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DEPT OF PLANNING
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CITY & COUNTY OF HONOLULU

Attorneys for Intervenor
SCHNITZER STEEL HAWAII CORP.

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

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

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

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S EXCEPTIONS TO THE
PLANNING COMMISSION'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION AND ORDER;
EXHIBIT 1; CERTIFICATE OF SERVICE

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S EXCEPTIONS TO THE
PLANNING COMMISSION'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER**

COMES NOW Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer"), by and through the undersigned attorneys, and hereby submits the following exceptions to the Planning Commission's proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed December 6, 2017, pursuant to the Rules of Planning Commission, City and County of Honolulu § 2-75.

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 § 91-14(g), Hawaii Revised Statutes ("HRS"), the 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 Hawai'i 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 Hawai'i 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.* Rather, a conclusion of law "that is supported by the [finding of facts] and that reflects an application of the correct rule of law will not be overturned." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 119, 839 P.2d 10, 29 (1992).

II. BACKGROUND

This matter is a consolidation of two separate, but related, applications before the Planning Commission, City and County of Honolulu (the “Planning Commission”): (1) the Department of Environmental Services, City and County of Honolulu’s (“Applicant” or “ENV”) December 3, 2008 Application for State Special Use Permit (“SUP”), seeking to supersede an existing SUP and allow a 92.5 acre expansion of the Waimanalo Gulch Sanitary Landfill (“WGSL” or the “Landfill”) and extend its time of use (the “2008 Application”), being re-considered by the Planning Commission pursuant to an order of remand from the State of Hawaii Land Use Commission (“LUC”); and (2) ENV’s June 28, 2011 Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying the Land Use Commission’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 (the “2011 Application”).

On April 28, 2017, the Planning Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order (“April 2017 Planning Commission Decision”), adopting ENV’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order submitted January 27, 2017, except for those finding of facts before 2011. On May 1, 2017, the LUC received the April 2017 Planning Commission Decision.

On May 12, 2017, KOCA filed a Motion to Deny and Remand, and an Alternative Motion to Deny the Applications Unless Additional Conditions are Imposed, arguing that denial of the applications was necessary because the Planning Commission improperly issued the April 2017 Planning Commission Decision before allowing the parties an opportunity to submit their objections. On May 22 and 23, 2017, ENV and Schnitzer, respectively, filed responses with the LUC, agreeing that the Rules of the Planning Commission required the Planning Commission to permit the parties to file exceptions to its proposed Findings of Fact, Conclusions of Law, but

opposing KOCA's assertion that denial was required. Rather, both ENV and Schnitzer argued that remand was warranted to cure the procedural defect in the April 2017 Planning Commission Decision.

On May 24, 2017, the LUC considered KOCA's Motion to Deny and Remand and ordered that the motion be granted in part and denied in part. The LUC remanded the record in the 2008 Application and the 2011 Application to the Planning Commission for further proceedings to:

- Clarify whether the Planning Commission followed Section 2-75 of the Rules of the Planning Commission in issuing its Findings of Fact, Conclusions of Law, and Decision and Order.
- Clarify the basis of the Planning Commission's proposed additional Condition No. 3, which specifies a December 31, 2022, date within which the Applicant is to identify an alternative site that will be used upon the WGSF to use and the subsequent commencement of operations at the alternative landfill site.
- Clarify whether the record needs to include updated information on the operation of the WGSF, the landfill site selection process and the waste diversion efforts of the City and County of Honolulu.
- Assuming the Planning Commission eventually recommends approval of the matter, clarify the effective date of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order.
- Clarify whether the Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact, Conclusions of Law, and Decision and Order.

("2017 LUC Order").

On December 6, 2017, pursuant to the LUC's order, the Planning Commission issued the instant Proposed Findings of Fact, Conclusions of Law, Decision and Order ("2017 Proposed Planning Commission Decision"). Parties were given until February 8, 2018 to submit their exceptions.

III. EXCEPTIONS

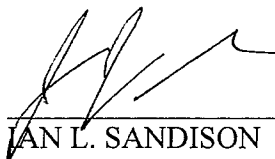
As a general matter, Schnitzer objects to the Planning Commission's continued omission of the 2008 Application record. On August 4, 2009, after a full contested case hearing, the Planning Commission issued a Findings of Fact, Conclusions of Law, Decision and Order granting the 2008 Application ("2009 Planning Commission Decision"). However, although the instant proceeding is meant to address and resolve both the 2008 Application and the 2011 Application, the Planning Commission has not endeavored to reconcile and integrate the 2009 Planning Commission Decision in its 2017 Proposed Planning Commission Decision. It is not sufficient to merely order that the 2009 LUC Order, which adopted the 2009 Planning Commission Decision, "is incorporated by reference" and "any inconsistent finding, conclusion, or condition" is superseded. 2017 Proposed Planning Commission Decision at 39. It is the function of the fact finder to resolve the conflicting evidence based on the credibility of the witnesses and the weight of the evidence. *See Anders v. State*, 60 Haw. 381, 391, 590 P.2d 564, 570 (1979). By abdicating the function of determining which prior findings of fact and/or conclusions of law are "inconsistent" to the reader, the Planning Commission is not fulfilling its function as finder of fact. Per the consolidation of County Special Use Permit File No. 2008/SUP-2 and the proceedings on Applicant's 2011 Application, the Planning Commission bears the onus of issuing a single decision resolving both proceedings, including resolving conflicting evidence.

Additionally, Schnitzer objects to the Planning Commission's failure to explicitly address the concerns raised by the LUC in the 2017 LUC Order. In the order, the LUC plainly requested five points of clarification from the Planning Commission, yet the 2017 Proposed Planning Commission Decision does not refer to, much less address, the 2017 LUC Order in its conclusions of law, decision, or order. This lack of acknowledgement is a noticeable oversight

and could call into question the extent to which the Planning Commission complied with the 2017 LUC Order.

For these reasons, Schnitzer urges the Planning Commission to adopt the attached proposed Findings of Fact, Conclusions of Law, Decision and Order which is attached as Exhibit 1. Exhibit 1 is a true integration and consolidation of the 2009 Planning Commission Decision and 2017 Proposed Planning Commission Decision and it also explicitly addresses the concerns the LUC raised in its 2017 LUC Order.¹

DATED: Honolulu, Hawaii, February 5, 2018.



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¹ Indicated in red are the citations that have been corrected and indicated in blue are the findings of fact that Schnitzer has added for thoroughness.

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

[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION
AND ORDER

**[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

This matter is a consolidation of two contested case hearings before the Planning Commission, City and County of Honolulu (the "Planning Commission"). The first proceeding involves the Department of Environmental Services, City and County of Honolulu's ("Applicant" or "ENV") application for a new special use permit ("SUP"), the expansion of the Waimanalo Gulch Sanitary Landfill ("WGSL" or the "landfill") and the withdrawal of County Special Use Permit No. 86/SUP-5. The second proceeding involves ENV's application to modify the Land Use Commissions ("LUC") 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 ("2009 LUC Order") for County Special Use Permit No. 2008/SUP-2 for the sole purpose of deleting the July 31, 2012 deadline for the landfill to accept municipal solid waste ("MSW").

Any proposed findings of fact or conditions submitted by the Applicant or Intervenors that are not expressly ruled upon by the Planning Commission by adoption herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected. To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

Based on the record in this consolidated matter, including the evidence adduced at the contested case hearings, the credibility of the witnesses testifying at the hearings, and the respective proposed findings of fact, conclusions of law, and decisions and orders submitted by

the parties and their respective parties thereto, the Planning Commission hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

I. PROCEDURAL MATTERS

1. The WGS� is located at 92-460 Farrington Highway, Honoliuli, Ewa, Oahu. See Planning Division Master Application Form included within the Special Use Permit Application filed December 3, 2008; see also Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003:072 and 073, dated October 2008, included in 2011 Contested Case Hearing Exhibit (“2011 Exhibit”) “2011 Exhibit A1.”

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

3. On October 12, 2008, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003: 072 and 073*, dated October 2008 (“2008 FEIS”), for the expansion of WGS�, was accepted on behalf of the Mayor by the Department of Planning and Permitting (“DPP”). Id.; Exhibit “7” to the Department of Environmental Services, City and County of Honolulu’s July 6, 2009 Memorandum in Opposition to Intervenor’s Motion to Dismiss the Application.

4. On October 23, 2008, OEQC published notice of the 2008 FEIS Acceptance in *The Environmental Notice*, in accordance with the Hawaii Environmental Policy Act (“HEPA”), Hawaii Revised Statutes (“HRS”) Chapter 343. See 2009 DPP Recommendation at 6.

A. 2008 APPLICATION

5. On December 3, 2008, the Applicant, filed a State Special Use Permit Application (“2008 Application”), with DPP pursuant to HRS Section 205-6, and Rules of the Planning Commission, City and County of Honolulu (“RPC”), Subchapter 4, Rules Applicable to State Special Use Permits. See 2008 Application. The 2008 Application, designated as Special Use Permit Application File No. 2008/SUP-2, is for a new Special Use Permit (“SUP”) for the use of the approximately 200.622-acre (the “Property”), identified by Tax Map Key (“TMK”) Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, Oahu, Hawaii. See 2008 Application at Figure 1-1 and Planning Division Master Application Form. The 2008 Application sought to expand the current operating portion of the Property, approximately 107.5 acres, by approximately 92.5 acres (the “Project”). See 2008 Application at Planning Division Master Application Form and p. 1-2.

6. The Applicant concurrently sought to withdraw its existing SUP permit for approximately 107.5 acres, Special Use Permit File No. 86/SUP-5, and the conditions imposed therein, if the Application for the new SUP permit is granted. See April 2, 2009 memorandum from Applicant to DPP; Transcript (“Tr.”) 7/2/09, 20:4-10; 2009 DPP Recommendation at 3, 24.

7. The Applicant also filed a petition with the Land Use Commission, State of Hawaii, for a district boundary amendment to reclassify the Property from the State Agricultural District to the Urban District, which may be withdrawn if the Application is granted. See 2008 Application at p. 2-2, fn. 1.

8. The Planning Commission's public hearing to consider ENV's application was scheduled for May 6, 2009. On April 3, 2009, a notice of the hearing of the matter was published in the *Honolulu Star-Bulletin*.

9. On April 16, 2009, Ko Olina Community Association ("KOCA"), Colleen Hanabusa, and Maile Shimabukuro (collectively, "Intervenors") filed a Petition to Intervene in this matter. On April 24, 2009, Applicant filed a Memorandum in Opposition to Intervenors' Petition to Intervene.

10. On May 1, 2009, DPP transmitted its report and recommendation for approval of the 2008 Application to the Planning Commission. See 2009 DPP Recommendation.

11. On May 1, 2009, the Planning Commission conducted a site visit to the Property and to the H-POWER facility.

12. At the public hearing on May 6, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony. The Planning Commission was also scheduled to hear argument regarding Intervenors' Petition to Intervene. At Intervenors' request, however, the Planning Commission continued the public hearing and consideration of Intervenors' Petition to Intervene to May 20, 2009.

13. On May 7, 2009, Todd K. Apo ("Apo") filed a Petition to Intervene in this matter. On May 18, 2009, Applicant filed a Memorandum in Opposition to Apo's Petition to Intervene.

14. On May 19, 2009, Intervenors' filed a Motion to Recuse Commissioner John Kaopua.

15. On May 20, 2009, the public hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. At the

continued public hearing, the Planning Commission heard and granted Intervenors' Petition to Intervene. Pursuant to RPC Subchapter 5, the matter was noted as a contested case. The Planning also began hearing argument regarding Apo's Petition to Intervene and continued that matter to June 10, 2009.

16. On June 5, 2009, Applicant filed a Memorandum in Opposition to Intervenors' Motion to Recuse Commissioner John Kaopua.

17. On June 10, 2009, the hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The Planning Commission heard and granted Intervenors' Motion to Recuse Commissioner John Kaopua. The Planning Commission denied Apo's Petition to Intervene on the grounds that it was untimely filed, that Apo's position regarding that Application was substantially the same as the position of the Intervenors, and that proceeding will be inefficient and unmanageable if Apo was allowed to Intervene. See Findings of Fact, Conclusions of Law, and Order issued on July 27, 2009. Thereafter, the Planning Commission closed the public hearing on the 2008 Application.

18. On June 15, 2009, Intervenors filed their List of Witnesses, listing 42 potential witnesses including Apo. Applicant also filed its List of Witnesses, listing six potential witnesses.

19. On June 22, 2009, the contested case hearing began on the 2008 Application at Kapolei Hale, 1000 Uluhoia Street, Kapolei, Hawaii. The Applicant submitted Exhibits ("2009 Exhibit") "A1" through "A31," which were accepted into the record by the Planning Commission. See Tr. 6/22/09, 29:2-13. The Applicant presented its first two witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning, and Hari Sharma ("Sharma"), who was qualified as an expert in the field of geotechnical and geo-

environmental engineering. Id. at 33:5-8, 234:7-12. Intervenor offered, and the Planning Commission received into the record, 2009 Exhibits “B1” and “B4.” Id. at 81:6-11, 226:14-15.

20. On June 24, 2009, the Planning Commission resumed the contested case hearing on the 2008 Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The examination of Sharma was completed. The Applicant presented its third witness Joseph R. Whelan (“Whelan”).

21. On June 29, 2009, Intervenor filed a Motion to Dismiss the 2008 Application, contending that the 2008 FEIS did not cover the entire 200.622-acre site and therefore, ENV’s 2008 Application had to be dismissed.

22. On July 1, 2009, the Planning Commission resumed the contested case hearing on the 2008 Application at Kapolei Hale, 1000 Uluhiah Street, Kapolei, Hawaii. The examination of Whelan was completed. The Applicant presented its fourth and fifth witnesses: Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering, and Frank Doyle, Chief of the Division of Refuse, City and County of Honolulu. See Tr. 7/1/09, 93:2-8; 176:4-9. Applicant offered, and the Planning Commission accepted for the record, Exhibit “A32.” Id. at 168:16-17.

23. On July 2, 2009, the Planning Commission resumed the contested case hearing on the 2008 Application at the City Council Chambers, Third Floor, 530 South King Street, Honolulu, Hawaii. The Applicant offered no further witnesses and concluded its case-in-chief. See Tr. 7/2/09, 4:15-17. Intervenor began their case-in-chief and presented the following seven witnesses: Abbey Mayer; Josiah Hoohuli; William J. Aila, Jr.; Daniel Banchiu; Cynthia Rexentes; Maeda Timson; and Apo. The Applicant offered, and the Planning Commission received into the record, 2009 Exhibits “A33” and “A34.” Id. at 32:20-25; 240:7-13. Intervenor

offered, and the Planning Commission received into the record, 2009 Exhibit “B5.” Id. at 185:21-23. Other documents were referenced by the Planning Commission and the parties as 2009 Exhibits “B2” through “B3.” Intervenors rested their case. Id. at 279:15.

24. On July 6, 2009, Applicants filed a Memorandum in Opposition to Intervenors’ Motion to Dismiss the Application.

25. On July 8, 2009, the Planning Commission resumed the contested case hearing on the 2008 Application at the City Council Committee Meeting Room, Second Floor, 530 South King, Street, Honolulu, Hawaii. Applicant presented David M. Shideler as a rebuttal witness, who was qualified as an expert in archaeology and historical cultural resources. See Tr. 7/8/09, 11:15-21. Applicant offered, and the Planning Commission received into the records, 2009 Exhibits “A35,” “A36,” and “A37.” Id. at 8:25-9:5, 65:14-22, 68:6-13. Intervenors made their witness, Apo, available for additional questions by Commissioner Beadie Dawson. The examination of Apo was completed.

26. On July 8, 2009, the Planning Commission also heard and denied Intervenors’ Motion to Dismiss the 2008 Application on the grounds that the Planning Commission does not have jurisdiction to consider the sufficiency of the 2008 FEIS and that Intervenor Hanabusa had previously filed the appropriate matter contesting the sufficiency in State circuit court. The Planning Commission scheduled decision-making for the Application on July 31, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Id. at 110:15-25; 111:1-5, 20-21.

27. The Applicant offered, and the Planning Commission received into the record, 2009 Exhibits “A1” to “A37,” without objection.

28. Intervenors offered, and the Planning Commission received into the record, 2009 Exhibits “B1,” “B4,” and “B5,” without objection.

29. The Applicant called the following witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning; Hari Sharma, who was qualified as an expert in the field of geotechnical and geo-environmental engineering; Joseph R. Whelan; Richard Von Pein, who was qualified as an expert in the first of landfill design and geotechnical engineering; Frank Doyle; and David M. Shideler, who was qualified as an expert in the field of archaeology and historical cultural resources.

30. Dr. Sharma prepared a report entitled “Engineering Report for Landfill Expansion; Waimanalo Gulch Sanitary Landfill,” dated March 12, 2008, which is 2009 Exhibit “A29.” See Tr. 6/22/09, 235:4-25.

31. Intervenors called the following witnesses: Abbey Mayer; Josiah Hoohuli; William Aila, Jr.; Daniel Banchiu; Cynthia Rexentes; Maeda Timson; and Todd Apo. Intervenors did not move to qualify any of these persons as expert witnesses.

32. Intervenors Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro did not testify and did not submit any written testimony during the contested case hearing.

33. Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGSL. See Tr. 7/1/09, 251:18-24.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site. Id. at 260:16-22; 261:3-22; see also Tr. 04/04/12, 56:1-58:17; Tr. 4/11/12, 41:2-42:6; Tr. 04/11/12, 73:19-74:5; 122:6-123:12.

35. On July 17, 2009, Applicant filed the Department of Environmental Services, City and County of Honolulu's Post-Hearing Brief and the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact and Conclusions of Law, and Decision and Order, and Certificate of Service.

36. On July 17, 2009, Intervenors filed the Post Hearing Brief of Intervenors, Certificate of Service and Intervenors' Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro Proposed Findings of Fact and Conclusions of Law and Decision and Order, and Certificate of Service.

37. On July 29, 2009, Applicant filed that certain Department of Environmental Services, City and County of Honolulu's (1) Response to Post-Hearing Brief of Intervenors and (2) Exceptions to Intervenors' Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Declaration of Gary Y. Takeuchi; Exhibits "1" - "3"; and Certificate of Service.

38. On July 29, 2009, Intervenors filed that certain Reply Brief of Intervenors, Certificate of Service.

39. On July 31, 2009, the Planning Commission approved the 2008 Application subject to ten conditions and further recommended that all conditions previously placed on EGSL under SUP File No. 86/SUP-5 would be null and void. See Findings of Fact, Conclusions of Law, and Decision and Order, Planning Commission of the City and County of Honolulu, File Nos. 2008/SUP-2 and 86/SUP-5 at 24-27.

40. On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications ("2009 LUC Decision"). See 2009 Exhibit A19.

41. The LUC issued the SUP subject to the following condition:

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

42. On November 19, 2009, ENV filed an appeal against the LUC, Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa in the Circuit Court of the First Circuit. Among the issues appeal was the LUC’s imposition of Condition No. 14.

43. On September 21, 2010, the Circuit Court affirmed Condition No. 14 of the LUC decision.

44. On November 12, 2010, ENV filed a Notice of Appeal to the Hawaii Intermediate Court of Appeals. See Letter from David K. Tanoue, Director of the DPP, to Gayle Pingree, Chair of the Planning Commission, dated September 9, 2011 (“2011 DPP Recommendation”), Attachment B at 10.

45. On July 14, 2011, ENV moved to transfer the appeal to the Hawaii Supreme Court, which was granted by the Supreme Court on August 1, 2011. See ENV’s Memorandum in Opposition to Motion to Dismiss at 5.

B. 2011 APPLICATION

46. On June 28, 2011, Applicant filed an 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”), with DPP pursuant to RPC Sections 2-18 and 2-49, and the Rules of the State of Hawaii, Land Use Commission, Section 15-15-70. See 2011 Application. The 2011 Application specifically seeks the deletion of Condition No. 14 from the 2009 LUC Order. Condition No. 14 of the 2009 LUC Order provided that “Municipal solid waste shall be allowed at the WGS� up to July 31, 2012,

provided that only ash and residue from H-POWER shall be allowed at the WGSF after July 31, 2012.” Id. ENV sought to amend SUP Permit No. 2008/SUP-2 because there was no assurance that the Supreme Court would render a decision on the appeal of the 2009 LUC Order prior to the July 2012 deadline and it needed to ensure the continued operation of the landfill.

47. On September 4, 2011, a notice of Planning Commission’s public hearing to consider ENV’s 2011 Application set for October 5, 2011, was published in the *Honolulu Star-Bulletin*.

48. On September 9, 2011, DPP transmitted its report to the Planning Commission, recommending approval of the 2011 Application. See 2011 DPP Recommendation.

49. On September 16, 2011, Ko Olina Community Association and Maile Shimabukuro (collectively, “Intervenor KOCA”) filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as parties. On September 23, 2011, Applicant filed a Memorandum in Opposition to Intervenor’s Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties. On September 30, 2011, Intervenor filed a Reply Memorandum to Applicant’s Memorandum in Opposition to Intervenor’s Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as parties.

50. On September 16, 2011, Schnitzer Steel Hawaii Corp. (“Intervenor Schnitzer”) filed a Petition to Intervene.

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

Motion to Intervene as joint intervenors. See Tr. 10/5/11, 35:5-23, 42:9-43:3. Thereafter, the Planning Commission closed the public hearing on the 2011 Application.

52. On October 26, 2011, Applicant filed its List of Witnesses, consisting of five potential witnesses. Intervenor KOCA filed its List of Witnesses, consisting of 31 potential witnesses. Intervenor Schnitzer filed its List of Witnesses, consisting of one potential witness.

53. On November 7, 2011, Intervenor KOCA filed a Motion to Dismiss.

54. On November 9, 2011, the Planning Commission filed its Order Regarding Prehearing Conference.

55. On November 14, 2011, Applicant filed its Memorandum in Opposition to Intervenor KOCA's Motion to Dismiss. Intervenor Schnitzer also filed its Memorandum in Opposition to Intervenor KOCA's Motion to Dismiss.

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

57. On December 7, 2011, the Planning Commission conducted a hearing at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii, on Intervenor KOCA's Motion to Dismiss. The Planning Commission heard and denied Intervenor KOCA's Motion to Dismiss. Thereafter, the Planning Commission commenced the contested case hearing on the 2011 Application and the parties presented their opening statements. On December 13, 2011, the parties filed written direct testimony.

58. On January 11, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. The Applicant began its case-in-chief and

presented its first witness: Timothy Steinberger, Director of the Department of Environmental Services. See Tr. 01/11/12, 11:10-11. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K1” to “K162.” Id. at 15:12-14; 17:22-23; 96:2-13. Intervenor Schnitzer moved to admit the court reporter’s transcript of the October 5, 2011 public hearing so as to allow the public testimony to be made a part of the record. Id. at 15:18-22. The Planning Commission granted Intervenor Schnitzer’s request. Id. at 15:23.

59. On January 25, 2012, the Planning Commission resumed the contested case hearing on the 2011 Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. Applicant offered, and the Planning Commission received into the record, 2011 Exhibits “A1 to A33.” Tr. 1/25/12, 6:13:20. The Applicant presented its second and final witness in its case-in-chief, Steven Y.K. Chang, Branch Chief, State of Hawaii, Department of Health, Solid and Hazardous Waste Branch. Id. at 6:21. Applicant offered no further witnesses and concluded its case-in-chief, but reserved the right to call rebuttal witnesses. Intervenor Schnitzer presented its first and only witness, Larry Snodgrass, and concluded its case-in-chief. Id. at 72:4-5, 86:20. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibit “K163.” Id. at 6:10-12. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K164” through “K169.” Id. at 38:14-19, 51:8-13; 55:11-15; 85:22-86:3.

60. On February 8, 2012, the Planning Commission resumed the contested case hearing on the 2011 Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. Intervenor KOCA began its case-in-chief and presented the following four witnesses: Ken Williams; Beverly Menson; Cynthia Rezendes; and Paul Duke Hospodar. Tr. 02/08/12, 14:4-5, 56:13-14, 72:18-19, 82:15-16. ENV offered,

and the Planning Commission received into the record, 2011 Exhibits “A34” and “A35.” Id. at 29:25-30:2, 56:6-8.

61. On March 7, 2012, the Planning Commission resumed the contested case hearing on the 2011 Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. Intervenor KOCA presented its fifth and sixth witnesses: Shad Kane and Dwight Miller. The Planning Commission accepted Mr. Miller as an expert in solid waste management. Tr. 03/07/12, 5:20-21, 17:22-23, 19:19-25. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K170,” “K171,” “K173” to “K176,” “K178” and “K179.” Id. at 122:19-23; 152:20-153:4, 153:13, 155:4-5.

62. On April 4, 2012, the Planning Commission resumed the contested case hearing on the 2011 Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. The parties agreed to take the remaining witnesses out of order due to scheduling difficulties. Intervenor Schnitzer first presented Tom Zelenka as a rebuttal witness. Tr. 04/04/12, 7:19-20. Applicant then presented Janice Masters as its first rebuttal witness. Id. at 30:4-5. Applicant offered, and the Planning Commission received into the record, 2011 Exhibit “A36.” Id. at 33:4-16. Intervenor KOCA presented its seventh and eighth witnesses: Maile Shimabukuro and Maeda Timson. Id. at 123:18-19, 133:5-6. Intervenor KOCA then rested its case. Id. at 143:11-13. Applicant presented its second rebuttal witness, Gary Gill, Deputy Director, State of Hawaii, Department of Health, Environmental Management Division. Id. at 143:17. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K191,” “K194,” “K208,” “K215,” “K217,” “K218,” “K222,”

“K223,” “K226,” and “K227.” Id. at 15:8-22, 18:24-19:3, 19:5-18, 24:4-16, 83:14-19, 101:15-19, 122:20-24, 143:4-10, 168:22-169:11.

63. On April 11, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. Applicant presented its third and fourth rebuttal witnesses: Hari Sharma, who was qualified as an expert in landfill design and permitting, and Timothy Steinberger. See Tr. 04/11/12, 6:14-15, 69:4-5. Applicant offered, and the Planning Commission received into the record, 2011 Exhibits “A37” to “A50.” Id. at 13:1-9, 15:21-25, 16:1, 25:1-7, 36:10-37:20, 43:25-44:2, 105:11-15, and 138:1-5. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K189,” “K190,” “K193,” “K195,” “K196,” “K198,” “K230,” “K247,” and “K251.” Id. at 191:19-24. Applicant rested its case. Id. at 212:17-22.

64. On April 23, 2012, the Planning Commission resumed the contested case hearing on the Application at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. Intervenor KOCA presented two rebuttal witnesses: Dwight Miller and Eddie Belluomini. See Tr. 04/23/12, 7:7-11, 36:6-10. Intervenor KOCA then rested its case. Id. at 48:24. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K255,” “K257,” “K192,” “K220,” “K256,” and “K258.” Id. at 12:13-17, 15:16-21, 47:18-25, 48:1-23. The parties presented their closing arguments.

65. The Planning Commission scheduled decision-making for the 2011 Application on May 25, 2012, at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii. On April 24, 2012, Intervenor KOCA filed its Eighth Amended Exhibit List.

66. On April 27, 2012, Intervenor KOCA filed an *Ex Parte* Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence After the Hearing Closed (“Motion to Reopen the Contested Case Hearing”). Intervenor KOCA sought to admit 2011 Exhibits “K259” and “K260” into the record.

67. On May 1, 2012, Applicant filed a Memorandum in Opposition to Intervenor KOCA’s Motion to Reopen the Contested Case Hearing.

68. On May 2, 2012, ENV, Intervenor Schnitzer and KOCA filed their respective proposed findings of fact, conclusions of law, and decisions and orders (“proposed findings”).

69. On May 14, 2012, ENV filed a response, and Intervenor Schnitzer filed exceptions to Intervenor KOCA’s proposed findings. Intervenor KOCA also filed responses to ENV’s and Schnitzer’s proposed findings.

70. ENV offered, and the Planning Commission received into the record of the 2011 Application proceeding, 2011 Exhibits “A1” to “A42,” without objection, “A43” to “A46,” over objection of the Intervenor, and “A47” to “A50,” without objection.

71. Intervenor Schnitzer offered, and the Planning Commission received into the record, Exhibits “S1” to “S4.” Intervenor Schnitzer also requested to admit the court reporter’s transcript of the October 5, 2011 public hearing so that the public testimony would be made a part of the record. See Tr. 01/11/12, 15:18-22. The Planning Commission granted Intervenor Schnitzer’s request. Id. at 15:23.

72. Intervenor KOCA offered, and the Planning Commission received into the record, 2011 Exhibits “K1” to “K169,” over objection, “K170,” “K171,” “K173” to “K176,” “K178,” “K179,” “K189” to “K196,” “K198,” “K208,” “K215,” “K217,” “K218,” “K220,” “K222,” “K223,” “K226,” “K227,” “K230,” “K247,” “K251,” “K255” to “K258,” without objection.

C. **HAWAII SUPREME COURT DECISION AND LUC REMAND OF THE 2008 APPLICATION TO THE PLANNING COMMISSION FOR CONSOLIDATION WITH THE 2011 APPLICATION**

73. On May 4, 2012, the Supreme Court ruled in favor of ENV and struck Condition No. 14. The Supreme Court ruled that the MSW deadline imposed by the LUC is inconsistent with the evidence in the record and not supported by substantial evidence. The Supreme Court also determined that because Condition No. 14 appeared to be material to the LUC's approval of the SUP, the approval could not stand without further consideration. Accordingly, the Supreme Court remanded the matter to the LUC for further hearings as the LUC deems appropriate to determine whether the LUC would have reached the same conclusion without the imposition of Condition No. 14. Dep't of Envtl. Servs. v. Land Use Comm'n, 127 Haw. 5, 17-19 (2012).

74. By Order adopted October 8, 2012, the LUC remanded the 2008 Application to the Planning Commission for the expressed purpose of consolidating it with the proceeding on the 2011 Application, so that the Planning Commission may issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order on the Matter to the LUC. See Order Remanding County Special Use Permit File No. 2008/SUP-2 to the City and County of Honolulu Planning Commission, dated October 8, 2012.

D. **CONSOLIDATION OF PROCEEDINGS AND OTHER PROCEDURAL MATTERS**

75. 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.

76. On January 23, 2013, ENV filed its Memorandum in Opposition to Intervenor 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.

77. On February 19, 2013, the Planning Commission approved the stipulation and order to continue the hearing on the LUC's October 8, 2012, Order Remanding County Special Use Permit File No. 2008/SUP-2 to the City and County of Honolulu Planning Commission and Intervenor 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 October 8, 2012. A hearing on two above-described matters was scheduled for February 20, 2013, but continued to April 17, 2013. See Stipulation and Order to Continue the February 20, 2013 Hearings to April 17, 2013.

78. No further action was taken by the Planning Commission until August 17, 2016. On that date, the Planning Commission convened a hearing at the Mission Memorial Hearings Room, Mission Memorial Building, 550 South King Street, Honolulu, Hawaii, and considered Intervenor 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 October 8, 2012, and the Department of Environmental Services, City and County of Honolulu's Motion to Stay Proceedings to April 22, 2017. 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 LUC, and denied the City's Motion to Stay.

79. On September 30, 2016, ENV filed a Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts. ENV sought to have the Planning Commission take official notice of the Sixth Annual Report of the Status of Actions Take to Comply With the State Land Use Commission's Order dated October 2, 2009 and Status

of Operations of the Waimanalo Gulch Sanitary Landfill, which was submitted to the Planning Commission in compliance with Condition No. 6 of the 2009 LUC Order.

80. On October 5, 2016, ENV filed a Motion for Extension of Time to April 21, 2017, so that the parties may have adequate time to discuss a proposed deadline for the acceptance of MSW and draft a joint proposed findings of fact, conclusions of law, and decision and order. On October 6, 2016, Intervenor Schnitzer joined in the Motion for Extension of Time. On the same date, Intervenor KOCA joined in the request, subject to certain clarifications.

81. On October 7, 2016, Intervenor Hanabusa filed Intervenor Colleen Hanabusa's Statement Re: (1) Submission of Proposed Findings of Fact and Conclusions of Law and Decision and Order; (2) Various Parties' Submissions of Requests for Extensions of Time to Submit Proposed Findings of Fact, Conclusions of Law, and Decision and Order; (3) Department of Environmental Services, City and County of Honolulu's Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts, Filed on September 30, 2016.

82. On October 12, 2016, the Planning Commission heard ENV's Motion for Extensions of Time, Intervenor KOCA's Motion to Reopen the Contested Case Hearing, and ENV's Motion to Reopen the Contested Case Hearing. During the hearing, ENV amended its request for an extension of time by requesting a shorter 90-day extension, which was granted. The Planning Commission denied the motions to reopen the contested case hearing.

83. On January 27, 2017, ENV filed the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Findings of Fact, Conclusions of Law, and Decision and Order, and Exhibits 1 and 2.

84. On January 27, 2017, Intervenor Schnitzer filed Intervenor Schnitzer Steel Hawaii Corp.'s Proposed Findings of Fact, Conclusions of Law and Decision and Order.

85. On February 10, 2017, ENV filed 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.

86. On February 10, 2017, Intervenor KOCA filed Intervenors Ko Olina Community Association and Maile Shimabukuro's Response to Intervenor Schnitzer Steel Hawaii Corp.'s January 27, 2017 Proposed Findings of Fact, Conclusions of Law, and Decision and Order, and Exhibits 1-2.

87. On February 10, 2017, Intervenor KOCA filed Intervenors Ko Olina Community Association and Maile Shimabukuro's Response to Department of Environmental Service [*sic*], City and County of Honolulu's January 27, 2017 Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Exhibits 1-2.

88. On February 17, 2017, ENV filed the Department of Environmental Services, City and County of Honolulu's Motion to Strike Intervenor Colleen Hanabusa's (1) Renewal of Submission of Proposed Findings of Fact and Conclusions of Law, Memorandum in Support of Motion to Strike, Declaration of Kamilla C. K. Chan, and Exhibits 1-2.

89. On February 23, 2017, Intervenor Hanabusa filed Intervenor Colleen Hanabusa's Memorandum in Opposition to Department of Environmental Services, City and County of Honolulu's Motion to Strike Intervenor Colleen Hanabusa's (1) Renewal of Submission of Proposed Findings of Fact and Conclusions of Law, Filed on February 17, 2017.

90. The Planning Commission convened a hearing on March 1, 2017 and considered ENV's Motion to Strike Intervenor Hanabusa's Renewal of Submission of Proposed Findings of Fact and Conclusions of Law. The Planning Commission granted ENV's motion to strike.

91. Also on March 1, 2017, the Planning Commission considered the adoption of Findings of Fact, Conclusions of Law, and Decision and Order. During the hearing, Planning Commission Chair Dean I. Hazama and members Ken K. Hayashida, Wilfred A. Chang, Daniel S. M. Young, and Cord D. Anderson, each confirmed that they reviewed all evidence and the entire record from the 2008 and 2011 proceedings. The Planning Commission adopted ENV's Findings of Fact, except findings of fact before 2011, and ENV's Conclusions of Law, and modified the LUC's order dated October 22, 2009 by deleting Condition No. 14 and adding several conditions. The Planning Commission set forth this approval in its Findings of Fact, Conclusions of Law, and Decision and Order, dated April 28, 2017 ("2017 Planning Commission Decision").

92. In its 2017 Planning Commission Decision, the Planning Commission added the following conditions:

- The Applicant shall provide semi-annual reports to the Planning Commission and LUC regarding (a) the status of the efforts to identify and develop a new landfill site on Oahu, (b) the WGSF's operations, including gas monitoring, (c) ENV's compliance with the conditions imposed herein, (d) the landfill's compliance with its Solid and Hazardous Waste Permit and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the landfill, (e) the City's efforts to use alternative technologies, (f) the extent to which waste is being diverted from the landfill and (g) any funding arrangements that are being considered by the Honolulu City Council or the City Administration for activities that would further divert waste from the landfill..
- Public health and safety conditions: If the landfill releases waste or leachate, the ENV must immediately (a) notify the surrounding community, including the Makakilo/Kapolei/Honokai Hale, Waianae Coast and Nanakuli-Maili Neighborhood Boards, Intervenor Schnitzer Steel Hawaii Corp., Ko Oline Community Association, Maile Shimabukuro and Colleen Hanabusa and (b) take remedial actions to clean up

the waste and to keep the waste from spreading. Such remedial actions shall include, but shall not be limited to, placing debris barriers and booms at the landfill's shoreline outfall to prevent waste from spreading into the ocean.

- The Applicant shall identify an alternative site by December 31, 2022, that will be used upon Waimanalo Gulch Sanitary Landfill reaching its capacity
- The foregoing additional conditions shall supersede any inconsistent conditions in the 2009 LUC Order and shall otherwise supplement any and all existing conditions in the said 2009 LUC Order.

93. On May 1, 2017, the LUC received the Planning Commission File No. 2008/SUP-2 Findings of Fact, Conclusions of Law and Decision and Order dated May 1, 2017.

94. On May 3, 2017, the LUC received the Consolidated Record from the Planning Commission, an index of the record and original and copies of the 2008 proceedings.

95. On May 12, 2017, the LUC received Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Deny and Remand, Declaration of Christopher *[sic]* T. Goodin, and Exhibits A through D, and Intervenors Ko Olina Community Association and Maile Shimabukuro's Alternate Motion to Deny the Applications Unless Additional Conditions are Imposed, Declaration of Christopher T. Goodin, and Exhibits 1 through 5.

96. On May 19, 2017, the LUC received the Department of Environmental Services, City and County of Honolulu's Response to Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Deny and Remand, Declaration of Dana Viola, and Exhibit 1 and the Department of Environmental Services, City and County of Honolulu's Memorandum in Opposition to Intervenors Ko Olina Community Association and Maile Shimabukuro's Alternate Motion to Deny the Application Unless Additional Conditions are Imposed, Declaration of Kamilla C. K. Chan, and Exhibit 1.

97. On May 22, 2017, the LUC received the State Office of Planning's public testimony statement recommending approval of ENV's special permit application.

98. On May 22, 2017, the LUC received Intervenor Colleen Hanabusa's Joinder to Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion to Deny and Remand.

99. On May 22, 2017, the LUC received ENV's Amended Certificates of Service to: Department of Environmental Services, City and County of Honolulu's Response to Intervenor KOCA's Motion to Deny and Remand, and Department of Environmental Services, City and County of Honolulu's Memorandum in Opposition to Intervenor KOCA's Alternate Motion to Deny the Application Unless Additional Conditions are Imposed.

100. On May 23, 2017, the LUC received correspondence from Intervenor KOCA and Shimabukuro regarding a Request to Settle the Proposed Form of Order Granting in Part Intervenor's Motion to Deny and Remand, and correspondence from Intervenor Schnitzer regarding its Statement of Position on Intervenor KOCA and Shimabukuro's Motion to Deny and Remand.

101. On May 24, 2017, the LUC considered Intervenor KOCA's Motion to Deny and Remand. The LUC ordered that the motion be granted in part and denied in part. Pursuant to HAR §15-15-96(a), the record in the 2008 Application and 2011 Application were remanded to the Planning Commission for further proceedings to:

- Clarify whether the Planning Commission followed Section 2-75 of the Rules of the Planning Commission in issuing its Findings of Fact, Conclusions of Law, and Decision and Order.
- Clarify the basis of the Planning Commission's proposed additional Condition No. 3, which specifies a December 31, 2022, date within which the Applicant is to identify an alternative site that will be used upon the WGSL to use and the subsequent commencement of operations at the alternative landfill site.
- Clarify whether the record needs to include updated information on the operation of the WGSL, the landfill site selection process and the waste diversion efforts of the City and County of Honolulu.

- Assuming the Planning Commission eventually recommends approval of the matter, clarify the effective date of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order.
- Clarify whether the Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact, Conclusions of Law, and Decision and Order.

("2017 LUC Remand Order").

102. On June 20, 2017, Intervenor KOCA filed with the Planning Commission Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion for Recusal or Disqualification of Chair Dean Hazama, Memorandum in Support of Motion, Declaration of Christopher T. Goodin, and Exhibits A - E.

103. On June 26, 2017, ENV filed Department of Environmental Services, City and County of Honolulu's Response to Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion for Recusal or Disqualification of Chair Dean Hazama.

104. On June 26, 2017, Intervenor Hanabusa filed Intervenor Colleen Hanabusa's Renewal of Objections to Chair Dean Hazama's Participation and Votes in the Instant Case and Joinder to Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion for Recusal or Disqualification of Chair Dean Hazama, Filed on June 20, 2017.

105. On August 16, 2017, the Planning Commission heard Intervenor KOCA's Motion for Recusal or Disqualification of Chair Dean Hazama and Intervenor Hanabusa's Renewal of Objections and Joinder to Intervenor KOCA's Motion for Recusal or Disqualification of Chair Dean Hazama. At the hearing, Chair Hazama explained that he shared his inclinations about this matter after reviewing all evidence in this proceeding and stated that he could remain open and impartial. Accordingly, Chair Hazama declined to

recuse himself. The commissioners were invited to make a motion for disqualification, but none did so.

106. On November 22, 2017, Intervenors Ko Olina Community Association and Maile Shimabukuro's filed a Motion to Reopen the Contested Case.

107. On December 6, 2017, the Planning Commission met to adopt a proposed findings of fact, conclusions of law, and decision and order, and to discuss Intervenors Ko Olina Community Association and Maile Shimabukuro's Motion to Reopen the Contested Case. During the meeting, the Commission – in recognition that its 2017 Planning Commission Decision did not comply with the Rules of the Planning Commission – adopted and issued its Proposed Findings of Fact, Conclusions of Law, Decision and Order (“2017 Proposed Planning Commission Decision”).

108. Pursuant to Rules of the Planning Commission § 2-75, the Planning Commission provided the parties with its Proposed Findings of Fact, Conclusions of Law, Decision and Order on DATE.

109. On DATE, the parties submitted their respective Exemptions to the Proposed Findings of Fact, Conclusions of Law, Decision and Order filed on DATE.

110. On DATE, the Planning Commission heard the parties' oral argument in support of their respective Exemptions.

II. DESCRIPTION OF THE PROPERTY

111. The Property is owned by the City and County of Honolulu (“City”) and operated by the Waste Management of Hawaii, Inc. (“Waste Management”). See Tr. 7/1/09, 179:4-8.

112. The state land use district designation for the Property is Agricultural District. See 2009 DPP Recommendation at 1; 2008 Application at Planning Division Master Application Form.

113. The existing City zoning district for the Property is AG-2, General Agricultural District. See 2008 Application at Planning Division Master Application Form; 2009 DPP Recommendation at 1.

114. The Ewa Development Plan recognizes the existing landfill. See 2009 Exhibit “A5”; 2009 DPP Recommendation at 1.

115. Existing uses of the Property are landfill and open space. See 2009 DPP Recommendation at 2.

116. Elevations at the Property range from a low of 70 feet above mean sea level (msl) to 940 feet (msl) in the northern portion. Except for areas of fill, the steep-sloped valley contains dryland grasses and an abundance of rock outcrops. See 2009 DPP Recommendation at 8.

117. The area is fairly dry. According to an on-site gauge, located at the weather station, the average rainfall at EGSL is approximately 15 inches per year. See 2008 Application at 2-27; 2009 DPP Recommendation at 9.

118. The soil found at the Property consists primarily of Rock Land (rRK) with small amounts of Stony Steep Land (rSY). See 2008 Application at 2-30.

119. According to the Agricultural Lands of Importance (“ALISH”) to the State of Hawaii system, the Property is not classified as Prime Agricultural Land, Unique Agricultural Land or Important Agricultural Lands. See Figure 8-2 of 2009 Exhibit “A1.”

120. The University of Hawaii Land Study Bureau overall master productivity rating for the Property is “E,” which indicates very poor crop productivity potential. See 2008 Application at 2-31.

121. The Federal Emergency Management Agency, Flood Insurance Rate Map, identifies the landfill property as within “Zone D,” an area in which flood hazards are undetermined, but possible. See Figure 5-9 of 2009 Exhibit “A1.”

122. The Property is not located within the Special Management Area. See Figure 8-3 of 2009 Exhibit “A1.”

123. The land on which the WGSL is located continues to be unsuited for agricultural purposes.

III. SURROUNDING USES

124. Surrounding uses to the Property include the Hawaiian Electric Company Kahe Power Plant to the west, single-family dwellings and the Ko Olina Resort to the south, and vacant lands to the north and east. See Figure 7-3 of 2009 Exhibit “A1.”

125. Farrington Highway is located south of the Property. Id.

126. The region east of Property comprises of the Makaiwa Hills development, which is scheduled for development. See Tr. 6/22/19, 64:6-8; Figure 7-3 of 2009 Exhibit “A1.” WGSL has been in operation since 1989. See Tr. 7/1/09, 179:9-10. In 2008, the Makaiwa Hills parcel was rezoned for single family, mixed and apartment use by Ordinance 8-26, Bill 47 (2008). See 2009 Exhibit “A36.”

127. The Makaiwa Hills developer’s intention, according to its Final EIS dated October 2007 (the “Makaiwa Hills EIS”), is to proceeding with development from makai (south) proceeding in a mauka (north) direction, as well as proceeding east to west. See Tr. 6/22/09,

167:6-25. The Makaiwa Hills EIS indicates that construction of the western portion of its development closest to WGSL will not proceed until 2015. Id. at 167:25-168; 2009 Exhibit “A37” at p.4-60.

128. WGSL plans to initiate closure of the existing landfill cells in the area nearest Makaiwa Hills’ proposed residences prior to 2015. See Tr. 6/22/09, 168:1-8; 188:17-25, 189:1-14. In particular, cell E2 and portions of cells E1, E3, and several other MSW cells (labeled Closure Sequence “A” in 2009 Exhibit “A12”) are anticipated to be covered, capped, and closed by 2012. See 2009 Exhibit “A12”; Tr. 6/24/09, 91:7-92:1.

129. There is a ridgeline between Makaiwa Hills and WGSL. See Tr. 6/22/09, 191:12-18. The area of Makaiwa Hills nearest to WGSL’s landfill cells in the proposed expansion area is identified as open space on the Makaiwa Hills property and will not be developed. Id. at 191:4-8; 2009 Exhibit “A11.”

130. The current landfill access road proceeds up to the scalehouse, past the ash cells, veers due west to the west side of the Property, and travels up the western side of the Property and into the proposed expansion area. See Tr. 6/24/09, 89:5-16. This course takes the road away from the eastern boundary of the Property and away from Makaiwa Hills. Id.

131. Waste Management documents and responds to complaints received about the operations of WGSL. Id. at 100:9-101:3. Waste Management received and investigated six complaints in 2007, three complaints in 2008, and three complaints to date in 2009. Id. at 101:4-7.

132. Daniel Banchiu, general manager of JW Marriot, Ihilani (“Marriott”), testified for Intervenors at the July 2, 2009 hearing on the Application. See Tr. 7/2/09, 99:1-13. The Marriott operates a hotel at the Ko Olina resort. Id. at 99:21-24. He testified that he is aware of

view and odor complaints from his guests but that the Marriott has not notified Waste Management about any complaints. Id. at 100:14-101:12, 110:1-10. He also testified that guests complained of views of a smokestack in the distance. On cross-examination, however, he admitted that he has never been to the landfill and that the smokestack could be located at some other facility – perhaps a facility with a smokestack. Id. at 106:1-25; 107:1-12. WGSL does not have a smokestack, but the Kahe Power Plant, which is adjacent to the Property, does. See 2009 Exhibit “A1” at p. 5-93.

IV. STABILITY, CONTROLLED BLASTING AND BERMS

133. Pursuant to federal and state regulations governing landfills, a seismic hazard evaluation was performed to determine seismic slope stability of the landfill. See Tr. 6/22/09 at 238:21-239:5. Consistent with accepted industry practice, the Project was analyzed for a design earthquake of magnitude 7.0, with an acceleration of 0.25 G. Id. at 240:1-9.

134. Under the Resource Conservation and Recovery Act (“RCRA”), Subtitle D, Seismic Design Guidance document, the acceptable displacement of landfills due to a seismic event is 12 inches. Id. at 249:14-23.

135. The use of controlled blasting at the Property, which is very common in many landfill excavations, will not affect the stability of WGSL because the imparted energy of controlled blasting is so small and significantly less than 0.1 G. Id. at 240:12-23; 250:3-16; 254:3-7. Monitoring probes installed by the Hawaiian Electric Company near the western Property boundary to measure vibrations from controlled blasting efforts at the currently permitted landfill did not detect any measurable readings. Id. at 252:1-15.

136. In order to alleviate community concerns about controlled blasting, a blast test program will be implemented at the Property, wherein distance, velocity, and frequencies

transmitted by controlled blasting will be monitored. Id. at 251:7-16; 252:16-253:2. According to Dr. Hari Sharma, if the controlled blasting affects the landfill or any of the structures nearby, adjustments will be made. Id. at 251:7-16. There are no concerns regarding stability during the blast test program itself. Id. at 251:17-19.

137. A slope stability study was also prepared for the proposed Project. Id. at 244:2-4; 250:15-17. The proposed design meets the required factors of safety of 1.3 and 1.5 for short-term and long-term conditions, respectively. Id. at 245:18-246:11.

138. The impact of accumulated leachate on stability was also studied. According to Dr. Sharma and Richard Von Pien, even under extreme circumstances of leachate accumulation, using the worst case scenarios that have never been experienced, the landfill would remain stable. See Tr. 6/24/09, 61:2/24; Tr. 7/1/09, 170:16-25, 171:1-15.

139. Whenever new cells are designed, a seismic deformation analysis and slope stability analysis must be performed to determine how the design impacts the existing cells. See Tr. 6/24/09, 9:19-23.

140. Berms are included in the design for several reasons, including for diversion of the surface water to make sure leachate is contained within the landfill and to create airspace while ensuring stability. See Tr. 6/22/09, 236:18-237:2; Tr. 6/24/09, 24:13-20; Tr. 7/1/09, 100:12-15.

141. A small ash Toe Berm was a part of the original design for WGSL. Id. at 142:12-15; 142:21-143:3. The Ash Tow Berm was expanded in 2005 to address a small area where the factor of safety was less than 1.5. Id. at 142:17-20.

142. The E1 and West Berms were a part of the 2002 design for the 14.9-acre landfill expansion. Id. at 168:19-170:1; 2009 Exhibit "A32."

143. The West Berm will be extended further into the canyon under the proposed design for the expansion. See Tr. 6/22/09, 237:3-23; Tr. 6/24/09, 36:25-38:11.

V. STABILITY, CONTROLLED BLASTING AND BERMS

144. Leachate is rain water that falls on open landfill cells. See Tr. 7/1/09, 14:11. The bottom of the individual landfill cell is contoured to direct leachate to a low point (“sump”) and has a multi-layered composite liner system. Id. at 15:4-13; 101:2-25; 102:1-4; 2009 Exhibit “A1” at Figure 4-3. Within the sump is a permanent riser that contains a pump, which pumps the leachate in a hard pipe up to the surface, where it is then pumped into a tank for disposal at a wastewater treatment facility. Id. at 15:4-13, 17:12-15. The wastewater treatment facility accepts the leachate for treatment after determining it meets the requirements of the wastewater treatment facility’s own permits and would not violate the Clean Water Act. Id. at 18:6-15; Tr. 6/22/09, 144:7-19, 147:2-5. Each of the leachate sumps is equipped with an automated pump that activates at a present level below the compliance level. Id. at 105:9-12. There is an alarm that lets Waste Management know if the pump is no longer functioning. Id. at 105:13-16. In addition, Waste Management physically monitors the sumps. Id. at 105:13-16; 16:23-17:2.

145. Drainage for the Property is intended to capture storm water and divert it around the landfill if it originates off site (surface run-on) or into the existing sedimentation basin if it originates onsite (surface run-off). Id. at 13:16-25; 119:17-25. The sedimentation basin is designed to allow storm water to settle so that dissolved solids that come off the landfill can settle out of the basin. See Tr. 7/1/09, 77:21-24. The water is eventually discharged to the ocean subject to State of Hawaii Department of Health (“DOH”) permitting requirements under the national pollution discharge elimination system (“NPDES”). Id. at 77:19-78:6. A third-party

company takes samples to ensure compliance with certain discharge limits. Id. at 78:7-79:5. In addition, DOH inspects Waste Management's ditches and slopes. Id. at 78:7-15.

146. Leachate does not come into contact with storm water. Id. at 76:21-23. The storm water or surface water system is separate from the leachate collection system. Id. at 76:25-77:8; 97:15-98:8.

147. Groundwater in the area of the Property is monitored for leachate contamination. Id. at 98:12-17.

VI. GAS COLLECTION AND CONTROL SYSTEM AND EPA NOTICE OF VIOLATION

148. On April 4, 2006, the Environmental Protection Agency ("EPA") issued a Notice of Violation to WSGL, which included the late installation of a landfill gas collection and control system (the "GCCS") and alleged violations of reporting requirements. Id. at 19:3-8; Appendix B, Volume II of III, of 2009 Exhibit "A1." Both issues were resolved by August 2005. Tr. 7/1/09, 19:3-8. There are currently 40 gas wells at the Property. Id. at 22:18-25.

149. The GCCS collects landfill gases that are formed from the decomposition of the waste material. The gas is burned off at the onsite flare pursuant to a DOH-issued air quality permit. Id. at 23:6-11.

150. In installing the GCCS, elevated temperatures above EPA's standard operating temperature of 131° Fahrenheit were discovered at WSGL. Id. at 112:7-10; 113:25-114:2. Waste Management has submitted a demonstration to the EPA establishing that WSGL can be safely operated at higher than the standard operating temperatures. Id. at 112:11-15.

151. The EPA Notice of Violation is pending resolution of two outstanding issues that evolved from the Notice of Violation: the temperature issue and a monetary settlement. Id. at 106:2-13.

152. The EPA has not issued any notice of violation for the elevated temperatures at WGS. See Tr. 6/24/09, 21:18-22:1. There is no evidence that there has ever been, or that there is currently, a landfill fire at WGS. See Tr. 7/1/09, 108:8:14. If there was combustion at EGSL, Waste Management would implement its contingency plan, including turning off the gas wells in the area of the fire, thereby depriving the combustion area of needed oxygen, which is standard procedure for handling landfill oxidation events. Id. at 107:8-25; 108:1-7.

VII. TRAFFIC

153. A traffic impact report (“TIR”) was prepared for the Project. See Tr. 6/22/09, 51:6-17; Appendix I of 2009 Exhibit “A1.” The TIR analyzes the amount of existing traffic transiting Farrington Highway on both the eastbound and westbound approaches, as well as the volume of traffic entering and coming out of the Property. Id.

154. The TIR concluded that even with the expansion of the landfill, the volume of traffic would not be expected to increase dramatically. Traffic going in and out of the landfill is less than approximately one percent of the total volume of traffic in the region. See Tr. 6/22/09, 51:18-24.

VIII. ARCHAEOLOGICAL AND CULTURAL RESOURCES

155. An *archaeological Inventory Survey, Waimanalo Gulch Landfill Expansion*, 2008 (“AIS”) and a *Cultural Impact Assessment (Draft), Waimanalo Gulch Landfill Expansion*, 2008 (“CIA”) were prepared for the Property. See Appendices G and H of 2009 Exhibit “A1,” respectively.

156. One historic property, State Inventory of Historic Properties (“SIHP”) #50-80-12-6903, was identified by the study. See AIS (Appendix G of 2009 Exhibit “A1”) at 45. SIHP

#50-80-12-6903 consists of three large upright boulders potentially utilized as trail or boundary markers. Id.

157. Applicant proposes to address SIHP #50-80-12-6903 within a mitigation/preservation plan to be reviewed and accepted by the State Historic Preservation Division, Department of Land and Natural Resources, State of Hawaii (“SHPD”). See Tr. 6/22/09, 49:21-50:5; 2009 Exhibit “A3.” Specifically, Applicant has proposed to temporarily relocate the upright stones to Battery Arizona, and return the upright stones as close as possible to their current locations after the landfill has been closed. See Tr. 6/22/09 at 49:5-20; 2009 Exhibit “A3.”

158. SHPD has reviewed Applicant’s proposed mitigation and determined that there is no effect to historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD, to David Tanoue, Director of DPP, dated April 2, 2009. See Tr. 6/22/09, 49-20-51:1; 2009 Exhibit “A4.”

159. No native Hawaiian customary and traditional rights or practices at the Property were identified. See CIA (Appendix “H” of 2009 Exhibit “A1”) at 79.

IX. WASTE DIVERSION

160. Condition No. 2 of the 2009 Planning Commission Order (Condition No. 5 of the LUC Order) requires ENV to continue its efforts to use alternative technologies to provide a comprehensive waste stream management program. See 2011 Exhibits “A18” at 25, and “A19” at 6.

161. In 2010, the last year for which waste totals were available during the contested case hearings in this matter, ENV diverted 34.4% of the total MSW from the landfill to H-POWER. See 2011 Exhibit "A27." In 2010, the ENV also diverted 36.9% of the total MSW

from the landfill through general material recycling. Id. As of May 2010, ENV accomplished island wide-expansion of its curb-side green waste recycling program to over 150,000 residences. See Written Direct Testimony of Timothy E. Steinberger dated December 13, 2011 (“Steinberger Written Testimony”) at 19. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 20-21.

162. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on Oahu. Of the 1,214,904 tons, the landfill received only 163,736 tons of MSW and 179,946 tons of ash and residue from H-POWER. The amount of MSW deposited at WGS� reflects a steady decrease from 2009. In FY09 the landfill received approximately 233,065 tons of MSW and in FY10 some 178,512 tons of MSW. In comparison, ash and residue has remained fairly constant. The 2010 disposal rate represents a total diversion of MSW from the landfill of 71.7%. See 2011 Exhibit “A27,” see also 2011 Exhibit “A29.”

163. As the decreasing MSW tonnage to WGS� shows, ENV is continuing its effort to significantly reduce solid waste disposal at the WGS� by expanding H-POWER, the waste to materials recycling programs, and developing alternative disposal options for materials presently being landfilled. Collectively, these actions have and will divert significant amounts of waste away from WGS�. In addition, new technology solutions continue to be evaluated. However, there still are no new technologies with proven reliability and performance that would completely eliminate the need for a landfill. Steinberger Written Testimony at 17.

164. The H-POWER facility began operations in 1990 and as of 2011, it successfully diverts approximately 600,000 tons per year of MSW from the WGS�. HPOWER reduces our dependence on fossil fuels. One ton of trash produces saleable

energy the equivalent of one barrel of oil. Moreover, the facility converts more than 1,600 tons of waste per day into electricity sufficient to power more than 60,000 homes. As of December 2011, on an island-wide basis, H-POWER produced approximately 7% of Oahu's electricity. Id. at 18.

165. In addition, as of December 2011, almost 100% of the ferrous and non-ferrous metal in the MSW processed at H-POWER was recovered for recycling. At that time, approximately 18,000 tons of ferrous metals (e.g., tin cans) and 2,500 tons of non-ferrous metals (e.g., aluminum cans) are recycled annually. Id.

166. In December 2011, it was reported that the City would be adding a third boiler at H-POWER, which will increase the capacity of the facility to 900,000 tons per year. Id. at 18; Tr. 4/11/12, 84:22-24. The amount of waste diverted from the landfill and recycled to energy will increase substantially. The third boiler was scheduled to begin operations in January 2013. Steinberger Written Testimony at 18.

167. The continued operation of the H-POWER facility, however, is dependent upon continued operation of the WGSF for disposal of ash and residue. Also, DOH requires as a condition of H-POWER's permit that H-POWER have a disposal alternative — the landfill — as a contingency for routine maintenance, natural disasters, and emergencies. Id.

168. As of 2010, material recycling programs account for a 29.7% landfill diversion rate, which means that approximately 448,000 tons per year is diverted out of the total waste stream of 1.5 million tons per year. The City is continuing to increase the 29.7% diversion rate by expanding and improving programs. See 2011 Exhibit "A30," see also 2011 Exhibit "A28."

169. The City's bulky item collection service is designed to provide residents with once-a-month pickup service of old appliances, furniture, etc. Recyclable items such as white

goods, Freon containing appliances, tires, and used auto batteries and propane tanks are segregated and delivered to the respective recycling facilities. The remainder of bulky item collection is disposed of at the landfill. Steinberger Written Testimony at 19.

170. Residents also may self-haul their bulky items to City disposal sites, including three transfer stations and six convenience centers. Recyclable materials are segregated in separate bins or storage areas for delivery to recycling facilities. Materials that cannot be recycled is hauled to the landfill. Id.

171. The anticipated H-POWER expansion is a mass burn boiler that will accept and covert much of the bulky waste such as furniture, mattresses and carpet that presently go to the landfill, to energy and recycled metals. See Tr. 1/11/12, 65:9-10, 66:8-17. As of December 2011, the mass burn boiler was expected to be in operation by January 2013. Steinberger Written Testimony at 18.

172. As of November 2011, the City provides Green Waste Recycling to approximately 100,000 residences as part of the island-wide automated curbside recycling program. At that time, Oahu's capture rate for green waste was 77% which indicates a high level of participation at a high recovery level, either 85% participation at 90% recovery level or vice versa. (Capture rates are measured by the proportional amount of recyclable material collected relative to the total amount available in the specific waste stream. Capture rates do not denote the participation rate.) It is unlikely that this capture rate can get any higher. The City believes that the automated collection has encouraged more participation, further diverting materials from the landfill. Residents may self-haul green waste to City convenience centers or directly to the composting facility. All of the green waste is delivered to a private vendor that is contracted by the City to produce mulch and other products from the waste. Id. at 19-20.

173. All but incidental food waste and green waste is diverted from the WGSL. Tr. 04/11/12, 114:1-14.

174. From a sustainability standpoint, green waste is one of the few recyclable materials that is all reused here on this Island. Most other recyclable materials are shipped to the mainland or to Asia. Steinberger Written Testimony at 20.

175. Curbside Recycling for Residential Mixed Recyclables continues to increase with island wide expansion — 160,000 residences — as of May 2010. Id.

176. During fiscal year 2011, the curbside collection system recovered 18,000 tons of mixed recyclables and 53,000 tons of green waste for a total of 71,000 tons recycled. This contributes to a full 6% to the overall reduction of MSW going to the landfill. Id.

177. The City continues to promote condominium recycling through a program that reimburses condominium properties for costs associated with the start-up of a recycling program. Id. at 21.

178. Most multi-family dwellings contract with private hauling companies to collect their refuse and would likewise need to establish their own recycling programs. Multi-family recycling is voluntary. Id.

179. Commercial recycling is taking place at commercial business through private recyclers. Id.

180. The City enacted ordinances that support this recycling effort:

- Cardboard. Commercial and government generators are partially banned from landfill disposal. Only 10% of a truckload can be composed of cardboard.
- Green waste. Commercial and government generators are partially banned from landfill disposal. Only 10% of a truckload can be composed of green waste.
- Tires, auto batteries, white goods and scrap metals. Banned from all disposal sites.

- Glass containers. Glass recycling is required for bars and restaurants.
- Paper Recycling. All office buildings of a certain size must conduct recycling of paper goods.
- Food Waste Recycling. All hotels, restaurants, grocery stores, food courts, food manufacturer processors and hospitals meeting a certain size are required to recycle food waste.
- City agencies are required to purchase recycled paper products and to recycle newspaper, cardboard, office paper, aluminum, glass, and plastics.

Id. at 21-22.

181. ENV coordinates numerous events year-round to educate the public about waste management and recycling. Public Education and Outreach Programs include (a) the City's www.opala.org website, which provides comprehensive and up-to-date information about the City's refuse and recycling programs and services; and (b) tours of City facilities and recycling businesses, whereby the public has an opportunity to get an up-close look at waste processing and recycling operations and go behind the scenes at businesses that have instituted model recycling programs. Id. at 22.

182. The residual solids and semi-solids separated during the treatment of wastewater at wastewater treatment plants (“WWTPs”) are commonly referred to as sewage sludge or bio-solids. These materials have been landfilled, but ENV has been working to divert much of this waste stream from WGS. As of December 2011, the Synagro facility at the Sand Island WWTP digested, dewatered, and heat-dried approximately 20,000 tons per year of sewage sludge. The end product is a pellet that can be used as a fertilizer or soil amendment material. Furthermore, as of December 2011, ENV was working with the operator of H-POWER, Covanta, to be able to burn sewage sludge for energy as part of the third boiler that was expected to be operational by January 2013. Id. at 18, 22-23.

183. ENV completed a report, “Alternative Technologies for the Treatment and Minimization of Sewage Sludge,” that identifies potential sludge processing technologies

that could be implemented to provide waste mitigation or improve operational performance at the City's WWTPs. See 2011 Exhibit "A33." The report discusses a wide range of technologies for different stages in the sludge treatment process and thus technologies cannot be directly compared outside their specific treatment and processing function. Accordingly, the report is a list of appropriate technologies for further consideration as part of the ongoing island-wide solids planning effort; it is not a decision-making document that recommends a best solution. Additional factors that will need to be considered as part of any evaluation and selection process include:

- An assessment of a particular alternative technology specific to the WWTP(s) with respect to the facilities already existing there.
- Capital and operation and maintenance costs specific to the WWTP(s) under consideration.
- Implementation timeline for planning, design, permitting, procurement, construction and startup.
- Compatibility of technology with overall Island-wide Solids Master Plan.
- New development and increased future capacity needs.
- Planned upgrades at the existing WWTPs (i.e., upgrade to secondary treatment)

Steinberger Written Testimony at 23-24.

184. The report points out that the technology and process selection for implementation at any of the WWTPs will need to be evaluated from an island-wide perspective due to the issues of combining/transporting solids between WWTPs as well as the identified end-user needs and beneficial use limitations. Other key elements that should be considered in evaluating these technologies and processes for the Island-wide Master Plan include eligibility and redundancy planning in the event that a WWTP treatment unit (i.e., centrifuge or digester) or solids outlet (i.e., landfill or composting facility) is temporarily out of service. Id. at 24.

185. Despite the City's successes in diverting sewage sludge from the landfill, it was reported in December 2011 that 15,000 to 20,000 tons per year of sewage sludge was still landfilled, and as of July 31, 2011, there was nowhere else to dispose of sewage sludge. Id.

X. LANDFILL DESIGN AND OPERATIONS

186. In landfill design and permit reports, the important elements that must be outlined are the boundaries for the waste, the height of the waste, and the containment system for the waste (i.e., the kind of landfill lining system). The designation in the design drawings of the different cells that will contain the waste are not distinctly outlined but are identified by geographical location, much like street are identified. See Tr. 04/11/12, 18:1-19:21. Therefore, the numbering does not dictate the sequence of construction. The annual site conditions and location determine the sequence of construction. Id. at 23:7-24:19.

187. For effective design and permitting, the sequence of construction of the cells in the landfill is not outlined because the need for certain cells depends on variable factors like waste stream, how much waste is generated, and the type of waste received. Therefore, while the boundary, height and containment system are prescribed in landfill design and permitting documents, how the cell is built, the size of the cell, and the order of the construction of the cells are not constrained. On the contrary, if these latter aspects are prescribed, it may result in harm to human health and the environment because the landfill designer and operator would not have the flexibility to ensure the proper location for waste disposal. Id. at 18:5-19:21.

188. This flexibility in constructing the cells of a landfill is not unique to WGSL but is common practice in landfill design. Id. at 21:4-20.

189. The construction of cells E-5 and E-6 was not a digression from what was contained in the engineering report and FEIS because the size, sequence, and actual construction (whole or in parts) was not dictated by these reports. Id. at 25:3-26:24.

190. The size and sequence of construction of cells E-5 and E-6 did not increase the risk of public health hazards and did not contribute to the release of MSW that resulted from the December 2010 and January 2011 rain storms. On the contrary, the size and sequence of construction of cells E-5 and E-6 were more protective of public health because by building only a portion of the cell, the portion that is to be used, the liner is protected from long term exposure to the elements, rain and sun, and the integrity of the liner is maintained. Id.

191. In December 2010 and January 2011, WGS� was hit by a series of heavy rains that resulted in the flooding of areas within WGS�, including the active cell where MSW was being disposed. Steinberger Written Testimony at 26.

192. At that time, WMH was in the process of completing construction of the Western Surface Water Drainage System that was intended to divert stormwater around the landfill. The DOH Solid and Hazardous Waste Management permit for WGS� allowed the simultaneous construction and use of the cell and the Western Surface Water Drainage System. Id.

193. Because the heavy rains in December 2010 and January 2011 occurred before the Western Surface Drainage System was completed, the active cell that had been accepting waste at the WGS� was inundated with storm water, and the force and quantity of storm water breached the cell, causing a release of MSW, including treated medical waste, into the storm water and into the ocean. Id.

194. The City has been cooperating with Federal and State investigations concerning the release of MSW. WMH and the City worked with the U.S. Environmental

Protection Agency ("EPA") and the DOH in the aftermath of the storms, entering into an Administrative Order on Consent with EPA that outlined the remedial actions needed to address the MSW release and steps needed to reopen the landfill. The EPA issued a NOV on November 29, 2011, concerning the release of MSW into the storm water and into the ocean. EPA did not impose any penalties as part of the NOV and continues to monitor the WGSL operations closely. Id. at 26-27.

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

196. As a result of WMH's initial investigation, WMH hired an environmental consultant to perform a detailed assessment of (1) the current status of the wellfield and gas collection and control system to determine whether the fabricated data had 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 there is no evidence that the wellfield has undergone any adverse changes in the last two years. Id.

197. Despite these events, the DOH, Solid and Hazardous Waste Branch, the branch that regulates the solid waste operations at WGSL, is not intending to take enforcement action relating to the operations at the WGSL. The DOH, Solid and Hazardous Waste Branch is satisfied with the operations at WGSL. See Tr. 01/25/12, 59:19-61:12. The DOH, Solid and

Hazardous Waste Branch expressed concern about the imposition of the July 31, 2012 deadline for MSW at the point in time when there were not disposal options for certain types of waste which may potentially threaten human health or the environment. See id. at 12:15-19.

198. Despite pending enforcement and alleged EPA violations, in April 2012, Gary Gill, the Deputy Director of the DOH, Environmental Management Division, the individual heading the agency responsible for regulating WGS�, still insisted that Oahu needs a landfill, that WGS� is the only landfill for MSW and ash, and that shutting down the landfill before other options are available will endanger public health. See Tr. 04/04/12, 149:2-151:4.

XI. LANDFILL SITING

199. Condition No. 1 of the 2009 Planning Commission Decision (Condition No. 4 of the 2009 LUC Order) 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 WGS�. See 2011 Exhibit "A18" at 25; 2011 Exhibit "A19" at 6. 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 11; Tr. 01/11/12, 54:24-55:6.

200. 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 were: 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). Steinberger Written Testimony at 11-12.

201. 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 H-POWER, and construction and demolition debris waste (C&D) for the Island of Oahu. *Id.* at 12; Tr. 04/04/12, 35:1-8.

202. 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). Steinberger Written Testimony at 12.

203. 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.*

204. The Landfill Advisory Committee met on January 20, February 10, March 10 and 31, May 12, July 19, 2011, March 16, 2012, and April 20, 2012. See 2011 Exhibits "A31," "A47," and "K258."

205. 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 H-POWER
- 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

Steinberger Written Testimony at 12-13, see also 2011 Exhibit "A31."

206. 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. Steinberger Written Testimony at 13-14, see also Tr. 04/04/12, 40:1-41:14.

207. 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 Oahu;
- Groundwater Resources (Board of Water Supply and Others);
- Land Ownership (Federal, State, City, and Private);
- U.S. Fish & Wildlife Services (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 Hawaii (ALISH));
- Commission on Water Resource Management (CWRM) Well Data; and
- Criteria protecting airports and airfields with a 10,000 linear foot buffer.

Steinberger Written Testimony at 14, see also Tr. 04/04/12, 42:1-45:23.

208. 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 pyriformium* (critically imperiled Hawaiian shrub). RMTC noted that both sites should be considered as "non-sites" due to either existing or pending land uses. Steinberger Written Testimony at 14.

209. 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 Hawaii, 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."

210. 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. Steinberger Written Testimony at 15.

211. At the time of the contested case hearing on the 2011 Application, the Committee's meetings were still ongoing. Id.

212. The City's effort to identify and develop one or more landfill sites has been performed with reasonable diligence.

213. [Flexibility is critical to the siting process. 2011 Exhibit K144 at11-3.](#)

214. Even after the City selects a new landfill site or sites, it will take ENV 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 or investigations, analyzing alternatives including alternative sites and technologies, obtaining 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 15-16.

215. The detailed engineering studies are 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 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.

XII. STATE AND COUNTY LAND USE LAW AND REGULATIONS

216. The Project complies with the guidelines as established by the Planning Commission. See Tr. 6/22/09, 68:3-13; 2008 Application at 2-1 through 2-28.

217. The Project is consistent with various provisions of the Hawaii State Plan. See Tr. 6/22/09, 69:4-6; 2008 Application at 2-2 through 2-8.

218. The Project is consistent with the energy functional plan. GSL is a generator of naturally occurring methane and other landfill gases, and these gases are planned to be recovered by the City for use in the generation of electricity through a landfill gas-to-energy system. See 2009 Exhibit "A1" at p. 9-9; Tr. 6/22/09, 70:1-12.

219. The Project is consistent with the recreational functional plan. The Property will be reclaimed for other purposes that include outdoor recreation; for example, Kakaako Waterfront Park once served as a landfill in Honolulu. See 2009 Exhibit "A1" at p.8-10; Tr. 6/22/09, 70:13-71:2.

220. The Project is consistent with the City's general plan. WGSL is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGSL's eventual closure will allow the Property to be reclaimed for other public uses; and WGSL is needed in the event of a natural disaster. See Tr. 6/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

221. The Project is consistent with the Ewa Development Plan because the facilities map contained therein designates the landfill with the appropriate symbol. See Tr. 6/22/09, 73:9-74:11; 2009 Exhibit "A1" at pp. 8-28 through 8-29.

222. The Project is consistent with City zoning because a landfill is considered a "public use" under the Land Use Ordinance, and "public uses and structures" are deemed permitted uses in every City zoning district, without the need for a permit. See 2008 Application at 2-28 through 2-29; Tr. 6/22/09, 75:5-22.

XIII. PURPOSE AND NEED

223. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 months of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6; 83:1-14.

224. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See 2009 Exhibit "A20."

225. The proposed expansion of the landfill within the Property is needed because WGSL is a critical part of the City's overall integrated solid waste management efforts. See Tr. 7/1/09, 181:4-8.

226. Continued availability of WGS� is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. Id. at 181:9-18; 182:2-4, 10-17; 197:2-22; Tr. 01/25/12, 12:8-14; Tr. 04/04/12, 150:10-15; Tr. 04/11/12, 117:13-122:5; Steinberger Written Testimony at 29; 2011 Exhibit “A18”

227. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See 2008 Application at 2-6; Tr. 01/25/12, 12:15-19, 65:14-20; 04/04/12, 149:24-150:25.

228. WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. Tr. 7/1/09 at 181:20-183:4; Tr. 01/25/12, 58:22-25, 59:1-9.

229. WGS� is a critical portion of the City’s overall ISWMP, which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Tr. 7/1/09 at 178:10-18; 181:7-18; see Steinberger Written Testimony at 2, 4. The ISWMP is required by State law and approved by DOH after public comments. Tr. 7/1/09 at 182:18-183:25. One theme of the ISWMP is to minimize landfill disposal. Id. at 184:1-3.

230. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Id. at 179:11-23. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008m were landfilled at WGS�. Id. at 179:16-17. These amounts fluctuate based on such things as recycling and the economy. Id. at 179:18-19. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGS� each year. Id. at 179:24-25; 180:1-4.

231. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on Oahu. Of the 1,214,904 tons, the landfill received only 163,736 tons of MSW and 179,946 tons of ash and residue from H-POWER. The amount of MSW deposited at the WGS� reflects a steady decrease from 2009. In FY09 the landfill received approximately 178,512 tons of MSW and in FY10 some 233,065 tons of MSW. In comparison, ash and residue has remained fairly constant. The 2010 disposal rate represents a total diversion of MSW from the landfill of 71.7%. See 2011 Exhibit "A27."

232. Other items that cannot be recycled or burned at H-POWER are deposited at WGS�, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels. Tr. 7/1/09 at 180:10-21; Tr. 01/25/12, 10:6-12:14; Tr. 04/11/12, 118:16-119:23.

233. The WGS� Oversight Advisory Committee consists primarily from the leeward communities, who meet periodically to discuss concerns with Waste Management and the Applicant regarding WGS� operations. Tr. 7/1/09 at 184:9-18.

234. The Community Benefits Advisory Committee advises the City on the spending of money for grants and improvements throughout the Waianae Coast. In fiscal year 2008, there was approximately \$2 million appropriated in the City budget, and for fiscal year 2009, approximately \$2.5 million, for this program. Tr. 7/1/09 at 184:19-25, 185:1-7.

235. The City is actively reducing waste volume that is directed to the landfill. The H-POWER plant expanding and its capacity is expected to increase by an additional 300,000 tons of MSW per year by 2013. See Tr. 7/1/09, 185:8-186:6; Steinberger Written Testimony at 18. The expanded H-POWER facility will be able to burn items that the current facility cannot and

which are therefore currently being sent to the landfill. Tr. 7/1/09 at 186:17-25, 187:1-12; see Steinberger Written Testimony at 19. The City is in the process of completing the full implementation of its island-wide, curbside recycling program by May 2010. Tr. 7/1/09 at 186:7-13. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 187:13-18.

236. The City is currently in the process of procuring a new green waste recycling facility that will accept food waste and sewage sludge. Id. at 188:22-25. The City has a facility at the Sand Island Wastewater Treatment Plant that turns bio-solids into fertilizer pellets, with the goal of reusing 100 percent of the material for such uses as golf course fertilizer. Id. at 189:5-18. The City is also requesting technology demonstration proposals to explore alternate technologies. Id. at 194:11-25. ENV has looked at these technologies, like plasma arc and gasification, and to date they are not ready in the size the City needs, and are only demonstration technologies. Id. at 192:8-25; 193:1-25; 194:1-10.

237. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL. Id. at 201:9-16; 195:4-8.

238. In order to ensure there will be no cessation of waste disposal at the Property, construction of a new cell in the expansion area to be used when the capacity of the currently permitted cells is exhausted would need to begin on or around November 1, 2009, due to the amount of time that it takes for cell construction, liner placement, forming, etc. See Tr. 6/24/09, 84:8-20. Before construction can begin, an operating permit is required from DOH. Because the DOH operating permit can only be processed after a SUP or boundary amendment must be

granted in August or September of 2009 so that construction can be timely started. Id. at 99:11-23.

239. Despite progress made to divert waste from the landfill via 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.

240. Closing the WGSF to MSW without alternative disposal options will endanger public health. See Tr. 01/25/12, 12:15-19; 04/04/12, 149:2-151:4.

CONCLUSIONS OF LAW

The Planning Commission hereby concludes as follows:

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

2. Hawaii Revised Statutes Section 91-10(5) provides that:

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

The Applicant has the burden of proof to show by a preponderance of the evidence that the Application meets the provisions of Section 2-45 of the RPC.

I. 2008 APPLICATION

3. In the Special Use Permit No. 2008/SUP-2 application, the Applicant sought a new State Special Use Permit. Chapter 2, Subchapter 4 of the RPC sets forth the rules applicable to State Special Use Permits. Section 2-45 of the RPC provides as follows:

Test to be applied: Certain “unusual and reasonable uses within agricultural districts other than other for which the district is classified may be permitted. The following guidelines are established as guidelines in determining an “unusual and reasonable” use:

(a) Such use shall not be contrary to the objectives sought to be accomplished by the state land use law and regulations.

(b) The desired use would not adversely affect the surrounding property.

(c) Such use would not unreasonably burden public agencies to provide public roads and streets, sewer, water, drainage and school improvements, and police and fire protections.

(d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.

(e) That the land upon which the proposed use is sought is unsuited for uses permitted in the district.

4. Based on the findings set forth above, the Planning Commission concludes that the Applicant’s 2008 Application for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant’s representations as documents in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use

Permit was granted continue to exist and that the land on which WGSL is located continues to be unsuited for agricultural purposes.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

II. 2011 APPLICATION

6. In the 2011 Application to modify the 2009 LUC Order for County Special Use Permit No. 2008/SUP-2, the Applicant sought to delete the July 31, 2012 deadline for the landfill to accept municipal solid waste. Chapter 2, Subchapter 4 of the RPC sets forth the rules applicable to State Special Use Permits. Section 2-49(a) of the RPC provides as follows:

Request for modification or deletion of condition:

(a) A petitioner who desires a modification or deletion of a condition imposed by the commission shall make such a request to the commission in writing. This request shall be processed in the same manner as the original petition for a SUP. A public hearing on the request shall be held prior to any commission action.

7. Based on the findings set forth above, the Planning Commission concludes that the Applicant's 2011 Application to Modify (a) are not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection.

8. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

III. 2017 LUC REMAND ORDER

9. In compliance with the 2017 LUC Remand Order, the Planning Commission makes the following clarifications:

- The Planning Commission did not follow Section 2-75 of the Rules of the Planning Commission in issuing its 2017 Planning Commission Decision. Section 2-75 requires that:

Whenever commission members who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file written exceptions and present oral argument to the commission members who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

In issuing the 2017 Planning Commission Decision, the Planning Commission did not provide the parties with copies of its proposed decision, nor did it entertain argument – either written or oral. Noting this, the Planning Commission has taken every measure to ensure that the Planning Commission has complied with Section 2-75 in issuing the 2017 Planning Commission Decision.

- The Planning Commission has required that the Applicant identify an alternative landfill site by December 31, 2022 that will be used upon the WGSL to use and the subsequent commencement of operations at the alternative landfill site. The basis of this condition is the uncontested and credible evidence provided by the Applicant that closing the WGSL to MSW without alternative disposal options will endanger public health. Therefore, the Planning Commission is requiring that the Applicant identify an alternative landfill site by a specific deadline. However, the Planning Commission acknowledges and accepts that flexibility is critical to the siting process. Therefore, the deadline imposed by the Planning Commission is not imminent.
- The record does not need to include updated information on the operation of the WGSL, the landfill site selection process and the waste diversion efforts of the City and County of Honolulu because the Planning Commission has sufficient evidence to render its decision on the 2008 and 2011 Applications.
- The effective date of the Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order shall be [DATE].

- The Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact, Conclusions of Law, and Decision and Order.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the decision and order of the Planning Commission to Approve Applicant's Application Special Use Permit Application File No. 2008/SUP-2, for a new SUP for the existing and proposed expansion of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health is reached, subject to the following conditions. It is the further decision and order of the Planning Commission to Approve Applicant'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 Modification dated October 22, 2009, by deleting Condition Nos. 4 and 14, and adding the following conditions:

1. On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon Waimanalo Gulch Sanitary Landfill reaching its capacity at a future date. This identification shall have no impact on the closure date for the Waimanalo Gulch Sanitary Landfill because the Waimanalo Gulch Sanitary Landfill shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2022 but it is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace Waimanalo Gulch Sanitary Landfill when it reaches capacity at a future date. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

2. The Applicant shall provide semi-annual reports to the Planning Commission and the LUC regarding (a) the status of the efforts to identify and develop a new landfill site on O'ahu, (b) the WGSL's operations, including gas monitoring, (c) the ENV's compliance with the conditions imposed herein, (d) the landfill's compliance with its Solid and Hazardous Waste Permit and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the landfill, (e) the City's efforts to use alternative technologies, (f) the extent to which waste is being diverted from the landfill and (g) any funding arrangements that are being considered by the Honolulu City Council or the City Administration for activities that would further divert waste from the landfill.

3. Public health and safety concerns: If the landfill releases waste or leachate, the ENV must immediately (a) notify the surrounding community, including the Makakilo/Kapolei/Honokai Hale, Waianae Coast and Nanakuli-Maili Neighborhood Boards, Invervenors Schnitzer Steel Hawaii Corp., Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa and (b) take remedial actions to clean up the waste and to keep the waste from spreading. Such remedial actions shall include, but shall not be limited to, placing debris barriers and booms at the landfill's shoreline outfall to prevent waste from spreading into the ocean.

The Planning Commission further orders that pursuant to its consolidation of County Special Use Permit File No. 2008/SUP-2 and the proceedings on Applicant's 2011 Application, the 2009 LUC Order is incorporated by reference herein in order to issue this single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order. The foregoing Findings of Fact, Conclusions of Law, and additional conditions shall supersede any inconsistent

finding, conclusion, or condition in the 2009 LUC Order and shall otherwise supplement any and all existing findings, conclusions and conditions in said 2009 LUC Order.

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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

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

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

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