

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 1, 2011

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAITIUKURU
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCES MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSTRUCTION AND RESOURCES ENFORCEMENT
ENGINEERING
HERITAGE AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

DACA84-9-11-316

Michael Y. Sakai, Acting Chief
Real Estate Branch
U.S. Army Corps of Engineers
Honolulu District
Fort Shafter, Hawaii 96858-5440

Dear Mr. Sakai:

SUBJECT: Right-of-Entry from the State of Hawaii Department of Land and Natural Resources to the United States of America to conduct Defense Environmental Restoration Program (DERP) activities on State lands situated within the 'Āhihi-Kīna'u Natural Area Reserve, including TMKs: (2) 2-1-004:073, (2) 2-1-004:113, (2) 2-1-006:095 & 098, and Submerged Lands in Offshore Areas.

By correspondence dated July 18, 2011, the United States Army Corps of Engineers requested right-of-entry onto State of Hawaii lands identified and depicted in Exhibits A and B under management of the Department of Land and Natural Resources (Department) to conduct activities administered under the DERP.

In accordance with State of Hawaii Governor's Proclamation dated June 14, 2011, the requirements of Chapters 46, 6D, 6E, 6K, 115, 171, 183, 183C, 183D, 184, 187A, 188, 190, 195, 195D, 197, 200, 205A, 342B, 342D, 342E, 342F, 343 and 344, and §209-9, Hawaii Revised Statutes, are suspended, as allowed by federal law, and to the extent necessary to permit the U.S. Army Corps of Engineers to conduct removal actions under the DERP in the course of conducting preliminary assessments, site inspections, and remedial investigations on State of Hawaii lands as expeditiously as practicable. As noted in the Governor's Proclamation, and for those State lands identified in Exhibit A, applicable requirements of the HRS shall remain suspended until the date of completion of all DERP removal actions to be conducted in the course of the proposed preliminary assessments, site inspections, and remedial investigations (collectively referred to herein as "DERP activities"), or until June 30, 2016, the date of termination of the aforementioned Governor's Proclamation, whichever occurs sooner.

RELEVANT MILITARY HISTORY. Since the late 1990's, the United States of America (United States), Department of the Army (DA), acting by and through the United States Army Corps of Engineers (USACE), has been engaged in a statewide effort to address munitions constituents (MC) and munitions and explosives of concern (MEC) remaining on lands formerly

used by the Department of Defense (DoD). Over the years, the United States has requested and has been granted permission to enter various State lands to carry out these DERP activities, conducted in phases contingent upon availability of federal funding and administered under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), DERP, which include the Military Munitions Response Program (MMRP) and Formerly Used Defense Sites (FUDS) Program.

SITE BACKGROUND: The 'Āhihi-Kīna'u Natural Area Reserve ('Āhihi-Kīna'u) is managed by the Department of Land and Natural Resources (Department), Division of Forestry and Wildlife (DOFAW) under the Natural Area Reserve System (NARS), established in 1970 by the Hawaii State Legislature through its Act 139 which was codified into law as Chapter 195, Hawaii Revised Statutes (HRS). 'Āhihi-Kīna'u was the first site set aside for protection under the NARS in 1973, and today remains the only NARS site that includes both terrestrial and marine environments. 'Āhihi-Kīna'u includes some of the most pristine marine environments in the State of Hawaii, as well as unique anchialine pond systems and other terrestrial features that provide a baseline of idealized environmental conditions with which comparisons can be made of other conservation areas striving for improvement. Over the years, 'Āhihi-Kīna'u has also become the most popular destination among the 19 NARS sites in the State of Hawaii for visitation by both residents and tourists.

As trustee of the unique natural and archaeological resources at 'Āhihi-Kīna'u, the Department is currently engaged in a collaborative process with multiple stakeholders to develop and implement a new long term management plan for 'Āhihi-Kīna'u to address increasing human impacts and alien species which threaten the integrity of the natural and archaeological resources both onshore and offshore. The majority of 'Āhihi-Kīna'u has been closed to public access since August 2008 (refer to map in Exhibit B) to protect resources from further harm and allow time for biological resources to recover from previous impacts. This closure has also allowed time for important survey, inventory, and management work to be carried out by NARS and other cooperating agencies, in keeping with nine broad functional goals set forth in the September 2008 five-year NARS Strategic Plan, particularly the following:

Goal 4. Monitoring and Data Collection. Conduct a monitoring program that will effectively assess change in the status of resources and is useful in making management decisions.

Goal 6. External Partnerships. Collaborate with external partners as well as Divisions within DLNR to support the NARS mission and goals.

To acknowledge the lingering problem of munitions-related contamination due to the area's historical use as a military bombing target, the October 2010 'Āhihi-Kīna'u Natural Area Reserve Draft Management Plan cited as one of its objectives: "Action HI(f)—Minimize the impacts of unexploded ordinance [sic]" listed under Section 2.3.1, Goal 1. Manage Human Use, Objective HI-Reduce the Negative Impacts of Visitors and Increase Safety. To accomplish this, the Plan specified Task (i): "work closely with the Army Corp of Engineers to minimize impacts of unexploded ordinance [sic] removal to reserve resources, and staff and public safety."

Because the lands at 'Āhihi-Kīna'u are one of four locations on the island of Maui formerly used by the U.S. Navy from early 1945 through 1946 as practice bombing targets, USACE has planned CERCLA-defined DERP activities for this site, referenced by the United States as Maui Bombing Targets-Kanahena, which encompasses all of 'Āhihi-Kīna'u. This important environmental work by the USACE will not only address munitions-related hazards left by former military use of this area but will also provide recommendations to help inform the Department about proposed future use of the area.

RIGHT-OF-ENTRY: Therefore, in accordance with State of Hawaii Governor's Proclamation dated June 14, 2011, and, in keeping with the intentions of 'Āhihi-Kīna'u Natural Area Reserve Draft Management Plan Objective Action H1(f), and Strategic Plan Goals 4 and 6, and, Section 195-4, HRS, granting the Department the power to cooperate with any federal governmental agency in carrying out the purpose of Chapter 195, HRS, for the NARS, on behalf of the Department, the United States, its contractors, consultants and/or persons acting for or on its behalf is hereby granted right-of-entry over the subject areas within 'Āhihi-Kīna'u to conduct its DERP activities following CERCLA processes, subject to the following terms and conditions:

1. The purpose of this right-of-entry is limited to allow the United States, its contractors, consultants and/or persons acting for or on its behalf to conduct DERP 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, for five (5) years or completion of the remedial investigation, whichever is sooner. However, if the remedial investigation is projected to take longer than five (5) years, this right-of-entry may be renewed to accommodate the additional planned work. USACE on behalf of the United States shall submit written renewal requests to the Department at least 90 days prior to the expiration date of this right-of-entry to allow for timely processing of the documentation.
3. The United States' remedial investigation under this right-of-entry will be restricted to properties identified in Exhibit A. The parties may amend Exhibit A by mutual written agreement without amending this right-of-entry.
4. The United States, its contractors, consultants and/or persons acting for or on its behalf shall not store any personal belongings on the right-of-entry area during the effective period of this right-of-entry.
5. If any action of the United States, its contractors, consultants and/or persons acting for or on its behalf in the exercise of this right-of-entry results in damage to the real property, the United States, its contractors, consultants and/or persons acting for or on its behalf will at its discretion, either repair such damage or make an appropriate settlement with the State. In no event shall the repair or settlement exceed the fair market value of the

fee title of the real property at the time immediately preceding such damage. The United States' 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 Department may have to make a claim under applicable laws for any other damages other than those provided herein.

6. 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 indemnification or contribution under the Federal Tort Claims Act or under any other statutory remedy that may be available to the Owner and applicable to the Government.
7. The United States, 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 Department has made no effort to determine or remedy possible hazards located thereon, and that the United States, its contractors, consultants and/or persons acting for or on its behalf enters such lands at its own risk.
8. The United States, 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 and the Supremacy Clause of the United States Constitution.
9. Any action taken by the United States, 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.
10. For each project site within the scope of this right-of-entry, the United States 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, 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 and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii as an

additional insured and a copy 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 United States' contractors, consultants and/or persons acting for or on its behalf under this right-of-entry, nor to release or relieve the United States' contractors, consultants and/or persons acting for or on its behalf of the requirements of this right-of-entry.

11. The United States, its contractors, consultants and/or persons acting for or on its behalf shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. The United States, its contractors, consultants and/or persons acting for or on its behalf shall not allow the storage or use of such materials in any manner not sanctioned by law or regulation, or, if the material is unregulated, to the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the right-of-entry area any such materials except to use in the ordinary course of business of the United States, its contractors, consultants and/or persons acting for or on its behalf. If hazardous materials other than those used in the ordinary course of business are proposed to be brought on site, written notice will be given to the Department of the identity of such materials. The Department's consent is required to bring such materials on site, and consent may be withheld at the Department's sole and absolute discretion. In accordance with United States guidance for the investigation of the Military Munitions Response Program (MMRP) or Formerly Used Defense Sites (FUDS), the United States will conduct soil sampling for hazardous and toxic substances during project execution, and will provide copies of all test results to the Department and the State Hazard Evaluation and Emergency Response (HEER) Office.
12. The United States, its contractors, consultants and/or persons acting for or on its behalf shall be responsible for damage or injury caused by or resulting from any act or omission of the United States, its contractors, consultants and/or persons acting for or on its behalf which results in the release of hazardous materials on the right-of-entry area occurring while the United States, its contractors, consultants and/or persons acting for or on its behalf are in possession, or elsewhere if caused by the United States, its contractors, consultants and/or persons acting for or on its behalf. These covenants shall survive the expiration or earlier termination of this right-of-entry.

For purposes of this right-of-entry, "hazardous material" shall mean any pollutant, toxic substance, hazardous substance, or oil as defined in the Resource Conservation and Recovery Act (RCRA), as amended, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, the Federal Clean Water Act, as amended, or any ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted, to the extent such definition and such law, regulation, ordinance, rule, or by-law is consistent with Federal law and the Supremacy Clause of the United States Constitution.

ROE FOR USA REGARDING ENVIRONMENTAL WORK

TMKs: (2) 2-1-004:073, (2) 2-1-004:113, (2) 2-1-006:095 & 098, and Submerged Lands in Offshore Areas

August 1, 2011

Page 6 of 10

13. All reasonable efforts shall be made by the United States, its contractors, consultants and/or persons acting for or on its behalf to avoid or minimize impact to any existing improvements on the subject properties.
14. The United States, its contractors, consultants and/or persons acting for or on its behalf in the exercise of this right-of-entry, shall use appropriate precautions and measures to minimize inconveniences to surrounding residents, landowners, and the public in general.
15. The United States, its contractors, consultants and/or persons acting for or on its behalf shall contact and coordinate with the appropriate Divisions within the Department of Land and Natural Resources (as listed in the Work Plan referenced below) prior to accessing the right-of-entry area for its remedial investigation.
16. The United States, its contractors, consultants and/or persons acting for or on its behalf shall be responsible to provide written notification to Grantee(s) identified in a Table of Encumbrances, which DLNR will develop and incorporate into the Work Plan for each project site. The Department of Land and Natural Resources, Land Division, shall provide the names and addresses of grantees to the United States.
17. The United States, its contractors, consultants and/or persons acting for or on its behalf shall contact the DLNR personnel listed in the Work Plan to coordinate access and logistical issues.
18. It is anticipated a work plan will be developed after the issuance of this right-of-entry. The United States, its contractors, consultants and/or persons acting for or on its behalf agrees to allow the Department to comment and suggest or recommend conditions for the work plan. It is specifically understood by the parties hereto that this provision is merely advisory and not intended to allow the Department to mandate any condition or comment into the work plan which is solely between the United States and its contractor or consultant. The final work plans and reports will be immediately provided to the Department.
19. No open fire or burning of any kind shall be allowed on the right-of-entry area and/or the surrounding State property.
20. The Department of Land and Natural Resources, through its Chairperson, reserves the right to impose additional terms and conditions, if deemed necessary while this right-of-entry is in force for safety conditions.

Should you accept the above terms and conditions, please sign in the space provided below and return or fax a signed copy of this letter to the Land Division Office at 1151 Punchbowl Street, Room 220, in Honolulu, Hawaii, fax no. 587-0455.

ROE FOR USA REGARDING ENVIRONMENTAL WORK

TMKs: (2) 2-1-004:073, (2) 2-1-004:113, (2) 2-1-006:095 & 098, and Submerged Lands in Offshore Areas

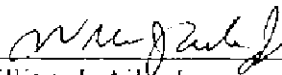
August 1, 2011

Page 7 of 10

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. For questions regarding land management concerns or coordination of logistical matters for work in a project site, please contact personnel listed in the corresponding Work Plan.

Thank you.

Very Truly Yours,



William J. Aila, Jr.
BLNR Chairperson

ACCEPTED:



Michael Y. Sakai
Real Estate Contracting Officer
U.S. Army Corps of Engineers, Honolulu District
Department of the Army
United States of America

Dated: August 1, 2011

- cc. Chairperson's Office
- Land Board Members
- Land Division
- Division of Forestry & Wildlife
- Division of State Parks
- Division of Conservation & Resource Enforcement
- Office of Conservation & Coastal Lands
- State Historic Preservation Division
- Division of Aquatic Resources

ROE FOR USA REGARDING ENVIRONMENTAL WORK

TMKs: (2) 2-1-004:073, (2) 2-1-004:113, (2) 2-1-006:095 & 098, and Submerged Lands in Offshore Areas

August 1, 2011

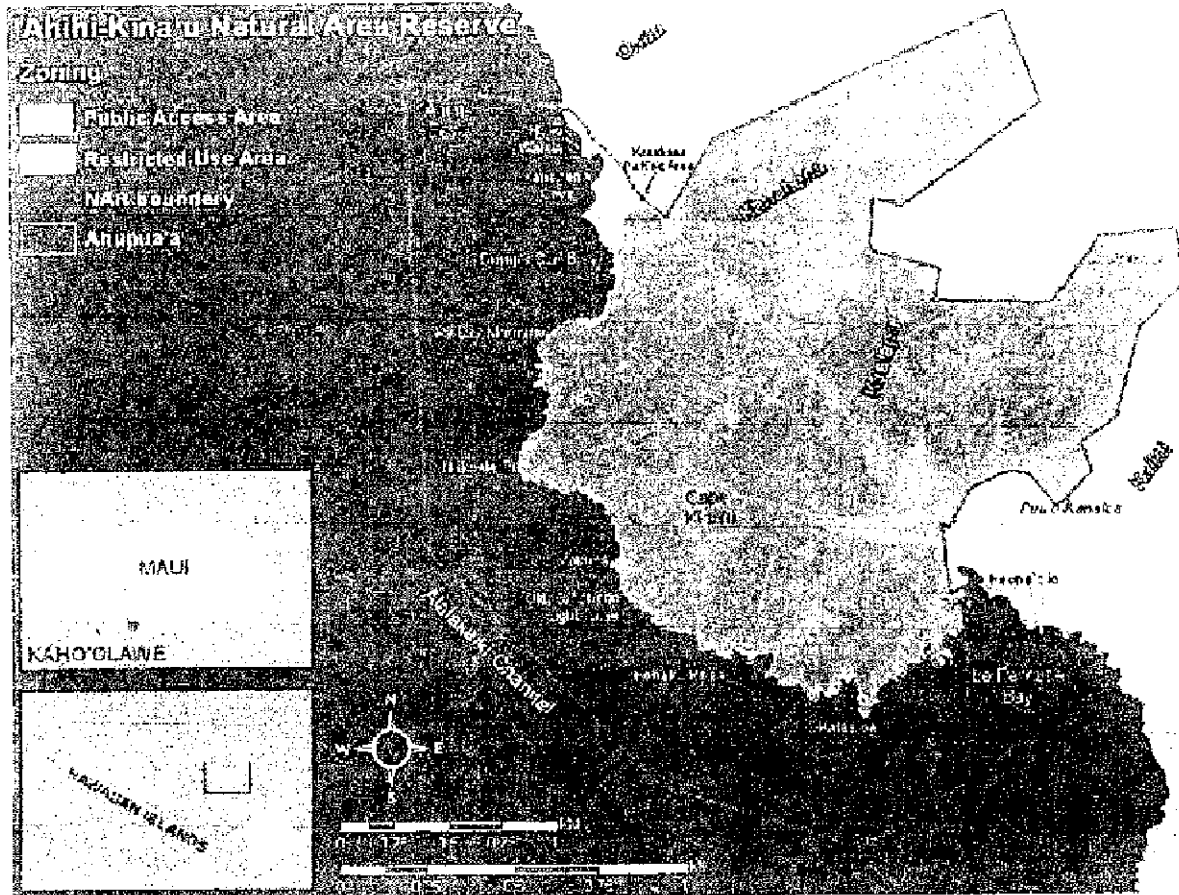
Page 9 of 10

MAUI BOMBING TARGETS-KANAHENA

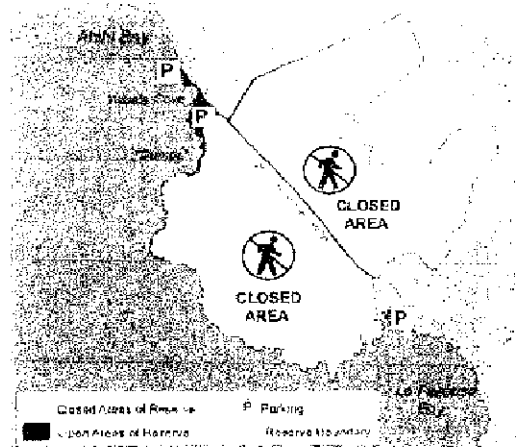
DLNR PROPERTY NAME	USACE PROJECT NAME	TAX MAP KEYS LISTED & ANY OTHER TMKS NECESSARY TO ACCESS AND CONDUCT THE DERP ACTIVITIES
'Ahihi Kīna'u Natural Area Reserve	Maui Bombing Targets - Kanahele	TMKs: (2) 2-1-004:073, (2) 2-1-004:113, (2) 2-1-006:095 & 098, and Submerged Lands in Offshore Areas

EXHIBIT A

MAP: Former Maui Bombing Targets at Kanahena Point, 'Āhihi-Kīna'u Natural Area Reserve, Island of Maui



From 'Āhihi-Kīna'u NAR Draft Management Plan, October 2010, Figure 21, page 66.



From NARS 'Āhihi-Kīna'u NAR brochure on area closure

ABOVE: 'Āhihi-Kīna'u Natural Area Reserve boundaries (red) delineate Former Maui Bombing Targets at Kanahena Point project area.

LEFT: Area of 'Āhihi-Kīna'u Natural Area Reserve closed for extended period of restricted public access through July 31, 2012 to address degradation of the Reserve's natural resources from human impacts.