Proposed Ex. K259 (4/25/12 landfill site selection information update). The subconsultant provided new scores for the sites, a new ranking list and a new map of the ranked sites. Proposed Ex. K260 (SSC corrected list of sites and map). A meeting to review the corrected ranking has not been scheduled.

**Finding of Fact 130** 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. Ex. K12 at 8 (¶ 34) (8/4/09 HPC order). The ENV’s estimates keep increasing. In 2003, the ENV admitted it would only take three to five years to identify and develop a new landfill. 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. 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.*, 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.” 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. 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV represents that it is “committed” to finding a new site. See 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.

### G. Landfill Operations

**Finding of Fact 132** 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. 4/11/12 Tr. at 145:22–23 (Steinberger); 4/11/12 Tr. at 145:24–146:14, 149:3–5 (Steinberger); Ex. K2 (6/5/03 LUC order); Ex. K155 at 3 (¶¶ 5–8) (3/14/08 LUC order); 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 Landfill to run out of safely useable space before the diversion channel had been completed. 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. 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 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 133** 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. 4/11/12 Tr. at 66:7–9, 66:15–17 (Sharma); 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. 3/7/12 Tr. at 39:25–40:4, 126:13–20, 128:14–129:13, 172:19–173:3 (Miller); 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 136** 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. 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.” 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.” 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.”

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.” Ex. K52 at 2–3 (12/23/10 DOH investigation report); Ex. K97 (1/11/11 DOH inspection report at 2).

On January 12, 2012, the Landfill received heavy rains. 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. 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. Williams Written Direct Testimony at 18 (¶ 43); 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); Williams Written Direct Testimony at 18 (¶ 43).

**Finding of Fact 137** 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. Williams Written Direct Testimony at 18 (¶ 44). The waste spread to beaches up the Leeward coast as far as Pokai bay, Shimabukuro Written Direct Testimony at 7 (¶ 10.e), and east as

far as Nimitz Beach, Williams Written Direct Testimony at 18 (¶ 44). No one from the ENV or Waste Management called Ko Olina to warn it about the flood. 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. Williams Written Direct Testimony at 22 (¶ 48); Hospodar Written Direct Testimony at 7–11 (¶ 21); 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. 2/8/12 Tr. at 85:22–86:8, 94:24–95:2 (Hospodar); 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. Ex. K133a (1/14/11 KHON 2 video); 4/23/12 Tr. at 41:13–15 (Belluomini). The workers never came back to assist with the cleanup, even though the waste continued to wash ashore in the area. Ex. K133b (1/14/11 KHON 2 video); 4/23/12 Tr. at 41:13–15 (Belluomini); 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. 2/8/12 Tr. at 88:24–89:1 (Hospodar); 4/23/12 Tr. at 69:6–8 (Belluomini).

**Finding of Fact 139** 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, 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. Ex. K133a (1/14/11 KHON 2 video); 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. Ex. K133b (1/14/11 KHON 2 video); 4/23/12 Tr. at 41:13–15 (Belluomini); 2/8/12 Tr. at 94:24–95:2 (Hospodar). The waste also continued to wash ashore at Ko Olina’s lagoons. 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. 2/8/12 Tr. at 85:22–86:8, 94:24–95:2 (Hospodar); 4/23/12 Tr. at 42:4–6 (Belluomini).

**Finding of Fact 140** 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 143** 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. 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.”); 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.”).

#### **H. Purpose and Need**

**Findings of Fact 145 to 149 and 151** 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. 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.” Ex. A18 at 25 (¶ 1). The ENV has stated that it plans to have only one landfill site that will accept all wastes. 4/4/12 Tr. at 72:13–24 (Marsters); 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 153** states in part that the items listed cannot be recycled or burned at H-POWER. The finding is partially false and materially incomplete. Di-

rector 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. 11/1/12 Tr. at 76:7–20 (Steinberger); 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. 1/11/12 Tr. at 77:11–12 (Steinberger).

**Finding of Fact 154** 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. 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%. 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. 4/4/12 Tr. Supp. at 12:5–6 (Gill); Ex. K189 at 1 (Los Angeles biosolids webpage); Ex. K190 at 2 (King County biosolids webpage); Ex. K148 at 4, 10 (Parametrix alternatives memorandum); 3/7/12 Tr. at 22:18–20, 96:4–7, 98:17–22, 139:11–140:4 (Miller).

**Finding of Fact 157** 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. Ex. K258 (4/20/12 SSC meeting photographs). However, the SSC has yet to send a report to the Mayor.

Furthermore, a subconsultant to the SSC disclosed that it had made an error in ranking the sites. Proposed Ex. K259 (4/25/12 landfill site selection information

update). The subconsultant provided new scores for the sites, a new ranking list and a new map of the ranked sites. Proposed Ex. K260 (SSC corrected list of sites and map). A meeting to review the corrected ranking has not been scheduled.

**Finding of Fact 158** 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. 4/4/12 Tr. at 72:13–24 (Marsters); Ex. K27 at 2 (1/20/11 SSC group memory). The ENV only wants one landfill site. 4/4/12 Tr. at 72:13–24 (Marsters); 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). 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. 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. 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." 3/7/12 Tr. at 202:20–24 (Miller). The timetable is shorter if the ENV "put[s] out" and "push[es] a schedule." 3/7/12 Tr. at 202:24–203:1 (Miller). The ENV claims to be "committed" to finding a new site. *See* 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.

#### IV. 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 Sections 2-18 and 2-49 of the RPC." 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." 12/7/11 Tr. at 11:9–13.

Furthermore, Section 2-38 is irrelevant. 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. 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. 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. 4/11/12 Tr. at 118:9–15, 125:15–126:4, 189:13–17, 201:20–202:1 (Steinberger); 3/7/12 Tr. at 24:23–23:7 (Miller). We refer the Commission to KOCA’s Proposed Findings for the many other changed conditions, trends and needs.

**Conclusion of Law 5** states that the ENV has shown good cause to amend the SUP. This finding is wrong. By “amend,” Schnitzer and the ENV mean to delete Condition 14 and allow the continued use of the Landfill to capacity.

As detailed in KOCA’s Proposed Findings, the ENV has not met its burden of showing good cause to delete Condition 14 and keep the Landfill open to all forms of waste open until it reaches capacity. First, the ENV has not acted reasonably diligently in identifying and developing a new landfill. KOCA’s Proposed Findings at 45–50 (¶¶ 247–269), 54 (¶¶ 7–10). Second, the ENV claims that it only wants to have one landfill. After the ENV develops a new landfill, it will not need the WGSL. KOCA’s Proposed Findings at 50–51 (¶¶ 270–275), 54–55 (¶¶ 11–12). Third, the ENV has not shown that the WGSL should be kept open until it reaches capacity. With the added capacity provided by the third H-POWER boiler, there is no need to

have a general purpose MSW landfill on O‘ahu. 3/7/12 Tr. at 22:24–23:7 (Miller). There are only certain items that will not be accepted at H-POWER, which the ENV admits constitute “probably a small percentage” of the MSW. 1/11/12 Tr. at 77:7–13 (Steinberger). After storing MSW collected from the entire island of O‘ahu for the last 23 years and after relying on the ENV’s broken promises of closure, there is no reason why the WGS� must or should be filled to capacity.

## V. 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 1** provides:

ENV shall continue to identify and develop one or more landfill sites that shall either replace or supplement the WGS�. 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 200S/SUP-2 is appropriate at that time.

KOCA agrees that the ENV must act with reasonable diligence to identify and develop a new landfill site on O‘ahu. However, once the new landfill is operational, there will no longer be a need for the WGS�. The ENV has stated that it only wants one landfill site. 4/4/12 Tr. at 72:13–24 (Marsters); Ex. K27 at 2 (1/20/11 SSC group memory). Because the ENV is required to develop a new landfill site and does not contest that condition, the ENV should be required to close in accordance with an approved closure plan filed with the Planning Commission. Thus, reevaluation and modification to the SUP is unwarranted.

**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.

This proposed condition is insufficient. It offers no standard by which the Commission may measure the ENV’s efforts. The City is already behind other municipalities with respect to the use of alternative technologies to divert waste from the Landfill. As Deputy Director Gill explained, “[W]e’re doing about half as well as we need to [with respect to landfill diversion], and not only as a city, but as a state . . . .” 4/4/12 Tr. Supp. at 12:5–6 (Gill). The City’s past efforts have not been adequate to bring it up to par with other municipalities. It is not enough for the City to simply continue its current efforts.

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

This condition is objectionable for a number of reasons. First, there is no reason to allow all forms of MSW to be accepted at the Landfill until January 1, 2014. Director Steinberger admitted the third boiler would be operational by October or November 2012. 4/11/12 Tr. at 84:22–24, 176:7–10, 211:12–15 (Steinberger). At that point the ENV will have the capacity to divert nearly all of the MSW that presently goes to the Landfill. With 300,000 tons of additional capacity, H-POWER will be capable of accepting all of the sewage sludge, medical waste, and food waste that



currently go to the Landfill. Steinberger Written Direct Testimony at 23 (§ 71); 4/11/12 Tr. at 90:3–21, 174:1–6 (Steinberger). Putrescible wastes like medical waste and sewage sludge should be diverted from the Landfill to H-POWER as soon as possible. These are the wastes that 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. 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 2014.

Second, Schnitzer’s Condition 3 is vague, ambiguous and misleading in its use of the words “including sewage sludge under the control of the City.” This language implies that sewage sludge not under the control of the City may not be subject to this Condition. This is nonsense. The City owns the Landfill and, subject to the permits for the facility, has control over whether sewage sludge may be disposed at the Landfill. Ex. K12 at 9 (§ 41) (8/4/09 HPC order). If the ENV bans the disposal of sewage sludge at the Landfill, all generators (including private generators) of sewage sludge will have to look to H-POWER’s third boiler and other disposal options.

Finally, Schnitzer’s Condition 3 is vague and ambiguous in its use of the words “that can be disposed of other than by landfilling” and “provided HPOWER or other facility is capable of processing the MSW.” The record establishes the kinds of waste that can and cannot be disposed of at H-POWER. With the third boiler, H-POWER will be able to accept, among other waste, the sewage sludge, medical waste and food waste that currently goes to the Landfill. Limited kinds of waste cannot go to

H-POWER. It should not be up to the ENV to pick and choose the waste it will send to H-POWER. KOCA's proposed condition accounts for these distinctions. KOCA's Findings at 55–56 (§ 2). Schnitzer's Condition 3 does not. KOCA's proposed condition also provides appropriate exceptions for H-POWER downtime and emergency contingencies. KOCA's Findings at 56–57 (§ 2).

**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 WGSL.

This condition is inadequate. Under Condition 4, MSW may be accepted at the Landfill any time one or more of the boilers is shut down for scheduled maintenance. During scheduled downtime, the storage capacity at H-POWER should be utilized before the Landfill is allowed to accept such "bypass" waste. 3/7/12 Tr. at 100:10–12 (Miller). KOCA's proposed condition accounts for this issue of necessity in allowing general MSW to be accepted at the Landfill after January 1, 2013, "if H-POWER is not in operation such that it cannot accept waste." KOCA's Findings at 57 (§ 2).

**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 WGSL.

This condition offers no legal or otherwise verifiable standard for when an "emergency" may be determined. Instead, the ENV Director is given unfettered discretion. By contrast, KOCA's proposed condition provides a legal and verifiable

standard for when an “emergency” occurs, allowing “waste reasonably related to [an] emergency” to be disposed at the Landfill “if there is an emergency declared by the Governor of the State of Hawai‘i pursuant to law, including but not limited to HRS ch. 128.”

**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 WGSL’s operations, and ENV’s compliance with the conditions imposed herein. The annual reports shall also address the ENV’s efforts to seek beneficial re-use of stabilized, dewatered sewage sludge, to utilize auto shredder residue as alternative daily cover, and to use other alternative technologies, as appropriate. The annual reports shall be submitted to the Planning Commission on June 31 of each year subsequent to the date of this Decision and Order.

The ENV’s efforts to site and develop a new landfill have not been reasonably diligent. The record shows that the length of time that has passed since the ENV was ordered to find a new site and the flaws in the process were not reasonable. The process of identifying and developing a new landfill site requires more monitoring and oversight than an annual report provides. Under Schnitzer’s proposed annual schedule, the Planning Commission would have received only one report thus far regarding the current site selection process.

As set forth in KOCA’s proposed Decision and Order, starting on September 1, 2012, and continuing every six months until there is a new landfill, the ENV must report to the Planning Commission in writing and in person. The reports must describe the ENV’s progress toward opening a new site. The ENV must be required to provide the public with notice of each such report and the written report should be

posted on the ENV's website. Additionally, the reports must address whether the ENV has complied with all other SUP 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 November 2, 2017, or when a new MSW landfill opens on O'ahu, whichever first occurs.

## VI. CONCLUSION

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

DATED: Honolulu, Hawai'i, May 14, 2012.

CADES SCHUTTE  
A Limited Liability Law Partnership



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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

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 31,  
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**

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

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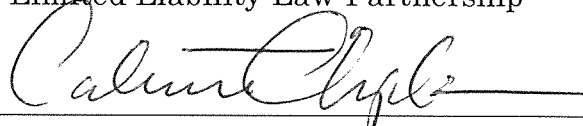
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DATED: Honolulu, Hawai'i, May 14, 2012.

CADES SCHUTTE  
A Limited Liability Law Partnership



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