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Attorneys for Intervenor

SCHNITZER STEEL HAWAII CORP.

DEPT OF PLANNING  
AND PERMITTING  
CITY & COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION  
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

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

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

INTERVENOR SCHNITZER STEEL  
HAWAII CORP.'S **STATEMENT OF  
POSITION** ON THE PLANNING  
COMMISSION'S PROPOSED  
CONDITION CONCERNING CLOSURE  
OF THE WAIMANALO GULCH  
SANITARY LANDFILL; CERTIFICATE  
OF SERVICE

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

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

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

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S STATEMENT OF POSITION  
ON THE PLANNING COMMISSION'S PROPOSED CONDITION CONCERNING  
CLOSURE OF THE WAIMANALO GULCH SANITARY LANDFILL**

COMES NOW Intervenor Schnitzer Steel Hawaii Corp. (“**Schnitzer**”), by and through its attorneys, Watanabe Ing LLP, and hereby states its position concerning the Planning Commission of the City and County of Honolulu’s (the “**Commission**”) proposed condition concerning closure of the Waimanalo Gulch Sanitary Landfill (“**WGSL**”).

The Hawai‘i Supreme Court has already reversed the Land Use Commission (“**LUC**”) once for imposing a condition setting a firm closure date without substantial evidence in the record to support that date. Schnitzer does not want the Commission or the LUC to repeat that procedural error. Any condition adopted by the Commission must be supported by substantial evidence from the record. As articulated by the Hawai‘i Supreme Court, “when agency decisionmaking is influenced by facts extraneous to the record... elementary precepts of due process guaranteed by both the state and federal constitutions are offended.” *Kilakila 'O Haleakala v. Bd. of Land*, 138 Hawai‘i 383, 412, 382 P.3d 195, 224 (2016). “Where an agency consults outside sources, the right of a party to cross-examine these sources and present rebuttal evidence is violated.” *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai‘i 217, 241, 953 P.2d 1315, 1339 (1998) (quoting *Mauna Kea Power Co. v. Bd. of Land & Nat. Res.*, 76 Hawai‘i 259, 263, 874 P.2d 1084, 1088 (1994)).

During the 2012 contested case hearing, the parties presented evidence concerning how long it would take to site and develop a new landfill. The parties also presented evidence that due to current technological and logistical limitations, certain types of waste—including automobile shredder residue—must be disposed of in a landfill. At the close of the February 28, 2019 hearing, the Commission considered adoption of the Intervenor Ko Olina Community

Association's and Maile Shimabukuro's (collectively, "KOCA") proposed condition 3, which stated:

- a. From the date of this Order until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGSL unless it cannot be disposed of within the City by any means other than landfilling; provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL, and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL.
- b. From March 2, 2024, until March 1, 2027, WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER; and (2) automobile shredder residue.
- c. The Landfill shall stop accepting any form of waste and close on or before March 2, 2027.

See Jan. 27, 2017 KOCA's Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 85-86.

Commission Member Goo indicated that he wanted the Department of Environmental Services, City and County of Honolulu ("ENV") to provide copies of its November 2017 report entitled, "Assessment of Municipal Solid Waste Handling Requirements for the Island of O'ahu" ("**Landfill Report**") for the Commission's review before deciding on KOCA's proposed Condition 3. See, e.g., Feb. 28, 2019 Draft Hr'g Tr. at 95:3-5; 97:19-21. ENV provided the Landfill Report to the Commission and the other parties on or around March 19, 2019, well after the close of the 2012 contested case hearing. To the extent the Commission intends to rely on—or is otherwise influenced by—information in the Landfill Report that is not otherwise duplicative of facts already in the record, such reliance runs the risk of violating the due process requirements. See *Kilakila 'O Haleakala*, 138 Hawai'i at 412, 382 P.3d at 224. If the

Commission intends to consider the Landfill Report as part of its decisionmaking, then it should reopen the evidentiary hearing for the limited purpose of allowing the parties to respond to the Landfill Report before the Commission enters its final Findings of Fact, Conclusions of Law, Decision and Order (“**D&O**”).

Even if the Commission does not rely on the Landfill Report, the Commission’s current proposed D&O does not articulate a clear evidentiary basis for imposing the 2024 and 2027 deadlines for a phased closure of the WGSL. Thus, to prevent another reversible error on appeal, the Commission must clearly set forth the evidentiary basis for any condition setting those or any other dates for WGSL to stop accepting certain wastes and for WGSL to close completely. To the extent substantial evidence does not exist in the record to support the proposed conditions, those conditions should not be included in the Commission’s final D&O.

DATED: Honolulu, Hawaii, April 10, 2019.



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CERTIFICATE OF SERVICE

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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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DATED: Honolulu, Hawaii, April 10, 2019.



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