

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

June 23, 2017

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 16SD-160

OAHU

Issuance of Right-of-Entry Permit to United States on Encumbered Land Onshore at Makua Beach and Unencumbered Submerged Lands Offshore of Makua Beach at Kahanahaiki, Waianae, Island of Oahu, Tax Map Key: (1) 8-1-001:portion of 008 and seaward of 008.

APPLICANT:

U.S. Army Corps of Engineers Honolulu District

LEGAL REFERENCE:

Sections 171-55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government fast lands at Makua Beach, Kaena Point State Park, and submerged lands offshore of Makua Beach, Kahanahaiki, Waianae, Island of Oahu, identified by Tax Map Key: (1) 8-1-001: portion of 008 and (1) 8-1-001: seaward of 008, as shown on the attached map labeled Exhibit A.

AREA:

Fast lands: 6.9 acres, more or less, TMK (1) 8-1-008-1:portion of 008.
Submerged lands: 20 acres, more or less, seaward of TMK (1) 8-1-008-1:008.

ZONING:

State Land Use District: Conservation
City & County of Honolulu CZO: N/A

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES ☐ NO ☒

CURRENT USE STATUS:

Fast lands: Set aside by Governor's Executive Order 3338 for Kaena Point State Park.

Submerged lands: Unencumbered.

CHARACTER OF USE:

Environmental remediation purposes.

TERM OF RIGHT-OF-ENTRY:

One year (12 months) from date of execution.

CONSIDERATION:

Gratis.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with §11-200-8A of the Hawaii Administrative Rules and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council on June 5, 2015, the subject request to conduct a surface clearance of the ocean floor with the objective to investigate, recover, and manage the disposition of potential munitions and explosives of concern (MEC) on the subject property is exempt from the preparation of an environmental assessment pursuant to:

Exemption Class 1: "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," and its **Item 1:** "Mitigation of any hazardous conditions that present imminent danger as determined by the Department Director and that are necessary to protect public health, safety, welfare, or public trust resources."

Exemption Class No. 4: "Minor alteration in the conditions of land, water, or vegetation" and its **Item 1:** "Upon determination by the Department Director that an emergency exists, emergency mitigation and restoration work to prevent further damage from occurring and to restore the topographical features and biological resources."

Exemption Class 5: "Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource," including its **Item 1:** "Conduct surveys or collect data on existing environmental conditions (e.g, noise, air quality, water flow, water quality, etc.); **Item 2:** "Non-destructive data collection and inventory, including field, aerial and satellite surveying and mapping;" and **Item 22:** "Conduct planning and feasibility studies."

Exemption Class 6: "Construction or placement of minor structures accessory to existing facilities," and its **Item 1:** "Construction, placement or installation of signage, pavement markings, buoys, or other similar structures."

These exemptions are summarized in Land Division's **Notification of Exemption Form**, attached hereto as Exhibit B, and incorporated herein.

REMARKS:

The United States (US) through its Army Corps of Engineers Honolulu District (USACE) is requesting right-of-entry to conduct a surface clearance of the ocean floor with the objective to investigate, recover, and manage the disposition of potential munitions and explosives of concern (MEC) at the Makua underwater munitions area located offshore of Makua Beach, Kahanahaiki, Waianae, on the island of Oahu.

HISTORICAL PERSPECTIVE. To attain the level of readiness necessary to deter adversaries and defend our nation, the Department of Defense (DoD) must develop, test, and deploy weapon systems and military munitions, and then train its personnel to use and maintain those systems. Since World War II, large areas both onshore and offshore in Hawaii have been used for such military training involving live ammunition. As a result, some properties are known or suspected to still contain materials that may include unexploded ordnance (UXO) and other materials remaining from previous DoD use, and are the subjects of long-term remediation efforts carried out by the DoD today through its Defense Environmental Restoration Program/Formerly Used Defense Sites and Military Munitions Response Program (DERP/FUDS-MMRP).

The subject area was previously used by the U.S. Army, Marines, Navy, Air Force, and National Guard for combined live-fire exercises required to properly train troops for the battlefield.

PROGRAM ADMINISTRATION. The USACE is the executing agency for the DERP/FUDS-MMRP. The USACE Honolulu District serves Hawaii, American Samoa, Commonwealth of the Northern Marianas Islands, Guam, and the Republic of Palau. Planned work on projects in this region has been projected to extend to the year 2134. In Hawaii, many of these projects are located on public lands managed by the Department.

Remediation activities generally evaluate the presence of munitions and explosives of concern (MEC) including what is commonly known as UXO, as well as discarded military munitions (DMM) and munitions constituents (MC) on the subject properties, and provide appropriate remediation, response and mitigation.

REGULATORY FRAMEWORK. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress on December 11, 1980 to address releases or threatened releases of hazardous substances that may endanger public health or the environment. In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), which amended and strengthened CERCLA. SARA also renamed its Installation Restoration Program (IRP) as the Defense Environmental Restoration Program (DERP) and expanded the IRP with programs to address environmental cleanup on various types of DoD-used properties. The USACE serves as the executing agency for the DERP/FUDS-MMRP. Response actions today are authorized under DERP and SARA Section 211, and CERCLA provides the regulatory framework for environmental restoration.

The main goal is to reduce, in a timely and cost-effective manner, the risk to human health and the environment resulting from past DoD activities. To ensure adherence to the substantive requirements of all pertinent federal and state environmental laws and regulations, USACE prepares an Environmental Protection Plan (EPP) for each project contract. The EPP details operational procedures and methods to be implemented for environmental protection, including prevention/control of pollution and habitat disruption, consideration of impacts to land, water, and air, as well as biological and cultural resources, management of visual aesthetics, noise, and also solid, chemical, gaseous and liquid wastes, radiant energy and other possible pollutants.

The EPP must undergo a rigorous review by both USACE and the Regulator, which in Hawaii is the Department of Health (DOH) Hazard Evaluation and Emergency Response Office (HEER). A Memorandum of Agreement executed on September 10, 1991 between the DoD and the State of Hawaii, represented by DOH, assures the DoD of State coordination and support for regulatory matters.

All work to be conducted at the subject property will adhere to strict safety protocols, as outlined in a Site Safety and Health Plan. The project is being conducted in coordination with the USACE Omaha District MMRP section to ensure all applicable standards and requirements are being met.

RIGHT-OF-ENTRY REQUIREMENT. Commencement of work at the project site is contingent upon availability of federal funding and landowner consent to right-of-entry. Participation is voluntary.

VALUE TO THE STATE OF HAWAII. Right-of-entry will be provided *gratis* to the Applicant, as the State of Hawaii benefits from the remediation of long standing munitions-related environmental contamination left by past military use. Consequently, in order to protect the health, safety and welfare of the general public, it is in the State's best interests to support and facilitate these projects.

TIME-CRITICAL REQUEST. The federal UXO remediation programs described above are currently the sole means to address military munitions contamination in Hawaii on a statewide scale. USACE may not always be able to submit right-of-entry (ROE) requests far in advance of their need, and delays to ROE issuance can result in project re-prioritization and loss of funding to specific sites.

Regarding the subject property, on June 3, 2016, two local residents who were scuba diving in the waters off of Makua Beach at Kaena State Park found a MEC item, believed to be a 105mm projectile, in five feet of water about 20 yards offshore. Navy Explosive Ordnance Disposal (EOD) was called. They assessed the situation and determined the munitions item needed to be detonated in the water, which was safely done.

In response to the above incident, a time-critical removal action for surface clearance was authorized and is being performed under the USACE Omaha District Rapid Response Program. Pending issuance of right-of-entry, this work is planned to begin in July 2017 and be completed within an approximately three month period.

ROE PERMIT CONDITIONS. A previous ROE executed by the department in January 2017 to the US for a land-based UXO remediation project on the Big Island (see Exhibit C) will serve as the basis for an ROE for the subject property.

To ensure public safety, the Applicant intends to and will be required to maintain security at the project site in areas where work is being performed.

COMMENTS. Comments regarding the Applicant's proposed activities on the subject property have been solicited from the Office of Conservation and Coastal Lands, the Division of Aquatic Resources, the Division of Boating and Ocean Recreation, and the Division of State Parks. Staff await feedback.

RECOMMENDATION: That the Board

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

2. Authorize the issuance of a right-of-entry permit to the United States covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

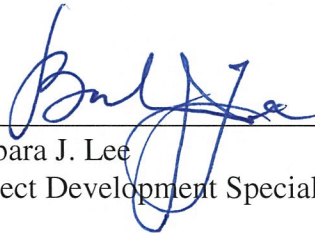
A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;

B. Review and approval by the Department of the Attorney General;

C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and


D. Authorize the Chairperson to issue extensions to this right-of-entry to the Applicant for good cause as related to the aforementioned activities.

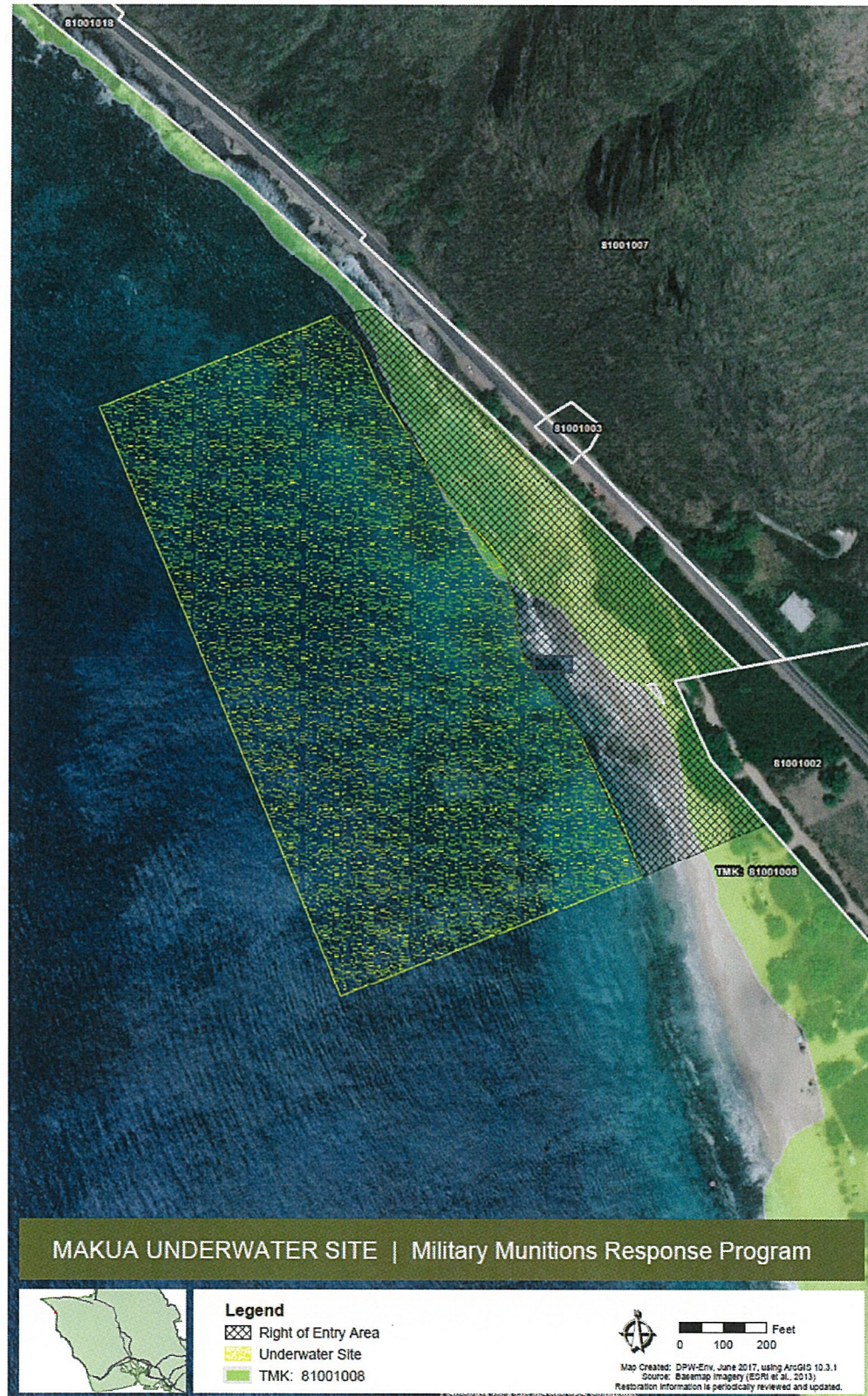
Respectfully Submitted,



Barbara J. Lee
Project Development Specialist

APPROVED FOR SUBMITTAL:


Suzanne D. Case, Chairperson



Map provided courtesy of staff from the U.S. Army Garrison-Hawaii.

EXHIBIT A

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS, and Chapter 11-200, HAR:

Project Title: Issuance of Right-of-Entry Permit to United States on Encumbered Land Onshore at Makua Beach and Unencumbered Submerged Lands Offshore of Makua Beach at Kahanahaiki, Waianae, Island of Oahu,

Project/Reference No.: PSF 16SD-160

Project Location: Tax Map Key: (1) 8-1-001: portion of 008 and seaward of 008.

Project Description: The applicant will conduct work at the subject property with the objective to investigate, recover, and manage the disposition of munitions.

Ch 343 Trigger(s): Use of State lands (§343-5(a)(1), HRS).

Exemption Class, Item and Description, and Rationale In accordance with §11-200-8 of the Hawaii Administrative Rules and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council on June 5, 2015, the subject request to conduct a surface clearance of the ocean floor with the objective to investigate, recover, and manage the disposition of potential munitions and explosives of concern (MEC) on the subject property is exempt from the preparation of an environmental assessment because activities may involve: 1) basic data collection, research, experimental management and resource evaluation activities that will not result in a serious or major disturbance to the environmental resources of the area; 2) mitigation of hazardous conditions due to presence of unexploded ordnance; 3) minor alterations in the conditions of the land, water, or vegetation in the area; 4) installation of appropriate signage in the interest of public safety; and other related actions, pursuant to:

Exemption Class 1: “Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing,” and its **Item 1:** “Mitigation of any hazardous conditions that present imminent danger as determined by the Department Director and that are necessary to protect public health, safety, welfare, or public trust resources.”

Exemption Class No. 4: “Minor alteration in the conditions of land, water, or vegetation” and its **Item 1:** “Upon determination by the

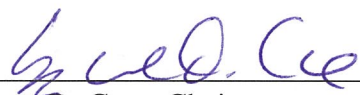
Department Director that an emergency exists, emergency mitigation and restoration work to prevent further damage from occurring and to restore the topographical features and biological resources.”

Exemption Class 5: “Basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource,” including but not limited to its **Item 1:** “Conduct surveys or collect data on existing environmental conditions (e.g, noise, air quality, water flow, water quality, etc.); **Item 2:** “Non-destructive data collection and inventory, including field, aerial and satellite surveying and mapping;” and **Item 22:** “Conduct planning and feasibility studies.”

Exemption Class 6: “Construction or placement of minor structures accessory to existing facilities,” and its **Item 1:** “Construction, placement or installation of signage, pavement markings, buoys, or other similar structures.”

Consulted Parties: Office of Conservation and Coastal Resources, Division of Aquatic Resources, and Division of Boating and Ocean Recreation.

Recommendation: It is recommended that the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

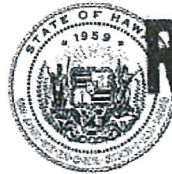


Suzanne D. Case, Chairperson

 Date: 6/14/17



DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

January 27, 2017

SUZANNE B. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
ROE # 4270
KEKOA KALUHIWA
FIRST DEPUTY
JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

DACA84-9-17-0091

PSF: 16SD-160

Michael Bauman, Acting Chief
Real Estate Branch
U.S. Army Corps of Engineers
Honolulu District
Building 230, Room 318
Fort Shafter, Hawaii 96858-5440

Dear Mr. Bauman:

SUBJECT: Right-of-Entry to the United States of America to Perform Remedial Investigation/Feasibility Studies through its Defense Environmental Restoration Program for Formerly Used Defense Sites on State lands in Waimea, District of South Kohala, Island of Hawaii, at Puu Kawaiwai, Panoluukia, and Kapia, Tax Map Key (3) 6-2-001:015 (por.), and at Ouli, Tax Map Key: (3) 6-2-005:022.

By correspondence dated November 9, 2016, the United States Army Corps of Engineers Honolulu District, of the Department of the Army, United States of America, requested right-of-entry onto various State of Hawaii lands under management of the Department of Land and Natural Resources ("Department" or "Owner") to continue the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) process including Remedial Investigation/Feasibility Studies (RI/FS), Remedial Action - Construction, and Long Term Monitoring activities through the Defense Environmental Restoration Program for Formerly Used Defense Sites (FUDS) that have been conducted under a previous right of entry effective from August 1, 2011 through July 31, 2016.

While the original request will be processed through regular Department protocols over the next few months, included in the request are certain Waikoloa Maneuver Area project sites scheduled for RI/FS activities for which sooner access will be needed.

Therefore, pursuant to the authority granted by the Board of Land and Natural Resources at its meeting of January 27, 2017 (Item D-12), and, in consideration of the mutual benefits of the work described below, this right-of-entry is issued to the United States of America, hereinafter called the "Government," by the Chairperson on behalf of the Department, hereinafter called the

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"Owner," to grant right-of-entry to those State lands referenced herein, subject to the following terms and conditions:

GENERAL CONDITIONS

1. The purpose of this right-of-entry is limited to allow the Government to conduct RI/FS activities to evaluate the presence of munitions and explosives of concern (MEC) and munitions constituents (MC), including, where necessary, conducting appropriate actions to respond to and mitigate hazardous conditions from unexploded ordnance (UXO) on the subject properties.
2. This right-of-entry shall be effective upon execution, subject to acceptance of the terms and conditions stated herein, beginning with the date of the signing of this instrument and continuing for a period not to exceed one year (12 months), or terminating with the earlier of the completion of the RI/FS activities or the filing of a notice of termination in the local land records by the representative of the United States in charge of the FUDS Waikoloa Maneuver Area, whichever is sooner.
3. The Owner hereby grants to the Government an irrevocable right to enter in, on, over, and across those State lands included within the Waikoloa project area identified by Tax Map Key numbers (3) 6-2-001:015 and (3) 6-2-005:022, and summarized on page 6 of this right-of-entry, for use by the Government, its representatives, agents and contractors and assigns as a work area for environmental investigation and response; including the right to store, move, and remove equipment and supplies; erect and remove temporary structures on the land; investigate and collect samples; excavate and remove ordnance and explosive waste, pollutants, hazardous substances, contaminated soils, containerized waste, and replace with uncontaminated soil; dispose of ordnance and explosive waste by detonation; and perform any other such work which may be necessary and incident to the Government's use for the investigation and response on said lands; subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowner(s), their heirs, executors, administrators, successors and assigns, all such right, title, interest, and privilege as may be used and enjoyed without interfering with or abridging the rights and right-of-entry hereby acquired.
4. The Government shall not store any personal belongings on the right-of-entry area during the effective period of this right-of-entry.
5. All tools, equipment, and other property taken upon or placed upon the right-of-entry area by the Government shall remain the property of the Government and may be removed by the Government at any time within a reasonable period after the expiration of this right-of entry.

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6. If any action of the Government's employees or agents in the exercise of this right-of-entry results in damage to the real property, the Government will, in its sole discretion, either repair such damage or make an appropriate settlement with the Owner. In no event shall such repair or settlement exceed the fair market value of the fee title to the real property at the time immediately preceding such damage. The Government's liability under this clause is subject to the availability of appropriations for such payment, and nothing contained in this agreement may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies. The provisions of this clause are without prejudice to any rights the Owner may have to make a claim under applicable laws for any damages other than those provided herein.
7. The Owner will not be responsible for any damage or loss, including but not limited to personal injury or death, caused by or arising from the Government's exercise of the rights granted by this right of entry, and not caused by the negligence or willful misconduct of the Owner. In accordance with the Anti-Deficiency Act, 31 USC 1341 (the Act), the Government is prohibited from entering into a contract to indemnify against a future contingent liability without specific statutory authority. Such authority does not exist for this right of entry. However, nothing in the Act or in this right of entry shall operate to prohibit or foreclose the Owner or anyone else from presenting a claim and/or seeking any other relief under the Federal Tort Claims Act or under any other statutory remedy that may be available to the Owner and applicable to the Government.
8. The Government, its contractors, consultants and/or persons acting for or on its behalf, acknowledges and agrees that portions of such lands are raw and unimproved, that the Owner has made no effort to determine or remedy possible hazards located thereon, and that the Government, its contractors, consultants and/or persons acting for or on its behalf enters such lands at its own risk.
9. The Government, its contractors, consultants and/or persons acting for or on its behalf shall comply with all applicable laws, statutes, ordinances, rules, and regulations of the Federal, State, and County government affecting the right-of-entry area to the extent that compliance is consistent with Federal law.
10. Any action taken by the Government, its contractors, consultants and/or persons acting for or on its behalf pursuant to this right-of-entry shall be conducted in accordance with CERCLA and applicable Federal, Department of Defense and Army guidance.
11. Other than in the ordinary course of business, no open fire or burning of any kind shall be allowed on the right-of-entry area and/or the surrounding State property.
12. For each project site within the scope of this right-of-entry, the Government shall ensure that its contractors, consultants and/or persons acting for or on its behalf shall procure, at their own cost and expense, and maintain during the entire period of this right-of-entry,

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from an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A" or other comparable and equivalent industry rating, a policy or policies of comprehensive public liability insurance or its equivalent, in an amount of at least \$1,000,000.00 per incident/\$2,000,000.00 aggregate. The policy or policies of insurance shall name the State of Hawaii as an additional insured and, as proof of its procurement, a certificate of insurance for the same shall be filed with the State of Hawaii, Department of Land and Natural Resources. The procuring of the required policy(s) of insurance shall not be construed to limit the liability of the Government's contractors, consultants and/or persons acting for or on its behalf under this right-of-entry, nor to release or relieve the Government's contractors, consultants and/or persons acting for or on its behalf of the requirements of this right-of-entry.

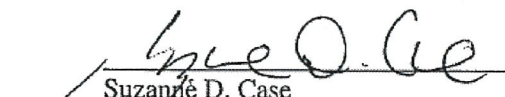
13. The Chairperson may issue extensions to this right-of-entry for good cause as related to the aforementioned activities.

Should you accept the above terms and conditions, please sign in the space provided below and return a signed copy of this letter to the Land Division Office at 1151 Punchbowl Street, Room 220, in Honolulu, Hawaii, or by email to barbara.j.lee@hawaii.gov.

If you have any questions regarding right-of-entry terms and conditions, please feel free to contact: Barbara Lee, Project Development Specialist in the Land Division, at (808) 587-0453 or at the email address above.

Thank you.

Sincerely,


Suzanne D. Case
BLNR Chairperson

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January 27, 2017
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ACCEPTED:

COY.MICHAEL.D
ALE.1168594727

Digitally signed by
COY.MICHAEL.DALE.1168594727
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=USA,
cn=COY.MICHAEL.DALE.1168594727
Date: 2017.01.31 07:15:39 -09'00'

MICHAEL D. COY
Real Estate Contracting Officer
U.S. Army Corps of Engineers, Alaska District
Department of the Army
United States of America

Dated: 31 January 2017

cc: Chairperson's Office
Land Board Members
Land Division
Division of Conservation & Resource Enforcement
State Historic Preservation Division

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January 27, 2017
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STATE LANDS

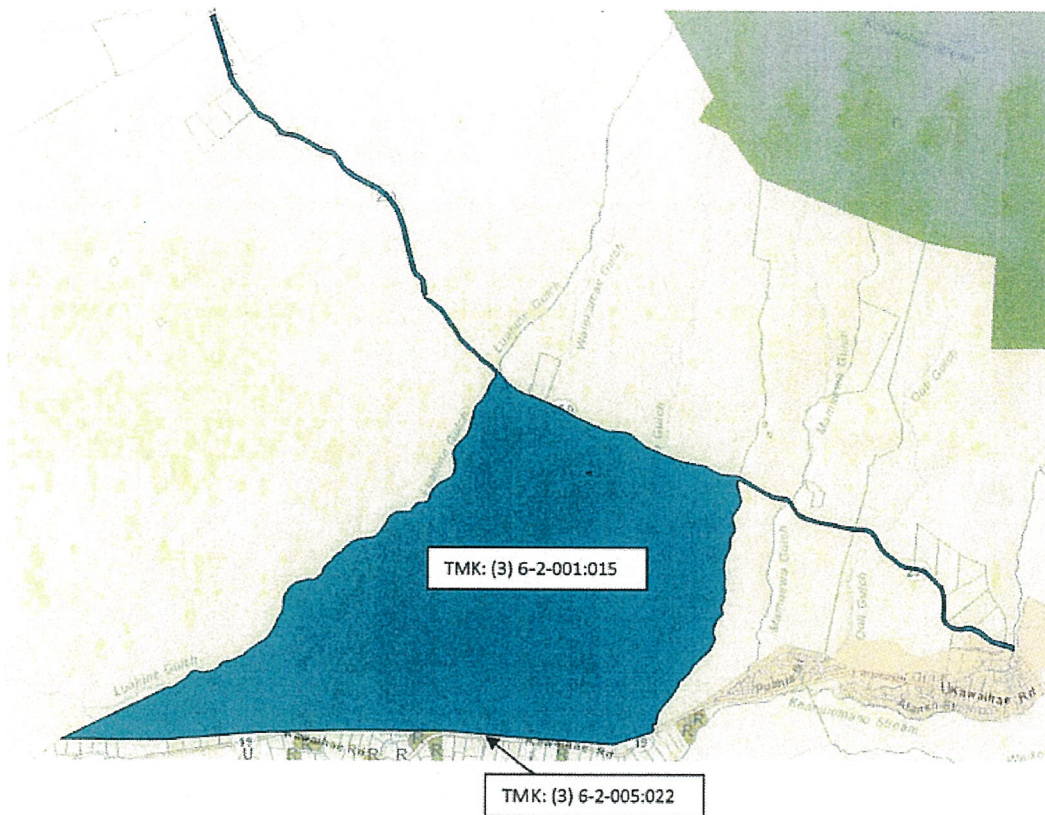
**PORTION OF WAIKOLOA MANEUVER AREA PROJECT NUMBER H09HI035920
CERCLA PHASE: REMEDIAL INVESTIGATION/FEASIBILITY STUDY FY16 WORK AREAS**

TMK	TMK ACRES	UNENCUMBERED AREA (ACRES)	ENCUMBERED AREA (ACRES)	LAND DOCUMENT*	PURPOSE
(3) 6-2-001:015	1930.64		1931.00	GL4474, Original	Richard Smart, pasture lease (Parcel 14-B)
			1931.00	GL 4474, Assignment	Parker Ranch, Inc., pasture lease, executed 09/10/1997
			0.360	GL 4474, Withdrawal	Withdrawal for public utility sub-station, executed 05/29/1981
			1930.64	BLNR Approval for GL 4474 extension	Parker Ranch, Inc., pasture lease, lease extension; execution still in progress as of 01/27/2017
			0.7888	lod27886	HELCO electrical easement
			0.1889	lod28306	COH water easement
			1.6	rp7475	DOT baseyard/storage
(3) 6-2-005-022	0.035	0.035			N/A

* documents provided separately for reference

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January 27, 2017
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LOCATION OF SUBJECT PROPERTY
PORTION OF WAIKOLOA MANEUVER AREA PROJECT NUMBER H09HI035920



Map Excerpt from GL 4474
Parcel 14-B

