

ORIGINAL

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of)	DOCKET NO. SP07-401
)	
HAWAIIAN CEMENT)	DECISION AND ORDER APPROVING
)	SPECIAL USE PERMIT
To Conduct A Sand Mining Operation)	
On Approximately 56.1 Acres Of Land)	
Within The State Land Use)	
Agricultural District At Waikapu,)	
Maui, Hawai'i, Tax Map Key: 3-8-07:)	
Por. 101)	
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DECISION AND ORDER APPROVING SPECIAL USE PERMIT

On July 23, 2003, Chris Hart & Partners filed a Special Use Permit Petition ("Original Petition") on behalf of Hawaiian Cement ("Petitioner" or "Applicant") with the County of Maui Department of Planning ("DP") to conduct a sand mining operation on approximately 58.827 acres of land within the State Land Use Agricultural District at Waikapu, Maui, Hawai'i, identified as Tax Map Key: 3-8-07: por. 101, pursuant to section 205-6, Hawai'i Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawai'i Administrative Rules ("HAR").

On August 11, 2003, the County of Maui Department of Public Works and Environmental Management (“DPWEM”) certified the Original Petition as complete and ready for processing.¹

On November 21, 2006, Petitioner filed a Revised Special Use Permit Petition (“Revised Petition”) with the DP. The Revised Petition reflected a change in the location of the sand mining operation. Because of the presence of numerous prehistoric burials on the original 58.827-acre site, an adjacent site that consists of approximately 56.1 acres of land within the State Land Use Agricultural District, identified as Tax Map Key: 3-8-07: por. 101 (“Property”), was selected.²

On April 24, 2007, the County of Maui Planning Commission (“Planning Commission”) conducted a hearing on the Revised Petition pursuant to a public notice published in the Maui News on April 3, 10, and 17, 2007. There were two individuals who presented oral testimony on the Revised Petition. After due deliberation at its hearing on April 24, 2007, the Planning Commission recommended approval of the Revised Petition to the Land Use Commission (“LUC”), subject to 12 conditions.

On August 10, 2007, the LUC received copies of the Planning Commission’s decision on the Revised Petition and a portion of the record. On October

¹ Subsequent to the filing of the Original Petition, the DPWEM commissioned a study to assess and quantify the sand resources on Maui. In February 2006, Howard Hanzawa of SSFM International, Inc., submitted his report entitled *Maui Inland Sand Resource Quantification Study*.

² Petitioner has met with the Maui Burial Council and attempted to resolve issues related to the unearthing of the prehistoric burials. Petitioner ceased grading work in the area where the burials were found in accordance with the recommendations of the Department of Land and Natural Resources, State Historic Preservation Division (“DLNR, SHPD”), and the Maui Burial Council.

16, November 5, and November 8, 2007, the LUC received copies of the remaining portion of the record in this matter.

The LUC has jurisdiction over the Revised Petition. Section 205-6, HRS, and sections 15-15-95 and 15-15-96, HAR, confer jurisdiction upon the LUC to approve special use permits for areas greater than 15 acres.

On December 13, 2007, the LUC met in Honolulu, Hawai`i, to consider the Revised Petition. Chris Hart, Raymond Cabebe, and David Gomes appeared on behalf of Petitioner. Madelyn D'Enbeau, Esq., and Robyn Loudermilk appeared on behalf of the County of Maui. Bryan C. Yee, Esq., and Scott Derrickson were also present on behalf of the State Office of Planning.

At the meeting, Petitioner clarified that (i) it currently has lease agreements for the original 58.827-acre site and the Property;³ (ii) the current usage rate on the Property is approximately 6,700 tons of sand per month, and no sand has been exported from Maui to O`ahu since January 2007; (iii) the amount of sand required for County-funded and approved beach nourishment projects cannot be established as the County has not undertaken any such projects at this time; (iv) the sand mining operation begins at 6:30 a.m. and concludes at 4:00 p.m.; (v) Petitioner's grading permit has been extended until October 31, 2008, and covers approximately 15 acres; (vi) the flora/faunal study was completed in 2004; and (vii) it would like to mine sand on an approximately 200-acre portion of TMK: 3-8-07: 101 (aka Lot 12-A).

³ Petitioner has been conducting sand mining on the Property pursuant to its grading permit.

Following discussion by the Commissioners, a motion was made and seconded to approve the Revised Petition, subject to Condition Numbers 1 through 11 as recommended by the Planning Commission and additional Condition Numbers 12 through 18.⁴ Upon further discussion, the motion was amended and seconded to amend Condition Number 13 to include gravel coverage.

The LUC found that (i) the sand mining operation will provide a significant source of sand for cement and building construction on the island of Maui; (ii) there is no known major wildlife habitat or wetland on the Property nor are there any rare, threatened, or endangered species of flora or fauna on the Property; (iii) although no cultural remains or deposits were encountered in the 50 backhoe trenches that were excavated on the Property, Petitioner will undertake precautionary monitoring during all ground altering work on the Property; (iv) the Property consists of vacant, undeveloped land while the surrounding areas are largely undeveloped and include grazing and industrial uses; the nearest residence is located approximately one-quarter mile from the Property; (v) the Property is well-screened by kiawe trees and is not visible from Waiko Road, Kuihelani Highway, and Honoapi`ilani Highway; (vi) Petitioner will implement dust control measures to mitigate any adverse air quality impacts; (vii) due to the limited nature of the sand mining operation, public services in Kahului and the Central Maui area are not expected to be adversely impacted; (viii) the

⁴ The LUC amended and replaced Condition Number 12 in its entirety. Condition Number 12 was originally recommended by the Planning Commission.

grading of the sand hills and removal of sand will level the topography of the Property; Petitioner will institute erosion control measures during periods of incremental grading, improving the drainage conditions of the area; (ix) the sand mining operation will not require a connection to the County water system nor the wastewater treatment system; (x) access to the Property from Waiko Road is via the old County landfill access road; Petitioner will maintain the landfill access road and will provide its fair-share contribution for improvements to Waiko Road; (xi) much of the great Maui inland sand resources that were available 30 years ago are no longer available due to the development on or the preservation of the larger dunes; and (xii) the Property consists of sandy soil and has a Land Study Bureau overall (master) productivity rating class of "E," which indicates the lowest overall productivity; it is unsuited for agricultural cultivation.

Following deliberation by the Commissioners, a vote was taken on the amended motion to approve the Revised Petition, subject to the conditions as recommended by the Planning Commission and as amended and supplemented herein by the LUC. There being a vote tally of 7 ayes and 2 absent, the motion carried.

ORDER

Having duly considered the complete record of the Planning Commission's proceedings on the Revised Petition and the oral arguments presented by the parties in this proceeding, and an amended motion having been made at a meeting conducted on December 13, 2007, in Honolulu, Hawai'i, and the amended motion

having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the amended motion, the LUC hereby APPROVES the Revised Petition granted by the Planning Commission to conduct a sand mining operation on approximately 56.1 acres of land within the State Land Use Agricultural District at Waikapu, Maui, Hawai`i, identified as Tax Map Key: 3-8-07: por. 101, and approximately identified on Exhibit "A," attached hereto and incorporated by reference herein, subject to the following conditions:

1. That the LUC Special Use Permit shall be valid for a period of two (2) year(s) from the date of its granting, subject to further extensions by the LUC upon a timely request for extension filed at least one-hundred twenty (120) days prior to its expiration. The appropriate Planning Commission shall make a recommendation to the LUC and may require a public hearing on the time extension.

2. That the conditions of this State Special Use Permit shall be enforced pursuant to sections 205-12 and 205-13, HRS. Failure to comply with one or more of the conditions herein shall result in a notice of violation issued by the appropriate enforcement agency, notifying the permit holder of the violation and providing the permit holder no more than sixty (60) days to cure the violation. If the permit holder fails to cure the violation within sixty (60) days of said notice, the appropriate enforcement agency shall issue an order which may require one or more of the following: that the violative activity cease; that the violative development be

removed; that a civil fine be paid not to exceed \$1,000 per violation; that a civil fine not to exceed \$5,000 shall be issued if violation not cured within six months of the issuance of the order. The order shall become final thirty days after the date of its mailing or hand-delivery unless written request for a hearing is mailed or delivered to the DP within said thirty (30) days. Upon receipt of a request for a hearing, the DP shall specify a time and place for the permit holder to appear and be heard. The hearing shall be conducted by the planning director or the director's designee in accordance with the provisions of chapter 91, HRS, as amended.

3. That the subject LUC Special Use Permit shall not be transferred without the prior written approval of the LUC. The appropriate Planning Commission shall make a recommendation to the LUC. However, in the event that a contested case hearing preceded issuance of said LUC Special Use Permit, a public hearing shall be held by the appropriate Planning Commission upon due published notice, including actual written notice to the last known addresses of parties to said contested case and their counsel.

4. That the Applicant, its successors and permitted assigns shall exercise reasonable due care as to third parties with respect to all areas affected by subject LUC Special Use Permit and shall procure at its own cost and expense, and shall maintain during the entire period of this LUC Special Use Permit, a policy or policies of comprehensive liability insurance in the minimum amount of ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00) naming the County of Maui and State of Hawai'i as

an additional named insured, insuring and defending the Applicant, County of Maui, and State of Hawai`i against any and all claims or demands for property damage, personal injury and/or death arising out of this permit, including but not limited to: (1) claims from any accident in connection with the permitted use, or occasioned by any act or nuisance made or suffered in connection with the permitted use in the exercise by the Applicant of said rights; and (2) all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms and conditions of this permit. Proof of a policy naming County of Maui as an additional named insured shall be submitted to the DP within ninety (90) calendar days from the date of transmittal of the decision and order.

5. That full compliance with all applicable governmental requirements shall be rendered.

6. That the Applicant shall develop the Property in substantial compliance with the representations made to the LUC in obtaining the Special Use Permit. Failure to so develop the Property may result in the revocation of the permit.

7. That the Applicant shall make available at cost sand for Maui County-funded and approved beach nourishment projects on the island of Maui.

8. That the Applicant shall not export sand extracted from the Property off the island of Maui.

9. That the Applicant shall comply with the proposed mitigation measures identified in the *Archaeological Assessment Survey for the Proposed Hawaiian Cement and Ameron Sand Mining Area, Maui Lani Subdivision Lot 12-A*, identified in the August 11, 2006, letter to Mr. Jeffrey Pantaleo from the DLNR, SHPD.

10. That the old Waikapu Landfill access road shall be maintained by the Applicant to include keeping an even surface and watering for dust control.

11. That the Applicant shall provide its fair share contribution to the DPWEM for improvements to Waiko Road.

12. That the Applicant shall timely provide without any prior notice, annual reports to the LUC and the DP in connection with the status of the sand mining operation and the Applicant's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the LUC.

13. That upon cessation of the sand mining operation on the Property, the Applicant shall grade and gravel the Property as level open land in accordance with the County of Maui grading permit.

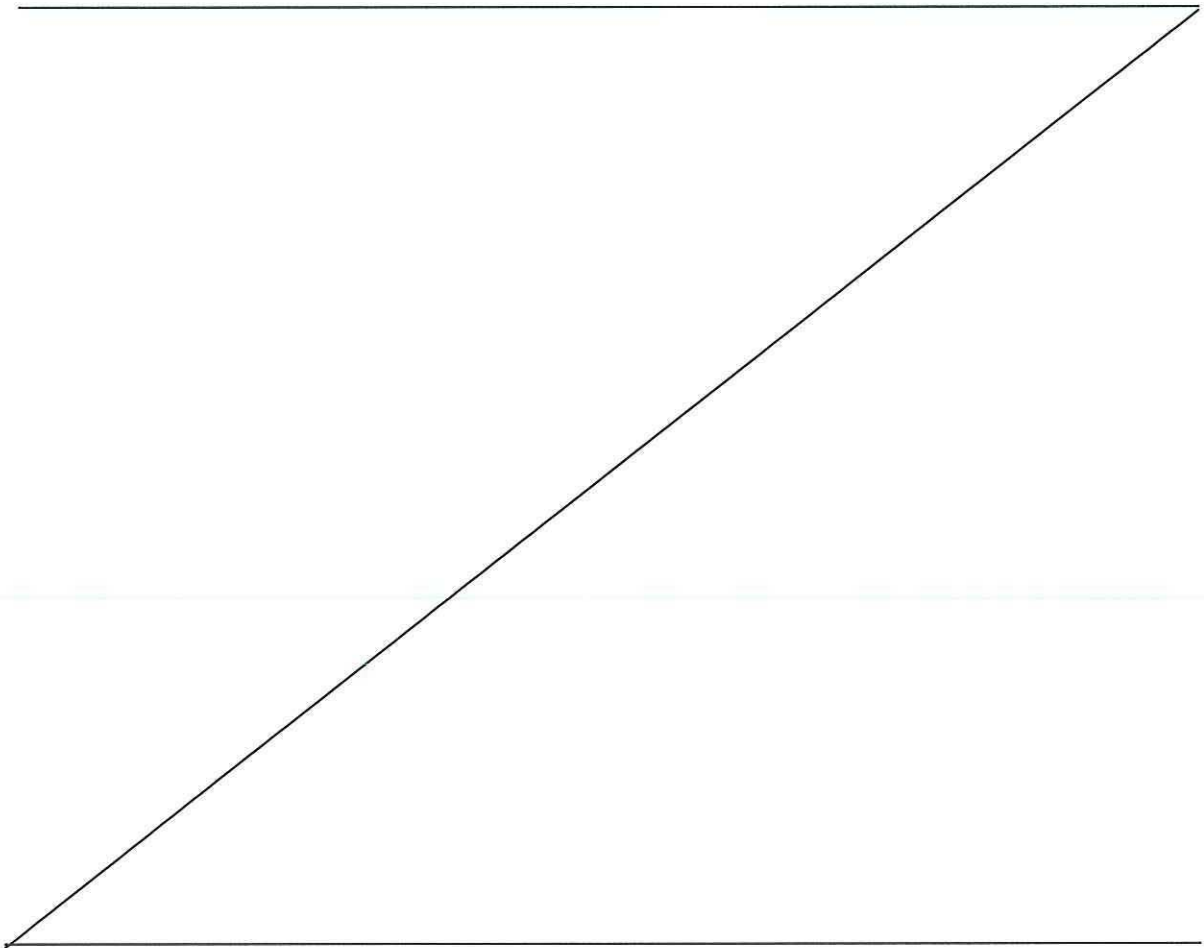
14. That the Applicant shall prepare a dust control management plan for review and approval by the DOH.

15. That the Applicant shall incorporate applicable BMPs to mitigate infiltration and runoff related to the sand mining operation.

16. That the Applicant shall obtain a National Pollutant Discharge Elimination System permit for the sand mining operation.

17. That the Applicant shall file a metes and bounds map and description of the Property with the LUC within six months of the date of this Decision and Order.

18. That the Property shall be used for a sand mining operation only. No other use shall be permitted.

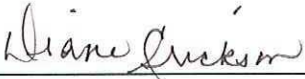


ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 26th day of February, 2008. This ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.


Done at Honolulu, Hawai'i, this 26th day of February, 2008, per motion on December 13, 2007.

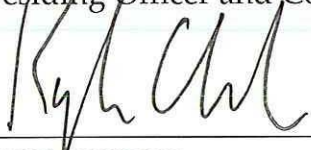
APPROVED AS TO FORM


Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAI'I


By (absent)
LISA M. JUDGE
Chairperson and Commissioner


By 
DUANE KANUHA
Presiding Officer and Commissioner

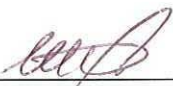
By 
KYLE CHOCK
Commissioner

By 
THOMAS CONTRADES
Commissioner

By 
VLADIMIR PAUL DEVENS
Commissioner

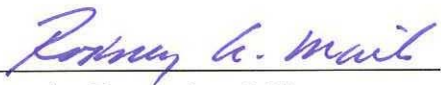
By 
NORMAND LEZY
Commissioner

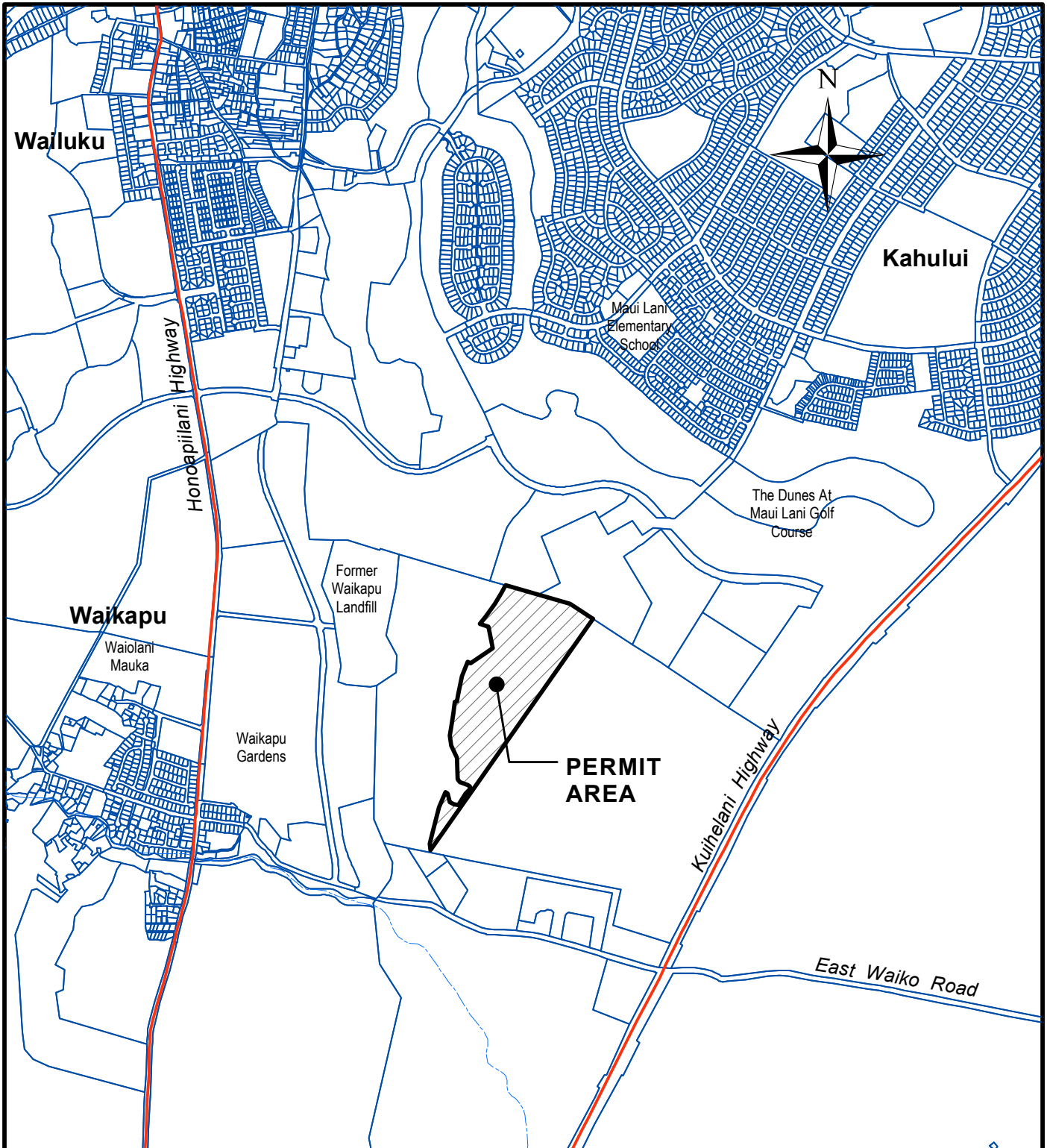
By 
RANSOM PILTZ
Commissioner

By 
NICHOLAS W. TEVES, JR.
Commissioner

Filed and effective on:
FEB 26 2008

By (absent)
REUBEN S.F. WONG
Commissioner

Certified by:

Interim Executive Officer

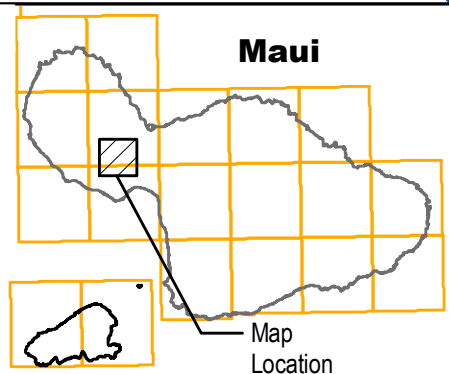


SP07-401 HAWAIIAN CEMENT

LOCATION MAP

Tax Map Key: 3-8-007: portion of 101,
 Waikapu, Wailuku, Maui, Hawai'i
 Scale: 1 : 24,000 ft.

Exhibit "A"



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Petition Of) DOCKET NO. SP07-401
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HAWAIIAN CEMENT) CERTIFICATE OF SERVICE
)
To Conduct A Sand Mining Operation)
On Approximately 56.1 Acres Of Land)
Within The State Land Use)
Agricultural District At Waikapu,)
Maui, Hawai'i, Tax Map Key: 3-8-07:)
Por. 101)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Decision And Order Approving Special Use Permit was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. MARY LOU KOBAYASHI
Office of Planning
P. O. Box 2359
Honolulu, Hawaii 96804-2359

BRYAN YEE, Esq.
Deputy Attorney General
425 Queen Street
Honolulu, Hawaii 96813

JEFF HUNT, Director
County of Maui, Planning Department
250 South High Street
Wailuku, Hawaii 96793

BRIAN MOTO, Esq.
JANE LOVELL, Esq.
Corporation Counsel
County of Maui
250 South High Street
Wailuku, Hawaii 96793

CERT. DAVE GOMES
 Hawaiian Cement
 P. O. Box 488
 Kahului, Hawaii 96732

Dated: Honolulu, Hawaii, FEB 26 2008 .



RODNEY A. MAILE, Interim Executive Officer