

CERTIFIED MAIL

April 18, 1985

Mr. Sidney Fuke  
Planning Consultant  
100 Pauahi Street, Suite 212  
Hilo, HI 96720

Dear Mr. Fuke:

Special Management Area Use Permit Application  
Applicant: Hilo Coast Processing Company  
Tax Map Key: 2-8-07:Portion of 53

The Planning Commission at its duly held public hearing on April 9, 1985, voted to approve the application, Special Management Area Use Permit No. 85-2, to allow the establishment of coal storage area and a coal burning energy plant and related improvements at Pepeekeo, South Hilo, Hawaii.

Approval of this request is based on the following:

The purpose of Chapter 205-A, Hawaii Revised Statutes and Rule No. 9, Special Management Area Rules and Regulations of the County of Hawaii is to preserve, protect, and where possible, to restore the natural resources of the coastal zone area. As a result, special controls on development within the area along the shoreline are necessary to avoid permanent loss of valuable resources and the foreclose of management options.

One of the criteria for approving a development within the Special Management Area (SMA) is that the development is consistent with the General Plan and Zoning Code and other applicable ordinances. As presented earlier, the request does conform to the General Plan and Zoning Code which designate the subject area for industrial uses.

The proposed development shall meet Federal Environmental Protection Agency and State Board of Health air and water quality standards in order to substantially minimize adverse environmental or ecological effects. The petitioner will also be required, through conditions of approval, to obtain and

APR 19 1985

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comply with all applicable state and federal permits and requirements dealing with air and water pollution control.

The property is not known to contain any unique ecological systems, nor provide habitats for any endangered plant or animal species. Further, there are no archaeological features of importance found on the property. It should be noted that the subject property has long been used as a sugar processing and electrical generation facility.

The proposed development is not expected to have any significant adverse effects on the coastal resources, nor adversely affect any existing access to the shoreline. The proposed improvements will be situated approximately 200 feet at its nearest point from the shoreline. Further, any potential adverse effects on the off-shore water quality will be mitigated through compliance with existing regulations.

Based on the above, it is determined that the approval of the proposed project will not result in the loss of valuable natural, cultural, or recreational resources of the shoreline and coastal area.

The proposed development is not expected to impede the mauka-makai view plane from the Hawaii Belt Road since the proposed improvements will be to an existing structure. The existing sugar mill complex is barely visible from the highway. Therefore, the visual impact is expected to be negligible.

All essential utilities and services, including a private water system, are or will be made available to the subject property. In this regard, the proposed development will complement the objectives of Rule No. 9, Rules and Regulations of the Special Management Area, and the Land Use and Industrial elements of the General Plan which encourage development, such as proposed, in areas serviced by existing infrastructures.

Based on the above, it is determined that the proposed development will not have any substantial adverse impacts on the surrounding area nor will its approval be contrary to the objectives and policies of Chapter 205-A, Hawaii Revised Statutes, or with the intent of Rule No. 9.

Approval of this Special Management Area Use Permit request is subject to the following conditions:

1. The petitioner, successors or its assigns shall comply with all of the stated conditions of approval.

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2. Plans for the proposed improvements shall be submitted to the Planning Director for Plan Approval within one year from the effective date of the Special Management Area Use Permit. All applicable federal and state permits required for air and water pollution control must be obtained and copies submitted to the Planning Department prior to the issuance of Final Plan Approval.
3. Construction shall commence within one year from the date of receipt of Final Plan Approval and be completed within two years thereafter.
4. The petitioner shall be restricted to using only washed, low-sulfur Class B sub-bituminous coal or its equivalent. Substitutions will not be permitted without the prior approval of the State Department of Health and the County Planning Department.
5. Drainage system(s) in accordance with the requirements of the Department of Public Works and State Department of Health shall be installed.
6. Operations shall comply with all applicable federal and state health requirements related to air quality, water quality and solid waste disposal as well as all other applicable rules, regulations, and requirements. Copies of compliance reports and related correspondences shall be submitted to the Planning Department concurrent with their submittal to and receipt from the applicable Federal and State agencies.
7. The petitioner shall submit annual reports to the Planning Director, prior to the anniversary date of the SMA permit, providing an update on all aspects of the coal burning operation. Such report shall include, but not necessarily be limited to:
  - a) the volume of coal utilized during the reporting period;
  - b) the ratio of coal utilized in relation to the other fuel sources;
  - c) projected volume of coal to be utilized in the next reporting period;
  - d) a summarization of the petitioners performance relative to all applicable federal and state health

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requirements related to air quality, water quality and solid waste disposal;

- e) identification of any significant changes to the air and water quality abatement system and explanation of the reason for the changes;
- f) identification of any divergence from the proposed operation and maintenance procedures; and,
- g) any other information that may be considered appropriate.

8. Should the Planning Department determine that any of the foregoing conditions have not been met or substantially complied with in a timely fashion, the Special Management Area Use Permit shall be void.

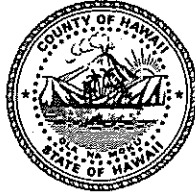
Please feel free to contact the Planning Department if there are any questions on this matter.

Sincerely,

  
Donald Thompson  
Chairman, Planning Commission

cc: Edward Alan Kennett  
Larry Iwami  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
DPED, CZM Program w/background  
bcc: Plan Approval Section

Stephen K. Yamashiro  
Mayor



## County of Hawaii

### PLANNING COMMISSION

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 Fax (808) 961-9615

#### CERTIFIED MAIL

February 3, 1995

Mr. Richard B. Cushnie  
Hilo Coast Processing Co.  
PO Box 18  
Pepeekeo, HI 96783

Dear Mr. Cushnie:

Special Management Area Use Permit No. 221  
Applicant: Hilo Coast Processing Co.  
Request: Amendment to Allow an Increase in Height  
of Flu Stack at HCPC Power Plant  
Tax Map Key: 2-8-7:53

Note new TMK: 2-8-008:104

The Planning Commission at its duly held public hearing on January 26, 1995, voted to approve the above amendment to allow an increase in height of the flu stack at HCPC power plant. The project site is located at the Hilo Coast Processing Sugar Mill, Makahanaloa, South Hilo, Hawaii.

Approval of this request is based on the following:

The granting of this request would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended and Rule 9, Special Management Area Rules and Regulations of the County of Hawaii is to preserve, protect, and where possible, to restore the natural resources of the coastal zone area. Therefore, special controls on development within an area within the SMA are necessary to avoid permanent loss of valuable resources and the foreclosure of management options.

One of the criteria for approving the proposed development within the SMA is that it is consistent with the General Plan

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Mr. Richard B. Cushnie  
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and Zoning Code. The project site is situated in the General Industrial (MG-5a) District which allows an electrical generating plant.

Another criteria in reviewing an SMA Use Permit Application is that "The development will not have any significant adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each of which taken in itself might not have a substantial adverse ecological effects." The electricity generated at this power plant is essential for continual electrical service to the entire County of Hawaii. In addition to compelling public interest for the continued production of electricity, the technical documents on file demonstrates that there will be compliance with the Clean Air Act.

A third finding is that "the development is consistent with the objectives and policies as provided by Chapter 205A, HRS, and the Special Management Area guidelines." More specifically the recreational, historic, scenic, coastal environmental, and economic aspects of the project need to be considered. The visual impacts of project will be limited to the height of the stack and the emissions from the stack. However, the plant is located more than one mile makai of the Hawaii Belt Road and 8 miles from downtown Hilo.

According to Section 9-7(C) of the Planning Commission's Rules, all development permitted in the Special Management Area shall be subject to reasonable terms and conditions as necessary in order to ensure that:

1. Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles;
2. Adequate and properly located public recreation areas and wildlife preserves are reserved;
3. Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon Special Management Area resources;
4. Alterations to existing land forms and vegetation, except crops, and construction of structures shall cause minimum

Mr. Richard B. Cushnie  
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adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake;

5. Adverse environmental or ecological impacts are minimized to the extent practicable; and
6. The proposed development is consistent with the goals, policies, and standards of the General Plan.

Based on the above findings, the proposed development will not have substantial adverse impacts on the surrounding area, nor will its approval be contrary to the objectives and policies of Chapter 205A, HRS, relating to Coastal Management and Rule No. 9 of the Planning Commission relating to the Special Management Area.

Approval of this request is subject to the following conditions:

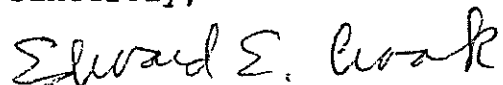
1. The applicant, its successors or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicant, its successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for the property damage, personal injury or death arising out of any act or omission of the applicant, its successors or assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of the permit.
3. The applicant, its successors or assigns shall secure approval of proposed increase in stack height within one year from the effective date of this amendment to Special Management Area Permit No. 221.
4. All conditions of SMA Use Permit No. 221 issued by the Planning Commission on April 18, 1985 shall to continue to apply to this amendment.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Mr. Richard B. Cushnie  
February 3, 1995  
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Should you have any questions, please feel free to contact Connie Kiriu or Daryn Arai of the Planning Department at 961-8288.

Sincerely,



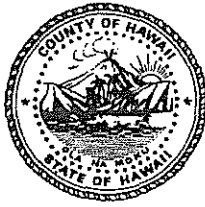
Edward E. Crook, Vice-Chairman  
Planning Commission

CRK:smn

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xc: Honorable Stephen K. Yamashiro, Mayor  
Planning Director  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division-Hilo  
State Land Use Commission  
State Department of Health  
Plan Approval Section





## County of Hawai'i

### WINDWARD PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

JUN 07 2011

Mr. Richard McQuain, President  
Hū Honua Bioenergy, LLC  
201 Merchant Street, Suite 1830  
Honolulu, HI 96813

Dear Mr. McQuain:

Special Management Area Use Permit (SMA 221)

Request: Amend SMA No. 221 to Allow Facility Improvements and Change in  
Fuel Source From Coal to Biomass

Applicant: Hū Honua Bioenergy, LLC

Tax Map Key: 2-8-008:104 (formerly 2-8-007:portion of 053)

The Windward Planning Commission at its duly held public hearing on May 4, 2011, voted to approve the Hearing Officer's Proposed Findings of Fact; Conclusions of Law and Decision and Order with an amendment to include an additional Finding of Fact, and to deny Intervenors' proposed Findings of Fact. Special Management Area (SMA) Use Permit No. 221 originally allowed the establishment of a coal storage area and a coal burning energy plant and related improvements. The amendment request is to allow a change in fuel source from coal to biomass, to upgrade the existing facility, and to construct support facilities and infrastructure at the former Pepe'ekeō Power Plant, Makahanaloa, South Hilo, Hawai'i.

Attached is the Windward Planning Commission's Findings of Fact; Conclusions of Law and Decision and Order.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Mr. Richard McQuain, President  
Hū Honua Bioenergy, LLC  
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Should you have any questions, please contact Daryn Arai of the Planning Department at 961-8288, Ext. No. 8142.

Sincerely,



Zendo Kern, Chairman  
Windward Planning Commission

Enclosure

cc/enc: Steven D. Strauss, Esq.  
Jodi Yamamoto, Esq.  
Amy Self, Esq.  
Julie Mecklenburg, Esq.  
Mr. Robert Ferazzi  
Mr. Gary Faagau  
Mr. Bruce A. MacDuckston  
Mr. Stephen Meek  
Mrs. Elaine Munro  
Mr. and Mrs. Stephen E. Kempton  
Department of Public Works  
Department of Water Supply  
State Department of Health  
County Real Property Tax Division  
Department of Land and Natural Resources/HPD  
DOT-Highways, Honolulu  
Ms. April Suprenant, Long Range Division  
Zoning Inspector - Hilo  
Plan Approval Section  
Mr. Gilbert Bailado /

BEFORE THE COUNTY OF HAWAII

PLANNING COMMISSION

Application of

HU HONUA BIOENERGY LLC

for Amendment to Special Management  
Area Permit No. 221 to Allow Change in Fuel  
Source from Coal to Biomass, Pepe'ekeō  
Ahupua'a, South Hilo District, Hawai'i,  
Tax Map Key No.: (3) 2-8-008:104

Special Management Area Use Permit 221

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION AND ORDER;  
CERTIFICATE OF SERVICE

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## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

### **I. INTRODUCTION:**

This matter comes before the Windward Planning Commission of the County of Hawai'i (the "Planning Commission"), pursuant to Chapter 205A of the Hawai'i Revised Statutes ("HRS") and Rule 9 of the Rules of Practice and Procedure of the Planning Commission, upon the application of Hu Honua Bioenergy LLC ("Hu Honua") to amend its existing Special Management Area Use Permit No. 221. Hu Honua's application was the subject of a contested case hearing in Hilo, Hawai'i (the "Contested Case Hearing") conducted by Robert J. Crudele (the "Hearing Officer"), the hearing officer appointed by the Planning Commission as permitted by Rule 4.4(a) of the Rules and Procedures of the Planning Commission. The Contested Case Hearing before the Hearing Officer commenced October 18, 2010, and was closed on February 25, 2011. The Hearing Officer submitted his Recommended Findings of Fact, Conclusions of Law, and Decision and Order to the Planning Commission on March 21, 2011. The Planning Commission considered the complete case record and the Hearing Officer's recommendations at its hearings on April 7, 2011 and May 4, 2011 and made the determinations and decisions set forth herein at the close of the May 4, 2011 hearing on the matter.

### **II. FINDINGS OF FACT:**

Having reviewed and examined the record in this case and having determined that the Hearing Officer did carefully consider all testimony, exhibits, and arguments presented at the hearing of this matter and did take into account the credibility and accuracy of the evidence, the Planning Commission makes the following findings of fact by a preponderance of the evidence:

#### **A. Background**

1. This matter involves Hu Honua's application (the "Amendment Application") to amend Hu Honua's valid, existing Special Management Area Use Permit No. 221 (the "Existing SMA Permit"), which permits the operation of a coal-burning power plant (the "Power Plant") at 28-283 Sugar Mill Road, in Pepe'ekeō, Hawai'i (TMK No. (3) 2-2-2:104) (the "Plant Site" or the "Subject Property"). *Direct Testimony and Affidavit of BJ Leithead Todd dated September 23, 2010, Exhibit A-79 ("Leithead Todd Affidavit")* ¶ 2; *Direct Testimony and Affidavit of Richard*

K. McQuain dated October 2, 2010, Exhibit A-80 ("McQuain Affidavit") ¶ 4; Direct Testimony and Affidavit of Dennis Poma dated October 1, 2010, Exhibit A-81 (the "Poma Affidavit") at ¶4.

2. The Subject Property, which is 25.57 acres, is owned by Maukaloa Farms, LLC and leased by Maukaloa Farms, LLC to Hu Honua. *Amendment Application, Exhibit A-8, Summary Sheet prior to p. 1.*

3. Through its Amendment Application, Hu Honua seeks to upgrade the Power Plant and to convert it into a renewable electrical power generation facility fueled by locally grown biomass, to allow several upgrades and additions to existing structures, and to construct support facilities and infrastructure within the Special Management Area ("SMA"). *Planning Department Recommendation Regarding Amendment to SMA Application, Exhibit A-10 (the "Planning Department Recommendation")*, p. 1.

4. The Subject Property constitutes part of the former Pepe'ekeō Sugar Mill site, which was in operation since the 1800s. It is also the site of the former Pepe'ekeō Power Plant, which was in operation from the 1980s until late 2004. The Subject Property has been used for industrial purposes for over 100 years and is currently zoned to permit public and private utility facilities, including power plants. *Planning Department Recommendation, Exhibit A-10, p. 3; Leithead Todd Affidavit, Exhibit A-79, p. 4.*

5. The Planning Director recommends approval of the Amendment Application. *Planning Department Recommendation, Exhibit A-10, p. 1; Leithead Todd Affidavit, Exhibit A-79, p. 2.*

**B. The Parties**

6. Petitions to intervene in the Contested Case Hearing were filed by the Association of Owners at the Orchards at Pepeekeo (the "Orchards Association"), Mr. and Mrs. Michael De Coito, Tony Delellis, Raquel Dow, Mr. Gary Faagau and Mr. Stefan Hagen, Mr. and Mrs. Robert Ferazzi, Mrs. Rosemary Sylvester Gonzalez, The Hilo Project, LLC (c/o Gary Olimpia, Managing Member), Mr. and Mrs. Stephen Kempton, Stephen Meek, Elaine Munro, Susan Munro and Kerry Glass, Edward Pabst, Michael Pearing, Yu Yok Pearing, Pepeekeo Point Gardens Association (the "Pepeekeo Gardens Association"), Pepeekeo Point Shoreline Association (the "Pepeekeo Point Association"), Bridget Rapoza, Marcus Spallek, Margaret Spallek, and Marcella St. Ambrogio. *Planning Department Letters Acknowledging Receipt of Petitions to Intervene, Exhibits A-40 to A-60.* The Windward Planning Commission of the

County of Hawai'i (the "Planning Commission") granted these petitions to intervene at its meeting on May 7, 2010, based on proximity. *Transcript of Planning Commission Meeting on May 7, 2010, pp. 27-40*. Michael and Yu Yok Pearing, husband and wife, consolidated their petition such that they jointly constitute one intervenor. *Transcript of Prehearing Conference on June 29, 2010 (the "Prehearing Conference Transcript")*, 81:11-16.

7. Steven Strauss, as counsel, represents the following intervenors (the "Strauss Intervenors"): (1) Tony Delellis, (2) Raquel Dow, (3) Mr. Gary Faagau and Mr. Stefan Hagen (who constitute a single intervenor), (4) Mr. and Mrs. Robert Ferazzi (who constitute a single intervenor), (5) Mrs. Rosemary Sylvester Gonzalez, (6) The Hilo Project, LLC (c/o Gary Olimpia, Managing Member), (7) Susan Munro and Kerry Glass (who constitute a single intervenor), (8) Edward Pabst, (9) Mr. and Mrs. Pearing (who constitute a single intervenor), (10) Bridget Rapoza, (11) Marcus Spallek, (12) Margaret Spallek, and (13) Marcella St. Ambrogio. *Prehearing Conference Transcript, 16:9-13; Letter from Steven Strauss to Robert Crudele dated June 29, 2010*. While Mr. Strauss initially represented Mr. and Mrs. Michael De Coito, the De Coitos withdrew as a party, did not participate in the Contested Case Hearing, and are no longer an intervenor in this case.

8. Gary Faagau represents the Orchards Association *pro se*, Robert Ferazzi represents Pepekeo Gardens Association *pro se*, and Bruce MacDuckston represents Pepekeo Point Association *pro se*. *Prehearing Conference Transcript, 16:15-22, 17:15-18:3*. Elaine Munro represents herself *pro se*, Mr. and Mrs. Stephen Kempton represent themselves *pro se*, and Stephen Meek represents himself *pro se*. *Prehearing Conference Transcript, 16:24-17:14*.

9. Claudia Rohr filed a petition to intervene in the Contested Case Hearing. The Planning Commission denied Ms. Rohr's petition to intervene at its meeting on August 12, 2010, noting that Ms. Rohr's petition was untimely, that it failed to show how her interest was clearly distinguishable from that of the general public, and that the Contested Case Hearing process had already commenced and progressed. *Transcript of Planning Commission Hearing on August 12, 2010, pp. 18-19*.

10. Hu Honua, as applicant, is a party to the Contested Case pursuant to Rule 4-6(a) of the Hawai'i Planning Commission Rules of Practice and Procedure (the "Planning Commission Rules").

11. Ms. Leithead Todd, as the Planning Director, is a party to the Contested Case pursuant to Rule 4-6(a) of the Planning Commission Rules.

12. The matter came on for Contested Case Hearing before the Planning Commission's duly-appointed Hearing Officer, Robert J. Crudele, Esq. (the "Hearing Officer"), from October 18 through 22, 2010, and concluded on October 27, 2010. At the Contested Case Hearing, Applicant Hu Honua was represented by its counsel, Jodi Shin Yamamoto and David E. Austin; Ms. Leithead Todd was represented by her counsel, Amy G. Self, Deputy Corporation Counsel; Mr. Strauss and Evan Silberstein represented the thirteen (13) intervenors noted above; Mr. Faagau represented the Orchards Association *pro se*; Mr. Ferazzi represented Pepeekeo Gardens Association *pro se*; Mr. MacDuckston represented Pepeekeo Point Association *pro se*; and Elaine Munro represented herself *pro se*. Contested Case *Hearing Transcript (the "Hearing Transcript")*, 4:18-5:18. Neither the Kemptons nor Mr. Meek participated in the Contested Case Hearing.

**C. The Proposed Upgrades to the Power Plant**

13. The Power Plant is located on approximately 26 acres of land which is zoned MG-5a (General Industrial) and A-20a (Agricultural). Upgrading the Power Plant will involve upgrading the existing boiler and air emissions equipment, improving existing structures, and constructing supporting facilities and infrastructure. The Power Plant, existing structures and proposed new structures are all located within the area of the property zoned General Industrial. *Amendment Application, Exhibit A-8, Summary Sheet prior to p. 1 and Figure 9.*

14. The primary reason for the Amendment Application is to allow the use of renewable biomass fuel instead of the previously permitted coal, as the Existing SMA Permit does not allow for fuel source substitutions without an amendment to the permit. *Planning Department Recommendation, Exhibit A-10, p. 1; Leithead Todd Affidavit, Exhibit A-79, p. 2.*



15. The upgrades, additions, and support facilities and infrastructure will include the following:
- a. Upgrading the boiler and boiler building: significant renovation will be done to accommodate biomass and increase combustion efficiency. The boiler building will be enclosed with acoustic siding, which will reduce noise and improve aesthetics.
  - b. Upgrading air pollution control equipment: the existing air pollution equipment will be replaced with state of the art equipment known as an “electrostatic precipitator” and a “selective non-catalytic reduction system”. The height of the exhaust gas stack will be reduced from 190 feet to 140 feet.
  - c. Constructing a chip storage building, which will be 13,430 square feet, with a height of 61 feet, to provide dry storage for wood chips.
  - d. Constructing a chip processing building, which will be 8,400 square feet with a height of 37 feet, to process wood logs into chips.
  - e. Adding wood transport conveyors, which will be approximately 110 feet long, to transport chips from the chip storage building to the boiler.
  - f. Installing a concrete pad and step up transformer to improve the interconnection between the Power Plant and Hawai'i Electric Light Company's (“HELCO”) grid. *Planning Department Recommendation, Exhibit A-10, p. 2; Leithead Todd Affidavit, Exhibit A-79, pp. 3-4.*

**D. Existing Infrastructure and Utilities**

16. Access to the Subject Property is from Sugar Mill Road, which is a private subdivision road, over which Hu Honua has an existing easement. Additionally, primary access for fuel delivery from Sugar Mill Road to the Subject Property, over which Hu Honua has existing easement rights, will be from the old cane haul road. *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8; Hearing Transcript, 1224:19-1225:2.*

17. The Subject Property is located within an area adequately served with essential services and facilities such as water, transportation systems and other utilities. *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8.*

18. County water is available to the site. Three brackish wells will supply up to 21.6 million gallons per day of non-contact cooling water for the steam condenser. *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8.* Additionally, Hu Honua has the right to utilize two non-potable fresh water wells mauka of the Plant Site for relatively small quantities of boiler make-up water. *McQuain Affidavit, Exhibit A-80, ¶ 20.*

19. There is an existing cesspool currently servicing the facility. The cesspool system will be replaced with a licensed septic system approved by the DOH and, thus, there should be no significant adverse impacts on the environmental or ecological resources of the area from wastewater. *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8-9.*

20. Electricity and telephone services are available to the Plant Site. *Planning Department Recommendation, Exhibit A-10, p. 8; Leithead Todd Affidavit, Exhibit A-79, p. 9.* Emergency services, such as police, fire and medical services, are located in Hilo, Hawai'i, which is within reasonable proximity to the Plant Site. *Planning Department Recommendation, Exhibit A-10, p. 8; Leithead Todd Affidavit, Exhibit A-79, p. 9.*

**E. Procedural Matters**

21. On October 18, 2010, the initial day of the Contested Case Hearing, the Strauss Intervenors submitted a Request to Consider Applicant's and County of Hawai'i Planning Department's Compliance with Environmental Review Requirements Before Other Issues. Hu Honua and the Planning Director orally opposed this request. The Hearing Officer took the request under advisement and the Contested Case Hearing on the issues proceeded as scheduled. *Hearing Transcript, 34:15-35:9.*

22. During the Contested Case Hearing, the Hearing Officer ruled that he would take administrative notice of the laws and regulations cited in the parties' briefs. *Hearing Transcript, 1153:8-13.*

**F. SMA Use Permit Requirements**

23. A portion of the Plant Site is located within the SMA, which requires the approval of a SMA permit for development within the SMA. The Existing SMA Permit was approved on April 9, 1985, to allow the establishment of a coal burning power plant, a coal storage area and

related improvements. *Planning Department Recommendation, Exhibit A-10, p. 3; Leithead Todd Affidavit, Exhibit A-79, p. 4.*

24. The proposed Amendment Application requests a change in fuel source from coal to biomass and related improvements, which requires an amendment to the Existing SMA Permit. *Planning Department Recommendation, Exhibit A-10, p. 3; Leithead Todd Affidavit, Exhibit A-79, p. 4.*

25. The grounds for approving development within the SMA are based on HRS Chapter 205A-26(2) and Rule 9-11(e) of the Planning Commission Rules. *Planning Department Recommendation, Exhibit A-10, p. 3; Leithead Todd Affidavit, Exhibit A-79, p. 4.*

26. In accordance with Hawai'i Revised Statutes, Section 91-10(5), Hu Honua has demonstrated by a preponderance of the evidence that its Amendment Application meets the criteria articulated in Hawai'i Revised Statutes, Chapter 205A, and Planning Commission Rule 9.

27. Hu Honua's project and proposed upgrades to the Power Plant will comply with the requirements of HRS Chapter 205A-26(2) and Rule 9-11(e) of the Planning Commission Rules. *Planning Department Recommendation, Exhibit A-10, pp. 3-14; Leithead Todd Affidavit, Exhibit A-79, pp. 4-15.*

28. Rule 9-11(e) states that a proposed development may be permitted only upon finding that:

- (1) The development will not have any substantial adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and is clearly outweighed by public health, safety, or compelling public interest ("Criterion No. 1");
- (2) The development is consistent with the objectives and policies and the SMA guidelines provided by Chapter 205A, HRS ("Criterion No. 2");
- (3) The development is consistent with the General Plan, Zoning Code, and other applicable ordinances ("Criterion No. 3"); and
- (4) The development will, to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist, including specific factual findings regarding:

- (A) The identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the area;
- (B) The extent to which these resources, including traditional and customary native Hawai'i rights, will be affected or impaired by the proposed action; and
- (C) The feasible action, if any to be taken by the Planning Commission to reasonably protect any valued cultural, historical or natural resources, including any traditional or customary native Hawaiian rights ("Criterion No. 4"). *Planning Department Recommendation, Exhibit A-10, pp. 3-4; Leithead Todd Affidavit, Exhibit A-79, pp.4-5.*

29. Criterion No. 1. In this case, the proposed development will not have any substantial adverse environmental or ecological effect. Further, to the extent that any adverse effects exist, such adverse effects will be minimized to the extent practicable and will be clearly outweighed by public health, safety, or compelling public interest. *Planning Department Recommendation, Exhibit A-10, p. 4; Leithead Todd Affidavit, Exhibit A-79, p. 5; Poma Affidavit, Exhibit A-81, ¶ 6.*

30. In considering the significance of potential environmental effects, the Planning Director considered the sum of those effects and evaluated the overall and cumulative effects of the action. *Planning Department Recommendation, Exhibit A-10, p. 4; Leithead Todd Affidavit, Exhibit A-79, p. 5.*

31. A "substantial adverse effect" is determined by the specific circumstances of the proposed use, activity or operation. In determining whether the proposed development may have a substantial adverse effect on the environment, the Planning Director considered every phase of the proposed action and expected consequences, both primary and secondary, and the cumulative as well as the short and long-term effect of the proposal. *Planning Department Recommendation, Exhibit A-10, p. 4; Leithead Todd Affidavit, Exhibit A-79, p. 5.*

32. Pursuant to Rule 9-10(h) of the Planning Commission Rules, the Planning Director should bear in mind that in most instances, the following factors of a proposal, although

not limited to the same, may constitute a substantial adverse effect on the environment when the proposed use, activity or operation:

- (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource, including but not limited to, historic sites and view planes outlined in the General Plan or other adopted plans (“Consideration No. 1”);
- (2) Curtails the range of beneficial uses of the environment (“Consideration No. 2”);
- (3) Conflicts with the long-term environmental policies or goals of the General Plan or the State Plan (“Consideration No. 3”);
- (4) Substantially affects the economic or social welfare and activities of the community, County or State (“Consideration No. 4”);
- (5) Involves substantial secondary impacts, such as population changes and effects on public facilities (“Consideration No. 5”);
- (6) In itself has no substantial adverse effect but cumulatively has considerable adverse effect upon the environment or involves a commitment for larger actions (“Consideration No. 6”);
- (7) Substantially affects a rare, threatened, or endangered species of animal or plant, or its habitat (“Consideration No. 7”);
- (8) Detrimentally affects air or water quality or ambient noise levels (“Consideration No. 8”);
- (9) Affects an environmentally sensitive area, such as flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal water (“Consideration No. 9”); or
- (10) Is contrary to the objectives and policies of the Coastal Zone Management Program and the Special Management Area Guidelines of Chapter 205A, HRS (“Consideration No. 10”). *Planning Department Recommendation, Exhibit A-10, pp. 5-6; Leithead Todd Affidavit, Exhibit A-79, p. 5-7.*

33. In reviewing the Amendment Application against the factors that may constitute a substantial adverse effect, the Amendment Application proposing to modify the Power Plant’s fuel source from coal to biomass, to upgrade the existing Power Plant, and to construct support facilities and infrastructure at the Plant Site will not have a substantial adverse environmental or

ecological impact on the SMA. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, pp. 5-6; Poma Affidavit, Exhibit A-81, ¶ 6.*

34. Consideration No. 1. The proposed upgrades to the Power Plant will not result in the loss or destruction of any natural or cultural resource within the SMA and, accordingly, will not amount to an adverse effect under Consideration No. 1. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6.* While concrete slab foundations of former mill buildings in the area of the Plant Site have been identified as historic, they will accordingly be surveyed and appropriately documented in an archaeological inventory survey report, as required by the Division of Land and Natural Resources, State Historic Preservation Division (“SHPD”), to mitigate any potential adverse effects. *Letter from PCSI to SHPD dated September 9, 2010, Exhibit A-37 (the “End of Field Report”), pp. 2-3; Letter from SHPD to Planning Department dated April 29, 2010, Exhibit A-32, pp. 1-2.* The Subject Property is not within a historic site as listed in the National Register of Historic Places or the Hawai‘i Register of Historic Places. *End of Field Report, Exhibit A-37, p. 1; Amendment Application, Exhibit A-8, p. 8.* The property has been used for heavy industrial and agricultural uses since the late 1800s such that no traditional Hawaiian features or cultural materials were observed on the surface of the project area. *End of Field Report, Exhibit A-37, p. 2.*

35. Consideration No. 2. The upgrades to the plant will not curtail the range of beneficial uses of the environment, as the proposed Power Plant will continue to operate in an area used for both heavy industry and agriculture for well over one hundred years. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6; Poma Affidavit, Exhibit A-81, ¶ 6A.*

36. Consideration No. 3. The upgraded Power Plant will not conflict with the long-term environmental policies and goals of the General Plan or State Plan under Consideration 3. Surrounding properties are zoned Agricultural (A-20a), Single Family Residential (RS-7.5 and RS-20), General Industrial (MG-5a) and Limited Industrial (ML-20). Surrounding land uses include scattered dwellings, agricultural uses, and an industrial base yard. Accordingly, the continued use of the property as a power plant fits into the general plan of the area. *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8.* Further, the project is minor and fulfills aspects of these policies calling for an improved economic environment. *Poma Affidavit, Exhibit A-81, ¶ 6C.*

37. Consideration No. 4. The upgraded Power Plant will not have a substantial negative impact on the economic and/or social welfare and activities in the community, County or State. In fact, the project will create approximately 30 long-term jobs at the upgraded Power Plant, approximately 120 indirect support jobs in the community, and approximately 100 construction jobs for the up to 12-month refurbishment period for the Power Plant. Further, Hu Honua's fuel, renewable eucalyptus, will be locally grown on the Big Island and will support the local forestry industry and economy. Hu Honua's fuel will produce lower overall emissions burning biomass rather than coal and will displace approximately 250,000 barrels of imported oil each year. The Power Plant will also provide approximately 20 MW of electricity to HELCO, and Hu Honua's energy will result in more stable electricity rates as HELCO will be less dependent on the volatile price of foreign oil. Additionally, Hu Honua's project will make a significant contribution to the State's renewable energy goals. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6; McQuain Affidavit, Exhibit A-80, ¶ 3; Poma Affidavit, Exhibit A-81, ¶ 6D.*

38. Consideration No. 5. The upgrades to the Power Plant will not cause any population changes or effects on public facilities. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6; Poma Affidavit, Exhibit A-81, ¶ 6E.*

39. Consideration No. 6. The upgraded Power Plant will not involve a commitment for larger actions after the upgraded Power Plant is operational. The Hu Honua project is not related to other activities in the region in such a way as to produce adverse cumulative effects or involve a commitment for larger actions. *Poma Affidavit, Exhibit A-81, ¶ 6F.*

40. Consideration No. 7. The upgrades to the Power Plant will not affect any rare, threatened, or endangered species of animal or plant, or its habitat, as none are known to exist at the Subject Project. Further, the Subject Property is not within any known critical habitat. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6; Poma Affidavit, Exhibit A-81, ¶ 6G.*

41. Consideration No. 8 (Air Quality). The facility will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts on air. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 7.*

42. Hu Honua is currently working with DOH to obtain its air permit for the upgraded Power Plant. Hu Honua filed its application for a new air permit with the DOH in August, 2009, which will be required prior to commencement of plant operations. Following over a year of collaboration with the DOH, a draft air permit was issued on August 12, 2010, and on September 15, 2010, a hearing regarding the draft air permit was held in Hilo, Hawai‘i, to solicit public comment. *McQuain Affidavit, Exhibit A-80, ¶ 16; Poma Affidavit, Exhibit A-81, ¶ 13; Draft Air Permit, Exhibit A-71*. The DOH, in conjunction with Hu Honua, is in the process of responding to the public comments submitted. *Hearing Transcript, 80:1-5*.

43. The draft air permit, which is complete and covers all aspects of Hu Honua’s operation of the upgraded Power Plant (*Hearing Transcript, 1089:11-20*), requires that the project fully meet all current federal and state emission requirements for both primary and secondary emissions. In this way, public health will be protected and any adverse impact on air quality will be mitigated to within applicable legal limits. *Hearing Transcript, 1041:25-1043:11*. Hu Honua will employ the best available control technology (“BACT”) in the upgraded Power Plant. Further, the total emission level allowed in the new draft permit is less than 30% of the level permitted under the prior coal permit. *McQuain Affidavit, Exhibit A-80, ¶ 16; Poma Affidavit, Exhibit A-81, ¶ 13; Draft Air Permit, Exhibit A-71; Comparison of Existing Coal-Fired Permit vs. Draft Biomass Permit, Exhibit A-84*.

44. Pursuant to Proposed Conditions No. 4 and 16 of the Planning Department Recommendation, Hu Honua’s Amended SMA Permit will be subject to revocation should Hu Honua be unable to obtain its air permit or should Hu Honua be unable to operate within the parameters of the air permit, as required by law. *Planning Department Recommendation, Exhibit A-10, pp. 16 and 18; Leithead Todd Affidavit, Exhibit A-79, pp. 16 and 18*.

45. Consideration No. 8 (Water Quality). The facility will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts on water discharge. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6-7*.

46. Hu Honua has an existing National Pollutant Discharge Elimination System (“NPDES”) permit governing storm water discharge for the Subject Property. *McQuain Affidavit, Exhibit A-80, ¶ 17; Poma Affidavit, Exhibit A-81, ¶ 15; Notice of General Permit Coverage, NPDES, effective September 1, 2008, issued to Hu Honua, Exhibit A-6*. Hu Honua



will apply for an individual NPDES permit that will govern storm water runoff and non-contact cooling water and other water discharge prior to the operation of the Power Plant. The terms and conditions of such permits will be in accordance with DOH and EPA requirements. *McQuain Affidavit, Exhibit A-80, ¶ 17; Poma Affidavit, Exhibit A-81, ¶¶ 14-15*. Further, any impacts from soil erosion and runoff during site preparation and construction phases will be adequately mitigated through compliance with existing regulations and proper construction practices required by the Department of Public Works. *Planning Department Recommendation, Exhibit A-10, p. 6; Leithead Todd Affidavit, Exhibit A-79, p. 7*.

47. In order to further mitigate any potential negative impacts on water quality, Hu Honua's facility design will dramatically reduce the amount of waste water generated by the facility. This will be done through the utilization of a drag chain system instead of water to transport ash through the upgraded Power Plant. Additionally the upgraded Power Plant design incorporates new measures to ensure that the temperature of the cooling water discharged is within the limits prescribed by current environmental regulatory standards. *McQuain Affidavit, Exhibit A-80, ¶ 17; Hearing Transcript, 661:4-13*.

48. Pursuant to Conditions No. 4 and 16 of the Planning Department Recommendation, Hu Honua's Amended SMA Permit will be subject to revocation should Hu Honua be unable to comply with applicable County, State and/or Federal requirements relating to water quality and discharge. *Planning Department Recommendation, Exhibit A-10, pp. 16 and 18; Leithead Todd Affidavit, Exhibit A-79, pp. 16 and 18*.

49. Consideration No. 8 (Ambient Noise Levels). The facility will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts on noise levels. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, pp. 6-7*.

50. Hu Honua will mitigate any noise related to plant operations by limiting the noise at its site property boundary to 55 dBA at all times (*Hearing Transcript, 303:15-20*), in accordance with Amended Condition No. 5. This is below the 70 dBA level to which Hu Honua could operate in light the industrial zoning of the Subject Property. In addition, Hu Honua has committed to installing acoustic paneling on the plant, green noise buffers around the Subject Property, and special mufflers on the boiler safety valves to minimize the noise levels from the plant. Pursuant to Condition No. 3, landscaping will be included in the development plans to

mitigate any potential adverse noise or visual impacts to adjacent residential properties. *McQuain Affidavit, Exhibit A-80, ¶ 18; Planning Department Recommendation, Exhibit A-10, pp. 5-6, and 16; Leithead Todd Affidavit, Exhibit A-79, p. 7 and 16; Amended Condition No. 5, Exhibit A-11.*

51. As further required by Amended Condition No. 5, fuel truck deliveries will be permitted only between the hours of 6:00 A.M. and 6:00 P.M. to reduce the amount of noise and traffic generated by the fuel delivery trucks. Further, the use of “jake brakes” will be prohibited on Sugar Mill Road and will be specifically prohibited in Hu Honua’s delivery contracts. *Planning Department Recommendation, Exhibit A-10, p. 6; Leithead Todd Affidavit, Exhibit A-79, p. 7; Amended Condition No. 5, Exhibit A-11; McQuain Affidavit, Exhibit A-80, ¶ 19.*

52. Pursuant to Conditions No. 4 and 16 and Amended Condition No. 5 of the Planning Department Recommendation, Hu Honua’s Amended SMA Permit will be subject to revocation should Hu Honua be unable to comply with applicable County, State and/or Federal requirements relating to noise. *Planning Department Recommendation, Exhibit A-10, pp. 16 and 18; Leithead Todd Affidavit, Exhibit A-79, pp. 16 and 18.*

53. Consideration No. 9. The upgraded Power Plant will not affect nor will it be likely to be damaged as a result of being located in an environmentally sensitive area, such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal water. *Poma Affidavit, Exhibit A-81, ¶ 6I.* The area of the Power Plant is not mapped by the Federal Emergency Management Agency and is identified as an area of “minimal tsunami inundation.” *Planning Department Recommendation, Exhibit A-10, p. 7; Leithead Todd Affidavit, Exhibit A-79, p. 8.*

54. Consideration No. 10. The upgrades to the Power Plant are not contrary to the objectives and policies of the Coastal Zone Management Program and the Special Management Area Guidelines of HRS Chapter 205A. *Poma Affidavit, Exhibit A-81, ¶ 6J.*

55. Traffic. Although project traffic impacts alone are not proper issues for consideration in the approval of an amendment to an SMA permit under Topliss v. Planning Commission, 9 Haw. App. 377, 842 P.2d 648 (1993), to the extent that traffic is considered for its environmental or ecological impact, such impact will not be substantial and/or any adverse effect will be appropriately minimized. *Id. at 394, 842 P.2d at 648.*

56. As required by Amended Condition No. 5, fuel truck deliveries will be permitted only between the hours of 6:00 A.M. and 6:00 P.M. to reduce the amount of traffic generated by the fuel delivery trucks. *Amended Condition No. 5, Exhibit A-11; McQuain Affidavit ¶ 19.* Further, Hu Honua engaged SSFM to conduct a traffic assessment, and SSFM orally informed Hu Honua that no action will be required with respect to traffic as the existing roads are adequate to handle anticipated traffic. *Hearing Transcript, 1222:2-13.*

57. Drainage. Pursuant to Condition No. 7, a drainage study will be prepared by a licensed civil engineer and submitted to the Department of Public Works prior to issuance of the final plan approval. Any recommended drainage improvements, if required, will be constructed and will meet with the approval of the Department of Public Works prior to receipt of a certificate of occupancy. *Planning Department Recommendation, Exhibit A-10, p. 17; Leithead Todd Affidavit, Exhibit A-79, p. 16.*

58. No Construction Within Shoreline Setback. No new construction or grading work will occur within the shoreline setback area, and no new use is being proposed within the shoreline setback area. *Hearing Transcript, 1211:16-25.*

59. The 16 Conditions. The 16 conditions contained in the Planning Department Recommendation will minimize to the extent practicable any substantial adverse environmental or ecological effect attributable to the proposed development. *Planning Department Recommendation, Exhibit A-10, pp. 4-8.*

60. Criterion No. 2. In this instance, the development is consistent with the objectives, policies and SMA guidelines provided by HRS Chapter 205A. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, pp. 11-12.*

61. The objectives of the SMA Statute are set forth in HRS § 205A-2(b), specifically:
- (1) Recreational resources: To provide coastal recreational opportunities accessible to the public.
  - (2) Historic resources: To protect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.

- (3) Scenic and open space resources: To protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.
- (4) Coastal Ecosystems: To protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems.
- (5) Economic Uses: To provide public or private facilities and improvements important to the State's economy in suitable locations.
- (6) Coastal hazards: To reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution.
- (7) Managing development: To improve the development review process, communication, and public participation in the management of coastal resources and hazards.
- (8) Public participation: To stimulate public awareness, education, and participation in coastal management.
- (9) Beach protection: To protect beaches for public use and recreation.
- (10) Marine resources: To promote the protection, use, and development of marine and coastal resources to assure their sustainability. *Planning Department Recommendation, Exhibit A-10, pp. 8-10; Leithead Todd Affidavit, Exhibit A-79, pp. 9-11.*

62. The policies of HRS Chapter 205A are contained in HRS Section 205A-2(c) and detail the methods of implementing each of the ten objectives of HRS Chapter 205A. *Planning Department Recommendation, Exhibit A-10, pp. 8-10; Leithead Todd Affidavit, Exhibit A-79, pp. 9-11.*

63. Recreational Resources. The project is consistent with the provision of coastal recreational opportunities. The Plant Site is located on private property without any recreational uses, but is located adjacent to the shoreline. The shoreline in this area has high cliffs and rough seas at times. There is no record of public trails, public access parking, or designated public access that traverses the Plant Site, and public access to the shoreline for fishing is provided on the north and south sides of the Plant Site. There are five public access easements established in 2004 (SUB 7644) which subdivided the surrounding properties. Accordingly, the project will

have little or no impact on the recreational resources of the area. *Planning Department Recommendation, Exhibit A-10, p. 8; Leithead Todd Affidavit, Exhibit A-79, p. 9; Hearing Transcript, 1218:2-1219:10; Alta Survey of Plant Site, with Markings, Exhibit A-78A.*

64. Historic Resources. The project is consistent with the protection and preservation of historic resources. Any adverse impact from Hu Honua's project on historic properties will be mitigated in consultation with SHPD, which recommended approval of the Amendment Application provided that a field investigation and an archeological inventory survey report are completed. *Letter from SHPD to Planning Department dated April 29, 2010, Exhibit A-32, pp. 1-2; Poma Affidavit, Exhibit A-81, ¶ 8.* PCSI completed a field survey of the Subject Property during a three-day site visit from July 21 through July 23, 2010. *End of Field Report, Exhibit A-37, p. 1.* PCSI is in the process of completing the archaeological inventory survey report in accordance with SHPD's request and will be submitting the final report to SHPD for its review and acceptance. *Poma Affidavit, Exhibit A-81, ¶ 8.*

65. Following its field investigation/survey, PCSI produced its End of Field Report to SHPD on September 9, 2010. *End of Field Report, Exhibit A-37.* The End of Field Report noted that no traditional Hawaiian features or cultural materials were observed on the surface of the property. Four foundation features associated with former mill operations (probably older than 50 years, and thus, considered historic properties) were recorded within close proximity to the area proposed for development, but are outside it. A small segment of the proposed development area includes a portion of the 1909 mill foundation, which is a historic property, and this may be significant for the information it can provide about past activities on the property. However, such information can be obtained satisfactorily through the inventory survey process, and this process will mitigate any adverse effects the project may have on these structures. Thus, following completion of the final inventory survey report, no further work (e.g. archaeological monitoring) will be recommended by PCSI for these structures. *End of Field Report, Exhibit A-37, pp. 2-3; Poma Affidavit ¶ 8; Leithead Todd Affidavit, Exhibit A-79, p. 10.*

66. Hu Honua's Amended SMA Permit will be subject to revocation should Hu Honua fail to mitigate effects on historic properties. Conditions No. 11 and 12 to the Planning Department Recommendation provide for the protection of historic properties and mitigation of effects prior to the commencement of construction, as required by SHPD. If mitigation measures are not undertaken prior to commencement of construction, Hu Honua's permit will be subject to

revocation pursuant to Condition No. 16 to the Planning Department Recommendation. *Planning Department Recommendation, Exhibit A-10, pp. 17-18; Leithead Todd Affidavit, Exhibit A-79, pp. 17-18.*

67. Scenic and Open Space Resources. The project is consistent with the protection and preservation of scenic and open space resources. The Plant Site and general vicinity are not listed as a site of natural beauty within the General Plan. Additionally, the development will not interfere with scenic views from the nearest State Highway, which is Hawai'i Belt Road. Lastly, the proposed request will reduce the height of the existing stack from 190 feet to 140 feet, further minimizing any visual impact of the Power Plant from Hawai'i Belt Road. *Planning Department Recommendation, Exhibit A-10, p. 9; Leithead Todd Affidavit, Exhibit A-79, p. 10.*

68. Coastal Ecosystems. The project is consistent with the protection of coastal ecosystems. Hu Honua will be required to comply with DOH, Clean Water Branch's requirements regarding wastewater and storm water discharge as required under proposed Condition No. 4 to the SMA Permit. As part of the DOH permit(s), Hu Honua will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts to coastal waters. *Planning Department Recommendation, Exhibit A-10, p. 9; Leithead Todd Affidavit, Exhibit A-79, pp. 10-11.*

69. Economic Uses. The project is consistent with the provision of facilities and improvements important to the State's economy. The Power Plant is located in an area that has been in industrial use since the 1800s. The upgraded Power Plant will utilize an alternative energy source and will lessen the State's dependence on imported oil, which is important to the State's economy. The upgraded Power Plant will also create needed jobs and will provide HELCO with additional renewable electricity for the residents of Hawai'i, which, according to HELCO's General Manager, is critical to HELCO's meeting the State's renewable portfolio standards. *Planning Department Recommendation, Exhibit A-10, pp. 9-10; Leithead Todd Affidavit, Exhibit A-79, p. 11; Hu Honua's Deposition Designations for Jose Dizon, Exhibit A-82, designations 5-7 (Exhibit "A" to Deposition Designations, pp. 25-26).*

70. Coastal Hazards. The project is consistent with the reduction of hazard to life and property from coastal hazards. The Subject Property is in an area that is not mapped by the Federal Emergency Management Agency and is identified as an area of "minimal tsunami inundation." Additionally, the Power Plant is not located within a tsunami evacuation zone.

*Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11.*

71. Managing Development. The project is consistent with the improvement of the development review process, communication, and public participation in the management of coastal resources and hazards. As a condition of approval, Hu Honua will be required to comply with all applicable State, County and Federal laws, rules, regulations and requirements regarding the development and operation of the upgraded Power Plant. This request is limited primarily to the use of an alternative fuel source, which, along with additional emission controls, will result in an operation of lesser impacts. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11.*

72. Public Participation. The project is consistent with the stimulation of public awareness, education, and participation in coastal management. The SMA permit process allows for public participation through a public hearing process. Additionally, Hu Honua has consistently made attempts to inform the public of the proposed request by attending several community meetings and providing information to the public through a full page notice in the Hawai'i Tribune Herald newspaper published in June of 2009. In addition, the public is actively participating in the Contested Case Hearing process. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11; Letters from Planning Department to Various Intervenors regarding Petitions for Standing in Contested Case, Exhibits A-40 through A-60.*

73. Beach Protection. The project is consistent with the protection of beaches. The Plant Site is not located near any known public beach, the shoreline boundary of the Plant Site is identified as steep cliffs, and the renovation work proposed will be over 100 feet from the shoreline. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11.*

74. Marine Resources. The project is consistent with the promotion of the protection, use, and development of marine and coastal resources. Hu Honua will be required to comply with the DOH's requirements regarding wastewater and storm water discharge. Hu Honua will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts, which will ensure protection of marine resources in the

area. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11.*

75. The SMA guidelines are noted in HRS Section 205A-26(1), as referenced in Rule 9-7 of the Planning Commission Rules, and require that all development shall be subject to reasonable terms and conditions set by the Planning Commission in order to ensure that:

- (1) Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles;
- (2) Adequate and properly located public recreation areas and wildlife preserves are reserved;
- (3) Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon SMA resources; and
- (4) Alterations to existing land forms and vegetation, except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, wind damage, storm surge, landslides, erosion, siltation, or failure in the event of earthquake. *Amendment Application, Exhibit A-8, p. 9.*

76. Adequate Access to Beaches; Public Recreation Areas and Wildlife Preserves.

The upgrades to the Power Plant will not impede access to publicly owned or used beaches, recreation areas, or natural reserves, and will not impede public recreation areas or wildlife preserves. *Amendment Application, Exhibit A-8, p. 9.* The Plant Site is located on private property without any recreational uses, located adjacent to the shoreline. The shoreline in this area has a high cliff. There is no record of public trails, public access parking, or designated public access that traverses the Plant Site, and public access to the shoreline for fishing is provided on the north and south sides of the Plant Site. There are five public access easements established in 2004 (SUB 7644) which subdivided the surrounding properties. *Planning Department Recommendation, Exhibit A-10, p. 8; Leithead Todd Affidavit, Exhibit A-79, p. 9; Hearing Transcript, 1218:2-1219:10.*

77. Solid and Liquid Waste Management. The facility is required to adhere to strict environmental regulations regarding generation, classification, handling and disposition of solid and liquid waste. Solid waste will either be beneficially used or recycled to the fullest extent and



liquid waste will be treated under permit conditions. *Amendment Application, Exhibit A-8, p. 9.* Further, the Planning Director is recommending approval of the Amendment Application subject to Condition No. 13, which requires that Hu Honua comply with all applicable County, State and Federal laws, rules, regulations and requirements, including those relating to solid and liquid waste management. Likewise, Condition No. 10 requires that a Solid Waste Management Plan is submitted to the Department of Environmental Management for review and approval prior to the issuance of a final plan approval. *Planning Department Recommendation, Exhibit A-10, pp. 17-18; Leithead Todd Affidavit, p. 17.*

78. Minimization of Effects on Water Resources, Scenic Amenities and Danger of Natural Disasters. The facility improvements and new structures will be designed and constructed in accordance with the latest building and industrial codes to prevent significant adverse impacts. *Amendment Application, Exhibit A-8, p. 9.* Further, the Planning Director is recommending approval of the Amendment Application subject to Condition No. 4, which specifically requires that Hu Honua comply with all applicable County, State and Federal requirements related to water quality and discharge, and subject to Condition No. 13, which generally requires that Hu Honua comply with all applicable County, State and Federal laws, rules, regulations and requirements. Condition No. 9 requires that all earthwork and grading must conform to Chapter 10, Erosion and Sediment Control, of the Hawai'i County Code. Any impacts from soil erosion and/or runoff during the site preparation and construction phases will be adequately mitigated through compliance with existing regulations and proper construction practices required by the Department of Public Works. Thus, the Amendment Application is subject to conditions that will minimize any adverse effects to these resources. *Planning Department Recommendation, Exhibit A-10, pp. 6, and 16-18; Leithead Todd Affidavit, pp. 7 and 15-18.*

79. The SMA guidelines also require pursuant to HRS Section 205A-26(3), as referenced in Rule 9-7 of the Planning Commission Rules, that the Planning Commission shall seek to minimize, where reasonable:

- (1) Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough or lagoon;
- (2) Any development which would reduce the size of any beach or other area usable for public recreation;

- (3) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the SMA and the mean high tide line where there is no beach;
- (4) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the ocean;  
and
- (5) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.

80. Dredging of a Bay. The upgrades to the Power Plant will not involve the dredging, filling or other alteration of any bay, estuary, salt marsh, river mouth, slough or lagoon. *Amendment Application, Exhibit A-8, pp. 2-3.*

81. Reduction of Public Recreation Area or Public Access. The upgrades to the Power Plant will not reduce the size of any beach or other area usable for public recreation and will not reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams, or the mean high tide line where there is no beach. The Subject Property is not located near any known public beach, the shoreline boundary of the Subject Property is identified as steep cliffs, and the proposed development will be over 100 feet from the shoreline. *Planning Department Recommendation, Exhibit A-10, p. 10.* The Plant Site is located on private property and there is no record of a designated public access that traverses the Subject Property. There are five public access easements located on properties adjacent to the Subject Property. *Planning Department Recommendation, Exhibit A-10, p. 8; Leithead Todd Affidavit, Exhibit A-79, p. 9.*

82. Interference with Line of Sight to the Sea. The upgrades to the Power Plant will not substantially interfere with or detract from the line of sight toward the sea from the State Highway nearest the ocean, which is Hawai'i Belt Road (not Sugar Mill Road, which is a private roadway). The proposed upgrades to the Power Plant include decreasing the height of the existing stack from 190 feet to 140 feet, which will lessen any visual impact of the Power Plant from the State Highway. *Planning Department Recommendation, Exhibit A-10, p. 9; Leithead*

*Todd Affidavit, Exhibit A-79, p. 10.* The Subject Property is located approximately one mile from Hawai'i Belt Road. *Amendment Application, Exhibit A-8, p. 12 (Section M).*

83. Adverse Effect on Water Quality, Wildlife Habitats, or Agricultural Uses of Land.

The Planning Commission is seeking to minimize, where reasonable, any adverse impacts on water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, and/or potential or existing agricultural uses of land. Condition No. 4 addresses water quality and discharge. *Planning Department Recommendation, Exhibit A-10, p. 16; Leithead Todd Affidavit, Exhibit A-79, p. 16.* The Subject Property is not within any known critical habitat. *Planning Department Recommendation, Exhibit A-10, p. 5; Leithead Todd Affidavit, Exhibit A-79, p. 6; Poma Affidavit, Exhibit A-81, ¶ 6G.* Hu Honua's compliance with DOH and EPA regulations will minimize any potential adverse impacts on marine resources in the area. *Planning Department Recommendation, Exhibit A-10, p. 10; Leithead Todd Affidavit, Exhibit A-79, p. 11.* Further, the control of air emissions, water emissions and noise pursuant to Condition No. 4, as well as the on-site disposal of all development-generated runoff pursuant to Condition No. 6, as well as the control of fugitive dust and runoff sedimentation pursuant to Condition No. 8, will minimize any impacts on potential or existing agricultural uses of land. *Planning Department Recommendation, Exhibit A-10, pp. 16-17; Leithead Todd Affidavit, Exhibit A-79, pp. 16-17.*

84. Criterion No. 3. In this case, the proposed development is consistent with the General Plan and Zoning Code and other applicable ordinances. *Planning Department Recommendation, Exhibit A-10, pp. 11-13; Leithead Todd Affidavit, Exhibit A-79, p. 12.*

85. The General Plan. The development is consistent with the General Plan. The General Plan Land Use Pattern Allocation Guide ("LUPAG") map, promulgated by the County of Hawai'i, establishes general urban and non-urban areas within Hawai'i County. The project site is designated as "Industrial" by the LUPAG map. The Industrial designation includes uses such as manufacturing and processing, wholesaling, large storage and transportation facilities, light industrial and industrial-commercial uses. The upgraded Power Plant will be consistent with the LUPAG Map Industrial designation. *Planning Department Recommendation, Exhibit A-10, p. 11; Leithead Todd Affidavit, Exhibit A-79, p. 12.*

86. The County General Plan contains information regarding the County's goals for renewable energy. The proposed development will complement, among others, the following goals, policies and standards of the Energy Element of the General Plan:

- (1) Strive towards energy self-sufficiency.
- (2) Encourage the development of alternate energy resources.
- (3) Encourage the development and use of agricultural products and by-products as sources of alternate fuel.
- (4) Strive to assure a sufficient supply of energy to support present and future demands.
- (5) New power plants shall incorporate devices that minimize pollution.

*Planning Department Recommendation, Exhibit A-10, p. 11; Leithead Todd Affidavit, Exhibit A-79, p. 12.*

87. The Zoning Code. The development is consistent with the Zoning Code. The Plant Site is presently zoned General Industrial (MG-5a) and Agricultural (A-20a). Within the Zoning code, utility facilities, public and private, including power plants are permitted within the General Industrial zoned district, where the proposed development is located. Therefore, the proposed development is consistent with the County of Hawai'i Zoning Code. *Planning Department Recommendation, Exhibit A-10, p. 13; Leithead Todd Affidavit, Exhibit A-79, p. 14.*

88. Criterion No. 4. In this case, the development of the upgraded Power Plant will, to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist. *Planning Department Recommendation, Exhibit A-10, pp. 13-14; Leithead Todd Affidavit, Exhibit A-79, pp. 14-15.*

89. Investigation of Valued Resources. Several archaeological and historical studies were conducted and various reports were submitted with and after the SMA Amendment Application: (1) An Archaeological Literature Review was conducted of the Subject Property by PCSI; (2) Archaeological Inventory Survey was completed July 2010 (End of Field Report, PCSI, 09/09/2010); and (3) a County Environmental Report. *Planning Department Recommendation, Exhibit A-10, p. 13; Leithead Todd Affidavit, Exhibit A-79, p. 14.*

90. Assessment of Cultural, Historical, and Natural Resources. The Plant Site has been used for industrial purposes for over one hundred years from the 1850s until 2004. The archaeological inventory survey completed in July 2010 (PCSI Archaeological Inventory Survey,

End of Field Report) revealed that no traditional Hawaiian features or cultural materials were observed on the surface of the proposed development area. Four foundation features associated with former mill operations probably older than 50 years, and thus considered historic properties, were recorded within close proximity to the area proposed for development, but are outside it. A small segment of the proposed development area includes a portion of the 1909 mill foundation, also an historic property. Completion of the archaeological inventory survey in consultation with SHPD will mitigate any adverse impacts from the proposed development on these concrete structures. *End of Field Report, Exhibit A-37, pp. 2-3; Poma Affidavit ¶ 8.*

91. No Adverse Effects or Impairment of Valued Resources. There is no evidence that the flora in the area are particularly desired or used for cultural practices. The subdivision in which the Plant Site is located is open to the public and allows for public access to the shoreline. Therefore, Hawaiian fishing rights along the shoreline will not be affected by this project. *Planning Department Recommendation, Exhibit A-10, pp. 13-14; Leithead Todd Affidavit, Exhibit A-79, p. 15.*

92. Feasible Actions to Protect Native Hawaiian Rights. To the extent that traditional and customary native Hawaiian rights are exercised in the area, the proposed action will not affect traditional Hawaiian rights. The upgrades to the Power Plant will not restrict the use of natural resources along the shoreline, as public access easements to the shoreline on the north and south side of the Plant Site have been established on adjacent properties. *Planning Department Recommendation, Exhibit A-10, p. 14; Leithead Todd Affidavit, Exhibit A-79, p. 15.* Further, Condition No. 12 will protect any currently unidentified cultural, historical, and natural resource in the event any are encountered during construction. *Planning Department Recommendation, Exhibit A-10, p. 17; Leithead Todd Affidavit, Exhibit A-79, p. 17.*

93. Amendment Application Complete. Pursuant to Rule 9-11 of the Planning Commission Rules, Hu Honua's Amendment Application was complete and properly acted upon by the Planning Director. *Planning Department Recommendation, Exhibit A-10; Amendment Application, Exhibit A-8.*

94. No EA Required. It was appropriately determined pursuant to HRS Chapter 343 by both the DOH and Planning Director that no environmental assessment or environmental impact statement was required in connection with the Amendment Application. *SMA Amendment*

*Application, Exhibit A-8, Attachment 1; Chapter 343 Review Checklist for New Applications that go to Planning Commission and New Subdivisions, Exhibit SI-2A; Hearing Transcript, 163:2-6.*

95. Authority of the Planning Commission. Pursuant to HRS Section 205A-26 and Rule 9-11 of the Planning Commission Rules, the Planning Commission is authorized to issue to Hu Honua an amendment to the Existing SMA Permit based upon Hu Honua's Amendment Application, subject to reasonable terms and conditions to ensure that the proposed project meets all SMA requirements. *Planning Department Recommendation, Exhibit A-10; Amendment Application, Exhibit A-8.*

### **III. CONCLUSIONS OF LAW:**

Based on the foregoing proposed Findings of Fact, the Hearing Officer makes the following Conclusions of Law, including mixed conclusions of fact and law.

1. The Planning Commission has jurisdiction over the Amendment Application pursuant to HRS Chapter 205A and Rule 9 of the Planning Commission Rules.

2. Pursuant to Rule 9-11 of the Planning Commission Rules, Hu Honua's Amendment Application was complete and properly acted upon by the Planning Director.

3. Pursuant to HRS Chapter 343, it was appropriately determined by both the DOH and Planning Director that no environmental assessment or environmental impact statement was required in connection with the Amendment Application.

4. Pursuant to HRS Section 205A-26 and Rule 9-11 of the Planning Commission Rules, the Planning Commission is authorized to grant the Amendment Application subject to reasonable terms and conditions.

5. Pursuant to HRS Section 91-10, Hu Honua had the burden of proof in this contested case, including the burden of producing evidence as well as the burden of persuasion, with the degree or quantum of proof being a preponderance of the evidence. Hu Honua sustained this burden.

6. The proposed development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest.

7. The proposed development is consistent with the objectives, policies and SMA guidelines provided by HRS Chapter 205A.

8. The proposed development is consistent with the County of Hawai'i General Plan, Zoning Code, and other applicable ordinances.

9. The proposed development will, to the extent feasible, reasonably protect native Hawaiian rights if they are found to exist, including specific factual findings regarding:

- (A) The identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the area;
- (B) The extent to which these resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and
- (C) The feasible action, if any to be taken by the Planning Commission to reasonably protect any valued cultural, historical or natural resources, including any traditional or customary native Hawaiian rights.

10. The impacts of the proposed development on traffic and roadways cannot be a basis for denial of an SMA use permit application. Topliss v. Planning Commission, 9 Haw. App. 377, 842 P.2d 648 (1993).

11. To the extent that any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.

#### **IV. DECISION AND ORDER:**

Based upon the evidence presented in this matter and in accordance with the foregoing Findings of Fact and Conclusions of Law, and pursuant to Rules 4 (Contested Case Procedure) and 9 (Special Management Area) of the Planning Commission Rules, the Planning Commission has adopted the Hearing Officer's Recommendations and has ruled to reject each of the Proposed Findings of Fact filed by the Strauss Intervenors in this case, having found that each such proposed finding is either irrelevant, unsupported or otherwise inconsistent with the findings of fact and conclusions of law set forth herein.

IT IS HEREBY DECIDED AND ORDERED BY THE PLANNING COMMISSION that the application of Hu Honua Bioenergy LLC to amend Special Management Area Use Permit No. 221 to permit Hu Honua to convert the existing power plant on an approximately 26-acre parcel located at 28-283 Sugar Mill Road, in Pepe'ekeō, Hawai'i (TMK No. (3) 2-2-2:104), into

a renewable electrical power generation facility fueled by locally grown biomass, to allow several upgrades and additions to existing structures, and to construct support facilities and infrastructure within the Special Management Area, is approved subject to the following conditions:

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval of this permit.
2. Prior to the issuance of a water commitment by the Department of Water Supply, the applicant shall submit the anticipated maximum daily water usage calculations as recommended by a registered engineer, and a water commitment deposit in accordance with the “Water Commitment Guidelines Policy” to the Department of Water Supply within one hundred and eighty (180) days from the effective date of this permit.
3. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit. Prior to construction, the applicant, successors or assigns shall secure Final Plan Approval for the proposed development from the Planning Director in accordance with Chapter 25-2-70, Chapter 25 (Zoning Code), Hawai‘i County Code. Plans shall identify, if applicable, all existing and proposed structures, fire protection measures, paved driveway access and parking stalls, and other improvements associated with the proposed use. Landscaping shall be included in the development plans to mitigate any potential adverse noise or visual impacts to adjacent residential properties in accordance with the Planning Department’s Rule No. 17 (Landscaping Requirements).
4. Operation of the biomass facility shall comply with all applicable County, State and Federal requirements related to air quality, water quality and discharge, and noise. Copies of compliance reports and related correspondences shall be submitted to the Planning Department concurrent with their submittal to and receipt from the applicable County, State and Federal agencies.
5. Sound levels shall follow Department of Health rules for residential areas (55 dBA daytime), HAR, Title 11, Chapter 46 (Community Noise Control), and noise at the site property boundary shall be limited to 55 dBA at all times. Fuel truck deliveries



shall be permitted only between the hours of 6:00 A.M. to 6:00 P.M. The use of “jake brakes” shall be prohibited on Sugar Mill Road.

6. All development-generated runoff shall be disposed of on-site and shall not be directed toward any adjacent properties.
7. A drainage study shall be prepared by a licensed civil engineer and submitted to the Department of Public Works prior to issuance of Final Plan Approval. Any recommended drainage improvements, if required, shall be constructed meeting with the approval of the Department of Public Works prior to receipt of a Certificate of Occupancy.
8. During construction, measures shall be taken to minimize the potential of both fugitive dust and runoff sedimentation. Such measures shall be in compliance with construction industry standards and practices utilized during construction projects of the State of Hawai‘i.
9. All earthwork and grading shall conform to Chapter 10, Erosion and Sediment Control, of the Hawai‘i County Code.
10. A Solid Waste Management Plan shall be submitted to the Department of Environmental Management for review and approval prior to the issuance of a Final Plan Approval.
11. Any archaeological and/or architectural mitigation measures required by the State Department of Land and Natural Resources, State Historic Preservation Division (“SHPD”) shall be implemented prior to the commencement of any construction or land alteration activities on the property. The Planning Director shall be immediately notified in writing of the mitigation measures required by SHPD for the proposed development.
12. Should any undiscovered remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered, work in the immediate area shall cease and SHPD shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from SHPD when it finds that sufficient mitigation measures have been taken.
13. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.

14. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of this permit. The report shall include, but not be limited to, the status of the development and extent to which the conditions of approval are being satisfied. The applicant shall address each condition specifically and separately. The report shall also include a summary of the applicant's performance relative to all applicable County, State and Federal requirements related to air quality, water quality and discharge, and noise. This condition shall remain in effect until all of the conditions of approval have been satisfied and the Planning Director acknowledges that further reports are not required.
15. If the applicant should require an additional extension of time, the Planning Department shall submit the applicant's request to the Planning Commission for appropriate action.
16. Should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate procedures to revoke the permit.

DATED: Hilo, Hawai'i,           \* JUN 07 2011          .

  
ZENDO KERN, CHAIRMAN  
Windward Planning Commission

BEFORE THE COUNTY OF HAWAII

PLANNING COMMISSION

Application of

HU HONUA BIOENERGY LLC

for Amendment to Special Management  
Area Permit No. 221 to Allow Change in Fuel  
Source from Coal to Biomass, Pepe'ekeō  
Ahupua'a, South Hilo District, Hawai'i,  
Tax Map Key No.: (3) 2-8-008:104

SMA No. 221

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on JUN 07 2011 a true and correct copy of the foregoing document was duly served upon the following parties via Electronic Mail and U.S. Mail, postage prepaid, to their last known address as follows:

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David Austin, Esq.  
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DATED: Hilo, Hawai'i, JUN 07 2011



ZENDO KERN, CHAIRMAN  
Windward Planning Commission

William P. Kenoi  
Mayor



Duane Kanuha  
Director

Bobby Command  
Deputy Director

West Hawai'i Office  
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Kailua-Kona, Hawai'i 96740  
Phone (808) 323-4770  
Fax (808) 327-3563

**County of Hawai'i**  
**PLANNING DEPARTMENT**

East Hawai'i Office  
101 Pauahi Street, Suite 3  
Hilo, Hawai'i 96720  
Phone (808) 961-8288  
Fax (808) 961-8742

October 7, 2013

Mr. John Sylvia, CEO  
Hu Honua Bioenergy, LLC  
One Embarcadero Center, Suite 1320  
San Francisco, CA 94111

Dear Mr. Sylvia:

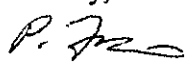
Third Circuit Court's Order of Partial Remand for Supplemental Proceedings  
To Clarify Condition Nos. 11 and 12 of the Commission's June 7, 2011, Decision and Order  
Amendment to SMA No. 221 to Allow Facility Improvements and Change in  
Fuel Source from Coal to Biomass  
Applicant: Hu Honua Bioenergy, LLC  
Tax Map Key: 2-8-008:104

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The Windward Planning Commission at its duly held public hearing on October 3, 2013, took action on the Third Circuit Court's Order of Partial Remand to the County of Hawai'i Windward Planning Commission for Supplemental Proceedings filed August 27, 2013. The purpose of this remand was for the Commission to clarify Condition Nos. 11 and 12 of its June 7, 2011, Decision and Order approving an amendment to Special Management Area Use Permit No. 221, which originally allowed the establishment of a coal storage area and a coal burning energy plant and related improvements. The approved amendment request allowed a change in fuel source from coal to biomass, to upgrade the existing facility, and to construct support facilities and infrastructure at the former Pepe'ekeō Power Plant, Makahanaloa, South Hilo, Hawai'i.

We have enclosed the Windward Planning Commission's Supplemental Findings of Fact, Conclusions of Law, and Decision and Order which is dated October 4, 2013.

Sincerely,

  
DUANE KANUHA  
Planning Director

Lhuhonuaremand01wpc

Enclosure

cc/enc: Gary Grimmer, Esq.  
Steven D. Strauss, Esq.  
Mr. Gary Faagau  
Margaret Masunaga, Esq.  
Mr. Bruce A. Macduckston  
Mr. Robert E. Ferazzi

OCT 07 2013

**BEFORE THE COUNTY OF HAWAII**

**PLANNING COMMISSION**

**Application of**

**HU HONUA BIOENERGY LLC**

**For Amendment to Special Management  
Area Permit No. 221 to Allow Change in Fuel  
Source from Coal to Biomass, Pepe'ekeo  
Ahupua'a, South Hilo District, Hawai'i,  
Tax Map Key No.: (3) 2-8-008:104**

**Special Management Area Use Permit 221**

**SUPPLEMENTAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION AND ORDER**

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**SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND DECISION AND ORDER**

**I. INTRODUCTION**

This matter comes before the Windward Planning Commission of the County of Hawai'i (the "Planning Commission"), pursuant to Chapter 205A of the Hawai'i Revised Statutes ("HRS") and Rule 9 of the Rules of Practice and Procedure of the Planning Commission, upon the application of Hu Honua Bioenergy LLC ("Hu Honua") to amend its existing Special Management Area Use Permit No. 221. Hu Honua's application was the subject of a contested case hearing in Hilo, Hawai'i (the "Contested Case Hearing") conducted by Robert J. Crudele (the "Hearing Officer"), the hearing officer appointed by the Planning Commission as permitted by Rule 4.4(a) of the Rules and Procedures of the Planning Commission. The Contested Case Hearing before the Hearing Officer commenced October 18, 2010, and was closed on February 25, 2011. The Hearing Officer submitted his Recommended Findings of Fact, Conclusions of Law, and Decision and Order to the Planning Commission on March 21, 2011. The Planning Commission considered the complete case record and the Hearing Officer's recommendations at its hearings on April 7, 2011 and May 4, 2011 and made the determinations and decisions set forth in the Findings of Fact, Conclusions of Law, And Decision And Order dated June 7, 2011.

Certain Intervenors in the contested case appealed from the Decision and Order, by filing a Notice of Appeal on July 6, 2011 in the Third Circuit Court, State of Hawaii, which was assigned Civil No. 11-1-0238. The Planning Commission and its then Chairman Zendo Kern were named as Respondents. Hu Honua intervened in the Appeal as a Respondent. By Order dated and entered August 27, 2013, the Court remanded this matter to the Planning Commission



requesting Supplemental Findings of Fact, Conclusions of Law, and Decision and Order concerning conditions 11 and 12 of the June 7, 2011 Decisions and Order.

The Planning Commission considered the Court's Order at its hearing of October 3, 2013 and made the supplemental determinations and decisions set forth herein at the close of said hearing.

## **II. SUPPLEMENTAL FINDINGS OF FACT**

1. The Planning Commission hereby incorporates herein, by this reference, its Findings of Fact, Conclusions of Law, and Decision and Order dated June 7, 2011.

2. The Court's Order requires the Planning Commission to determine and issue a Supplemental Decisions and Order as to whether Applicant Hu Honua must follow the September 9, 2010 Preliminary Archaeological Inventory Survey by Pacific Consulting Services, Inc. ("PCSI"), which was presented to the Hearings Officer in the Contested Case Hearing, or a later and final Archaeological Inventory Survey ("AIS") accepted and approved by the State Historical Preservation Division of the Department of Land and Natural Resources ("SHPD").

3. Hu Honua submitted a Final AIS PSCI to SHPD and by letter dated May 30, 2013, SHPD approved and accepted same.

4. The Planning Commission has reviewed the Final AIS and SHPD letter and makes them a part of the record herein.

## **III. SUPPLEMENTAL CONCLUSIONS OF LAW**

Based on the foregoing, the Planning Commission makes the following Conclusions of Law, including mixed conclusions of fact and law.

1. The Final AIS meets the requirements of and is accepted by SHPD.
2. Conditions 11 and 12 of the June 7, 2011 Decision and Order should and shall be revised to clarify that Hu Honua shall meet all requirements of the Final AIS and SHPD letter.
3. To the extent that any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.

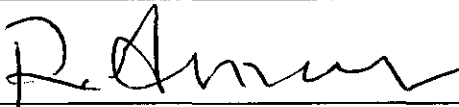
**IV. SUPPLEMENTAL DECISION AND ORDER**

Based upon the Final AIS and SHPD letter and the evidence presented at the hearing of October 3, 2013,

IT IS HEREBY DECIDED AND ORDERED BY THE PLANNING COMMISSION that conditions 11 and 12 of the June 7, 2011 Decision and Order are revised and supplemented to state as follows:

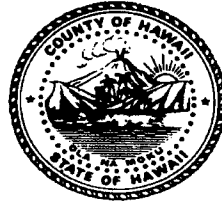
11. Prior to the commencement of any construction or land alteration activities on the property, the applicant shall comply with any archaeological and/or architectural mitigation measures required by the State Department of Land and Natural Resources, State Historic Preservation Division ("SHPD") and identified within the approved Final Archaeological Inventory Survey dated June 2013, the Planning Director shall be immediately notified in writing of the mitigation measures required by SHPD for the proposed development.
12. Should any undiscovered remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered, work in the immediate area shall cease and SHPD shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from SHPD when it finds that sufficient mitigation measures have been taken.

DATED: Hilo, Hawaii, Oct. 4, 2013.



RONALD GONZALES, CHAIRMAN PRO TEM  
Windward Planning Commission

Harry Kim  
Mayor



Joseph Clarkson, Chair  
Donald Ikeda, Vice Chair  
Gilbert Aguinaldo  
Donn Dela Cruz  
Thomas Raffipiy  
John Replogle

## County of Hawai'i

### WINDWARD PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

MAY 16 2018

Jodi S. Yamamoto, Esq.  
Yamamoto Caliboso LLC  
1100 Alakea Street, Suite 3100  
Honolulu, HI 96813

**CERTIFIED MAIL**  
**7015 3010 0001 8963 4866**

Steven D. Strauss, Esq.  
P.O. Box 11517  
Hilo, HI 96721

**CERTIFIED MAIL**  
**7015 3010 00001 8963 4873**

Dear Ms. Yamamoto and Mr. Strauss:

**SUBJECT: Hū Honua Bioenergy LLC (SMA 221)**  
**Partial Remand to the Windward Planning Commission to Address the**  
**Impacts on the Public Shoreline with Regards to Repairing or Replacing**  
**Outfall 001**  
**Tax Map Key: 2-8-008:104**

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The Windward Planning Commission, at its duly held public hearing on May 3, 2018 reviewed and considered the adoption of the proposed Second Supplemental Findings of Fact, Conclusions of Law and Decision and Order for Special Management Use Permit 221.

The Commission voted and adopted the enclosed proposed Second Supplemental Findings of Fact, Conclusions of Law, and Decision and Order for Special Management Use Permit 221.

Should you have any questions, please contact Jeff Darrow of the Planning Department at 961-8158.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joseph B. Clarkson'.

Joseph Clarkson, Chairman  
Windward Planning Commission

LHuhonuabioenergyFOFCOLD&OSMA221wpc

Enclosure: Second Supplemental Findings of Fact, Conclusions of Law, and Decision and Order

cc: Malia Hall, Esq., Deputy Corporation Counsel

MAY 16 2018

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 MAY 16 2018

Sen: STEVEN D STRAUSS ESQ  
 Str: P O BOX 11517  
 City: HILO HI 96721

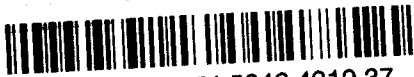
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

STEVEN D STRAUSS ESQ  
 P O BOX 11517  
 HILO HI 96721



9590 9402 1274 5246 4210 37

**2. Article Number (Transfer from service label)**

7015 3010 0001 8963 4873

PS Form 3811, July 2015 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature [Signature]  Agent  
 Addressee  
 B. Received by (Printed Name) Joseph K. Leetoy-Morgan C. Date of Delivery 5-21-18  
 D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

**3. Service Type**  
 Adult Signature  
 Adult Signature Restricted Delivery  
 Certified Mail®  
 Certified Mail Restricted Delivery  
 Collect on Delivery  
 Collect on Delivery Restricted Delivery  
 Insured Mail  
 Insured Mail Restricted Delivery (over \$500)  
 Priority Mail Express®  
 Registered Mail™  
 Registered Mail Restricted Delivery  
 Return Receipt for Merchandise  
 Signature Confirmation™  
 Signature Confirmation Restricted Delivery

Domestic Return Receipt

U.S. Postal Service™  
**CERTIFIED MAIL® RECEIPT**  
 Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

7015 3010 0001 8963 4866

Certified Mail Fee	\$	3.45
Extra Services & Fees (check box, add fee as appropriate)		
<input checked="" type="checkbox"/> Return Receipt (hardcopy)	\$	2.15
<input type="checkbox"/> Return Receipt (electronic)	\$	
<input type="checkbox"/> Certified Mail Restricted Delivery	\$	
<input type="checkbox"/> Adult Signature Required	\$	
<input type="checkbox"/> Adult Signature Restricted Delivery	\$	
Postage	\$	6.88
<b>Total Postage and Fees</b>	\$	6.88

Postmark Here  
 MAY 16 2018

Se **JODI S YAMAMOTO ESQ**

St **YAMAMOTO CALIBOSO LLLC**

City **1100 ALAKEA STREET SUITE 3100**

PS **HONOLULU HI 96813**

Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**1. Article Addressed to:**

**JODI S YAMAMOTO ESQ  
 YAMAMOTO CALIBOSO LLLC  
 1100 ALAKEA STREET SUITE 3100  
 HONOLULU HI 96813**



9590 9402 1274 5246 4210 20

**2. Article Number (Transfer from service label)**

7015 3010 0001 8963 4866

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 X *Jodi*  Agent  Addressee

B. Received by (Printed Name) **Jennifer Endo** C. Date of Delivery **5/17/18**

D. Is delivery address different from item 1?  Yes  No  
 If YES, enter delivery address below:

*Jodi*

**3. Service Type**

<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™
<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery
<input type="checkbox"/> Certified Mail Restricted Delivery	<input checked="" type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Insured Mail	
<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	

BEFORE THE COUNTY OF HAWAI'I  
WINDWARD PLANNING COMMISSION

Application of

HU HONUA BIOENERGY LLC

For Amendment to Special Management  
Area Permit No. 221 to Allow Change in  
Fuel Source from Coal to Biomass,  
Pepe'ekeo Ahupua'a, South Hilo District,  
Hawai'i, Tax Map Key No.: (3) 2-8-008:104

Special Management Area Use Permit 221

SECOND SUPPLEMENTAL FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER

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SECOND SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER

I. INTRODUCTION

This matter comes before the Windward Planning Commission of the County of Hawai'i (the "Planning Commission"), pursuant to Chapter 205A of Hawai'i Revised Statutes ("HRS") and Rule 9 of the Rules of Practice and Procedure of the Planning Commission, upon the application of Hu Honua Bioenergy LLC ("Hu Honua") to amend its existing Special Management Area Use Permit No. 221. Hu Honua's application was the subject of a contested case hearing in Hilo, Hawai'i (the "Contested Case Hearing") conducted by Robert J. Crudele (the "Hearing Officer"), the hearing officer appointed by the Planning Commission. The Contested Case Hearing before the Hearing Officer commenced October 18, 2010, and was closed on February 25, 2011. The Hearing Officer submitted his Recommended Findings of Fact, Conclusions of Law, and Decision and Order to the Planning Commission on March 21, 2011. The Planning Commission considered the complete case record and the Hearings Officer's recommendations at its hearings on April 7, 2011 and May 4, 2011 and made the determinations and decisions set forth in the Findings of Fact, Conclusions of Law, and Decision and Order dated June 7, 2011.

Certain Intervenors in the contested case appealed from the Decision and Order, by filing a Notice of Appeal on July 6, 2011 in the Third Circuit Court, State of Hawai'i, which was assigned Civil No. 11-1-0238. The Planning Commission and its then Chairman Zendo Kern were named as Respondents. Hu Honua intervened in the Appeal as a Respondent. By Order dated and entered August 27, 2013, the Court remanded this matter to the Planning Commission

requesting Supplemental Findings of Fact, Conclusions of Law, and Decision and Order concerning conditions 11 and 12 of the June 7, 2011 Decision and Order.

The Planning Commission considered the Third Circuit Court's Order at its hearing of October 3, 2013 and issued its Supplemental Findings of Fact, Conclusions of Law, and Decision and Order dated October 4, 2013. The Third Circuit Court entered Final Judgment on March 10, 2014.

Appellants who filed the Notice of Appeal on July 6, 2011 in the Third Circuit Court timely filed their Notice of Appeal on April 9, 2014, from the Third Circuit Court's Final Judgment in the Intermediate Court of Appeal's ("ICA"), State of Hawai'i, which was assigned No. CAAP-14-0000751. The Planning Commission, its then Chairman Gregory Henkel, and Hu Honua, were named as Appellees.

By Order dated and entered January 22, 2018 ("ICA Order"), the ICA remanded this matter to the Planning Commission to address the impacts on the public shoreline with regard to repairing or replacing Outfall 001. The Planning Commission considered the ICA's Order at its hearing of April 5, 2018, and made the following supplemental determinations and decisions set forth herein at the close of said hearing.

## II. SUPPLEMENTAL FINDINGS OF FACT

1. The Planning Commission hereby incorporates herein, by this reference, its Findings of Fact, Conclusions of Law, and Decision and Order dated June 7, 2011, and its Supplemental Findings of Fact, Conclusions of Law, and Decision and Order dated October 4, 2013.

2. The ICA Order requires the Planning Commission "to address the impacts on the public shoreline with regard to repairing or replacing Outfall 001."

3. Hu Honua submitted a letter dated February 27, 2018 from Hu Honua President Warren Lee, to Planning Commission Chair, Joseph Clarkson, addressing the impacts on the public shoreline with regard to repairing or replacing Outfall 001.

4. Specifically, Hu Honua confirmed that Hu Honua will not repair or replace Outfall 001 and that no repair or replacement is necessary because Hu Honua will:

- (1) instead use underground injection control wells in order to address the discharge of water from plant operations (including non-contact cooling water and other water discharge from plant operations) and said wells are not within the shoreline setback area and/or the public shoreline;
- (2) handle development-generated storm water runoff (i.e., the delta representing post-development storm water less pre-development storm water) through on-site disposal, an existing requirement in Condition No. 6 of SMA Permit 221, and said on-site disposal is not within the shoreline setback area and/or the public shoreline; and
- (3) handle supply well testing water through the underground injection control wells, and said wells are not within the shoreline setback area and/or the public shoreline.

Therefore, Hu Honua confirmed that there will be no impact to the public shoreline with regard to Outfall 001 from the above-referenced development-generated water from plant operations, storm water runoff, and supply well testing.

5. Hu Honua represented that pre-development storm water runoff has been continuously exiting the cliff to and throughout various portions of public shoreline of the

subject property, without the need for the flume structure, for over a hundred years since the original set of mill buildings were constructed on or about 1909.

6. SMA Permit 221, FOF 46 and Condition No. 4, together, already require Hu Honua to comply with Department of Health (DOH) and other County, State, and Federal requirements regarding water discharge for the subject property.

7. The Planning Commission has reviewed Hu Honua's letter dated February 27, 2018 and makes it a part of the record herein.

8. In a letter dated December 27, 2017 addressed to Hu Honua, the Planning Department concluded the underground injection control wells and the 4<sup>th</sup> brackish water supply well are covered under SMA 221, and the aforementioned wells are not in the shoreline setback area.

9. The Planning Commission has reviewed the Planning Department's letter dated December 27, 2017 and makes it a part of the record herein.

### III. SUPPLEMENTAL CONCLUSIONS OF LAW

Based upon the foregoing, the Planning Commission makes the following Conclusions of Law, including mixed conclusions of fact and law:

1. Hu Honua has confirmed that it will not perform any repair, replacement, or construction at Outfall 001. Hu Honua also confirmed that it will not introduce any new use within the shoreline setback area, consistent and in compliance with SMA Permit 221, FOF 58, which provides that "[n]o new construction or grading work will occur within the shoreline setback area, and no new use is being proposed within the shoreline setback area."

2. If Hu Honua decides to repair or replace Outfall 001 and/or introduce any new use within the shoreline setback area, Hu Honua shall notify the Planning Department, and follow all applicable County, State and Federal Laws, rules, regulations and requirements.

3. The Planning Commission has addressed the impacts on the public shoreline as a public trust resource, with regard to repairing or replacing Outfall 001 in connection with Hu Honua's development activity, as instructed by the ICA on remand.

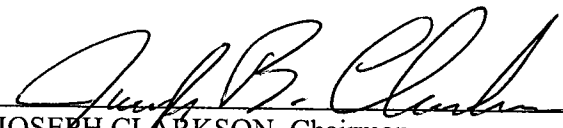
4. To the extent that any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.

IV. SUPPLEMENTAL DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and the evidence presented at and in connection with the hearing of April 5, 2018,

IT IS HEREBY DECIDED AND ORDERED BY THE PLANNING COMMISSION that there will be no impact on the public shoreline with regard to repairing or replacing Outfall 001.

Dated: Hilo, Hawai'i, MAY 3, 2018.

By   
JOSEPH CLARKSON, Chairman  
Windward Planning Commission  
County of Hawai'i