

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Engineering Division  
Honolulu, Hawaii 96813

November 8, 2013

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

**Authorization to Enter Into Agreements  
With the Private Property Owners of 1071 Koohoo Place, 1081 Koohoo Place,  
1111 Koohoo Place, 1115 Koohoo Place, 1123 Koohoo Place, 1129 Koohoo Place,  
1129A Koohoo Place, 1135 Koohoo Place, 1141 Koohoo Place  
and  
Declaration of Exemption from Environmental Assessment Requirements Chapter 343, HRS,  
and Chapter 11-200, Hawaii Administrative Rules  
for  
Job No. J45C041A Lanikai Rockfall Mitigation, Kailua, Oahu, Hawaii**

**BACKGROUND:**

On November 4, 2007, a ten-ton boulder damaged a private property along Koohoo Place in Kailua. An inspection by specialists of AECOM Technical Services, Inc. (AECOM) has determined that the source of the rockfall was located in private property. During the investigation, various boulders and rock outcrops, with the potential to fall in the near future were discovered within State lands located on parcel TMK 4-2-02:17.

**HRS CHAPTER 343 EXEMPTION:**

In accordance with Hawaii Administrative Rule Section 11-200-8(a) for the Department of Land and Natural Resources, as reviewed and concurred upon by the Environmental Council on July 13, 2011, the subject project is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repair or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing".

Refer to attached Exemption Notification labeled Exhibit A.

**AGREEMENT:**

The Engineering Division on behalf of the Division of Forestry and Wildlife desires to enter into agreements with nine (9) private property owners listed below for the construction of Job No. J45CO41A, Lanikai Rockfall Mitigation, Kailua, Oahu. The agreement would allow for the right-of-entry during construction & after construction, the ownership and maintenance responsibilities of the improvements would be turned over to the private property owners.

1071 Koohoo Place (TMK: 4-3-06:13),  
1081 Koohoo Place (TMK: 4-3-06:12),  
1111 Koohoo Place (TMK: 4-3-06:74),  
1115 Koohoo Place (TMK: 4-3-06:11),  
1123 Koohoo Place (TMK: 4-3-05:43),  
1129 Koohoo Place (TMK: 4-3-05:42:1),  
1129A Koohoo Place (TMK: 4-3-05:42:2),  
1135 Koohoo Place (TMK: 4-3-05:41), and  
1141 Koohoo Place (TMK: 4-3-05:38)

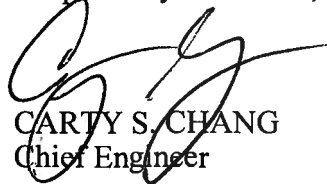
A copy of the Draft Agreement, which is subject to change, is attached as Exhibit B.

**RECOMMENDATION:**

1. Declare that, after considering the potential effects of the proposed project as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. Board authorize the Chairperson to sign Agreements with the following nine private property owners and other documents pertaining to the project, subject to the approval to form by the Department of Attorney General and to take any other appropriate action needed to address the situation:

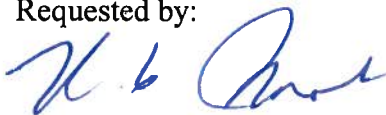
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1129A Koohoo Place (TMK: 4-3-05:42:2),  
1135 Koohoo Place (TMK: 4-3-05:41), and  
1141 Koohoo Place (TMK: 4-3-05:38)

Respectfully submitted,



CARTY S. CHANG  
Chief Engineer

Requested by:



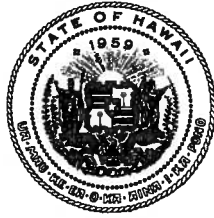
ROGER H. IMOTO, Administrator  
Division of Forestry and Wildlife

Approved For Submittal:



WILLIAM J. AILA, JR., Chairperson

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**

ENGINEERING DIVISION  
POST OFFICE BOX 373  
HONOLULU, HAWAII 96809

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

ESTHER KIA'AINA  
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

**EXEMPTION NOTIFICATION**

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

Project Title:	Lanikai Rockfall Mitigation Project, Kailua, Oahu, Hawaii
Job Number:	J45CO41A
Project Location:	Lanikai, Kailua, Oahu, Hawaii
Project Description:	Scope of work: Installation of rockfall impact fences and accessory components on landowners' properties. Demolition and removal of vegetation and rooted trees within the vicinity of the location of the rockfall impact fences.
Chapter 343 Trigger(s)	Use of State Funds
Exemption Class & Description:	Exemption Class No. 1, operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing [HAR 11-200-8(a)(1)].
Exemption Item Number and Description:	Mitigation of any hazardous conditions that present imminent danger as determined by the Department Director and that are necessary to protect public health, safety, welfare, or public trust resources.
Recommendation	It is anticipated this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

\_\_\_\_\_  
William J. Aila, Jr., Chairperson

10/22/13  
\_\_\_\_\_  
Date

**EXHIBIT A**

## **LANIKAI ROCKFALL REMEDIATION PROJECT AGREEMENT**

This LANIKAI ROCKFALL REMEDIATION PROJECT AGREEMENT ("AGREEMENT") is made and entered into by and between the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, through its Board of Land and Natural Resources, (the "STATE") and \_\_\_\_\_, ("LANDOWNER").

WHEREAS, the real property that is subject to this AGREEMENT consists of land in East Hawaii on the Lanikai hillside located at \_\_\_\_\_, Hawaii, and further identified as TMK No. \_\_\_\_\_ and owned by the LANDOWNER ("Property").

WHEREAS, the STATE wishes to enter LANDOWNER'S Property for the purpose of remediating potential rockfall hazards on the Property; and

WHEREAS, the scope of work to be conducted on LANDOWNER'S Property includes installation of rockfall impacting fences on the Property (see DLNR Job No. J45C041A; Lanikai Rockfall Mitigation Project), as shown on the STATE'S plan identified as ATTACHMENT "A" to this AGREEMENT ("PROJECT"); and

WHEREAS, funding for the PROJECT has been authorized by Act 162, SLH 2009, Item A-10, as amended by Act 180, SLH 2010, Item A-10 for design, and Act 164, SLH 2011, Item A-17 for construction.

NOW, THEREFORE, in consideration of the above and all promises, terms, and conditions contained herein, the parties hereto mutually agree as follows:

A. **RIGHT OF ENTRY**

A right of entry to the STATE is granted by LANDOWNER over LANDOWNER'S Property as follows:

### **EXHIBIT B**

1. Grant of Entry. LANDOWNER hereby grants to the STATE, its officers, employees, consultants, and contractors, permission to enter upon the Property for the PROJECT, which is admitted to be for a public purpose. The STATE will take reasonable steps to ensure that contractors the STATE selects for the PROJECT will permit the LANDOWNER to exercise its existing rights in and to the PROPERTY, including, but not limited to, access over and through the PROPERTY, as long as said exercise of rights does not unreasonably delay or interfere with the PROJECT.

2. Utilization. This right of entry for the PROJECT shall be utilized from Monday through Friday, between the hours of 8:00 a.m. and 4:30 p.m., for the duration of the PROJECT. This right of entry may be utilized on other days or at other times under urgent or emergency circumstances, in which case the STATE, its consultants, or its contractors, will make all reasonable efforts to notify LANDOWNER beforehand, giving LANDOWNER as much notification time as possible.

3. STATE'S Responsibility. During the course of work on the PROJECT and until the transfer of ownership of the improvements to LANDOWNER occurs, as described below, the STATE shall be responsible, to the extent provided by law, for damage or injury caused by the STATE's officers and employees in the scope of their employment provided that the STATE's liability for such damage or injury has been determined by a court or agreed to by the STATE. The STATE shall pay for such damage and injury, provided that funds are appropriated and allotted for that purpose.

4. Construction Contractor's Indemnity, Defense, and Insurance. The State will use its best efforts to cause the construction contractor for the PROJECT to defend, indemnify, hold harmless, and insure LANDOWNER to the same extent as the STATE.

5. No Unreasonable Interference. LANDOWNER shall not unreasonably interfere with the PROJECT.

6. Termination of Right of Entry. The right of entry shall terminate twelve (12) months after the execution of this AGREEMENT or upon completion of the PROJECT, whichever occurs earlier.

B. IMPROVEMENTS CONSTRUCTED ON PROPERTY

Improvements shall be constructed on LANDOWNER'S Property as follows:

1. Improvements. LANDOWNER agrees to allow the STATE to construct improvements on the Property ("Improvements"), on LANDOWNER'S behalf, as shown on the STATE'S plan, identified as ATTACHMENT A to this AGREEMENT, subject to the provisions of this AGREEMENT. The installation of the Improvements will consist of the following:

- a. Demolition and removal of vegetation and/or rooted trees within the vicinity of the location of the Rockfall Impact Fences; and
- b. Construction of Rockfall Impact Fences and accessory components on LANDOWNER'S Property.

2. Acceptance of Plan and Design of Improvements. By the execution of this AGREEMENT by LANDOWNER, LANDOWNER acknowledges that LANDOWNER has reviewed and accepted the STATE'S plan and design of the Improvements.

3. Ownership of Improvements. Upon the completion of the PROJECT, the ownership of the Improvements constructed on LANDOWNER'S Property and all risks, responsibilities, and liabilities applicable to the Improvements shall automatically vest in the LANDOWNER. The STATE shall notify LANDOWNER in writing, at the address indicated

above, of the completion of the PROJECT and transfer of the ownership of the Improvements to the LANDOWNER.

4. Repair and Maintenance of Improvements. Upon the vesting of ownership of the Improvements in the LANDOWNER, LANDOWNER shall be solely responsible for the upkeep, repair, and maintenance of all Improvements in good order and condition in accordance with the "Maintenance and Repair Instructions," attached as ATTACHMENT B, at LANDOWNER'S sole cost and expense. The construction of the Improvements on LANDOWNER'S Property does not affect or release any of LANDOWNER'S responsibility to maintain any portion of LANDOWNER'S Property above the Improvements. LANDOWNER understands and agrees that if LANDOWNER'S Property includes any part of the hillside, LANDOWNER must also maintain the portion of the hillside owned by LANDOWNER in accordance with relevant Hawaii Revised Statutes.

5. Release by LANDOWNER. In consideration of the Improvements to be constructed on LANDOWNER'S Property and owned by LANDOWNER, in behalf of LANDOWNER and LANDOWNER'S heirs, beneficiaries, executors, administrators, representatives, successors, assigns, and any person or entity acting for, under, or through them, LANDOWNER hereby releases and forever discharges the State of Hawaii, its officials, employees, representatives, and agents, from and on account of any and all claims, actions, causes of action, claims for relief, damages, injuries, losses, punitive or treble damages, liens, debts, costs, interest, attorneys' fees, experts' or consultants' fees, expenses, and other relief, whether in law or in equity, whether known or unknown, suspected or unsuspected, fixed or contingent, past, present, and future, whether sounding in tort, contract, statute or otherwise, resulting from, arising out of, or connected with the Lanikai hillside and the PROJECT.

LANDOWNER further acknowledges and agrees that the STATE, by entering into this AGREEMENT, does not hereby assume or undertake any duty or responsibility, contractual or otherwise, to complete the PROJECT or to perform any other additional or future work on the PROPERTY. LANDOWNER also acknowledges that the STATE's undertaking of the PROJECT is dependent upon the participation of other landowners in the surrounding area. The failure of other landowners to participate in this PROJECT may prevent the STATE from undertaking or completing the PROJECT.

6. Indemnity and Defense by LANDOWNER. Upon transfer of ownership of the Improvements to LANDOWNER, LANDOWNER agrees on behalf of LANDOWNER and LANDOWNER'S heirs, beneficiaries, executors, administrators, representatives, successors, assigns, and any person or entity acting for, under, or through them, to indemnify, defend, and hold harmless the State of Hawaii, its officials, employees, representatives, and agents, against any claim or liability, including all loss, damages, costs, expenses, and attorneys' fees, for any damage to real or personal property, including environmental damage, or injury to or death of persons when such damage, injury, or death results from, arises out of, or is connected with the portion of Lanikai hillside owned by LANDOWNER, the State land above the Property, the PROJECT or the Improvements.

C. Other Terms and Conditions

The parties hereto further agree as follows:

1. No Admission of Liability. LANDOWNER understands and agrees that the State of Hawaii does not admit to any liability or responsibility regarding any damage or injury to the Property, personal property, or persons caused by or related to Lanikai hillside, rockfall, the PROJECT or the Improvements.



2. Runs with the Land. This AGREEMENT shall inure to the benefit of and run with the land that is the subject of this AGREEMENT and which is referred to herein as the Property. This AGREEMENT shall be filed with the Bureau of Conveyances or Land Court, as appropriate, on or after the execution of the AGREEMENT.

3. Effective Date. This AGREEMENT shall become effective upon its execution by all of the parties to the AGREEMENT.

4. Contractual Disputes. If there is any dispute between the STATE and LANDOWNER regarding the interpretation, breach, or enforcement of this AGREEMENT, the First Circuit Court of the State of Hawaii shall have jurisdiction over such disputes.

5. Amendment. This AGREEMENT shall not be amended except in writing signed by the parties.

6. Singular, Plural. In this AGREEMENT, the singular shall include the plural, and the plural shall include the singular, as the case may be.

8. Headings, Captions. The headings and captions used herein are for convenience of reference only and are not to be used to construe, interpret, define, or limit the paragraphs to which they may pertain.

9. Counterparts. This AGREEMENT may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same AGREEMENT, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, recordation, filing, and delivery of this instrument, duplicate unexecuted pages of the counterparts may be discarded and the remaining pages assembled as one document.

10. No Party Deemed Drafter. All signatories to this AGREEMENT and their attorneys have had the opportunity to review, comment upon, and amend this AGREEMENT. All signatories agree that the language hereof is complete, integrated, and unambiguous. If there is ever a dispute as to the meaning of this AGREEMENT or any part thereof, no party shall be deemed the drafter of the AGREEMENT for purposes of the canon of construction that an instrument is construed against its drafter.

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

STATE:

Approved by the Board  
of Land and Natural Resources  
at its meeting held on  
December 8, 2006.

\_\_\_\_\_  
By: William J. Aila, Jr.  
Chairperson, Board of Land and Natural  
Resources

LANDOWNER:  
  
\_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General