

**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES OFFICE OF**  
**CONSERVATION AND COASTAL LANDS**  
**Honolulu, Hawaii**

*February 27, 2015*

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

ENF: KA-14-58

**REGARDING:** Unauthorized, 1) Construction of Erosion Control Structures, 2) Landscaping including grubbing and grading, and 3) Drainage Improvements Located in the Conservation District *Limited* and *General* Subzones

**LANDOWNER:** NORMAN J. CARIS

**LOCATION:** Aliomanu Estates, Kawaihau District, Island of Kaua'i

**TMK:** (4) 4-9-005:027

**AREA OF PARCEL:** 15.44 acres

**AREA OF USE:** >1.0 acre

**SUBZONE:** *Limited* and *General*

**DESCRIPTION OF AREA:**

The subject parcel is located on the southern side of Pāpa'a Bay, in the Kawaihau District on the western coast of the Island of Kaua'i (**Exhibit 1, 1a**). The parcel is located in an area known as the *Aliomanu Plateau*, which contains the largely developed *Aliomanu Estates Subdivision*. The Aliomanu Plateau flanks a broad valley to the north, formed by the Pāpa'a Stream, which empties into the ocean from the seaward (*makai*) side of the valley into Pāpa'a Bay. The area of concern, and the subject parcel, is located within the State Land Use Conservation District *General* and *Limited* Subzones. The current use of the area includes Single Family Residential development of large "lots" that lie predominately within the State Land Use *Agricultural* District. The majority of the subject parcel, and the agriculturally zoned Aliomanu Plateau area, have been developed extensively over the past 10+ years with numerous Single Family Residences (SFR), landscaping, accessory land uses (i.e., pools, garages), and land clearing/grading (**Exhibit 2**). There is one public shoreline access point in this area; a public parking lot, adjacent to the subject parcel, demarcates the beginning of a shoreline public access trail which bisects the parcel and runs to the shoreline beach area directly seaward (*makai*) of the SFR (**Exhibit 3**).

Approval for the development of the parcel was provided by the BLNR under Conservation District Use Permit (CDUP) KA-2589, and included the construction of a SFR, landscaping, and driveway construction. The final BLNR approval was granted along with 19 conditions (**Exhibit 4, 3 pgs.**).

Additional authorizations:

Authorization under Site Plan Approval (SPA): KA-13-13 was provided by this office to allow a neighboring property owner to conduct invasive species removal (i.e., ironwood trees) on the subject parcel. The area approved for clearing is labeled as a “view plane easement” for the purposes of the neighboring parcel. Permission was granted by this office to allow the clearing of invasive species, although no grading, grubbing or excavation was planned or approved.

**ALLEGED UNAUTHORIZED LAND USES:**

On *September 30, 2013* the County of Kaua’i Planning Department issued a stop work order and Zoning Compliance Notice to the landowner Norman J. Caris for alleged unauthorized “development” within the County’s Special Management Area (SMA) (**Exhibit 5, 3 pgs.**). In *October, 2013* the Office of Conservation and Coastal Lands (OCCL) was provided site photographs showing extensive land uses being conducted, or nearing completion, on the subject parcel, and surrounding area (**Exhibit 6**). A review of State and County records revealed that no approvals for the current land uses were provided to the landowner from either the County of Kaua’i or the State of Hawaii Department of Land and Natural Resources, therefore the work is considered to be an alleged violation of Conservation District rules and regulations. A follow up site investigation was conducted by OCCL staff to observe the alleged unauthorized land uses (**Exhibit 7, 7a, 7b, 7c**) and to meet with the County of Kaua’i Department of Planning and the State Historic Preservation Division on site.

The photographs, notice of violation, site visit, and subsequent discussions with County of Kaua’i employees revealed that a terrace system that contains at least six (6) stone “walls” has been constructed adjacent to the SFR, along with new drainage system appurtenances, and the clearing/grubbing/grading of a large area of the previously vegetated *makai* portion of the subject parcel. A comparison between surveys of the permitted “limits of grading” under CDUP: KA-2589 and the recent “limits of grading” outline the possible extent of the alleged unauthorized activities that occurred on the subject parcel (**Exhibit 8**). Additionally, aerial photographs (**Exhibit 9 & 10**) further elucidate the approximate area that was cleared of vegetation, and the location of the alleged unauthorized uses in relation to the shoreline and existing SFR.

After notice of the alleged violation was provided to the landowner by the OCCL on *November 5, 2013*, an agent for the landowner requested that portions of the unauthorized land uses be allowed to be completed per letter dated *February 4, 2014*. It was determined by the landowner’s agent that the alleged unauthorized “drain outlet” was not completed, and may influence erosion and soil loss on the property. The OCCL disagreed with those findings and did not permit the completion of the unauthorized drain outlet; therefore, to our knowledge the drain outlet remains unfinished.

**DISCUSSION:**

Lands within the state land use conservation district contain important natural resources essential to the preservation of the Hawaii's fragile natural ecosystem, and the sustainability of Hawaii's water and food supply. It is therefore the intent of the State to conserve, protect, and preserve the important natural resources of Hawaii through appropriate management and use in order to promote their long-term sustainability, and for continued public health, safety, and welfare. To that end, unmitigated impacts to the conservation district are in direct contrast to the objectives of the State land use district designations, and are an impetus to the loss of Hawaii's limited natural resources.

**State Historic Preservation Concerns:**

A representative of the State Historic Preservation Division (SHPD) accompanied OCCL staff during a site visit in order to determine if the alleged unauthorized grading and excavation impacted any previously referenced archeological/historical "sites" located on the subject parcel (*SIHP Site 50-30-04-1896 & 1847*). Conditions for approval listed under CDUP: KA-2589 stated that the referenced sites required preservation and protection from development. OCCL staff notes that the location of the SHPD "sites" documented in CDUP: KA-2589 and the alleged unauthorized land uses are in different areas of the subject parcel. While these previously documented "sites" may not have been affected by the alleged unauthorized land uses it is unclear if any previously undiscovered historical/cultural "sites" have been impacted.

A SHPD report based off of the most recent site investigation dated *December 12, 2014* (**Exhibit 11, 3 pgs.**), states that the previous approvals for the development of the property included a condition that:

- *"Long term preservation plan provisions will apply if there is further development of the Caris property. This calls for continued avoidance and protection of Sites 50-30-04-1896 (subsurface cultural layer containing a human burial and an "adze" grinding stone) and 50-30-04-1897 (subsurface cultural layer). For site 1896 this will include avoidance of the cultural layer makai of the house location"*

SHPD continues by stating:

- *"We were unable to verify that all previously identified historic properties are still intact and protected as indicated in approved plans. The archeological inventory survey report and monitoring report indicate the presence of significant historic properties, including a human burial, and the requirement for diligence in preserving and protecting these properties during subsequent activities. The inventory survey report and all mitigation plans were funded by the landowner (Caris) who would have been fully aware of the significant sites and their preservation status prior to the recent grading activities"*.

Furthermore, since the SHPD was not consulted and no archeological monitor was present during the recent grading, these alleged unauthorized land uses may be

considered a violation of SHPD rules, pursuant to Hawaii Revised Statutes (HRS) §6E-11 (c).

Based on these alleged unauthorized land uses the SHPD is requesting that:

1. *An addendum archeological inventory survey (AIS) should be conducted, at the cost of the landowner, to identify the limits of the existing cultural layers and to determine the extent (if any) of damage to the previously identified historic properties. As the existing AIS was conducted over 20 years ago, current archeological methodology and mapping will better inform site boundaries. The archeological firm conducting the survey should consult with the SHPD Kaua'i archeologist prior to fieldwork to determine strategy; and*
2. *An updated preservation plan informed by the approved addendum AIS should be prepared and submitted to SHPD for review. The preservation plan will include provisions for protective buffer zones and maintenance of any cultural/historic "sites".*

Conservation District Concerns:

Below are sections selected from the Conservation District Use Application (CDUA) and Environmental Assessment (EA) submitted by the landowner for the original property development. Approval was provided under Conservation District Use Permit (CDUP) KA-2589 (February 10, 1993); in that document the applicant appears to promote preservation of the seaward (*makai*) portions of the parcel, and designate the use of low-impact construction practices during development:

- *"Vegetation will not be removed on the property except in the area immediately affected by project construction. No large areas beyond the proposed improvements will be cleared; specifically no large lawns are planned for the residence and no unnecessary area will be cleared". Aerial photographs clearly show that this is not the case, in that a large area was cleared specifically for a lawn; the alleged unauthorized improvements were constructed in this lawn area;*
- *"Based on the total area of the property, approximately nine percent (9%) of the land would be cleared of trees to make way for the proposed project. Trees on the remainder of the site will not be uprooted. Immediately makai of the residence, the applicant is proposing to selectively trim a small area of trees to 10' to 15' in height to provide view corridors for the residence. Preserving the lower portion of the trees will preserve the rooting system makai of the residence and eliminate potential erosion conditions. The land immediately around the residence and accessory facilities will be landscaped to act as a supplemental erosion control measure for the project";*
- *Condition #17: "That the applicant shall remove trees for the dwelling footprint and grading areas only and trimming of trees only for the makai viewplane";*

- According to the EA report the area directly *makai* of the proposed SFR, and other improvements, was to be left in-tact, with only minor disturbance to the existing vegetation;
- *Only 16.2% of the subject parcel will be used for the residence, amenities, and driveway which leave approximately 83.8% (i.e., ~13 acres) in open space, and*
- *The proposed residence will employ an adaptive design suitable to the land (i.e., steep terrain) and will use only a small portion of the subject parcel.*

### **ANALYSIS:**

Under Departmental guidelines the penalty range for alleged unauthorized land uses is substantially determined based on the type of permit that would have been required, had the landowner applied to the DLNR to conduct the alleged unauthorized land uses. In this case there are a variety of alleged unauthorized land uses that occurred on the subject parcel (**Exhibit 12**).

#### **Erosion Control:**

Pursuant to Hawaii Administrative Rules (HAR) §13-5-22, P-13, **LAND AND RESOURCE MANAGEMENT (D-2)** *Road construction and major erosion control projects.*

Under the Penalty Guideline Framework this action is considered “Major” since the identified land use would require a Board Permit under the permit prefix “D”. This violation follows a penalty range of \$10,000 to \$15,000.

#### **Landscaping (i.e., grading, grubbing and tree removal):**

Pursuant to HAR 13-5-24, L-2, **LANDSCAPING (D-1)** *Landscaping (including clearing, grubbing, grading, and tree removal), including chemical and mechanical control methods, in accordance with state and federal laws and regulations, in an area of or more than 10,000 square feet. Any replanting shall be appropriate to the site location and shall give preference to the plant materials that are endemic or indigenous to Hawaii. The introduction of invasive plant species is prohibited.*

Under the Penalty Guideline Framework this action is considered “Major” since the identified land use would require a Board Permit under the permit prefix “D”. This violation follows a penalty range of \$10,000 to \$15,000.

#### **Drainage Improvements:**

Pursuant to HAR 13-5-22, P-8, **STRUCTURES AND LAND USES, EXISTING (C-1)** *Moderate alteration of existing structures, facilities, uses, and equipment.*

Under the Penalty Guideline Framework this action is considered “Moderate” since the identified land use would require a Departmental Permit under the permit prefix “C”. This violation follows a penalty range of \$2000 - \$10,000.

The preceding land uses occurred in the Conservation District without approval and therefore allegedly violated the above referenced chapters and rules. This report and staff recommended conditions seek to resolve the subject Conservation District violation.

**FINDINGS:**

1. That the landowner did in fact, authorize, cause or allow the construction of a major erosion control structure without authorization;
2. That the landowner did in fact, authorize, cause or allow the clearing of vegetation, and grading/grubbing of land without authorization;
3. That the landowner did in fact, authorize, cause or allow the modification of on-site drainage improvements; and
4. That the unauthorized land use occurred within the State Land Use Conservation District, Limited *and* General Subzones.

**AS SUCH, STAFF RECOMMENDS AS FOLLOWS:**

That, pursuant to §183C, HRS, the Board find the landowner in violation of §183C-7, HRS and §13-5-6 HAR, and is subject to the following:

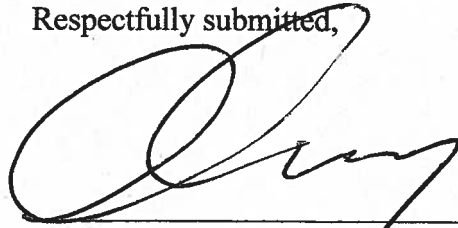
1. The landowner is fined in one (1) instance for violating the provisions of §183C-7, HRS, and §13-5-6, HAR, for the *unauthorized construction of a major erosion control structure* by failing to obtain the appropriate approvals within the Conservation District for \$15,000;
2. The landowner is fined in one (1) instance for violating the provisions of §183C-7, HRS, and §13-5-6, HAR, for *unauthorized landscaping* by failing to obtain the appropriate approvals within the Conservation District for \$15,000;
3. The landowner is fined in one (1) instance for violating the provisions of §183C-7, HRS, and §13-5-6, HAR, for the *unauthorized modification of on-site drainage improvements* by failing to obtain the appropriate approvals within the Conservation District for \$10,000;
4. The landowner is fined an additional \$2,500 for *administrative costs* associated with the subject violations;
5. The landowner shall pay all designated fines and administrative costs (total \$42,500) within sixty (60) days of the date of the Board's action;
6. Within one-hundred and eighty (180) days of the Board's action the landowner shall either: A) conduct land restoration as prescribed by the Department of Land and Natural Resources, or B) submit to the Office of Conservation and Coastal Lands (OCCL) a Conservation District Use Application (CDUA) to apply for



After-the-Fact authorization for the alleged unauthorized land uses and structures. As always the final decision to approve or deny the CDUA will be at the discretion of the BLNR;

7. The landowner shall complete an addendum archeological inventory survey (AIS) of the subject parcel in accordance with SHPD guidelines and requirements listed in **Exhibit 11** within one-hundred and eighty days (180) of the date of the Board's action. This should include an updated preservation plan to also be submitted to the SHPD for review and approval;
8. The landowner shall coordinate with OCCL regarding the applicants choice relating to condition #6 of this enforcement action, and shall allow OCCL staff to visit the site as needed to resolve this enforcement action; and
9. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the *State of Hawaii - Office of the Attorney General* for disposition, including all administrative costs.

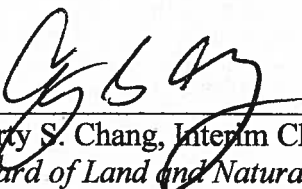
Respectfully submitted,



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Alex J. Roy, M.Sc., Planner  
*Office of Conservation and Coastal Lands*

Approved for submittal:



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Carty S. Chang, Interim Chairperson  
*Board of Land and Natural Resources*



DATA OBTAINED FROM  
THE STATE OF HAWAII  
OFFICE OF PLANNING:  
planning.hawaii.gov/gis/



SLU Conservation District

Papa'a Bay

SLU Agricultural District

TMK: (4) 4-9-005:027



# EXHIBIT 1

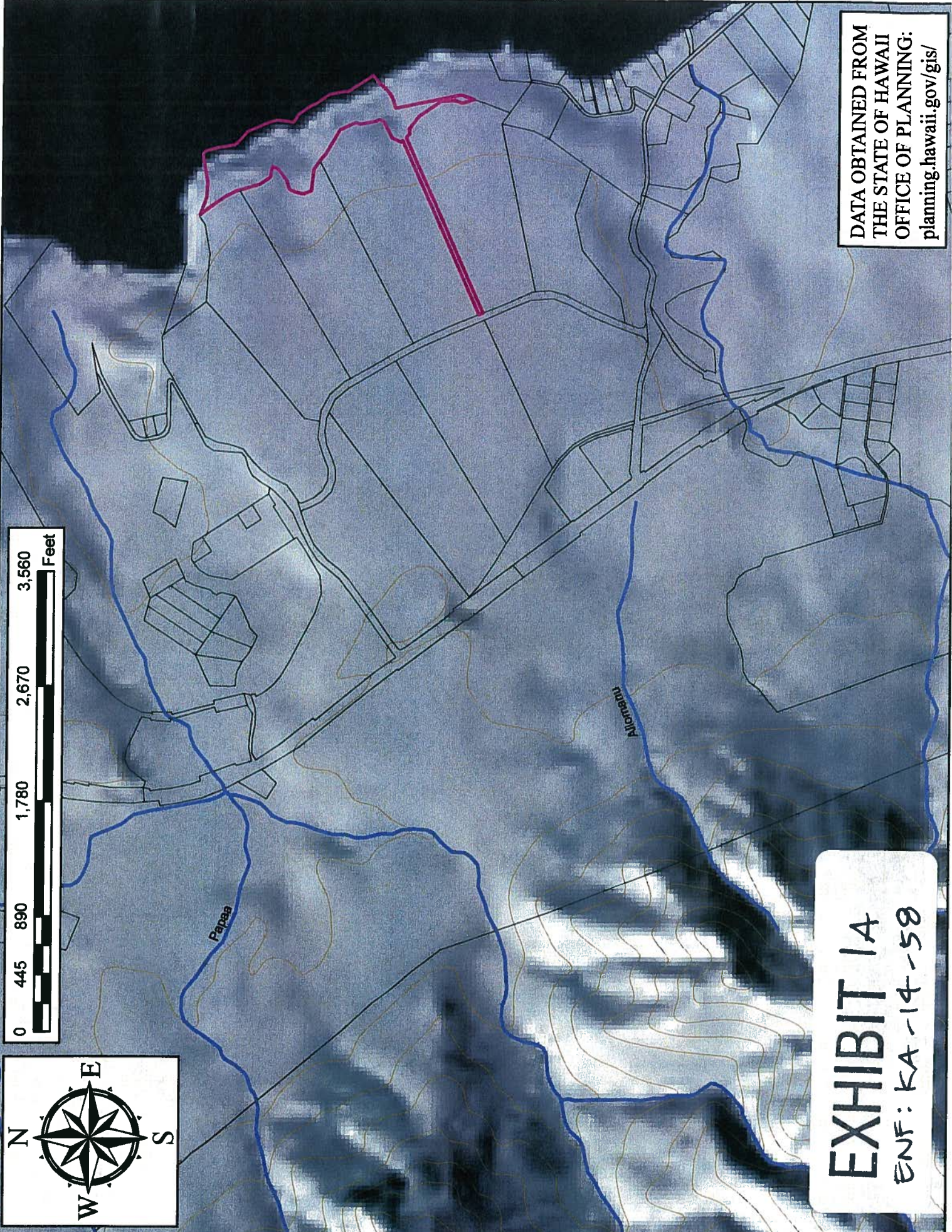
ENF: KA-14-58





**EXHIBIT 1A**  
ENF: KA-14-58

DATA OBTAINED FROM  
THE STATE OF HAWAII  
OFFICE OF PLANNING:  
[planning.hawaii.gov/gis/](http://planning.hawaii.gov/gis/)







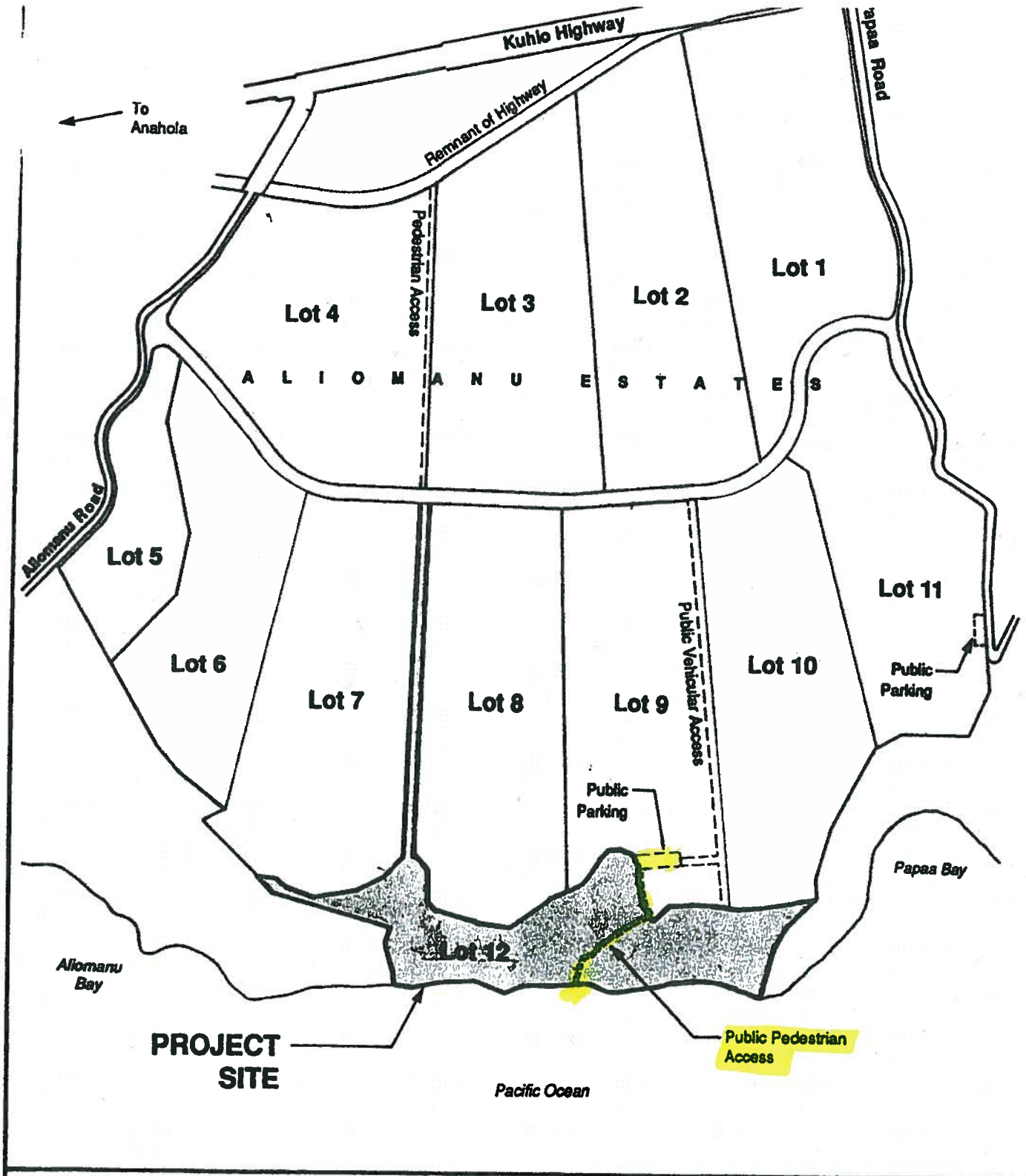
1996

EXHIBIT 2  
ENF: KA-14-58



2010





# EXHIBIT 3

ENF: KA-14-58

Carl's Residence  
Aliomanu Estates  
Aliomanu, Kauai, Hawaii

RECEIVED



BOARD OF LAND AND NATURAL RESOURCES

DEPUTIES

JOHN P. KEPPEL II  
DONA L. HANAIKE

1993 FEB 12 A 11: 55

'93 FEB 11 8: 30

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

AQUACULTURE DEVELOPMENT PROGRAM  
AQUATIC RESOURCES CONSERVATION AND ENVIRONMENTAL AFFAIRS  
CONSERVATION AND RESOURCES ENFORCEMENT  
CONVEYANCES  
FORESTRY AND WILDLIFE HISTORIC PRESERVATION PROGRAM  
LAND MANAGEMENT  
STATE PARKS  
WATER AND LAND DEVELOPMENT

REF: OCEA: SKK

P.O. BOX 621  
HONOLULU, HAWAII 96809

OCEA

FEB 10 1993

FILE NO.: KA-8/25/92-2589

DOC. NO.: 2104

Mr. Norman J. Caris  
23110 Mariposa De Oro  
Mailibu, California 90256

Dear Mr. Caris:

SUBJECT: Conservation District Use Application for a Single Family Residence and Accessory Uses at Aliomanu, Kawaihau, Kauai; TMK: 4-9-05: 27 (Lot 12)

We are pleased to inform you that your Conservation District Use Application for a single family residence and accessory uses was approved on January 22, 1993 subject to the following conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules and regulations of the Federal, State and County governments, and applicable parts of Section 13-2-21, Administrative Rules, as amended;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
3. The applicant shall comply with all applicable Department of Health Administrative Rules;
4. The single family dwelling shall never be used for rental or other commercial purposes;
5. The applicant shall submit a paint color selection for exterior surfaces to our Department prior to the approval of the construction plans;

ENF: KA-14-58  
EXHIBIT 4  
Pg 1 of 2

|                        |       |
|------------------------|-------|
| ___ Bell, J.           | _____ |
| ___ Hirota, P.         | _____ |
| ___ Sierra, J. /       | _____ |
| ___ Agona, L.          | _____ |
| ___ Wallrabenstein, P. | _____ |
| ___ Nagai, K.          | _____ |
| ___ Choo, H.           | _____ |
| ___ Cunningham, B.     | _____ |
| ___ Hayashi, G.        | _____ |
| ___ Iida, E.           | _____ |
| ___ Ishii, R.          | _____ |
| ___ Kondo, C.          | _____ |
| ___ Kato, A.           | _____ |
| ___ Lee, L.            | _____ |
| ___ Liu, R.            | _____ |
| ___ Matthews, C.       | _____ |
| ___ Miller, D.         | _____ |
| ___ Miyashiro, E.      | _____ |
| ___ Ogasawa, T.        | _____ |
| ___ Osh, C.            | _____ |
| ___ Oyatsu, G.         | _____ |
| ___ Sato, A.           | _____ |
| ___ Zukowski, M.       | _____ |



6. Before proceeding with any work authorized by the Board, the applicant shall submit four (4) copies of the construction plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three (3) of the copies will be returned to the applicant. Plan approval by the Chairperson does not infer approval required of other agencies. Compliance with Condition 1 remains the responsibility of the applicant;
7. Any work or construction to be done on the land shall be initiated within two (2) year of the approval of such use, and all work and construction must be completed within four (4) years of the approval of such use;
8. That the applicant notify the Department in writing when construction activity is initiated and when it is completed;
9. That all exposed and disturbed ground shall be revegetated within thirty (30) days unless otherwise provided for in a plan on file with and approved by the Department;
10. That the applicant shall implement appropriate measures to control erosion and sedimentation during and after construction;
11. That appropriate measures shall be exercised to prevent construction materials, debris, and petroleum derivatives from entering coastal waters;
12. A detailed preservation plan for the two sites shall be submitted to the State Historic Preservation Division for approval prior to implementation. This plan shall include buffer zones around the sites, interim protection measures during construction, and long-term preservation measures;
13. The applicant shall comply with the County of Kauai Department of Water, Department of Planning and the Department of Public Work's requirements as noted herein;
14. The applicant shall provide documentation (i.e. book/page or document number) that this approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
15. That in issuing this permit, the Department and Board has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;

EXHIBIT 4

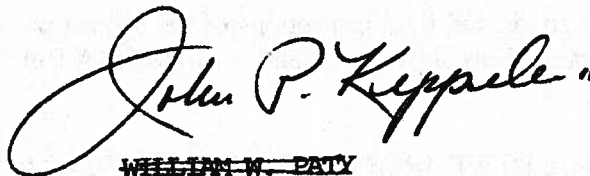
DR. 7 AE 7

- 16. That all representation relative to mitigation set forth in the accepted Environmental Assessment for this proposed use are hereby incorporated as conditions of this approval;
- 17. That the applicant shall remove trees for the dwelling footprint and grading areas only, and trimming of trees only for the makai viewplane;
- 18. That failure to comply with any of these conditions shall render this Conservation District Land Use application null and void; and
- 19. Other terms and conditions as prescribed by the Chairperson.

Please acknowledge receipt of this permit, with the above noted conditions, in the space provided below. Please sign two copies. Retain one and return the other.

Should you have any questions on any of these conditions, please feel free to contact our Office of Conservation and Environmental Affairs staff at 587-0377.

Very truly yours,



~~WILLIAM W. PATY~~

Receipt acknowledged

Joe Vien for Belt Collins  
Applicant's Signature

Date 2/16/03

cc: County of Kauai Dept. of Planning  
County of Kauai Dept. of Public Works  
County of Kauai Dept. of Water  
Belt, Collins and Associates  
DOH/OHA/OSP/DOT

EXHIBIT 4

PG. 3 OF 3

**Bernard P. Carvalho, Jr.**  
Mayor



**Michael A. Dahilig**  
Director of Planning

**Gary K. Heu**  
Managing Director

**Dee M. Crowell**  
Deputy Director of Planning

**PLANNING DEPARTMENT**  
**County of Kauai, State of Hawaii**  
4444 Rice Street, Suite A-473, Lihu'e, Hawaii 96766  
TEL (808) 241-4050 FAX (808) 241-6699

CERTIFIED

**ZONING COMPLIANCE NOTICE**

**TO: Norman J. Caris**  
**P.O. Box 542**  
**Anahola, Hi 96703**

**DATE: SEP 30 2013**

**SUBJECT: ILLEGAL DEVELOPMENT WITHIN THE SMA DISTRICT ON:**  
**TMK: (4) 4-9-005:027 Kawaihau District**  
**'Aliomanu Estates Subdivision**  
**Moloa'a Hui Lands, Kauai, Hawaii**

The Planning Department conducted field inspections of the subject property on **August 30, 2013** and **Sept. 10, 2013** and found the following violations of the SMA Rules and Regulations and the Kauai County Code:

**a. SPECIAL MANAGEMENT AREA RULES AND REGULATIONS**

**Section 1.4 (F) (1) & (2):** "Development" means any of the following uses, activities or operations on land or in or under water within a Special Management Area:

- (1) Placement or erection of any solid material ...
- (2) Grading, removing, dredging, mining, or the extraction of any materials;

**Section 5.0 DEVELOPMENTS PROPOSED WITHIN THE SPECIAL MANAGEMENT AREA SUBJECT TO REVIEW**

Any use, activity, or operation proposed within the Special Management Area defined as "development" pursuant to Section 1.4 H above shall be subject to the review of the Director, Planning Department, and Planning Commission under these Rules and Regulations ...

**Noted Violation(s):** The noted activity of grading of the near shore field areas along with the placements of boulder/retaining walls and fills material seaward of the single family dwelling and concrete driveway, notably within the near shore, shoreline setback area is considered "Development". An SMA Permit for such development is required.

*An Equal Opportunity Employer*

**EXHIBIT 5**  
Pg. 1 of 3  
ENF: KA-14-58

Pursuant to the Special Management Area Rules and Regulations, you are directed to comply with the following requirements immediately:

- a. Cease and desist any further development on subject property.
- b. Provide Best Management Practices (BMP's) in all areas of the noted development prone to flooding and erosion ASAP.
- c. Provide the department with a certified survey of all development conducted seaward of the single family dwelling and concrete driveway. Such survey shall include identification of the current shoreline, as may be required for certification and permit processing, all placed boulders/retaining walls, fences and gates along with calculated grading volumes and its limits along with identifying any sub grade structures/culverts.
- d. Provide the Department with required SMA Assessment Application to address the development of grading of field areas and the placements of boulder/retaining walls and fills material makai/seaward of the previously approved SMA Permit issued for the single family dwelling and driveway. Such application may be subject to approval by the Kauai Planning Commission.

Failure to acquire proper permits for the noted development may result with the requirement of restoration of the area to pre-existing topographic conditions along with re-vegetation of all areas affected.

Pursuant to the:

**SMA RULES AND REGULATIONS SECTION 13.0 PENALTIES AND INJUNCTIONS**

*Section 13.0 A. Any person who violates any provision of these Rules and Regulations shall be subject to civil fine not to exceed \$100,000 or the cost of returning the affected environment or ecology within the Special Management Area to the condition existing before the violation. In addition to any other penalties, any person who performs any development in violation of this part shall be subject to civil fine not to exceed \$10,000 a day for each day in which such violation persists. Such a fine shall not become final until twenty-one days after the Director's decision to provide the person an opportunity to appeal and request a hearing before the Planning Commission. This hearing shall be held in accordance with Chapter 6 and Sections 1-9(92-5) of the Rules of Practice and Procedure of the Planning Commission.*

You may be levied a fine up to \$10,000.000 for the above noted SMA violations should you not preform the required remedial action as stated above or as may be agreed to. Should the

EXHIBIT 5

Pg. 2 of 3



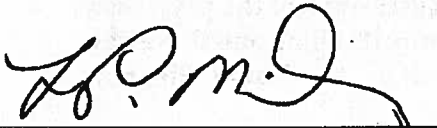
Norman J. Caris  
Page 3

**violations not be remedied within the agreed timeline, an additional fine of up to \$10,000.00 for each day in which such violation persists shall be levied.**

Be advised that the State Department of Health, Clean Water Branch may have specific concerns and requirements for the development conducted upon the subject property as above noted. Please contact the Dept. of Health, Kauai Branch should you have any questions to that regard.

Be advised that the Department of Land and Natural Resources, Office of Conservation and Coastal Lands may have specific requirements for the noted development conducted within the SLU Conservation District. Please contact the offices of DLNR, OCCL at your earliest opportunity upon receipt of this notice with any questions to that regard.

Please respond to the Planning Department within 15 calendar days upon receipt of this letter providing a written acceptable time frame/plan for compliance to the above noted remedial actions. Should you require assistance, please call me at 241-4064.



LESLIE P. MILNES  
CZM Planning Inspector

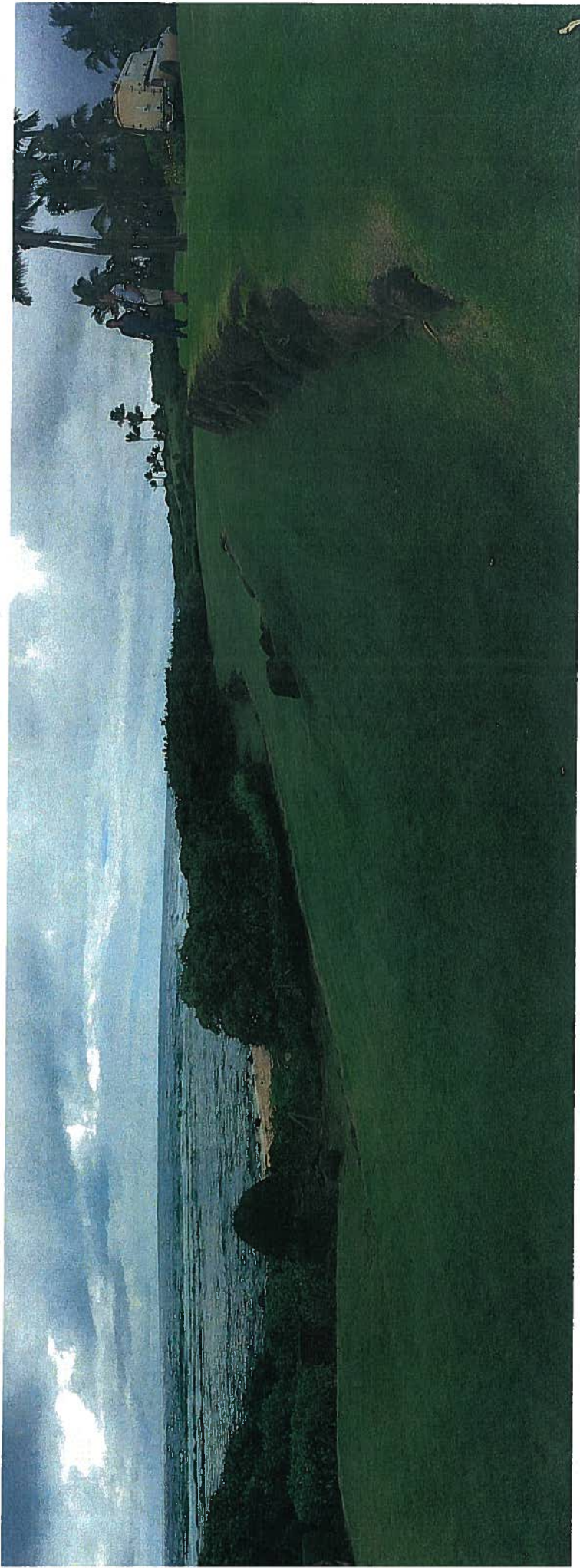
cc: County Attorney  
Office of the Mayor  
Department of Public Works, Engineering, Flood Compliance Section  
Dept. of Public Works, Engineering  
Dept. of Health, Clean Water Branch, Kaua'i Branch Office  
DLNR, Office of Conservation and Coastal Lands, Samuel J. Lemmo, Administrator

EXHIBIT 5  
Pg. 3 of 3



EXHIBIT 6





# EXHIBIT 7

ENF: KA-14-58



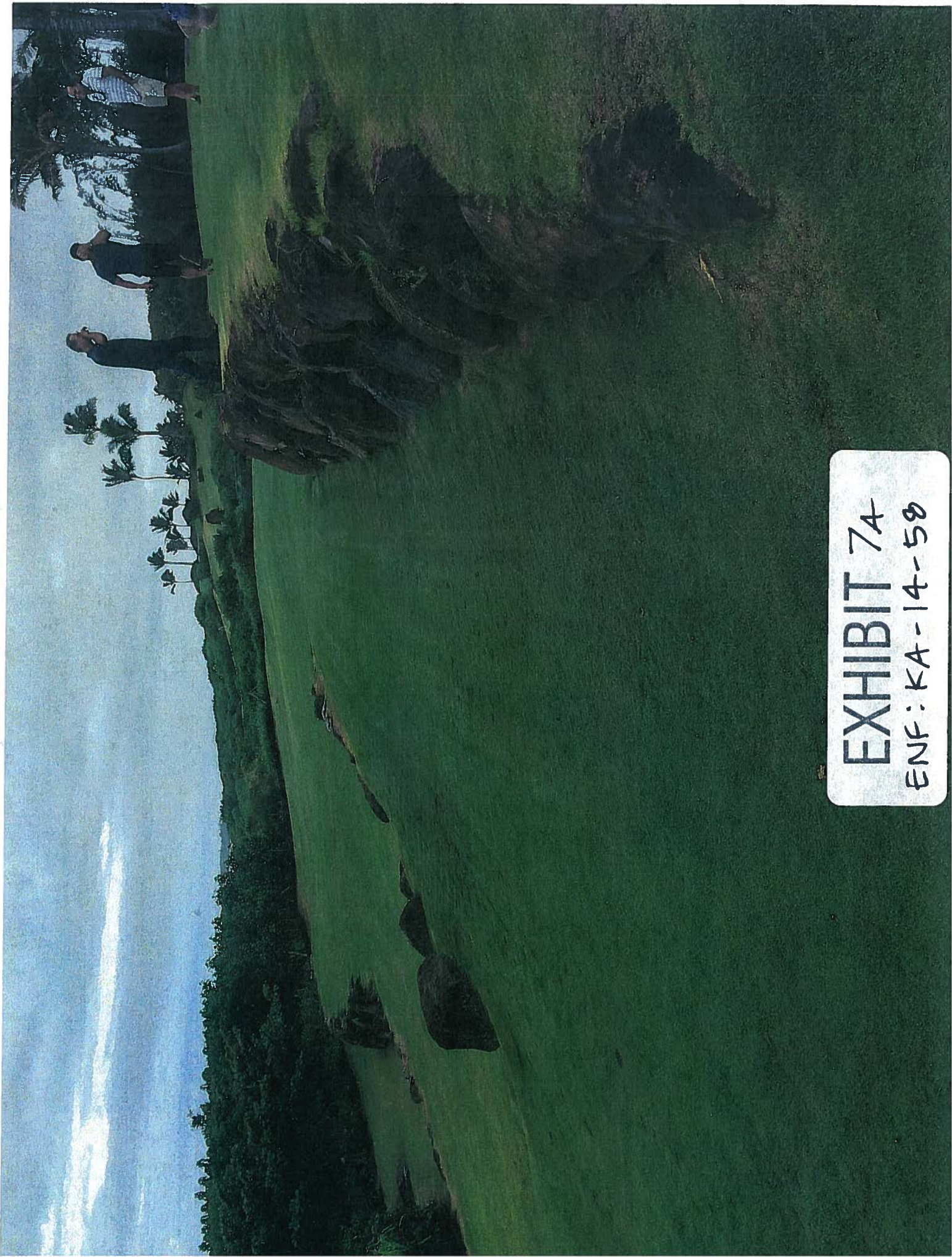


EXHIBIT 7A  
ENF: KA-14-58



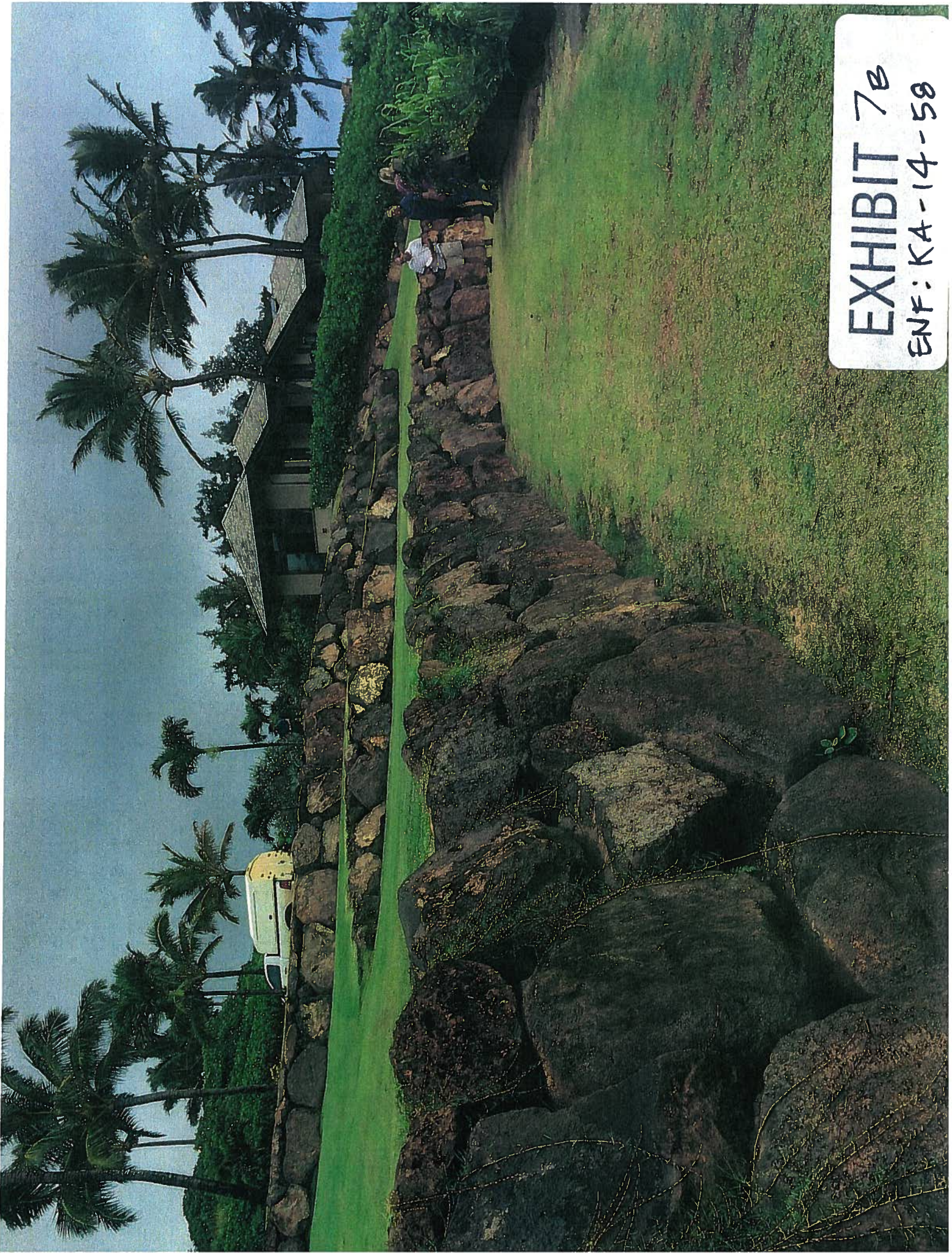


EXHIBIT 7B  
ENF: KA-14-58



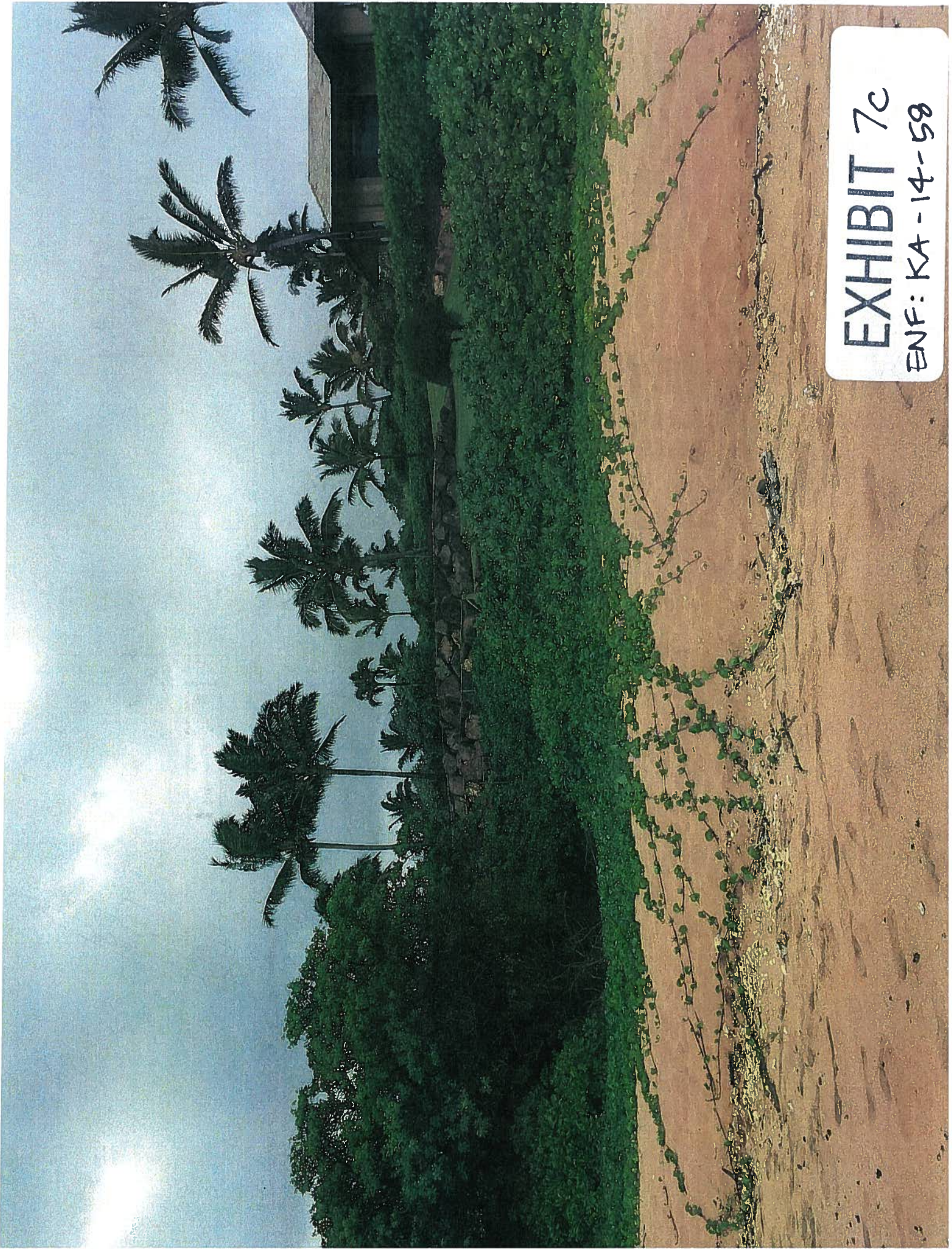


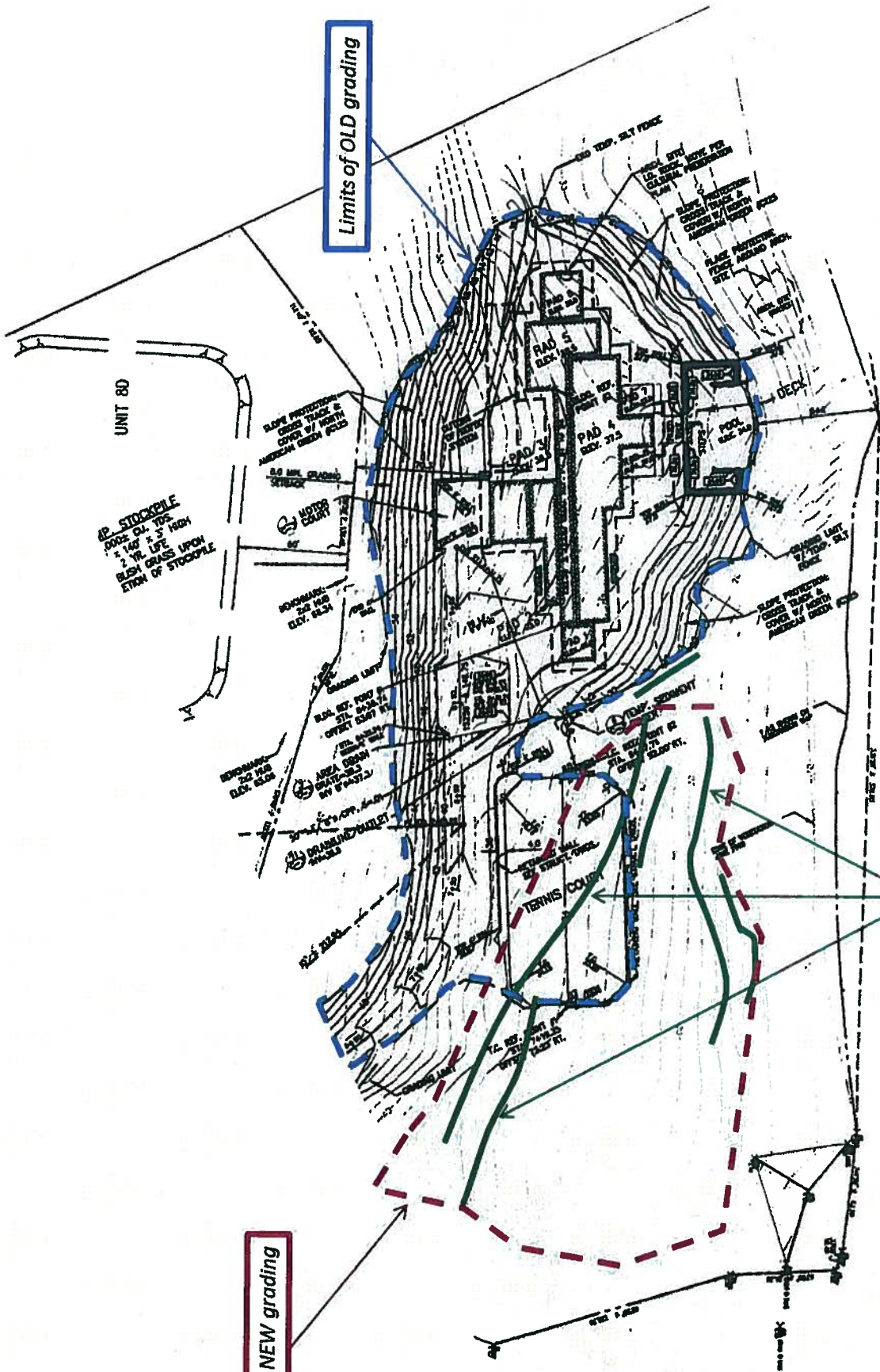
EXHIBIT 7c

ENF: KA - 14 - 58



# EXHIBIT 8

ENF: KA-14-58



Limits of OLD grading


Limits of NEW grading

NEW structures

UNIT 80

STOCKPILE  
 100' x 150' x 5' HIGH  
 2 1/2" LIFT  
 BUSH GRASS UPON  
 EROSION OF STOCKPILE

088A1


 Van Meter Engineering, Inc.  
 P.O. Box 857 Normal, IL 68701 (608) 228-7255  
 PROJECT NO. 07001 APR. 21, 1998

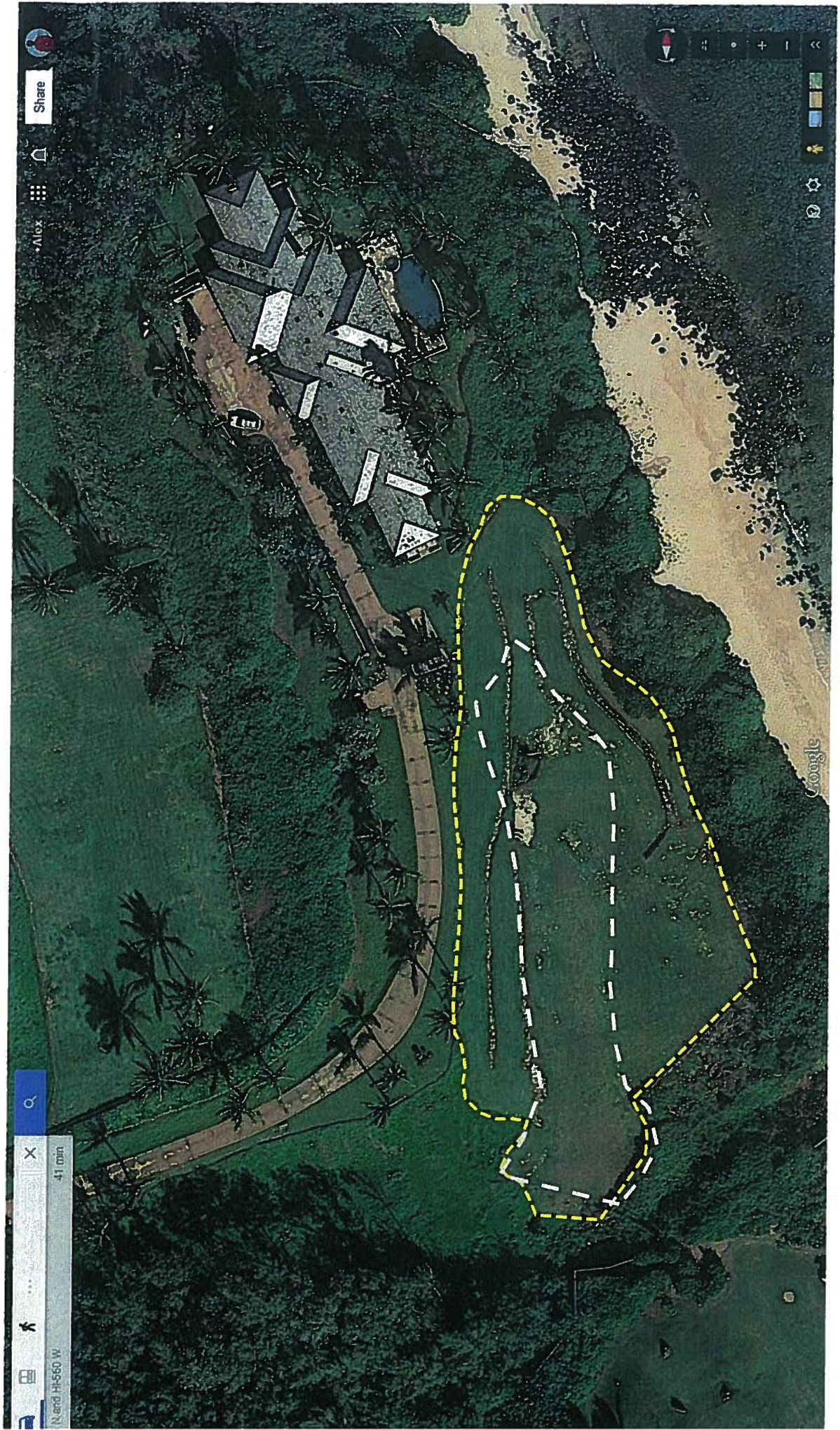




ENF:KA-14-58

EXHIBIT 9





ENF: KA-14-58

EXHIBIT 10



NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

JESSE K. SOUKI  
FIRST DEPUTY

WILLIAM M. TAM  
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



**HISTORIC PRESERVATION DIVISION  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

601 Kamokila Boulevard, Suite 555  
Kapolei, HI 96806

December 12, 2014

Alex Roy  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
1151 Punchbowl Street  
Honolulu, HI 96813

LOG NO: 2014.04607  
DOC NO: 1410MN20  
Archaeology

Aloha Mr. Roy:

**SUBJECT: Chapter 6E-11 and 6E-42 Historic Preservation Review -  
Unpermitted Grading at Caris Property  
Aliomanu and Papa'a Ahupua'as, Kawaihau District, Island of Kaua'i  
TMK: (4) 4-9-005:004 Lot 12**

This letter pertains to grading activity at the 15.44 acre Caris property, located within Alimanu Estates, in Anahola. On July 23, 2014, the State Historic Preservation Division (SHPD) responded to a complaint about unmonitored grading on the property, which is located in an area with high potential for subsurface cultural deposits and human remains. Consultation with the County of Kaua'i revealed the SHPD did not review building or other permits for the property and had not made recommendations prior to the grading, which was not permitted by the county. SHPD Kaua'i Lead Archaeologist Mary Jane Naone joined staff from the Office of Conservation and Coastal Lands (OCCL), the County of Kaua'i Planning Department, and landowner representatives on site to assess potential damage from the unpermitted grading on July 23, 2014 and the Kaua'i archaeologist revisited the site on September 22, 2014.

Previous archaeological work at the Caris property included an archaeological inventory survey (AIS) (Hammatt and Ida 1992), preparation of a preservation and monitoring plan (Hammatt and McDermott 2000) a burial disinterment and reinterment report (Perzinski, McDermott and Hammatt 2000), and a report titled "Implementation of Preservation Plan and Monitoring Report for a 15.44 Acre Parcel in 'Aliomanu and Pāpa'a, Kaua'i" (Busnesll, Kikiloi and Hammatt 2001). During the archaeological inventory survey, archaeologists identified two archaeological sites: SIHP Site 50-30-04-1896, which is comprised of a subsurface cultural layer (Feature B) containing a human burial (Feature A), and an adze grinding stone (Feature C) located 100 meters mauka (mountain side) of the other features. Site 50-30-04-1897 is another cultural layer located on a beach terrace north of the project area. Both sites contained artifacts and cultural material and were deemed significant under HAR §13-284-6. criterion "d" (has yielded, or is likely to yield, information important for research on prehistory or history) and Site 1896 is also significant under criterion "e" (has an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events, or oral accounts – these associations being important to the group's history and cultural identity).

The archaeological survey was reviewed and accepted by SHPD in a review letter dated October 26, 1992 (*Log No. 6462, Doc No. 2095w*). The review letter stated that "A detailed preservation plan for the two sites shall be submitted to the State Historic Preservation Division for approval prior to implementation. This plan shall include buffer zones around the sites, interim protection measures during construction, and long-term preservation measures".

In 1995, an interim preservation plan was prepared for Site 1896, which was located adjacent to the proposed Caris house site. In an October 12, 1995 review letter of the interim preservation plan, SHPD requested that a burial treatment plan be prepared for Feature A, the human burial within the site (*Log No. 15703, Doc No: 9510EJ28*). The

EXHIBIT 11

ENF: KA-14-58 1 of 3

review letter also requested that the preservation plan include preservation measures for Site 1897. Although the AIS states that "With a series of simple protective measures, the sites, including the burial can be preserved in place", the subsequent document, a preservation plan, calls for the relocation of the human burial, based on consultation with the Kaua'i burial council (Perzinski, McDermott, and Hammatt 2000: pg 15). The council originally accepted a burial treatment plan that called for preservation in place, but upon conducting a trip to the site, expressed concerns about the proximity of the burial to the shoreline and potential exposure to high surf. As reported in the reinterment report, the remains were temporarily stored in Lihue and reinterred on July 11, 1996.

The amended preservation plan was accepted by SHPD in a letter dated April 5, 2000 (*Log No. 25158, Doc No. 0003NMI6*). The preservation plan recommended moving the adze grinding stone to a "safe distance from its current location, adjacent to the location of the proposed house structure". The long term preservation measures included in the preservation plan state "The adze grinding stone will either be left at its relocation site, or returned to its original site, as determined by the land owner" (Hammatt and McDermott 2000: page 18). Additionally, Site 1897, the cultural layer was to be avoided. The preservation plan states that "if the vicinity of the site is used by the public for parking or camping, a deposit of sediment will be brought in to cover the subsurface deposits. The covering may not be necessary if the subsurface site is not in danger from erosion and/or modern land use" (page 18). Site 1897 is located north of the proposed house site and outside of the construction area.

The preservation plan and monitoring report reported on grading and grubbing that took place on March 28, 2000. Cultural Surveys Hawaii, Inc. (CSH) archaeologist Matt McDermott relocated the sites and implemented the monitoring plan by fencing off the cultural layer adjacent to the house site (Site 1896) and providing information to the work crew regarding inadvertent finds and site locations. He also supervised the relocation of the adze grinding stone. The stone was transported by use of a strap and dragged to a location 30 feet outside of the grading limit. The stone, estimated at between 3000-4000 lbs. was reportedly not damaged in the relocation. McDermott performed a follow up site inspection in June 2000. No additional historic properties or artifacts were identified during the grading. The report concludes:

Long term preservation plan provisions will apply if there is further development of the Caris property. This calls for continued avoidance and protection of Sites 50-30-04-1896 and 50-30-04-1897. For Site 1896 this will include avoidance of the cultural layer *makai* of the house location. Feature 1896A, the burial site, will not be disturbed by future improvements to the parcel. If the vicinity of Site 1897 is used by the public for parking or camping, a deposit of sediment will be brought in to cover the subsurface deposit. This covering may not be necessary if the subsurface site is not in danger from erosion and/or modern land use. A revised preservation plan may be necessary depending on the condition of the archaeological sites and the proposed alterations to the property (Bushnell, Kikiloi, and Hammatt 2000).

SHPD Kaua'i archaeologist Mary Jane Naone received notice of the recent unpermitted grading on June 19, 2014 via our Kapolei office and visited the site on July 23, 2014 with staff from the Department of Land and Natural Resources (DLNR) OCCL, and the County of Kaua'i. During the initial field visit, the archaeologist was unable to relocate the grinding stone or recognize a reinterment site, and representatives of the landowner did not know the whereabouts of these sites. The archaeologist observed that a large terraced area southwest of and immediately adjacent to the house site had been graded without archaeological monitoring.

The SHPD archaeologist returned to the site on September 22, 2014 with an archaeologist from Cultural Surveys Hawaii, Inc. (CSH), Gerald Ida, who had conducted the AIS in 1992. The archaeologists were reliant on the aforementioned reports and the memory of Gerald Ida to relocate both the reinterment site and identify the adze grinding stone, as well as to recognize (on the surface) the limits of the cultural layer. The CSH archaeologist located the "general area" of the reinterment site within a slope characterized by boulders and ironwood north of the house site, along an access trail to the beach. He confirmed that the reinterment site appeared to be undisturbed. The area also contained a large grinding stone with two grinding depressions, but this boulder is not the same as the feature previously identified (Site 1896 Feature C). Mr. Ida also relocated the general area of Site 1896, the cultural layer, and what he believed was the southern limit of the layer as determined by subsurface testing during the 1992 inventory survey. It appeared the new grading was outside of the limits of Site 1896 as he remembered it, although the land alteration made it difficult to determine the former extent of the cultural layer(s) on the surface. Finally, the archaeologists attempted to relocate the adze grinding stone via pedestrian survey on the outskirts of the graded area, and could not relocate the feature. We spoke with the landowner on site, who stated he was not on site during the removal of the rock, and had not been informed of its whereabouts or the need for preservation.

EXHIBIT 11  
ENF: KA-14-58 2 OF 3

Based on the two site visits and a review of the preservation documents for the Caris property, which include hand-drawn maps over twenty years old, we are unable to verify that all previously identified historic properties are still intact and protected as indicated in approved plans. The archaeological inventory survey report and the monitoring report indicate the presence of significant historic properties, including a human burial, and the requirement for diligence in preserving and protecting these properties during subsequent activities. The inventory survey report and all mitigation plans were funded by the landowner, who would have been fully aware of the significant sites and their preservation status prior to the recent grading activities.

The SHPD was not consulted and no archaeological monitor was present during the grading. Pursuant to HRS §6E-11 (c): "It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval."

If the Site 1896 adze grinding stone has been removed from the property, or the burial preserve area has been impacted in any way, this will constitute a violation of the approved preservation plan. Pursuant to HRS §6E-11 (a): "It shall be a civil and administrative violation for any person... to knowingly violate the conditions set forth in an approved mitigation plan that includes monitoring and preservation plans." A maximum fine of \$10,000 per separate violation is indicated in HRS §6E-11 (f). The violator shall also be fined "...an amount based on the value of the lost or damaged historic property or burial site." In order to determine the status of the preservation sites and the value of any site or portions thereof lost during grading, we recommend the following prior to the determination of fines and prior to the issuance of any after the fact permits:

1. An addendum archaeological inventory survey (AIS) should be conducted, at the cost of the landowner, to identify the limits of the existing cultural layers and to determine the extent (if any) of damage to the previously identified historic properties. As the existing AIS was conducted over twenty years ago, current archaeological methodology and mapping will better inform site boundaries. The archaeological firm conducting the survey should consult with the SHPD Kaua'i archaeologist prior to fieldwork to determine strategy.
2. An updated preservation plan informed by the approved addendum AIS should be prepared and submitted to SHPD for review. The preservation plan will include provisions for protective buffer zones and maintenance of the historic properties.

Please contact Kaua'i archaeologist Mary Jane Naone at (808) 271-4940 or [Maryjane.Naone@hawaii.gov](mailto:Maryjane.Naone@hawaii.gov) if you have any questions regarding this letter, or if you require a list of qualified archaeological firms. Mahalo for your assistance in preserving significant historic and cultural properties.

Aloha,



Theresa K. Donham  
Archaeology Branch Chief

cc. Michael Dahilig, Director of Planning, Kaua'i County  
4444 Rice Street Suite A473  
Lihue, HI 96766-1326

EXHIBIT //

ENF: KA-14-58 3 OF 3



**TABLE OF CONTENTS**

1 INTRODUCTION.....1

2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES.....1

2.1 PENALTY CALCULATION.....2

2.1.1 Identified Land Use Penalties.....3

2.1.2 Non- Identified Land Use Penalties.....4

2.1.3 Tree Removal.....5

2.1.4 Vegetation Removal/Vegetation Clearing.....5

2.1.5 Additional Considerations and Factors.....6

2.1.6 Continuing Violations and Permit Non-Compliance.....6

2.1.7 In-Kind Penalties.....7

2.1.8 Penalty Adjudication.....9

3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES.....10

3.1 PRIMARY RESTORATION DAMAGES.....11

3.2 COMPENSATORY DAMAGE CALCULATION.....12

3.3 ADJUDICATION OF DAMAGES.....13

APPENDIX A: GUIDELINE FRAMEWORK TABLES

APPENDIX B: DEFINITIONS

APPENDIX C: REFERENCES

APPENDIX D: DAMAGES EXAMPLES

APPENDIX E: PENALTY CALCULATION WORKSHEET

**CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES**

September 2009

*Relating to penalties for violations within the Conservation Districts*

Act 217

**EXHIBIT 12**  
 ENF: KA-14-58

## 1 INTRODUCTION

Hawaii Revised Statutes (HRS) §183C-7 was amended on July 7, 2008 to increase the maximum penalty for a Conservation District violation to up to \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

This document, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land and Natural Resources* is intended to provide the Office of Conservation and Coastal Lands (OCCL) with a framework to systematically carry out its enforcement powers, in the determination and adjudication of civil and administrative penalties. These guidelines are to be used for internal staff guidance, and should be periodically reviewed to determine their effectiveness, and whether refinements are needed. These guidelines are consistent with HAR §13-1, Subchapter 7, Civil Resource Violation System (CRVS).

## 2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

The charging and collecting of penalties is an enforcement tool that may be used to ensure future compliance by the responsible party and others similarly situated. The penalty amount(s) shall be enough to ensure immediate compliance with HAR §13-5 and HRS §183C, and cessation of illegal activities. Penalties will be assessed for each action committed by an individual(s) that conducts an unauthorized land use and that impairs or destroys natural resources protected under Chapter §183C, HRS.

The Staff will treat each case individually when assigning conservation district penalties using the following framework, and additional considerations and factors for upward or downward adjustments. The staff of the OCCL (Staff) will use these penalty schedule guidelines to issue violation notices and to make recommendations to the Board of Land

and Natural Resources (Board), Chairperson of the Board of Land and Natural Resources (Chairperson), or Presiding Officer, whom may ultimately adjudicate the Conservation District penalties. These guidelines presume that all cases in which a violation has occurred, the Chairperson, Board, or Presiding Officer may also assess administrative costs, damages to public land or natural resources, and costs associated with land or habitat restoration.

### 2.1 PENALTY CALCULATION

The penalty range for these actions will be substantially determined based on the type of permit that would have been required if the individual(s) had applied to the Department of Land and Natural Resources (Department) or Board for pre-authorization to conduct the identified use, under Hawaii Administrative Rules (HAR) §13-5-22, 23, 24, 25. Assessing the penalties according to the Conservation District permit type accounts for the level of review or scrutiny the unauthorized use would have received by the Department or Board in order to avoid damage to the natural resource. This graduated permit review framework corresponds to the level of actual or potential "harm to the resource"<sup>1</sup> caused by the violation.

Once the baseline for the penalty range has been established according to the required permit, the penalty may be adjusted appropriately upward or downward according to the "harm to resource" caused or potentially caused by the violator's action and additional considerations and factors (See 2.1.4),<sup>2</sup> within the assigned penalty range. Where Staff was unable to associate the unauthorized use with a typical land use identified in HAR §13-5, Staff may try to associate the action with the most similar identified land use in HAR §13-5, or according to the "harm to the resource" caused by the violation. Table 1

<sup>1</sup> "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource, which is expected to occur as a result of unauthorized use of construction, alteration, or landscape alteration (See Appendix B: Default/Adapted from Florida Department of Environmental Protection, 2009 Administrative Phase and Damage Liability, Ch. 62B-54.

<sup>2</sup> Penalty amounts may be adjusted up or down, based on additional considerations, such as the actual extent of the direct damage, significance of any other indirect impact, environmental record of the violator, responsiveness of violator, etc. (See 2.1.4 Additional Considerations and Factors).



was created to demonstrate the penalty ranges for the type of required permit and "harm to resource" (See 2.1.1 or Appendix A).

The first two of the following sections explain the identified and non-identified land use framework. The next four sections: Tree Removal, Additional Considerations and Factors, Continuing Violations and Permit Non-Compliance, and In-Kind Penalties, provide guidance for the upward or downward adjustment of penalties based on the initial framework discussed in Section 2.1.1, Identified land use penalties.

### 2.1.1 Identified Land Use Penalties

The violation penalty range associated with each required permit will be assessed in accordance with the following harm to resource indices in this graduated framework.

Table 1. Penalty Guideline Framework

| Harm to resource or potential for harm to resource | Identified land use permit penalties with the letter | Penalty Range     |
|--|--|-------------------|
| Major  | D (Board)  | \$10,000-\$15,000 |
| Moderate   | C (Departmental)                                     | \$2,000-\$10,000  |
| Minor  | B (Site Plan)  | \$1,000-\$2,000   |
| Very Minor   | (B) (Site Plan)                                      | Up to \$1,000     |

### Major Harm to the Resource/ Board Permit (D)

Violations identified with the required permit prefix (D) may incur a penalty in the range of \$10,000 - \$15,000 as a Board permit would have been required to minimize the possibility of causing "major harm to the resource." Examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, grading or alteration of topographic features, aquaculture, major marine construction or dredging, unauthorized shoreline structures, major projects of any kind, mining and extraction, etc.

### Moderate Harm to the Resource/Departmental Permit (C)

Violations identified with the required permit prefix (C) may incur a penalty in the range of \$2,000-\$10,000, as a Departmental permit would have been required, due to the possibility of causing "moderate harm to the resource." Examples of "moderate harm(s) to the resource" may be adverse impacts that degrade water resources, degrade native ecosystems and habitats, and/or alter the structure or function of a terrestrial, littoral or marine ecosystem. Such actions may include, but are not limited to, unauthorized landscaping causing ground disturbance, unauthorized alteration, renovation or demolition of existing structures or facilities, such as buildings and shoreline structures, maintenance dredging, agriculture, and animal husbandry, etc.

### Minor Harm to the Resource/Site Plan Approval (B) Permit

Violations identified with the required permit prefix (B) may incur penalties as a site plan approval would have been required to assure that "minor harm(s) to the resource" are minimized. "Minor harm(s) to the resource" may incur a penalty of \$1,000-\$2,000 and could be actions causing limited to short-term direct impacts including, but not limited to, small-scaled construction, construction of accessory structures, installation of temporary or minor shoreline activities or similar uses.

### Very Minor Harm to the Resource/(B) Permit

In instances in which a permit with the B prefix should have been sought but are considered to have only caused "very minor harm(s) to resource" a penalty of up to \$1,000 may be incurred. These "very minor harm(s) to the resource" could be actions in which the impact on the water resource or terrestrial, littoral or marine ecosystem was temporary or insignificant, and was not of a substantial nature either individually or cumulatively.

### 2.1.2 Non-Identified Land Use Penalties

Violations in which an unauthorized use is not identified in HAR §13-5-22, 23, 24, 25, Staff may try to associate the action with the most similar identified land use in HAR

§13-5 or according to the "harm to the resource" caused by the violation. Refer to the above section, *Identified Land Use Penalties*, for the most similar required permit prefix. To categorize the violation as a "harm to resource" when no similar use is identified in HAR §13-5, Staff will refer to Table 1 and the definitions of the four violation types of "harm to resource" (See Appendix B: Definitions).

### 2.1.3 Tree Removal

Violation penalties for the removal of any federal or state listed threatened, endangered, or commercially valuable tree may incur a fine of up to \$15,000 per tree. Removal of any native tree may incur a fine of up to \$1,000 per tree. The removal of any invasive tree shall be considered as removal/clearing of vegetation.

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.<sup>3</sup> If violation is considered as one violation, a fine amount of up to \$15,000 may be incurred, utilizing the guidelines for Major, Moderate, Minor, and Very Minor outlined in this schedule. However, the removal of any federally or state listed threatened or endangered tree shall be considered on a one violation per tree basis, with a maximum penalty of up to \$15,000 per tree.

### 2.1.4 Vegetation Removal/Vegetation Clearing

Past Staff recommendations and Board decisions have treated some cases of tree or removal as one citation of vegetation clearing/vegetation removal, this practice may be continued in violations resulting in minor or very minor harm to the resource. In accordance with the identified land uses within HAR §13-5 the assessment of vegetation removal has been based on a single citation of removal/clearing determined by the square footage of vegetation removed (See Table 3 Vegetation Removal). However, the

<sup>3</sup> While Staff and Board decisions in MA-01-09, OA-05-49 and MA-06-08 have treated the removal of non-native, invasive, or noxious trees as one citation of "clearing" with mandatory remediation plans.

Department may see fit to assess the removal/clearing of threatened, endangered, or commercially valuable plants similar to the modified tree removal framework and may be penalized on an individual plant basis of up to \$15,000 per plant.

Table 3. Vegetation Removal

| Action   | Commensurate Harm to Resources | Penalty Range              |
|--|--------------------------------|----------------------------|
| Removal of more than 10,000 sq. ft.                            | Major                          | \$10,000-\$15,000          |
| Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation | Moderate                       | \$2,000-\$10,000           |
| Removal of less than 2,000 sq. ft. vegetation                  | Minor                          | \$1,000-\$2,000            |
| Clearing of Invasive or noxious vegetation                     | Very Minor                     | Up to \$1,000 <sup>4</sup> |

Note: The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant. According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq.ft., as clearing 10,000 sq.ft. Staff could assess a penalty of \$10,000.

### 2.1.5 Additional Considerations and Factors

After Staff applies the Conservation District violation graduated penalty framework to identify the violation penalty range (1, 2, and 3 found above), the Staff may incorporate several considerations into the final assessed conservation district penalty including but not limited to, those factors identified in HAR §13-1-70 Administrative Sanctions Schedule; Factors to be Considered.

### 2.1.6 Continuing Violations and Permit Non-Compliance

Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

<sup>4</sup> Provided the harm to the resource and office damage were minimal.



Violation of existing approved Conservation District Use Permit (CDUP) conditions will be assessed on a case-by-case basis. Existing permit violations, in which deadlines are not met, may be individually assessed by the Staff as to prior violator conduct, knowledge, and compliance. Violation of permit conditions involving initiation and/or completion of project construction, notification of start and completion dates, failure to file legal documents, etc., may be considered very minor within the existing framework, although it should be noted that such actions may result in permit revocation. Failure to perform proper cultural, archeological, or environmental impact studies or failure to implement proper best management practices as identified in the standard permit conditions may be assessed more severely by Staff, as a moderate or major harm to the resource, due to the potential of greater adverse impacts to natural resources from the violator's failure to comply with the permit conditions, may have occurred.

#### 2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.<sup>5</sup> This would not serve as a way to avoid payment but as a way to reduce the cash amount owed while allowing the Department to consistently enforce its rules. The in-kind penalty project is not designed to credit the violator for restoration or remediation efforts that may be already required, but to offset a portion of the cash penalty assessed. The in-kind penalty should be enough to ensure future compliance with HAR §13-5 and HRS §183C, by the violator and to deter other potential violators from non-compliance.

In-kind penalties will only be considered if (1) the responsible party is a government entity, such as a federal agency, state agency, county agency, city agency, university, or school board, or if (2) the responsible party is a private party proposing an environmental

<sup>5</sup> In-Kind Penalty framework has been adopted from Florida Department of Environmental Protection, 2007, Program Directive 921, Settlement guidelines for civil and administrative penalties.

restoration, enhancement, information, or education project. In-kind penalties are limited to the following specific options:

- a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.
- b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCCL's, mission to protect and conserve Hawaii's Conservation District Lands.
- c. **Capital or Facility Improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.
- d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.

### 3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

Penalties to recoup damages to public lands or natural resources for the purposes of enforcement and remediation may be assessed in addition to Conservation District violation penalties assessed by the aforementioned guidelines. The assessed total value of the initial and interim natural resource(s) damaged or lost (compensatory damages) and the cost of restoration or replacement of the damaged natural resource(s) (primary restoration cost) along with any other appropriate factors, including those named in HAR §13-1-70, may be adjudicated by the Board. The total value may be estimated on a per annum basis, and then may be used to calculate the net present value of the initial and interim loss of natural resource benefits, until the ecosystem structure, function, and/or services are restored.

The cost of a full-scale damage assessment by the Department would be an administrative cost, which could be recouped by the Board from the landowner or offender pursuant §HRS 183C-7. In some cases, the damage to public lands or natural resources may occur on more than one ecosystem or habitat type, (e.g., sandy beaches, seagrass beds, and coral reefs). In such instances, damages for all impacted systems will be handled cumulatively.

Since all the ecosystem services provided by the ecosystem in question cannot be quantified (e.g., the aesthetic value), the values obtained are lower bound estimates, and may be applied to systems similar to the referenced ecosystem using the benefit transfer method. These valuations, to account for the loss of ecosystem services and the cost to restore them, may be applied to Hawaiian ecosystems on public lands: such as Koa and Ohia forests, coral reefs, seagrass beds, wetlands, dune and beach ecosystems, and other important Hawaiian ecosystems.

While each case is unique and individual in nature, the Department may not be able to conduct detailed damage assessments in each case, and may refer to past precedent,

#### 2.1.8 Penalty Adjudication

Violation penalties may be adjudicated similarly to the harm to resource indices in the penalty guideline framework.

| Level of Harm to Resource | Identified Land Use Permit and Penalty Range | Penalty Adjudicator              |
|---------------------------|--|----------------------------------|
| Major                     | \$10,000-\$15,000                            | Board                            |
| Moderate                  | \$2,000-\$10,000                             | Board                            |
| Minor                     | \$1,000-\$2,000                              | Chairperson or Presiding Officer |
| Very Minor                | up to \$1,000                                | Chairperson or Presiding Officer |

#### Major and Moderate Harm to the Resource

The Board may adjudicate penalties to violations categorized as causing or potentially causing major or moderate harm(s) to the resource. The Board may also adjudicate cases in which repeat violations, repeat violators, or egregious behavior were involved, or moderate to significant actual harm to the resource occurred. The Board may also adjudicate the payment of part or all, of the penalty as part of an In-kind penalty.

#### Minor and Very Minor Harm to the Resource

The Board may delegate to the Chairperson or a Presiding Officer the power to render a final decision in minor and very minor conservation district violations in order to provide expeditious processing and cost effective resolution. The Chairperson or appointed Presiding Officer may adjudicate penalties to minor and very minor violations characterized by inadvertent or unintentional violations and those violations which caused minor or very minor harm to the resource.



economic ecosystem valuations, and other published environmental valuations to estimate and assess damages on smaller scales (for valuations and publication examples see Appendix C: References and Appendix D: Damages Examples). Using the benefit transfer method to apply past precedents and published valuations in some situations would allow the Department to focus its administrative duties and time on remediation and restoration efforts. However, as ecological valuation and research continue, more comprehensive estimates may be produced and utilized.

The Board may allow restoration activities and damage penalties to be conducted and/or applied to a site different from the location of the damaged area where similar physical, biological and /or cultural functions exist. These assessed damages are independent of other, city, county, state and federal regulatory decisions and adjudications. Thus, the monetary remedies provided in HRS §183C-7 are cumulative and in addition to any other remedies allowed by law.

### 3.1 PRIMARY RESTORATION DAMAGES

The cost of land or habitat restoration or replacement, the cost of site monitoring, and site management may be assessed and charged as primary restoration damages. Restoration efforts will aim to return the damaged ecosystem to a similar ecological structure and function that existed prior to the violation. In cases in which the damaged ecosystem was predominately composed of non-native species, restoration efforts must re-vegetate Conservation District land and public lands with non-invasive species, preferably native and endemic species when possible. The use of native and endemic species may thus result in the restoration of ecological structure and function critical for the survival of endemic Hawaiian species.

Returning the damaged and or severely degraded site to a condition similar to or better than its previous ecological structure and function (e.g., a terrestrial system such as a Koa (*Acacia koa*) forest) would include: (1) calculating the level of ecosystem services to be restored from carbon sequestration, climate regulation, nutrient cycling, air and water purification, erosion control, plant and/or wildlife habitat, and any other services which

may be valued; (2) purchases, production and out-planting of Koa seedlings; and (3) monitoring, maintenance, and management for the time period of mature growth of ~40-60 years, to achieve mature canopy structure, native under-story, and an acceptable level of lost ecosystem structure, function and/or services restored.

### 3.2 COMPENSATORY DAMAGE CALCULATION

Compensatory damages to public lands or natural resources may be assessed and charged to the violator to compensate for ecosystem damage and lost initial and interim ecosystem services to the public. All Divisions of the Department may coordinate their resources and efforts along with existing ecosystem valuations and publications (See Appendix C and D for examples) to derive the estimated total value of the natural resource damaged until the ecosystem structure, function, and services are estimated to be recovered.

The total value of the natural resource that is lost or damaged may include the initial and interim values of the ecosystem services provided by the natural resource or habitat, and the social-economic value of the degraded site, until the ecosystem structure, function, and/or services are restored. Assessing the damages to the resource could include: estimating the loss of ecosystem services of carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

These natural resource damages may be assessed using economic valuation techniques to estimate the total value(s) of the natural resource(s) damaged on a per area basis, including: total ecosystem service value, total annual benefits, the market value of the natural resource, or any other factor deemed appropriate. The total value of the present and interim natural resource damage may be estimated by calculating the net present value of these lost benefits, values and services. The net present value may be calculated using a discount rate to scale the present and future costs to the public, of the interim losses of ecosystem services over the restoration time. The restoration time may be

estimated as the number of years for the damaged natural resource or ecosystem to reach maturity and/or the ecosystem structure and function to be restored similar to the pre-violation state. The discount of future losses and accrued benefits may be used in the valuation of mitigation efforts performed by the violator. For example the restoration conducted immediately after damage occurred may be calculated to have a higher present benefit worth than the benefit of restoration activities undertaken a year or two later.

In other instances, a habitat equivalency analysis (HEA) or a resource equivalency analysis (REA) may be used to scale equivalent habitat or wildlife losses for estimating both ecosystem damage penalties and restoration efforts.

### 3.3 ADJUDICATION OF DAMAGES

The adjudication of primary restoration damages and compensatory damages will be adjudicated by the Board due to the complexity of the assessment process and to assure proper checks and balances, including adequate public notice and a public hearing.

In addition to the damages and penalty violations assessed, the Department is allowed to recoup all administrative costs associated with the alleged violation pursuant to HRS §183C-7(b). All penalties assessed will be in compliance with HRS §183C-7(c) and will not prohibit any person from exercising native Hawaiian gathering rights or traditional cultural practices.

## APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

| Harm to resources or potential for harm to resources | Identified lead use permit permitting with the letter | Penalty Range     |
|--|---|-------------------|
| Major  | D (Board)   | \$10,000-\$15,000 |
| Moderate   | C (Departmental)                                      | \$2,000-\$10,000  |
| Minor  | B (Site Plan)   | \$1,000-\$2,000   |
| Very Minor   | (B) (Site Plan)                                       | Up to \$1,000     |

Table 2. Vegetation Removal

| Action   | Comparable Harm to Resource | Penalty Range     |
|--|-----------------------------|-------------------|
| Removal of more than 10,000 sq. ft.                            | Major                       | \$10,000-\$15,000 |
| Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation | Moderate                    | \$2,000-\$10,000  |
| Removal of less than 2,000 sq. ft. vegetation                  | Minor                       | \$1,000-\$2,000   |
| Clearing of Invasive or noxious Vegetation                     | Very Minor                  | Up to \$1,000*    |

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq. ft. in clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000. The clearing of forestland, endangered or commercially valuable plants, will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant.



## APPENDIX B: DEFINITIONS

### Definitions:

- (1) "Baseline" means the original level of services provided by the damaged resource.
- (2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.<sup>7</sup>
- (3) "Board" means the Board of Land and Natural Resources.
- (4) "Board Permit" means a permit approved by the Board of Land and Natural Resources.
- (5) "Chairperson" means the chairperson of the board of land and natural resources
- (6) "Civil Resource Violations System" or "CRVS" means a system of administrative law proceedings as authorized under chapter 199D, HRS, and further prescribed in Subchapter 7, 13-1, HAR, for the purpose of processing civil resource violations.
- (7) "Compensatory Damages" means damages for compensation for the interim loss of ecosystem services to the public prior to full recovery.
- (8) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
- (9) "Department" means the Department of Land and Natural Resources.
- (10) "Departmental Permit" means a permit approved by the Chairperson.
- (11) "Discounting" means an economic procedure that weights past and future benefits or costs such that they are comparable with present benefits and costs.
- (12) "Ecosystem Services" means natural resources and ecosystem processes, which may be valued according to their benefits to humankind.

*For example: carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism.*

<sup>7</sup> Ecosystem Valuations [http://www.ecosystemvaluation.org/benefit\\_transfer.htm](http://www.ecosystemvaluation.org/benefit_transfer.htm)

*recreation, scientific discovery, fisheries, society, cultural inspiration and practices, and any other services which may be valued.*

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.<sup>8</sup>
- (14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:

- (a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics
- (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
- (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
- (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

*For example, "major harm to the resource(s)" would be associated with a major land use violation that would have likely required a Board Permit, such as building a house, while a "minor harm to the resource(s)" may be*

<sup>8</sup> Definition adapted from Florida Department of Environmental Protection, 2000, Administrative Fines and Damages Liability, Ch. 62B-54.

*associated with minor land uses requiring an administrative Site Plan Approval, for building a small accessory structure.*

- (15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.
- (16) "Net Present Value" means the total present value (PV) of a time series of cash flows.
- (17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.
- (18) "Party" means each person or agency named or admitted as a party.
- (19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.
- (20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.
- (21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.
- (22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.
- (23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

## APPENDIX C: REFERENCES

- Cesar, H., van Beukering, P., Piniz, S., Dierking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
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## APPENDIX D: DAMAGES EXAMPLES

### Examples of Damage Assessments and Possible Remediation Efforts

The following are only brief past estimates used in Hawaii and other states; they are by no means comprehensive or limiting. These are intended to be examples for possible assessments and remediation efforts not as templates. As previously stated each case will be handled individually to account for unique ecological, economic and cultural impacts. The following are organized by habitat type.

#### Coral

##### Florida Department of Environmental Protection (Civil Damages).

The DEP can impose fines of up to \$1,000/m<sup>2</sup> of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

##### Cesar et al. 2002. Ecosystem Service Valuation

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREEN) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanuama Bay to be \$37.57 million (\$2,568/m<sup>2</sup>), of the coral reefs in Kihel to be \$28.09 million (\$65/m<sup>2</sup>) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m<sup>2</sup>).

##### Pfla enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m<sup>2</sup> of coral reef damage. This calculation

was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd<sup>3</sup> of beach sand. However between 30,000-50,000 yd<sup>3</sup> was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m<sup>2</sup>). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$630,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

*This damage to corals may be calculated as follows:*

- # Number of square meters of coral damaged
- X Multiplied by \$1,000 (or estimated value of coral on per/area basis)
- (#m<sup>2</sup> x \$1000)

Plus the estimated net present value of ecosystem services lost until recovery. (This may be more if damage to an area such as Hanalei Bay with increased recreational economic revenue.)

- +Plus cost of Remediation
- +Plus Cost of cleaning sediment from reef
- +Plus Cost of cleaning sediment/mud from beach sand
- +Plus Cost of coral reestablishment
- +Plus Cost of Monitoring
- +Plus Cost of Management

#### Seagrass beds (Compensatory Damage)

The Florida DEP fines offenders \$100/yard<sup>2</sup> of damage to seagrass beds for the first yd<sup>2</sup> damaged and \$75/yard<sup>2</sup> per each additional yd<sup>2</sup> damaged.

- \$100 for the first yard damaged
- +\$75 per each additional yard
- or net present total value of ecosystem services lost until recovery
- +vegetation planting
- +monitoring

#### Sand Beaches (ex. Of Primary Restoration Costs)

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continue, more comprehensive estimates may be produced. In KA-02-10 Pias, \$390,000 fine was estimated to clean 5,000 yd<sup>3</sup> of beach.

- +Cost of lost revenue due to altered Beach resources (compensatory)
- +primary restoration costs
- +Plus cost of cleaning of sediment/mud from beach area (if necessary)
- +Plus cost of beach nourishment (sand replacement)
- +Plus cost of native dune vegetation

(In some circumstances the loss of beach resources may be assessed in conjunction with other ecological impacts listed above, such as coral reefs and sea grass beds.)



**APPENDIX E: PENALTY CALCULATION WORKSHEET**

Violator's Name(s): \_\_\_\_\_  
 TMK: \_\_\_\_\_  
 OOCL Staff Member: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Part 1 - Penalties**

| Violation Type | Permit Prefix (D,C, B) | Harm to Resource (actual & potential) | Tree or Vegetation Status | Penalty Range | Adjustments (Mark Adj. Choice #1-4) | Multi-day (# days) | Total |
|----------------|------------------------|---------------------------------------|---------------------------|---------------|-------------------------------------|--------------------|-------|
| 1              |                        |                                       |                           |               |                                     |                    |       |
| 2              |                        |                                       |                           |               |                                     |                    |       |
| 3              |                        |                                       |                           |               |                                     |                    |       |
| 4              |                        |                                       |                           |               |                                     |                    |       |
| 5              |                        |                                       |                           |               |                                     |                    |       |
| 6              |                        |                                       |                           |               |                                     |                    |       |
| 7              |                        |                                       |                           |               |                                     |                    |       |
| 8              |                        |                                       |                           |               |                                     |                    |       |
| 9              |                        |                                       |                           |               |                                     |                    |       |
| 10             |                        |                                       |                           |               |                                     |                    |       |

Penalty Total: \_\_\_\_\_

**Penalty Adjustments and Descriptions (please attach additional adjustments and descriptions, including but not limited to those listed in §13-1-70)**

1. Actual environmental damage extent (onsite)  
 Description: \_\_\_\_\_

2. Actual environmental damage extent (offsite)  
 Description: \_\_\_\_\_

3. Does the violator's have a history of violations?  
 \_\_\_\_\_

4. Was the violation repetitious or of a long duration?  
 \_\_\_\_\_

5. Was the violator Responsive and exhibit a level of cooperation of with the Department and/or Staff?  
 \_\_\_\_\_

6. Does the Violator have a Financial Hardship?  
 \_\_\_\_\_

7. Did the violator receive Economic or commercial gain through non-compliance?  
 \_\_\_\_\_

8. Other:  
 Description: \_\_\_\_\_

Total Adjustment: up/down \_\_\_\_\_

Multi-day penalties

Number of days to multiply penalty: \_\_\_\_\_  
 Reasoning: \_\_\_\_\_

Total multi-day: \_\_\_\_\_