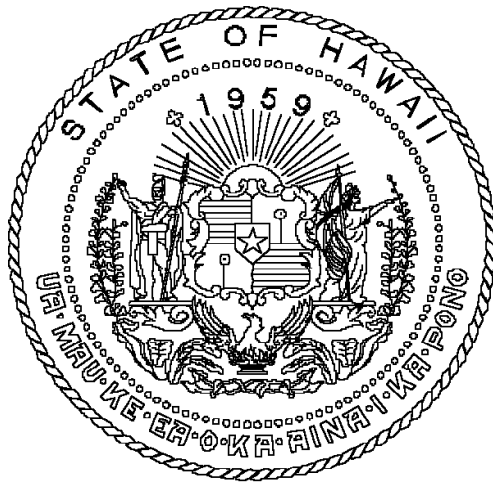


Annual Report to the Twenty-Second Legislature
2003 Regular Session

On

IDENTIFICATION OF RIVERS AND STREAMS WORTHY OF PROTECTION



Prepared by the

Department of Land and Natural Resources
Commission on Water Resource Management
State of Hawaii

In response to

Section 174C-31(c) (4)
Hawaii Revised Statutes

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INTRODUCTION

Senate Bill 2462 Senate Draft 1, House Draft 1, Conference Draft 1, was signed into law (Act 276, Session Laws of Hawaii 1988) by Governor John Waihee on June 13, 1988. This Act amended Section 174C-31 (Subsection (c)(4)), Hawaii Revised Statutes, of the State Water Code, and reads, in pertinent part, as follows:

"Identify rivers or streams, or portions of a river or stream, which appropriately may be placed within a wild and scenic river system, to be preserved and protected as part of the public trust. For the purpose of this paragraph, the term 'wild and scenic rivers' means rivers or streams, or a portion of a river or stream, of high natural quality or that possess significant scenic value, including but not limited to, rivers or streams which are within the natural area reserves system. The Commission shall report its findings to the legislature twenty days prior to the convening of each regular legislative session."

This fifteenth annual report to the Legislature provides an update on the current activities of the Commission on Water Resource Management (Commission) to implement the provisions of the Act.

BACKGROUND

Initial efforts undertaken by the Commission, in response to the Legislative directive to list streams of high natural quality, involved a joint project with the National Park Service to prepare the "Hawaii Stream Assessment" (HSA), a two-year project with two primary objectives: 1) inventory Hawaii's perennial streams and their physical characteristics and 2) assess the aquatic, riparian, cultural, and recreational values of Hawaii's perennial streams. Secondary objectives of the HSA included: (1) centralizing stream-related data and reference sources in a database and bibliography; (2) identifying and prioritizing areas where more information is needed; (3) providing data to assist in making management decisions within a statewide context rather than on an ad hoc basis; (4) developing general stream protection guidelines; and (5) identifying specific streams appropriate for protection and enhancement.

Completion of the HSA report in 1990 led to the development of a preliminary database, and supporting references and files that continue to serve as the cornerstone of the department's long-term stream management program. Other activities undertaken since the initial preparation of the HSA report include: convening of a Stream Protection and Management (SPAM) Task Force, drafting of administrative rules incorporating SPAM Task Force recommendations, and completion of the Commission's Multi-Attribute Prioritization of Streams (MAPS) project

summarized in the 1999 annual report to the Legislature. Statewide public hearings have been held on the proposed SPAM provisions amending Chapter 13-169, Hawaii Administrative Rules, however, based upon public comments received, updating of the amendments have been deferred pending future actions of the Commission's Stream Protection and Management Branch.

STREAM PROTECTION AND MANAGEMENT BRANCH

In 1990, the Hawaii Stream Assessment made the recommendation to “dedicate a CWRM staff position specifically and exclusively to conservation.” The SPAM Task Force, in 1994, recommended that “general fund monies are needed for additional permanent CWRM positions for streams for: (d) a streamkeeper with a conservation point of view.” A surface water hydrologist was hired in March 2002, to specifically address the issues of furthering the stream protection and management goals of the Commission staff.

On July 25, 2002, the reorganization of the Commission on Water Resource Management was approved, thereby establishing the Stream Protection and Management Branch. The branch is comprised of the Instream Use and Protection Section and the Surface Water Regulation Section. The duties of the Instream Use and Protection Section, which shall focus on the implementation of this Act, include, but are not limited to the following:

- Administers the statewide Instream Use and Protection program in cooperation with federal, state and county agencies.
- Prepares and enforces instream flow standards to protect instream water uses.
- Prepares interim instream flow standards, pending the establishment of permanent standards.
- Inventories stream systems, assesses their resource values, recommends stream protection policies, and develops a stream management plan for Commission adoption and use.
- Protects watersheds, streams, and wetlands from degradation.

In the past, the Commission has proceeded cautiously in regards to stream protection and management, responding to issues only as they arise. Continued lack of funding and staffing has prevented the Commission from adequately addressing surface water matters. However, the establishment of the Stream Protection and Management Branch and, specifically, the Instream Use and Protection Section will significantly advance the mandate of this Act. While the Commission now has the fundamental resources to examine surface water issues, it must be recognized that building the foundation of an appropriate statewide program will require time, and additional funding and staffing.

The Commission is currently developing a long range plan to address the duties of the Instream Use and Protection Section, as outlined above. The plan, to be implemented in a three-

phase approach, shall; 1) identify the data and informational requirements of the section; 2) assess and prioritize watersheds for the establishment of instream flow standards, protection, future monitoring needs, etc.; and 3) execute the establishment of instream flow standards and stream protection as mandated by the State Water Code.

In fulfilling the first phase of the implementation plan, the Instream Use and Protection Section is developing a comprehensive Surface Water Information Management (SWIM) System. The SWIM System builds upon the early structure and ideas of the Hawaii Stream Assessment, and shall be a compilation of various information databases including, but not limited to; completed stream-related surface water reports and studies, community-based watershed studies, U.S. Geological Survey stream gaging records, and GIS (Geographic Information System) data. An integral step in the data-gathering phase of the program will be coordinating with other agencies and integrating the various data maintained by the respective agency programs. Examples of these data include; 1) Aquatic species data maintained by the Division of Aquatic Resources (Department of Land and Natural Resources, DLNR); 2) Watershed information maintained by the Division of Forestry and Wildlife (DLNR); 3) Cultural and historic data maintained by the Historic Preservation Division (DLNR); 4) Water quality data maintained by the Department of Health; and 5) Coastal water information maintained by the Coastal Zone Management Program (Department of Business, Economic Development, and Tourism).

The second phase of the plan will establish a prioritization scheme for establishing quantifiable instream flow standards and enhancing the Commission's current stream protection and stream monitoring program. The complexities associated with quantifying instream flow standards will continue to be addressed in future meetings with other federal, state and county agencies, and community organizations. Proposed amendments to Chapter 13-169, HAR, have been deferred pending further identification and examination of informational and data requirements necessary to implement a statewide surface water monitoring program, specifically for regions where data is either inadequate or non-existent.

WATER RESOURCE PROTECTION PLAN

The Commission is continuing its efforts to complete a partial update of the Water Resource Protection (WRPP), a component of the Hawaii Water Plan. The current update of the WRPP focuses on augmenting the Commission's Stream Protection and Management Branch. Efforts include the identification and delineation of watershed areas suitable for adoption as surface water hydrographic units. Establishment of hydrographic units along with the development and adoption of an associated stream coding system will aid the Commission in its regulation, management, and protection of Hawaii's surface water resources. The implementation of the watershed coding system is a fundamental management tool in the compilation and coordination of data between federal, state and county agencies, private entities, and community organizations.

The partial update to the WRPP will also include an inventory and assessment of stream diversions, resulting in the development of a statewide stream diversion database. The database

has resulted in a preliminary GIS coverage, thus enabling the Commission to more effectively evaluate the effects of offstream diversions within a stream system. The database, which includes such information as ownership, rights claims, and diversion amount, is being verified for accuracy and completeness. While the database nears completion, there remains many uncertainties regarding the amount of actual water being diverted statewide. As such, additional field inspection and verification will have to take place to accurately quantify existing stream diversions. The collection of this data is critical to the Instream Use and Protection program and will require further funding and staffing as part of its statewide monitoring effort.

OTHER STREAM-RELATED ACTIONS

On August 22, 2000, the Hawaii Supreme Court (Supreme Court) released its ruling on the appeal of the Waiahole Ditch Decision and Order issued by the Commission on December 24, 1997. The Supreme Court remanded seven issues to the Commission for additional findings and conclusions, with further hearings if necessary. The first two of the seven issues addressed interim instream flow standards for windward Oahu streams.

On December 28, 2001, the Commission issued its LEGAL FRAMEWORK, FINDINGS OF FACT, AND DECISION AND ORDER (Final D&O). The Final D&O amended the interim instream flow standards for four windward Oahu streams, based on the best information presently available, as directed by the Supreme Court's August 22, 2000 ruling (Supreme Court's Ruling).

The Supreme Court's Ruling, in its Section III, entitled DISCUSSION, contains a number of statements, affirmations, and observations relevant to the Commission's day-to-day operations:

1. "In sum, given the vital importance of all waters to the public welfare, we decline to carve out a ground water exception to the water resources trust. Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction." Section III.B.3.a.
2. "We thus hold that the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as 'waste'." Section III.B.3.b.i.
3. "Accordingly, we recognize domestic water use as a purpose of the state water resources trust." Section III.B.3.b.i.
4. "...we continue to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose." Section III.B.3.b.i.
5. "We hold that, while the state water resources trust acknowledges that private use for 'economic development' may produce important public benefits and that such

benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected ‘trust purpose’.” Section III.B.3.b.i.

6. “In short, the object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes ‘use’.” Section III.B.3.b.ii.
7. “...we hold that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.” Section III.B.3.b.ii.
8. “Rather, we observe that the constitutional requirements of ‘protection’ and ‘conservation,’ the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the ‘zero-sum’ game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.” Section III.B.3.b.ii.
9. “...we affirm the Commission’s conclusion that it effectively prescribes a ‘higher level of scrutiny’ for private commercial uses such as those proposed in this case.” Section III.B.3.b.ii.
10. “In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” Section III.B.3.b.ii.
11. “Furthermore, we agree with the Commission that existing uses are not automatically ‘grandfathered’ under the constitution and the Code, especially in relation to public trust uses.” Section III.D.1.
12. “We agree with the Commission and add that public instream uses are among the ‘superior claims’ to which, upon consideration of all relevant factors, existing uses may have to yield.” Section III.D.1., footnote 52
13. “In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments. Neither the constitution nor Code, therefore, constrains the Commission to wait for full scientific certainty in fulfilling its duty towards the public interest in minimum instream flows.” Section III.D.3.
14. “Instream uses may be quantitatively or qualitatively rated, recognizing that instream uses may rely on factors other than streamflow to maintain their overall value.” Section III.D.3., footnote 60.

15. "...the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams. In the meantime, the Commission shall designate an interim standard based on best information presently available." Section III.D.3.

The Commission is proceeding with appropriate care and attention in addressing these and other issues resulting from the Supreme Court's Ruling. The Commission's Final D&O set quantified interim instream flow standards for four windward Oahu streams. The Commission must continue to work toward establishing permanent instream flow standards for these windward Oahu streams as well as for other streams statewide. In addition, the Commission has a request to amend the interim instream flow standard for Waikolu Stream on Molokai, in conjunction with a request for a water use permit for an additional amount of water for the Molokai Irrigation System. The Commission is also in the process of determining the interim instream flow standards for certain streams in East Maui.

The ongoing efforts to update the WRPP are consistent with the Court's directive and will provide needed information in support of the Commission's implementation of a quantitative-based stream protection and management program statewide. Refined assessments of available water resources, as they are developed based upon ongoing and new data collection, will be appropriately incorporated in the current update and within future iterations of the Water Resource Protection Plan.

The preceding fourteenth annual report to the 2002 Legislature briefly described the Commission's plans and efforts to update the HWP, with particular emphasis on the current update to the WRPP. As noted, all of the above efforts will lead to improving the Commission's overall management of surface water resources, enhancing the Commission's current surface water data collection and monitoring program, facilitating needed discussion regarding stream-related issues, lead to developing quantitative instream flow standards, and result in further development and refinement of proposed administrative rules implementing the Commission's Stream Protection and Management program.

PROGRAM LIMITATIONS

Program limitations stem primarily from inadequate staffing and a lack of funding resources. The following are excerpts from a State Auditor's report (Report No. 96-3):

1. "Overall activity in the area of surface water protection has been limited;"
2. "The Commission has issued stream alteration/diversion permits and accepted petitions for the designation of surface water management areas, but lacks adequate resources to carry out further mandates;" and
3. "The Commission's task force--Stream Protection and Management (SPAM)--developed recommendations for protecting surface water in 1994, but the

Commission has yet to use the recommendations in developing an overall program. It needs to identify the staffing and funding requirements necessary for carrying out a surface water protection program and proceed to obtain these resources."

It will continue to be the objective of the Commission to seek additional positions and funding from the Legislature to properly carry out the requirements of the Water Code as recommended by the State Auditor and for addressing issues remanded by the Court to the Commission.