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DEPT. OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU



Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF
ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF
HONOLULU

Application to Modify SUP No.
2008/SUP-2 (SP09-403) by
Modifying (1) Condition No. 1 of the
Planning Commission's Findings of
Fact, Conclusions of Law, and
Decision and Order, dated June 10,
2019, and (2) Condition No. 5 of the
LUC's Findings of Fact, Conclusions
of Law, and Decision and Order
Approving with Modifications the
City and County of Honolulu
Planning Commission's
Recommendation to Approve Special
Use Permit, certified on November
1, 2019

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
OBJECTIONS TO DEPARTMENT
OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF
HONOLULU AND SCHNITZER
STEEL HAWAII CORP.'S
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

CERTIFICATE OF SERVICE

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO'S OBJECTIONS TO DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF HONOLULU AND SCHNITZER STEEL
HAWAII CORP.'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER**

Intervenors Ko Olina Community Association and Maile Shimabukuro (“KOCA”) make the following objections to Applicant Department of Environmental Services, City and County of Honolulu (“ENV” or “**Applicant**”) and Intervenor Schnitzer Steel Hawaii Corp.’s (“**Schnitzer**”) proposed findings of fact (“FOF”), conclusions of law (“COL”), and decision and order (“D&O”).

I. General Objections

KOCA generally objects to both Schnitzer’s and ENV’s proposed FOF, COL, D&O as insufficient insofar as both fail to make findings about the following issues:

- That ENV is out of compliance with its permit by its failure to meet the December 31, 2022 site selection deadline. *See, e.g.*, KOCA Proposed FOF ¶ 5.
- ENV’s lack of “reasonable diligence” in siting a new landfill as required under the 2019 LUC Order and previous orders, including its failure to explore all solutions in the wake of Act 73. *See, e.g.*, KOCA Proposed FOF ¶¶ 35–42, 48–64.
- The WGSL’s history against which the application for modification arises, including the City’s history of promises to close the WGSL and its concomitant history of missing deadlines. *See, e.g.*, KOCA Proposed FOF ¶¶ 20–34.
- Previous site selection processes, which yielded ample data and analysis that ENV has in-hand, and past site selection processes’ more realistic treatment of the No-Pass Line. *See, e.g.*, KOCA Proposed FOF ¶¶ 30–34, 37–38.

- ENV's lack of explanation for its failure to pick a site notwithstanding ENV's prior site selection efforts. *See, e.g.*, KOCA Proposed FOF ¶¶ 34, 53.
- The impact of the WGS� on the neighboring community, which has been promised that it will not be required to bear the island's landfill burden in perpetuity. *See, e.g.*, KOCA Proposed FOF ¶¶ 43–47.

KOCA's proposed findings on these issues are supported by the record and warranted by law. Further, findings on these issues support the conclusion that this Commission must impose additional accountability measures on ENV to meet its permit obligations.

Additionally, several proposed FOF and COL contravene the LUC's 2019 Order and KOCA objects on those grounds. Indeed, KOCA generally objects to any FOF, COL, or condition that runs afoul of the LUC's 2019 Order, which remains binding and which the Applicant has only moved to modify in one discrete respect. But given that this conflict has arisen, KOCA requests that the Planning Commission's FOF, COL, D&O include the following: "To the extent that any of these findings or conclusions conflict with the LUC's November 1, 2019 Findings of Fact, Conclusions of Law, Decision & Order ("**2019 LUC Order**"), the 2019 LUC Order shall control."

II. Objections to ENV's Proposed FOF, COL, D&O

Objections to ENV Proposed FOF ¶ 4

The LUC's 2019 Decision and Order's Condition No. 5 was adopted with modifications from Condition No. 1 of the Planning Commission's 2019 Decision and Order, which states as follows:

1. On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure

date for the WGS� because the WGS� shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2022 but is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace WGS� when it reaches capacity at a future date. The identification of an alternative landfill site by December 31, 2022 is based on the evidence presented and that, as the Planning Commission discussed in 20 I 7, a five year timeframe was sufficient time for the Applicant to identify an alternative landfill site before the WGS� nears capacity. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

See Planning Commission's 2019 Order, included in the Application's Exhibit "A", at 65.

KOCA objects to this finding as incomplete and misleading insofar as it should be made clear that the LUC did **not** adopt the following component of Condition No. 5: "This identification shall have no impact on the closure date for the WGS� because the WGS� shall continue to operate until it reaches capacity." Instead, the LUC imposed a March 2, 2028 closure date on the WGS�. That condition is not affected by these proceedings and remains in full force and effect.

Objections to ENV Proposed FOF ¶ 24

24. Intervenor KOCA called Ken Williams and Dwight Miller as their witnesses. Intervenor KOCA moved to qualify Dwight Miller as an expert witness.

KOCA objects to this finding as misstating the record. The Commission did not "qualify" Mr. Miller as an expert witness on November 1, 2023, as he had previously been recognized as an expert already in the underlying proceedings for 2008/SUP-2. Rather, the Commission "**continue[d] to [] recognize[]** [Mr. Miller] as an expert in

solid waste management including landfill siting and design.” Tr. 11/01/23 (Miller) at 32:12–16 (emphasis added).

Objections to ENV Proposed FOF ¶¶ 30–33

30. Act 73 and its new restrictions came into effect after the Planning Commission and the LUC issued their respective 2019 Decisions and Orders that imposed the December 31, 2022 landfill identification deadline.

31. Director Babock [sic] testified that the new restrictions imposed by Act 73 prohibited Applicant from siting a landfill in a significant portion of the island of O’ahu. See Tr. 10/18/23, 26:18-27:4, 28:1-28:10, Exhibit “AIS” (map showing Act 73 restrictions).

32. Act 73 eliminated from consideration the previously proposed landfill sites outside of the No Pass Zone. See Dec. Babcock at 117; Tr. 10/18/23, 14:11-22.

33. In 2021, Mayor Rick Blangiardi appointed a new Landfill Advisory Committee (“LAC”) to assist with the evaluation and scoring of the six sites identified as the WGSL’s potential replacement landfill sites. See Tr. 10/18/23, 14:23-15:4, 29:18-30:8. The LAC held eight public meetings between October 2021 and June 2022, during which it helped develop processes and criteria to evaluate and score the six Act 73 compliant landfill sites under consideration by the City and County of Honolulu (the “City”). See Tr. 10/18/23, 14:23-15:4, 29:25-30:12.

KOCA objects to these findings as incomplete and insufficient as they fail to accurately convey the timeline of the LUC’s 2019 Order; Act 73; and the formation of the LAC and are thus misleading. The LUC’s 2019 Order was issued on November 1, 2019. Act 73 took effect on September 15, 2020 – about a year later, during which period, no site was selected. The LAC was formed on September 24, 2021 – another year after the enactment of Act 73.

Further, the references to “previously proposed” sites in proposed FOF ¶ 32 as “new” to the LAC in proposed FOF ¶ 33 are incomplete and misleading as these findings omit the history of previous site selection efforts, including the site selection

efforts in 2003, 2012, and the City’s 2017 report generated by its consultant, none of which resulted in the selection of a site – which failure ENV could not explain. These findings further fail to explain that when the “new” LAC was formed in September 2021, the Applicant already had data and analysis from previous site selection efforts, including the 2017 report.

Additionally, proposed FOF ¶ 32’s statement that Act 73 “eliminated from consideration” certain sites is incorrect insofar as amending Act 73 is one of the options recommended by the LAC.

Objections to ENV Proposed FOF ¶ 37

37. According to the BWS, “[t]he No Pass Zone was derived from the review of geologic maps and borings that define the areas of thick caprock around O’ahu. Areas that are below (or makai) the No Pass Zone are primarily located on thick caprock . . . Areas that are above the No Pass Zone, have no caprock and are located directly above the groundwater that is used for drinking water.” See BWS’ letter dated November 16, 2022 at 2.

KOCA objects to this finding as it is unsupported by all of the evidence presented at the contested case. The evidence presented showed that the no-pass line is an **approximate** boundary that demarcates an area mauka of which **generally** lacks caprock or other geological features to protect groundwater. The evidence further showed that the no-pass zone is conservative in that it is an estimate that does not account for the individual geological features at a particular site, and just because a site falls within the no-pass zone does not necessarily mean it is unsuitable for a landfill. *See* Tr. 11/01/23 (Miller) at 35:2–36:16.

Objections to ENV Proposed FOF ¶ 42

42. Due to the new legal restrictions imposed by Act 73 and the BWS' disapproval to the siting of any of the six proposed landfill sites because all sites are located in the BWS' "No Pass Zone", the Applicant is left with no viable new landfill sites, other than perhaps federal lands. See Dec. Babcock at ¶41; Tr. 10/18/23, 35:2-16.

KOCA objects to this finding as misleading to the extent that it suggests that the BWS's no-pass line is a legal boundary, and the BWS's "disapproval" is a legal requirement or a binding determination.

Objections to ENV Proposed FOF ¶¶ 46-57

46. Consistent with the requirements of the current SUP No. 2008/SUP-2 (SP09-403), Applicant has continued its efforts to use alternative technologies to provide a comprehensive waste stream management program. See Dec. Babcock at ¶19. Over the years, Applicant has been able to divert more and more waste from the WGS� to H-POWER. See Dec. Babcock at ¶19.

47. In Calendar Year 2010, approximately 1,214,904 tons of waste was generated on O'ahu. Of that amount, the Landfill received 163,736 tons of MSW and 179,946 tons of ash and residue from H-POWER (for a combined total of 343,682 tons). See Planning Commission's 2019 Decision and Order, at pages 50-51, ¶226, included in Exhibit "A" of the Application; see also Dec. Babcock at ¶20. According to Applicant's data, the landfill diversion rate for 2010 was 71.7%. See Dec. Babcock at ¶20.

48. In Calendar Year 2020, approximately 1,210,281 tons of waste was generated on O'ahu. Of that amount, the WGS� received 56,114 tons of MSW and 182,112 tons of ash and residue from H-POWER (for a combined total of 238,226 tons). See Application's Exhibit "G" (chart showing data for 2017 to 2021); see also Dec. Babcock at ¶21. According to Applicant's data, the landfill diversion rate for 2020 was 82.2%. See Dec. Babcock at ¶21.

49. In Calendar Year 2021, approximately 1,215,467 tons of waste was generated on O'ahu. Of that amount, the WGS� received 106,723 tons of MSW and 157,531 tons of ash and residue from H-POWER (for a combined total of 264,254 tons). See Application's Exhibit "G"; see also Dec. Babcock at 122. According to Applicant's data, the landfill diversion rate for 2021 was 80.0%. See Dec. Babcock at ¶22.

50. Based upon data collected (prior to Applicant's filing of its Application), Applicant projected that for Calendar Year 2022, the

WGSL would receive approximately 70,000 tons of waste and 160,000 tons of ash and residue from H-POWER (for a combined estimated total of 230,000 tons). See Dec. Babcock at ¶23. Based upon Applicant's estimates, the MSW landfill diversion rate for 2022 was projected to be approximately 83%. See Dec. Babcock at ¶23.

51. In 2012, H-POWER's capacity increased to 900,000 tons per year because of the addition of a third boiler. See Dec. Babcock at ¶25. The third boiler is a mass burn unit, which can process waste streams that previously required landfilling, including sewage sludge, bulky waste, and treated medical waste (except medical sharps). See Dec. Babcock at ¶25.

52. In total, H-POWER's original refuse derived fuel boilers and mass burn unit processes waste to reduce its volume by 90 percent, and as of 2021, approximately 750,000 tons per year of MSW and sludge are diverted from the WGSL. See Dec. Babcock at ¶26.

53. Improvements at the H-POWER facility have resulted in an increased amount of metal recovered for recycling. See Dec. Babcock at ¶27. Currently, H-POWER recovers about 25,000 tons of metal annually for recycling. See Dec. Babcock at ¶27.

54. "Process residue" is composed of fine materials in the waste stream such as glass, sand and dirt that are separated using trammel screens and removed during pre-combustion waste processing. See Dec. Babcock at ¶28.

55. In July 2021, H-POWER began combusting its process residue on a trial basis. See Dec. Babcock at ¶29. This change has reduced the amount of process residue being disposed at the landfill from about 4,000 tons per month to zero (i.e., 48,000 tons per year). See Dec. Babcock at ¶29.

56. Applicant is also pursuing ash recycling to further decrease waste that must be landfilled. See Dec. Babcock at ¶30. The ash recycling project, once permitted and built, has the potential to divert at least 60% of the H-POWER ash that is currently landfilled at the WGSL. See Dec. Babcock at ¶30.

57. Applicant has continued its effort to significantly reduce solid waste disposal at the WGSL by expanding H-POWER and the waste to materials recycling programs, and developing alternative disposal options for materials presently being landfilled. See Dec. Babcock at ¶33. Collectively, these actions have and will continue to divert significant amounts of waste from the WGSL. See Dec. Babcock at ¶33. However, despite new technological solutions that Applicant continues to consider, Applicant cannot completely eliminate the need for a landfill at this time. See Dec. Babcock at ¶33.

KOCA objects to these findings pertaining to the Applicant's waste diversion programs and statistics on waste generation and receipt at WGS� as irrelevant. Waste diversion efforts do not have any bearing on the sought site selection deadline extension, and the Applicant remains under an obligation to close the WGS� by March 2, 2028. The permit condition requiring the Applicant to use alternative technologies to provide a comprehensive stream management program is not at issue in these proceedings. Further, the Applicant is under an obligation to site and develop a **new** landfill to accept the waste streams described in these findings.

Objections to ENV Proposed FOF ¶ 58

58. Assuming current fill rates, WGS� is expected to reach full capacity in 2036. See Tr. 10/18/23, 23:10-17.

KOCA objects to this finding as incorrect and irrelevant. It is incorrect because the City is required to close the WGS� no later than March 2, 2028, regardless of whether it has reached capacity. It is irrelevant because closure is **required** by that date, which condition remains in full force and effect, so the date on which the WGS� would hypothetically be filled if it continued operations beyond March 2, 2028 is not relevant.

Objections to ENV Proposed FOF ¶¶ 59-62

59. WGS� is the only permitted public MSW facility on the island of Oahu. See Dec. Babcock at ¶15. It is the only landfill option for disposal of MSW for the general public and the only permitted repository for the ash produced by H-POWER. See Tr. 10/18/23, 18:2-20; Dec. Babcock at ¶15. A landfill to dispose of MSW is required because there will always be material that cannot be combusted, recycled, reused or shipped. See Dec. Babcock at ¶15. A landfill also is essential because H-POWER cannot operate without the landfill as a backup disposal option. See Dec. Babcock at ¶35. Specifically, H-POWER's Solid Waste Management

Permit issued by the State of Hawai'i, Department of Health, provides in relevant part:

Section C. MSW Storage and Processing

20. In the event that the facility is unable to combust RDF/MSW or process MSW for more than 72 hours, the permittees shall cease from accepting any more MSW at the affected area until the equipment is back in operation. **During such times, waste shall be diverted to permitted storage and disposal facilities or to operational areas of the facility.** All other permit conditions, including capacity limits, shall be maintained.

Section E. Management and Testing of Pre-Combustion Residue

27. The residue shall be transported to a permitted landfill for disposal

Section F. Management and Testing of Post-Combustion Ash

32. The ash shall be transported to a permitted ash monofill for disposal

See Solid Waste Management Permit No. IN-0049-11, included in Exhibit "H" of the Application (bold added).

60. A landfill is also critical to the public health during natural disasters such as tsunamis or hurricanes and during times of emergency to control the rapid and massive accumulation of waste. See Dec. Babcock at ¶37; Tr. 10/18/23, 24:9-17.

61. When the PVT landfill stopped accepting asbestos containing material ("ACM") on or about January 1, 2021, the City's landfill took on this waste stream to provide an on-island disposal option. See Dec. Babcock at ¶38. It has been reported that the PVT landfill will reach capacity in seven years, after which all of PVT's waste must go to the only remaining disposal site, the WGS. See Dec. Babcock at ¶38.

62. Therefore, a landfill is and will be necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of O'ahu. See Dec. Babcock at ¶40; Tr. 10/18/23, 23:18-22. A landfill is a critical component of the City's overall Integrated Solid Waste Management Plan, 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. See Dec. Babcock at ¶40.

KOCA objects to these findings pertaining to the purpose and need for a landfill as irrelevant and misleading. As stated in KOCA's proposed FOF, COL, D&O, "All parties acknowledge that it is important for the island of O'ahu to have an operational landfill." KOCA Proposed COL ¶ 8. The reasons why having an operational landfill is important for the island O'ahu have no bearing on the sought site selection deadline extension, and the Applicant remains under an obligation to close the WGSL by March 2, 2028.

Further, these findings are misleading and irrelevant because they erroneously imply that the location of **WGSL** is important. There is no evidence in the record that it is critical for the landfill to be located at WGSL specifically. In fact, the evidence in the record shows the opposite – simply having a landfill will satisfy the functions described in these findings (as a backup to H-POWER, proposed FOF ¶ 59, for public health, proposed FOF ¶ 60, and for after the closure of PVT, proposed FOF ¶ 61). *See, e.g.*, Tr. 10/18/23 at 82:21–83:2. (Garofalo) ("Q. . . . If I understand your testimony correctly, Schnitzer needs a landfill site on Oahu that is permitted to accept ASR, is that a fair summary? A: Yes. Q: That landfill site doesn't have to be Waimanalo, is that also fair? A: All it needs to be is in our Solid Waste Management permit that we can take it to that facility."). The City is under an obligation to find a **new** landfill site **other than** the WGSL, which must close by 2028, to satisfy those functions, a fact which is obfuscated by these findings.

Proposed FOF ¶ 61 is misleading and wrong for the same reason. Finding that "the PVT landfill will reach capacity in seven years, after which all of PVT's waste

must go to the only remaining disposal site, the WGS�” erroneously presupposes that the WGS� will be “the only remaining disposal site” in seven years, i.e., 2031. In fact, the WGS� must be closed by March 2, 2028. The City must find a new landfill site to accept waste after the closure of PVT.

Objections to ENV Proposed COL ¶ 4

4. Chapter 2, Subchapter 4 of the RPC, sets forth the rules applicable to State SUPs. Section 2-45 of the RPC provides as follows: Test to be applied. Certain ‘unusual and reasonable’ uses within agricultural districts other than those for which the district is classified may be permitted. The following guidelines are established 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) That the desired use would not adversely affect the surrounding property.

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

(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 the uses permitted within the district.

Based on the findings set forth above, the Planning Commission concludes that ENV’s Application for a modification of the deadline to identify a new landfill site 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 documented in the 2008 FEIS; (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection; (d) the same unusual conditions, trends and needs that existed at the time the original SUP was granted continue to exist; and (e) the land on which the WGS� is located continues to be unsuited for agricultural purposes.

KOCA objects insofar as whether or not the landfill is an “unusual and reasonable use” is not at issue in these proceedings. These proceedings concern the modification of a **condition** to an already-issued special use permit.

To the extent that the Commission determines that it should issue findings or conclusions concerning whether these guidelines should be analyzed, KOCA further objects to the proposed COL as unsupported by the evidence and inconsistent with the SUP as follows:

First, the proposed conclusion is inconsistent with the LUC’s FOF ¶ 430 in the 2019 Order, which found: “Based on the evidence in the record and the findings set forth above, the LUC finds that the expansion of the WGS� will not adversely affect surrounding properties as long as (1) it is operated in accordance *with the conditions imposed below* and government approvals and requirements; and (2) mitigation measures are implemented in accordance with the Applicant’s representations in the 2008 FEIS.” (Emphasis added). Compliance with the permit conditions – including the closure and site selection deadline – is a necessary component of minimizing adverse impacts to surrounding properties. ENV did not meet the site selection deadline and thus is out of compliance with its permit conditions. As detailed in KOCA’s Proposed FOF, COL, D&O and in the testimony of Ken Williams, the City’s long history of promised closure, followed by delays, adversely affects the WGS�’s neighbors. Thus, more oversight is needed.

Second, the conclusion that “the same unusual conditions, trends and needs that existed at the time the original SUP was granted continue to exist” is not supported

by the record. In fact, as it pertains to the site selection deadline, “conditions” have changed insofar as ENV has now failed to comply with its permit condition of siting a new landfill by December 31, 2022. ENV is out of compliance with its permit. Further, conditions have changed in that ENV has now missed every deadline that has been set for it in terms of closing the WGS� and siting a new landfill. These changed conditions necessitate additional oversight.

Thus, any discussion of the “unusual and reasonable” use test should find and conclude that additional oversight of ENV’s site selection progress is needed to prevent further adverse effects to surrounding properties and that additional oversight is needed because of the changed conditions, i.e., ENV’s failure to meet its permit conditions.

Objections to ENV Proposed D&O

1. Condition No. 1 of the Planning Commission’s 2019 Decision and Order shall be amended to the following:

On December 31, 2024, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure date for the WGS� because the WGS� shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2024 but is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace WGS� 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. Condition No. 5 of the LUC’s 2019 Decision and Order shall be amended to the following:

By no later than December 31, 2024, the Applicant shall identify an alternative landfill site that may be used upon closure of WGS�. Upon

identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

The Planning Commission further orders that the following condition be added:

3. The Applicant shall provide quarterly in-person reports to the Planning Commission regarding the status of the efforts to identify a new landfill site on O‘ahu.

All remaining conditions of SUP No. 2008/SUP-2 (SP09-403) shall remain in full force and effect.

First, KOCA objects to any mention of WGS� being used until it reaches capacity, as that was rejected by the LUC, which required WGS� to close on March 2, 2028.

Second, KOCA objects to the extent that Proposed Condition No. 3 does not provide enough guidance as to what ENV must be prepared to address in its quarterly reports. As stated in its Proposed D&O, KOCA urges the Commission to adopt the following condition, which more specifically sets out what must be discussed at each quarterly report in order to increase ENV’s accountability: “The Applicant shall report quarterly to the Planning Commission, in-person, to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community.”

III. Objections to Schnitzer's Proposed FOF, COL, D&O

Objections to Schnitzer Proposed FOF ¶ 10

10. As of the October 18, 2023 contested case hearing, the most recent estimate provides that at current fill rates, WGS� will reach capacity in 2036.

KOCA objects to this finding as incorrect and irrelevant. It is incorrect because the City is required to close the WGS� no later than March 2, 2028, regardless of whether it has reached capacity. It is irrelevant because closure is **required** by that date, which condition remains in full force and effect, so the date on which the WGS� would hypothetically be filled if it continued operations beyond March 2, 2028 is not relevant.

Objections to Schnitzer Proposed FOF ¶ 17

17. On November 1, 2019, the LUC considered and adopted the Planning Commission's June 10, 2019 Findings of Fact, Conclusions of Law, and Decision and Order. See DPP Recommendation, at 3.

KOCA objects that this finding omits that the LUC **modified** the Planning Commission's June 10, 2019 Findings of Fact, Conclusions of Law, and Decision and Order, including by modifying the condition at issue in these proceedings to impose a closure deadline.

Objections to Schnitzer Proposed FOF ¶ 55

55. On November 1, 2023, the contested case hearing resumed at the Mission Memorial Auditorium, 550 South King Street, Honolulu, Hawai'i. KOCA presented two witnesses: Ken Williams, General Manager of the Ko Olina Community Association, and Dwight Miller, P.E., Parametrix, Inc., who was qualified as an expert in solid waste management. See Williams Testimony (Tr. 11/01/23, 11 :8-30:10); Miller Testimony (Tr. 11/01/23, 30:12-46:11). The Parties then presented their closing statements. See ENV Closing Statements (Tr. 11/01/23, 49:9-51:18); Schnitzer Closing Statements (Tr. 11/01/23, 51 :20-54:25); KOCA

Closing Statements (Tr. 11/01/23, 55:2-61 :10). Following the Parties closing statements, the Planning Commission closed the contested case hearing on the 2022 Application. *See* Tr. 11/01/23, 61:17-62:3.

KOCA objects to this finding as misstating the record. The Commission did not “qualif[y]” Mr. Miller as an expert witness on November 1, 2023, as he had previously been recognized as an expert already in the underlying proceedings for 2008/SUP-2. Rather, the Commission “continue[d] to [] recognize[] [Mr. Miller] as an expert in solid waste management including landfill siting and design.” Tr. 11/01/23 (Miller) at 32:12–16 (emphasis added).

Objections to Schnitzer Proposed FOF ¶ 61–86

KOCA objects to these findings as irrelevant because intervenors were already granted intervention status in the underlying proceeding and so their interest in the proceedings has no further bearing on any remaining issue.

Further, these proposed findings are in contravention of the Commission’s on-the-record findings on KOCA motion to be recognized as an intervenor and Schnitzer’s intervention petition, which were circumscribed to the findings made in the underlying proceedings.

Specifically, the Planning Commission found with respect to KOCA’s intervenor status that: the 2019 Planning Commission and Land Use Commission decisions and orders are still in effect and controlling; these proceedings are limited to ENV’s request to modify or change the December 31st, 2022 deadline; and for the purpose of determining intervenor status, these proceedings are a continuation of the proceedings that led up to the 2019 Planning Commission and LUC Decisions and

Orders. With respect to KOCA's petition to intervene, the Commission found that: KOCA has been granted intervenor status and in past proceedings and met the requirements to intervene under the Planning Commission rules; there are no new facts that would change KOCA's interests or status in the special use permit proceeding; there's no opposition to KOCA's participation as a party in these proceedings; ENV has taken no position with regards to KOCA's intervenor status; and there is no evidence to deny KOCA's intervenor status since its position is substantially different from the other parties involved and that of the public also KOCA's participation will not render the proceedings inefficient or unmanageable. Tr. 08/09/23 at 7:20–9:23.

With respect to Schnitzer, the Planning Commission found: Schnitzer was granted intervenor's status in past proceedings and met the requirements to intervene under Planning Commission rules; there is no opposition to Schnitzer's participation as a party in these proceedings; there are no new facts that would change Schnitzer's interest or status in the special use permit; ENV has taken no position with regards to Schnitzer's intervenor status; and there is no evidence to deny Schnitzer's intervenor status since its position is substantially different from other parties involved and that of the public. Tr. 08/09/23 at 11:7–13:11.

KOCA objects to any findings that go beyond this Commission's previously made on the record findings with respect to intervention.

Objections to Schnitzer Proposed FOF ¶ 67

67. The only DOH-permitted solid waste management facility on Oahu that accepts Schnitzer's ASR is WGSL. See Tr. 10/18/2023, 80: 15-21; see also S-2.

In addition to the objections previously stated with respect to this finding, KOCA objects insofar as this finding, if appropriate to be made at all, should be qualified to clarify that **currently**, the WGSL is the only DOH-permitted solid waste management facility on O'ahu that accepts Schnitzer's ASR. This qualification is necessary because ENV is under an obligation to site and develop a new landfill that will accept Schnitzer's ASR; it does not have to be the WGSL specifically. See Tr. 10/18/23 (Garofalo) at 82:21–83:2.

Objections to Schnitzer Proposed FOF ¶ 78

78. KOCA does not oppose the 2022 Application. See Tr. 11/01/23, 27: 17-28:4, 61 :3-6. However, KOCA has indicated its displeasure with the 2022 Application. See Tr. 11/01/23, 11:8-30:10; see also DPP Recommendation, at 8. This displeasure is rooted in: 1) WGSL's effect on public health and safety; 2) past violations arising out of operational deficiencies at WGSL; 3) and continuous delays in the siting process. See Tr. 11/01/23, 9:24-10:9, and 11:8-30:10; see also K266-K281, and K283 to K355.

In addition to the objections previously stated with respect to this finding, KOCA objects to this finding as misstating and indeed minimizing KOCA's position. KOCA does not oppose providing the City a two-year extension; KOCA **does** oppose doing so without additional accountability measures. See KOCA's (1) Motion to Recognize Them as Existing Parties or in the Alternative (2) Petition to Intervene, filed June 9, 2023, at 8.

Further, "displeasure" is an inaccurate and flattening characterization of KOCA's position. As a preliminary matter, whatever KOCA's position, ENV is simply

out of compliance with its permit obligations because it failed to select a site by December 31, 2022. In any event, KOCA's position is that (1) ENV has failed to show reasonable diligence in siting a new landfill heretofore; (2) these proceedings must be viewed in the context of the WGSL's history, including its effects and strain on the community and the City's previous delays and missed deadlines; and (3) there must be additional accountability measures in place to ensure that ENV moves with urgency to meeting its permit obligations in the future.

Objections to Schnitzer Proposed FOF ¶¶ 83-84

83. Mr. Miller, KOCA's expert in solid waste management, testified that siting a landfill is a lengthy process that requires consideration of multiple variables. See Tr. I 1/01/23, 33: 1-38:3, and 41: 11-14. Those considerations include Act 73 and the Board of Water Supply ("BWS") No-Pass Zone. See Tr. 11/01/23, 34:16-38:3.

84. In discussing the BWS No-Pass Zone, Mr. Miller provided that while previous iterations of Landfill Advisory Committee had not strictly adhered to the No-Pass Zone in siting an alternative landfill, the latest Landfill Advisory Committee opted to strictly adhere to the No-Pass Zone and reject all alternative sites that fell within the No-Pass Zone. See Tr. 11/01/23, 35:23-36:11, 36:23-37:5, and 37:23-38:3; see also K264.

85. Mr. Miller testified about the different paths that the City could pursue to site a landfill before the requested 2024 deadline. See Tr. 11/01/23, 39: 15-24.

In addition to the objections previously stated with respect to these findings, KOCA objects to these findings as vague, inaccurate, misleading, and incorrect characterizations of Mr. Miller's testimony. First, it is not clear what "strict adherence" to the no-pass zone means as the no-pass zone is not a law, regulation, or other legal prohibition on landfill siting.

Second, these findings inaccurately characterize Mr. Miller's testimony on the no-pass zone. He testified to what the no-pass zone does, and does not, signify. Specifically, the no-pass line is an approximate boundary that demarcates an area mauka of which generally lacks cap rock or other geological features to protect groundwater. The no-pass zone is conservative in that it is an estimate that does not account for the individual geological features at a particular site, and just because a site falls within the no-pass zone does not necessarily mean it is unsuitable for a landfill. Tr. 11/01/23 (Miller) at 35:2–36:16. Previous site selection efforts utilized a more realistic, approach to groundwater protection that considers individual landfill sites' impact on groundwater in consultation with the BWS. Tr. 10/18/23 (Babcock) at 60:8–61:4; Tr. 11/01/23 (Miller) at 35:17–36:10.

Finally, these findings are misleading because they omit Mr. Miller's testimony that reasonable diligence would require pursuing **all** of the different paths available to the Applicant to meet the December 31, 2024 deadline.

Objections to Schnitzer Proposed FOF ¶ 87

87. Condition No. 1 of the 2019 PC Decision (Condition No. 5 of the 2019 LUC Decision) states:

On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon WGSL reaching its capacity at a future date.

The identification of an alternative landfill site by December 31, 2022 is based on the evidence presented and that, as the Planning Commission discussed in 2017, a five-year timeframe was sufficient time for the Applicant to identify an alternative landfill site before the WGSL nears capacity.

See 2022 Application, at 4, see also OPP Recommendation, at 2.

KOCA objects because it is LUC Condition No. 5 that required ENV to site a new landfill by December 31, 2022, which does not have the language “The identification . . . nears capacity” quoted in this finding. The LUC made other findings regarding the reasonable time required to site a landfill that are operative. *See* LUC 2019 Order at FOF ¶ 406 (“Thus, as of October 22, 2009, the Applicant knew or should have known that it needed to exert reasonable diligence in identifying and developing a new landfill site to replace or supplement the WGSL.”); *id.* ¶ 424 (“Based on the evidence, the LUC finds that a minimum of five to seven years is a reasonable time within which a landfill can be sited and developed if the Applicant proceeds with reasonable diligence.”); *id.* ¶ 425 (“The LUC finds that, as of the date of this Order, the March 2, 2028 closure date imposed below affords more than seven years to site and develop a new landfill and as such, constitutes a reasonable amount of time.”); *id.* ¶ 426 (“The LUC further finds that when calculated from October 22, 2009 (the most recent date upon which the Applicant knew or should have known that it needed to exert reasonable diligence in identifying and developing a new landfill site to replace or supplement the WGSL) to the March 2, 2028 closure date imposed below, the Applicant will have been afforded a minimum of 18 years to site and develop a new landfill.”).

Objections to Schnitzer Proposed FOF ¶ 87

91. At the time of the 2019 PC Decision and LUC Decisions adding the December 31, 2022 deadline to identify an alternative landfill site, the PC and the LUC could not have known that ENV's existing list of proposed landfill sites would be eliminated as a result of Act 73. *See* OPP Recommendation, at 4.

KOCA objects to this finding as vague, misleading, and inaccurate. First, it is unclear what “ENV’s existing list of proposed landfill sites” refers to. Second, Act 73 did not prohibit sites within the no-pass zone and certain federal sites, both of which the ENV has known about and considered in previous site selection efforts.

Objections to Schnitzer Proposed FOF ¶ 93

93. All of the six sites provided to the LAC were within the BWS No Pass Zone. See Tr. 10/18/23, 15:9-16; see also 2022 Application, at 8-9, and OPP Recommendation, at 4-5. The BWS No Pass Zone is a boundary-line delineating the areas directly above the groundwater aquifer with no cap rock from those areas where there is caprock. See Tr. 10/18/23, Tr. 34:19-35:1; see also 2022 Application, at 9. In a 2012 Report of the Mayor's Advisory Committee on Landfill Site Selection (the "2012 MACLSS Report") providing guidance to the City in its evaluation of alternative sites, the committee had "decided it would be more encompassing to include for assessment potential landfill sites located within the [Underground Injection Control] line and No Pass line." Ex. K264 at 1-3.

KOCA objects as this finding misstates what the no-pass line is. The no-pass line is an approximate boundary that demarcates an area mauka of which generally lacks cap rock or other geological features to protect groundwater. The no-pass zone is conservative in that it is an estimate that does not account for the individual geological features at a particular site, and just because a site falls within the no-pass zone does not necessarily mean it is unsuitable for a landfill. Tr. 11/01/23 (Miller) at 35:2–36:16.

Objections to Schnitzer Proposed FOF ¶ 99

99. When the BWS No Pass Zone and Act 73 are applied as restrictions, there were zero potential alternative landfill sites on Oahu. See 2022 Application, at 8.

KOCA objects insofar as this finding suggests that the no-pass line is a legally binding restriction or prohibition.

Objections to Schnitzer Proposed FOF ¶ 105

105. Following the LAC's Final Report and subsequent attempts to get BWS to reconsider, the City did not have adequate time to perform additional evaluations and identify an alternative site before the December 2022 deadline. See Tr. 10/18/23, 16:1-5. Accordingly, the City proceeded to prepare the 2022 Application for a two-year extension of the deadline to name a site. See Tr. 10/18/23, 38:10-14.

KOCA objects to this finding's reference to "subsequent attempts to get BWS to reconsider," as neither the previous findings nor the cited evidence in this finding support the characterization of ENV's communications with BWS after the LAC's report as "attempts to get BWS to reconsider," and this finding is vague and unclear as to what, exactly, ENV's position was as to what BWS should "reconsider."

Objections to Schnitzer Proposed FOF ¶¶ 106-07

106. If the City's requested extension is granted, it intends to use the remaining time to further evaluate and pursue other options for siting an alternative landfill outside of the No Pass Zone. See OPP Recommendation, at 6. As recommended by the LAC's Final Report, the City will: (1) seek a repeal or amendment to Act 73; (2) continue discussions with the U.S. military regarding the acquisition of a site outside the No Pass Zone; and (3) evaluate the feasibility of acquiring (by eminent domain if necessary) residential properties adjacent to potential landfill sites to create sites that would comply with the one-half mile buffer required by Act 73. See Tr. 10/18/23, 15:17-25; see also OPP Recommendation, at 6.

107. The City is currently actively engaging in the recommendations identified by the LAC. See Tr. 10/18/23, 39:3-40:19. The City has made contact with federal governmental agencies about the potential to use their parcels and is evaluating the possibility of eminent domain to create a buffer area that complies with Act 73. See Tr. 10/18/23, 39:7-25. The City has also looked into the potential of modifying the restrictions of Act 73 to examine what sites may become available if Act 73 is

amended. See Tr. 10/18/23, 40: 1-9. However, the City is pursuing the other options first. See Tr. 10/18/23, 40:10-11, 49:21-50:1.

KOCA objects as these findings are inaccurate and unsupported by the record. In fact, Director Babcock testified that (1) only the mayor and personnel from his office are involved in discussions with the federal government, ENV has no involvement, and he has no information on the status or progress of those discussions; (2) the City is **only** considering federal sites at this time; and (3) the City **will not** consider seeking to amend Act 73 unless it is unable to acquire a federal site, notwithstanding the fact that ENV has on knowledge of the timetable on the mayor's discussions with the federal government. Tr. 10/18/23 at 48:5–51:9.

Objections to Schnitzer Proposed FOF ¶¶ 108–116

KOCA objects to these findings pertaining to the Applicant's waste diversion programs and statistics on waste generation and receipt at WGS� as irrelevant. Waste diversion efforts do not have any bearing on the sought site selection deadline extension, and the Applicant remains under an obligation to close the WGS� by March 2, 2028. The permit condition requiring the Applicant to use alternative technologies to provide a comprehensive stream management program is not at issue in these proceedings. Further, the Applicant is under an obligation to site and develop a **new** landfill to accept the waste streams described in these findings.

Objections to Schnitzer Proposed FOF ¶ 117

117. Accordingly, WGS� is critical and necessary to the operations of H-Power and the health and safety of the entire Oahu community. See Tr. 10/18/23, at 18:5-20, and 23:18-25.

KOCA objects to this finding as misleading and inaccurate. KOCA objects to any reference to **WGSL** as important or critical, as opposed to the availability of a landfill in an alternative location. No party disputes that having an operational landfill on O‘ahu is important. But there is no evidence in the record that WGSL, as opposed to simply a landfill, is important. See Tr. 10/18/23 (Garofalo) at 82:21–83:2. WGSL is not inherently critical and necessary, and the City is under an obligation to find a new landfill to replace the WGSL, and to close the WGSL.

Objections to Schnitzer Proposed FOF ¶ 117

119. An extension of two years is necessary because an alternative landfill site was not available on December 31, 2022, the deadline set by Condition No. 1 of the PC Decision and Condition No. 5 of the LUC Decision. See Tr. 08/09/23, 18:10 - 19:4; see also 2022 Application, at 1-2.

KOCA objects as this finding is vague, inaccurate, and misleading. First, it is not clear what it means for an alternative landfill site to be “not available.” Second, an extension is being requested because ENV failed to select a new landfill site by December 31, 2022. The reasons why it failed to do so have been discussed at length in these proceedings. But it is not the “availability” of an alternative site undergirding the Application, but the ENV’s decision not to select a site.

Objections to Schnitzer Proposed FOF ¶¶ 120–25

120. Continued availability of WGSL is required as a permitting requirement for HPOWER. See Tr. 10/18/2023, 17:25 - 18: 11; see also 2022 Application, at 14.

121. Continued availability of WGSL is required because there is material that cannot be combusted, recycled, reused, or shipped. See Tr. 10/18/2023, 17:25 - 18: 11; see also 2022 Application, at 14. Even recycled products themselves create a residual waste product that cannot be recycled. See Tr. 10/18/2023, 16:25 - 17:24. The residual waste product,

including ASR produced at Schnitzer's scrap metal recycling facility, is one of the materials that cannot be combusted, recycled, reused, or shipped. See Tr. 10/18/2023, 17:2-24, and 72:25 - 73:5.

123. WGS� is a critical portion of the City's overall Integrated Solid Waste Management Plan, which looks at all of the factors that make up the solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled and burned for energy. See 2022 Application, at 16.

124. In addition to actively reducing waste volume that is directed to the Landfill, the City is currently actively engaging in the recommendations identified by the LAC. The City has made contact with federal governmental agencies about the potential to use their parcels and is evaluating the possibility of eminent domain to create a buffer area that complies with Act 73. See Tr. 10/18/23, 39:7-25.

125. Schnitzer, the largest private user of WGS�, is actively engaged in finding alternatives for ASR disposal. See Tr. 10/18/2023, 87: 15-23, 88: 1-19, and 96:9-97:4 Those efforts remain ongoing. See Tr. 10/18/2023, 88:1-19, and 96:9-97:4. Until a feasible alternative is identified and implemented, Schnitzer's only practical means to dispose of its ASR waste is as WGS�. See Tr. 10/18/2023, 72:25-73:5, 80: 15-21; see also S-2.

KOCA objects to these findings as misleading and inaccurate. KOCA objects to any reference to WGS� as important or critical, as opposed to the availability of a landfill in an alternative location. No party disputes that having an operational landfill on O'ahu is important. But there is no evidence in the record that WGS�, as opposed to simply a landfill, is important. See Tr. 10/18/23 (Garofalo) at 82:21-83:2. WGS� is not inherently critical and necessary, and the City is under an obligation to find a new landfill to replace the WGS�, and to close the WGS�.

Objections to Schnitzer Proposed FOF ¶ 126

126. Once the City selects a site or sites, it will take around seven years to site and develop a new landfill. See Tr. 10/18/23, 57:11-16; Tr. 11/01/23, 33:1-10; see also 2019 PC and LUC Decision.

KOCA objects to this finding as incorrect, confusing, and in contravention of the LUC's 2019 Order. First, "[o]nce the City selects a site or sites," the City will, of course, no longer have to "site" a new landfill.

Second, the LUC found that five to seven years was sufficient time to site **and** develop a new landfill if the Applicant proceeds with reasonable diligence. 2019 LUC Order at FOF ¶ 424 ("424. Based on the evidence, the LUC finds that a minimum of five to seven years is a reasonable time within which a landfill can be **sited and developed** if the Applicant proceeds with reasonable diligence." (emphasis added)). ENV's testimony in the contested case proceedings underling the 2019 Orders was that only three to four years would be necessary for development. *Id.* ¶ 421 ("Mr. Doyle indicated that it would take 'at least three, probably four years just to get ourselves up and operational on that landfill site.' 2011AP Ex. K85 at 95:6-8, 100:23-25 (3/27/03 Tr. Doyle)").

Further, the implication that the five to seven year time frame should be measured from the date the City selects a site is contrary to the LUC's findings that the City "will have been afforded a minimum of 18 years to site and develop a new landfill" as it "knew or should have known that it needed to exert reasonable diligence in identifying and developing a new landfill site to replace or supplement the WGS�" by no later than October 22, 2009. 2019 LUC Order at FOF ¶ 426.

KOCA objects to any attempt to deviate from the 2019 LUC findings.

Objections to Schnitzer Proposed COL ¶ 6

5. The Planning Commission concludes that the request for modification is necessary and in the best interest of all Oahu

communities given the confluence of factors regarding Act 73 and opposition by BWS that could not have been predicted at the time of issuance of the 2019 PC and LUC Decisions.

KOCA objects to this finding as unsupported by the record. First, the conclusion that constraints on site selection “could not have been predicted at the time of issuance of the 2019 PC and LUC Decisions” ignores that the City has known since at least 2009 of its site selection obligations and since at least 2003 of the no-pass line as a consideration in site selection.

Second, KOCA objects to any reference to what is “in the best interest of all Oahu communities” without any discussion of the **specific** community that is most impacted by the landfill, West O‘ahu. It would be inappropriate to conclude that extension is in the “best interest of all Oahu communities” without addressing the fact that West O‘ahu has borne the burden of the landfill’s harms for over thirty years, been promised that it will not have to do so in perpetuity, and overwhelmingly opposes any attempt to further extend the landfill’s use. The impacts on that specific community support the imposition of further accountability measures on ENV to ensure that it meets its site selection and closure deadlines.

Objections to Schnitzer Proposed COL ¶ 5

6. The Planning Commission concludes that the evidence adduced shows that ENV has been diligent in its attempts to identify alternatives sites for a new landfill, but those efforts have been hindered by circumstances beyond ENV's control.

KOCA objects as this conclusion is not supported by the record. As detailed in KOCA’s proposed FOF, COL, D&O, KOCA, ENV has **not** been reasonably diligent in siting a new landfill, because, inter alia, (1) ENV did not meet its deadlines despite

knowing since 2009 of its site selection obligation; (2) ENV did not move urgently after the 2019 LUC Order; and (3) ENV has not explored all possible solutions post-Act 73. See KOCA Proposed FOF ¶¶ 35–42, 48–64.

Objections to Schnitzer Proposed COL ¶ 7

7. Act 73, which was signed into law after the 2019 PC and LUC Decisions, placed additional legal restrictions on potential landfill sites. Adverse impacts suffered by local communities from occurrences such as the 2011 KOCA incident underscore the policy considerations of Act 73. The application of Act 73 to the shortlist of proposed alternative sites identified by ENV left ENV with just six sites that were all located above the No Pass Zone identified by BWS.

KOCA objects to this conclusion on several grounds. First, reference to the “2011 KOCA incident” minimizes the severity and scope of the 2011 spill, which impacted the **entire** Westside, with garbage spewing onto beaches all the way from Pokai Bay to White Plans Beach. The community was forced to clean up the dangerous waste itself. Tr. 11/01/23 (Williams) at 20:7–22:22; 2019 LUC Order at FOF ¶¶ 336–44. The spill resulted in civil and criminal penalties for the City and WGSL’s operator. Tr. 11/01/23 (Williams) at 23:13–18. The community continues to fear such a disaster reoccurring. *Id.* at 23:4–8.

Second, this conclusion ignores the uncontested testimony that under Act 73, WGSL could not be sited where it is today because it is too close to residential properties. Tr. 11/01/23 (Williams) at 26:11–17. As Mr. Williams testified, West O’ahu deserves the same protections as the rest of the island under Act 73, and it should not be made to bear the brunt of the landfill’s harms in perpetuity.

KOCA objects to any attempt to cast the 2011 disaster and its significant impacts on the community as support for the ongoing operation of WGSJ and further delays to siting a new landfill elsewhere, as this proposed COL appears to do.

Objections to Schnitzer Proposed COL ¶ 10

10. While Mr. Miller criticizes the City for not trying to change BWS' mind, the evidence shows that City, including the Mayor himself, did just that. On October 24, 2022, ENV along with Mayor Blangiardi and members of his administration, followed up with BWS to convey to BWS the urgency and significance of the landfill siting process. Between November 3, 2022, and November 16, 2022, ENV and the BWS corresponded regarding the BOWS' [sic] official position on the six proposed alternative sites evaluated by the LAC. BWS reiterated their position from the December 21, 2021 meeting and made clear that BWS would not approve of any of the six proposed landfill sites that are located above the BWS No Pass Zone. Therefore, the Planning Commission concludes that contrary to Mr. Miller's assertions, ENV performed its due diligence and made a concerted effort to site a landfill in accordance with the limitations imposed by Act 73, and work with the BWS with respect to the No Pass Zone.

KOCA objects to this finding on several grounds. First, this COL mischaracterizes Mr. Miller's testimony. Nowhere in Mr. Miller's testimony did he "criticize[] the City for not trying to change BWS' mind" nor is there any testimony that could be characterized as such. Schnitzer cites none. Instead, Mr. Miller testified to what the no-pass line means in that it is a conservative estimate and observed that it is a limitation that previous site selection committees had not imposed on themselves in the same manner. Tr. 11/01/23 (Miller) at 26:3-16.

Second, the COL goes on to discuss "evidence" that purportedly shows that the City "tri[ed] to change the BWS' mind," but there are no citations to any evidence in

the record undergirding this proposition. There are also no proposed FOFs that would support the contention that the City attempted to “change the BWS’ mind.”

Third, the implication that the BWS’ “mind” had to be “changed” implies that the BWS has legal authority over whether a landfill is cited, a proposition for which no authority is cited.

Finally, as KOCA set forth in its findings, the City has **not** performed its site selection obligation with “reasonable diligence” as been required since at least 2009.

Objections to Schnitzer Proposed COL ¶ 16-21

16. The Planning Commission concludes that this request is not contrary to the objectives sought to be accomplished by the State Land Use Law and Regulations to preserve and protect lands for its best use and to encourage uses for which lands are best suited.

17. The Planning Commission concludes that the extension of the desired use would not adversely affect surrounding property. The use has already been established and approved with conditions, in part, addressing impacts on surrounding property. The current request merely extends the deadline to identify an alternative landfill site, and does not extend the life of the WGSL.

18. The Planning Commission concludes that the extension would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, and schools improvements and police and fire protection. During the public comment period, agencies providing such services offered no objections to the proposal to extend the siting deadline.

19. The Planning Commission concludes that approval is warranted because the delay was caused by circumstances beyond ENV's control that arose after this Commission's 2019 Order. Unforeseen circumstances and extraordinary conditions resulting from the passage of Act 73 in 2020 and the 2021 Red Hill Fuel Leak have severely restricted the areas to site a potential new landfill. Accordingly, the Planning Commission concludes that providing ENV with more time to pursue an alternative site is consistent with the public policy to provide basic government services and to protect the public health.

20. Approval is further warranted because no parties have adduced any evidence or testimony that extension should not be granted.

21. The requested two-year extension does not alter previous findings that the WGSL is consistent with the Hawaii State Plan, the Oahu General Plan, and Ewa Development Plan. Therefore, the requested extension to December 31, 2024 to identify an alternative landfill site is consistent with State and local plans, programs, and local zoning requirements.

KOCA objects insofar as whether or not the landfill is an “unusual and reasonable use,” as these are the factors Schnitzer appears to be addressing in these COL, is not at issue in these proceedings. These proceedings concern the modification of a **condition** to an already-issued special use permit.

To the extent that the Commission determines that it should issue findings or conclusions concerning whether these guidelines should be analyzed, KOCA further objects to the proposed COL as unsupported by the evidence as follows:

First, COL ¶ 17 is inconsistent with the LUC’s FOF ¶ 430 in the 2019 Order, which found: “Based on the evidence in the record and the findings set forth above, the LUC finds that the expansion of the WGSL will not adversely affect surrounding properties as long as (1) it is operated in accordance *with the conditions imposed below* and government approvals and requirements; and (2) mitigation measures are implemented in accordance with the Applicant’s representations in the 2008 FEIS.” (Emphasis added). Compliance with the permit conditions – including the closure and site selection deadline – is a necessary component of minimizing adverse impacts to surrounding properties. ENV did not meet the site selection deadline and thus is out of compliance with its permit conditions. As detailed in KOCA’s Proposed FOF, COL, D&O and in the testimony of Ken Williams, the City’s long history of promised

closure, followed by delays, adversely affects the WGS�'s neighbors. Thus, more oversight is needed.

Second, COL ¶ 19 is unsupported by the evidence, and KOCA objects to any reference to "circumstances beyond ENV's control" when those circumstances occurred in 2020 and thereafter. ENV has known about its obligation to site a new landfill since at least October 22, 2009. 2019 LUC Order at FOF ¶ 426. As detailed in KOCA's Proposed FOF, COL, D&O, the City has failed to act with reasonable diligence both before and after Act 73, and therefore more oversight must be exercised over the City's site selection progress.

Finally, KOCA objects to the extent that any discussion of the "unusual and reasonable" use test and factors should including findings and/or conclusions that additional oversight of ENV's site selection progress is needed to prevent further adverse effects to surrounding properties and that additional oversight is needed because of the changed conditions, i.e., ENV's failure to meet its permit conditions.

Objections to Schnitzer Proposed D&O

1. Condition 1 of the 2019 PC Decision shall be amended to read as follows:

On December 31, 2024, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure date for the WGS� because the WGS� shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2024 but is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace WGS� when it reaches capacity at a future date. The identification of an alternative landfill site by December 31, 2024 is based on the evidence presented. Upon identification of the

alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

2. The Planning Commission also recommends that Condition No. 5 of the 2019 LUC Condition be amended to correspond with the foregoing proposed amendment to Condition No. 1 of the 2019 PC Condition. It is recommended that Condition No. 5 of 2019 LUC Decision be amended as follows:

By no later than December 31, 2024, the Applicant shall identify an alternative landfill site that may be used upon closure of WGSL. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

3. Condition 2 of the 2019 PC Decision shall be amended to read as follows:

The Applicant shall provide quarterly, in-person reports to the Planning Commission on the status of the efforts to identify and develop a new landfill site on O'ahu, The Applicant shall provide semi-annual reports to the Planning Commission and the LUC regarding (a) the WGSL's operations, including gas monitoring, (b) the ENV's compliance with the conditions imposed herein, (c) the landfill's compliance with its Solid Waste Management Permit issued by the Department of Health and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the landfill, (d) the City's efforts to use alternative technologies, (e) the extent to which waste is being diverted from the landfill and (f) 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.

4. The Planning Commission also recommends that Condition No. 7 of the 2019 LUC Condition be amended to correspond with the foregoing proposed amendment to Condition No. 2 of the 2019 PC Condition. It is recommended that Condition No. 7 of 2019 LUC Decision be amended as follows:

The Applicant shall provide quarterly, in-person reports to the Planning Commission on the status of the efforts to identify and develop a new landfill site on O'ahu. The Applicant shall provide semi-annual reports to the Planning Commission and the LUC

regarding (a) the WGS�'s operations, including gas monitoring, (b) the ENV's compliance with the conditions imposed herein, (c) the landfill's compliance with its Solid Waste Management Permit issued by the Department of Health and all applicable federal and state statutes, rules and regulations, including any notice of violation and enforcement actions regarding the landfill, (d) the City's efforts to use alternative technologies, (e) the extent to which waste is being diverted from the landfill and (f) 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.

5. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

6. Enforcement of the conditions of the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause by 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

First, KOCA objects to any mention of WGS� being used until it reaches capacity, as that was rejected by the LUC, which required WGS� to close on March 2, 2028.

Second, KOCA objects to further amendments to existing conditions beyond the site selection deadline condition as needlessly confusing, as the quarterly reporting obligation proposed in these proceedings is separate from the pre-existing semi-annual reporting obligation. The reporting conditions should be decoupled for clarity and a new condition simply added.

Third, KOCA objects to the extent that the proposed conditions do not provide enough guidance as to what ENV must be prepared to address in its quarterly reports. As stated in its Proposed D&O, KOCA urges the Commission to adopt the

following condition, which more specifically sets out what must be discussed at each quarterly report in order to increase ENV's accountability: "The Applicant shall report quarterly to the Planning Commission, in-person, to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community."

DATED: Honolulu, Hawai'i, January 9, 2024.

CADES SCHUTTE
A Limited Liability Law Partnership



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Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAI'I

In the Matter of the Application of
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

Application to Modify SUP No.
2008/SUP-2 (SP09-403) by Modifying (1)
Condition No. 1 of the Planning
Commission's Findings of Fact,
Conclusions of Law, and Decision and
Order, dated June 10, 2019, and (2)
Condition No. 5 of the LUC's Findings of
Fact, Conclusions of Law, and Decision
and Order Approving with Modifications
the City and County of Honolulu
Planning Commission's
Recommendation to Approve Special Use
Permit, certified on November 1, 2019,

CERTIFICATE OF SERVICE

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

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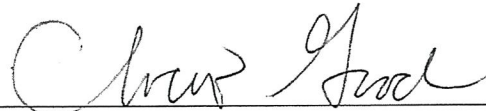
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DATED: Honolulu, Hawai'i, January 9, 2024.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase", is written above a horizontal line.

CALVERT G. CHIPCHASE
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