

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUB-TITLE 7. WATER RESOURCES

CHAPTER 169

PROTECTION OF INSTREAM USES OF WATER

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#### Subchapter 1

#### General Provisions

§13-169-1 Purpose. The purpose of this chapter is to provide for the establishment of a statewide program to protect, enhance, and reestablish, where practical, beneficial instream uses of water, including the development and establishment of standards for instream flows and the creation of a permit system to regulate the alteration of stream channels. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §174C-71)

§13-169-2 Definitions. As used in this chapter, unless the context otherwise requires:

"Baseline research" means the gathering of data of a primary nature which is used to create a base or foundation of knowledge for understanding some subject, such as the stream water of a particular stream in the state.

"Chairperson" means the chairperson of the commission on water resource management.

"Channel alteration" means to obstruct, diminish, destroy, modify, or relocate a stream channel; to change the direction of flow of water in a stream channel; to place any material or structures in a stream channel; or to remove any material or structures from a stream channel.

"Commission" means the commission on water resource management.

"Continuous flowing water" means a sufficient flow of water that could provide for migration and movement of aquatic life and includes those reaches of streams which, in their natural state, normally go dry seasonally at the location of the proposed alteration.

"Department" means the department of land and natural resources.

"Deputy" means the deputy to the chairperson of the commission on water resource management.

"Ground water" means any water found beneath the surface of the earth, whether or not in perched, dike-confined, or basal supply; in underground channels or streams; in standing, percolating, or flowing condition; or under artesian pressure.

"Hydrologic unit" means a surface drainage area or a ground water basin or a combination of the two.

"Impoundment" means any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

"Instream flow standard" or "permanent instream flow standard" means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect aquatic life, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of aquatic life and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;
- (7) Maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

"Interim instream flow standard" means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

"Non-instream use" means the use of stream water that is diverted or removed from its stream channel and includes the

use of stream water outside of the channel for domestic, agricultural, and industrial purposes.

"Person" means any individual, firm, association, organization, partnership, estate, trust, corporation, company, or any governmental unit.

"Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

"Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flow be uniform or uninterrupted. The fact that some parts of the bed or channel have been dredged or improved does not prevent the watercourse from being a stream.

"Stream channel" means a natural or artificial watercourse with a definite bed and banks which periodically or continuously contains flowing water. The channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past.

"Stream diversion" means the act of diverting, pumping or otherwise removing water from a stream into a channel, ditch, pipeline, or other conduit.

"Stream reach" means a segment of a stream channel having a defined upstream and downstream point.

"Stream system" means the aggregate of water features comprising or associated with a stream, including the stream itself and its tributaries, headwaters, ponds, wetlands, and estuary.

"Surface water" means both contained surface water (that is, water upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other watercourses, lakes, and reservoirs) and diffused surface water (that is, water occurring upon the surface of the ground other than in contained waterbodies). Water from natural springs is surface water when it exits from the spring onto the earth's surface. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-2, 174C-3)

§13-169-3 Penalties. (a) Any person who violates any provision of this chapter or any permit condition or who fails to comply with any order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day's continuance is a separate violation.

(b) No provision of this chapter shall bar the right of any injured person to seek other legal or equitable relief against a violator of this chapter. [Eff. MAY 27, 1988 ] (Auth: HRS §174C-8) (Imp: HRS §174C-15)

§13-169-4 Administrative and judicial review. Any person who is aggrieved or adversely affected by an order or action of the commission pertaining to any provision of this chapter may seek administrative and judicial review in accordance with chapter 91, Hawaii Revised Statute. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §174C-12)

## Subchapter 2

### Instream Use Protection Program

§13-169-20 Principles and guidelines for instream use protection. The protection of instream uses statewide shall be guided by the following general principles:

- (1) The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams should be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition.
- (2) A systematic program of baseline research is recognized as a vital part of the effort to describe and evaluate stream systems, to identify instream uses, and to provide for the protection and enhancement of such stream systems and uses.
- (3) Recognition shall be given to the natural interrelationship between surface and ground waters.
- (4) In determining flow requirements to protect instream uses or in assessing stream channel alterations, consideration should be given to the maintenance of existing non-instream uses of economic importance and the preservation of stream waters for potential non-instream uses of public benefit.
- (5) In order to avoid or minimize the impact on existing uses when preserving, enhancing, or restoring instream values, the commission shall

consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solutions.

- (6) Expressions of the public interest should be sought in the implementation of this chapter.

[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-2, 174C-71)

§13-169-21 General powers and duties. The general administration of this chapter shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

- (1) Shall establish instream flow standards for the protection of instream uses and shall require that such flow standards be followed when:
  - (a) the commission issues stream channel alteration permits under this chapter,
  - (b) the State disposes of water from state watersheds, including that removed by wells or tunnels where they may affect stream flow, and
  - (c) the State regulates the use of lands and waters within state conservation districts.
- (2) Shall regulate the alteration of stream channels by a permit system.
- (3) Shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies in establishing and administering a statewide instream use protection program.

[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-22 Establishment of program. An instream use protection program designed to protect, enhance, and re-establish, where practicable, beneficial instream uses of water statewide shall be established. The program shall include the:

- (1) Conducting of baseline research and the undertaking of hydrologic investigations on the area's stream systems;
- (2) Identification and documentation of instream uses of significance for the area;

- (3) Identification and documentation of existing stream water development;
  - (4) Establishment and monitoring of instream flow standards and interim instream flow standards for the preservation of stream waters to sustain the instream uses identified in subsection (2) above; and
  - (5) Establishment of a permit system to regulate the alteration of any stream channel in the area.
- [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-23 Baseline research. A continuing comprehensive program of baseline research for the state's streams and stream systems shall be initiated as part of the program to protect instream uses. Data from this research shall be used in developing the instream flow standards required under this chapter. When advisable, the commission may contract with any person for the baseline research to be performed. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-24 Scope of research. The baseline research required in §13-169-23 shall include:

- (1) Field surveys to identify and document instream and non-instream uses of stream water;
- (2) The collection of hydrologic data and assessments of streamflow characteristics and stream ecosystems; and
- (3) Determinations of stream water requirements for significant instream uses.

[Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

### Subchapter 3

#### Instream Flow Standard

§13-169-30 Initiation by commission. (a) The commission may initiate proceedings for the establishment of an instream flow standard for any stream(s) or stream reach(es) in the state. In acting upon the establishment of instream flow standards, the commission shall set forth in writing its

conclusion that the public interest requires an instream flow standard to be set, the reasons therefore, and the findings supporting the reasons.

(b) Instream flow standards shall be established on a stream-by-stream basis whenever necessary to protect the public interest in waters of the state. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-31 Notice of intent. (a) Upon the commission's decision to initiate proceedings to establish or modify an instream flow standard, the department shall publish a notice of the commission's intention to set the instream flow standard, setting forth:

- (1) The affected stream(s) or stream reach(es) thereof; and
- (2) A statement that interested persons may transmit their views in writing to the department.

(b) The notice shall be published at least once in a newspaper of statewide circulation and be given to the mayor of the appropriate county and to persons who have previously requested such notice in writing. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-32 Investigations required. (a) After giving notice and before any proposed instream flow standard is established by the commission, the department under the directive of the commission shall conduct whatever investigation is deemed necessary for the commission to reach a decision. During the investigation the department shall consult with and consider the recommendations of the state department of health, the U.S. Fish and Wildlife Service, the mayor of the appropriate county, and other agencies and persons having information on the stream(s), reach(es), or non-instream uses.

(b) The commission may also require reports from users of stream water detailing the quantity of water being used and the manner and extent of the use. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-33 Method for development of instream flow standard. (a) Each candidate stream or stream reach shall be assessed for the instream uses as defined in this chapter.

(b) In assessing instream uses, the department may employ various methods to determine the significance of each use and its associated stream water requirements. Instream



uses may be quantitatively or qualitatively rated, recognizing that instream uses may rely on factors other than streamflow to maintain their overall value. The assessment of instream uses shall be substantiated by adequate surveys to provide an indication of a stream or stream reach's potential to host particular instream uses, taking into account existing and potential water developments.

(c) The hydrologic data and streamflow characteristics of a stream or stream reach under consideration shall be analyzed and evaluated.

(d) Based on the evaluated instream use(s), requirements for the stream within defined reaches shall be determined. These requirements shall be expressed for specified time intervals (such as monthly or seasonal) and reaches in terms of the quantity, depth, quality, or other measurable attributes of stream water, or a combination of these attributes, needed to preserve, enhance, or restore the stream or stream reach's ability to provide for those identified instream uses. Each instream flow standard shall describe the measurable attributes necessary to protect the public interest in the particular stream. Instream flow standards shall be expressed in terms of variable flows of water necessary to adequately protect fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use. When quantitative data cannot be developed without undue expenditure of time, financing, and effort, the department may recommend qualitatively derived requirements.

(e) In formulating the proposed standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-34 Notice; public hearing. (a) Upon the drafting of a proposed instream flow standard and prior to its adoption, the commission shall hold a public hearing and shall publish a notice of the hearing, setting forth the:

- (1) Affected stream(s) or stream reach(es) thereof;
- (2) Purpose of the public hearing; and
- (3) Time, date, and place of the public hearing where written or oral testimony may be submitted or heard.

(b) The notice shall be published at least once in a newspaper of statewide circulation and the last publication shall be not less than twenty days before the date set for the hearing. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-35 Decision of commission. After the required public hearing and after necessary investigations have been completed, the deputy shall make a recommendation to the commission for its decision. The commission shall cause a notice of its decision concerning the adoption of the instream flow standard to be published in a newspaper of statewide circulation. Upon its adoption by the commission, the instream flow standard shall be incorporated into these rules and made a part hereof. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-36 Modifying instream flow standards. The modification of an existing instream flow standard by the commission may be initiated by the commission or by a petition to the commission by any interested person. The petition for modifying instream flow standards shall be made on forms provided by the department. The procedure for modifying an existing instream flow standard shall be similar to that for the establishment of an instream flow standard; provided that insubstantial modification may be determined and authorized without notice or hearing by the commission and provided, further, that the commission shall hold a hearing upon the written request of any person adversely affected by such order. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

#### Subchapter 4

#### Interim Instream Flow Standard

§13-169-40 Petition to adopt interim instream flow standard. (a) Pending the establishment of an instream flow standard for any stream(s) or stream reach(es), any person, with proper standing, may petition the commission to adopt an interim instream flow standard for such stream(s) or reach(es).

(b) The petition to adopt an interim instream flow standard shall set forth data and information concerning the need to protect and conserve beneficial instream use(s) of the stream(s) or stream reach(es), and any other relevant and reasonable information required by the commission.

(c) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses.

(d) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general interim instream flow standard applicable to all streams within a specified area.

(e) Interim instream flow standards may be adopted by the commission without the necessity of a public hearing. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-3, 174C-5, 174C-71)

§13-169-41 Review period. The commission shall grant or reject a petition to adopt an interim instream flow standard under this chapter within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner, subject to the approval of the commission. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-42 Schedule for adoption of interim instream flow standards. The commission shall adopt interim instream flow standards as follows:

- (1) Windward Oahu by July 31, 1987;
- (2) East Maui and Kauai by December 31, 1987;
- (3) Hawaii and Molokai by July 1, 1988; and
- (4) West Maui and Leeward Oahu by December 31, 1988.

The commission may alter priorities relative to given areas, and may extend the time needed for completion in the event contested case hearings or court appeals, relative to establishing interim instream standards, develop during this period. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: Act 45, SLH 1987, Section 4)

§13-169-43 Termination of interim instream flow standard. (a) Any interim instream flow standard adopted

under this subchapter shall terminate upon the establishment of an instream flow standard for the stream(s) or stream reach(es) for which the interim instream flow standard was adopted.

(b) Interim instream flow standards are by their nature temporary and subject to change. Consequently, any reliance upon the interim standards shall be at the water user's own risk. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §174C-71)

## Subchapter 5

### Stream Channel Alteration Permit

§13-169-50 Permit required. (a) Stream channels shall be protected from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. No stream channel shall be altered until an application for a permit to undertake the work has been filed and a permit is issued by the commission; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit.

(b) Projects under construction or projects reviewed and approved by the appropriate federal, state, or county agency prior to the effective date of this chapter will not be affected by this chapter. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71, 174C-93)

§13-169-51 Permit application; filing fee. (a) A person desiring a stream channel alteration shall file an application with the commission. No alteration work shall be undertaken by the applicant until a permit is issued by the commission.

(b) Each application for a permit shall be made on forms furnished by the department and shall include, but not be limited to:

- (1) The name and address of the applicant;
- (2) The name and address of the owner or owners of the land upon which the stream channel alteration is proposed;
- (3) The location and description of the proposed stream channel alteration and related facilities;

- (4) An assessment of the impact the channel alteration will have on the stream environment;
- (5) Relevant maps, plans, and drawings; and
- (6) Other information as may be necessary for the commission to determine the merits of the proposed stream channel alteration, including any hazards to public health, safety, or welfare, and the desirability of issuing a permit.

(c) Each application for a permit to undertake a stream channel alteration shall be accompanied by a non-refundable filing fee of \$25.00; provided that no fee shall be required of government agencies. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-52 Criteria for ruling on application. (a) The commission shall act upon an application within ninety calendar days after acceptance of the application.

(b) Based upon the findings of fact concerning an application for a stream channel alteration permit, the commission shall either approve in whole, approve in part, approve with modifications, or reject the application for a permit.

(c) In reviewing an application for a permit, the commission shall cooperate with persons having direct interest in the channel alteration and be guided by the following general considerations:

- (1) Channel alterations that would adversely affect the quantity and quality of the stream water or the stream ecology should be minimized or not be allowed.
- (2) Where instream flow standards or interim instream flow standards have been established pursuant to subchapters 3 and 4, no permit shall be granted for any channel alteration which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.
- (3) The proposed channel alteration should not interfere substantially and materially with existing instream or non-instream uses or with channel alterations previously permitted.

(c) Notwithstanding subparagraph (b) above, the commission may approve a permit pursuant to subparagraph (a) above in those situations where it is clear that the best interest of the public will be served, as determined by the commission. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-53 Term of permit. (a) Every permit approved and issued by the commission shall be for a specified period, not to exceed two years, unless otherwise specified in the permit.

(b) Every permit approved and issued by the commission shall contain the commencement and completion dates for the permitted activity. In determining the commencement and completion dates of the activity, the commission shall take into consideration the:

- (1) Cost and magnitude of the project;
- (2) Engineering and physical features involved;
- (3) Existing conditions; and
- (4) Public interests affected.

(c) The commission may extend the completion dates of the activity prescribed in any permit upon a showing of good cause and good-faith performance.

(d) If the commencement or completion date is not complied with, the department shall notify the permittee by certified mail that the permit shall be revoked within sixty days unless the permittee can show good cause that it should not be revoked. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-54 Revocation of permit. (a) A permit may be revoked in whole or in part for any:

- (1) Material false statement in the application or in any report or statement of fact required pursuant to this chapter;
- (2) Violation of this chapter relative to the permit; or
- (3) Violation of the conditions of the permit.

(b) In any proceeding to revoke a permit in whole or in part, the commission shall give written notice to the permit holder of the facts or conditions which warranted the action and provide the permit holder the opportunity for a hearing. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

§13-169-55 Emergency work. (a) When emergency channel alteration is necessary to prevent or minimize loss of life or damage to property, including the repair or restoration of structures damaged by a sudden and unforeseen event, a person may proceed to effect the channel alteration without a permit.

(b) In general, protective, health, and sanitation measures shall be limited to the minimum amount necessary to remove immediate threats to health and safety or to prevent immediate or further damage to property, and emergency repairs or restoration of structures shall be based on their replacement by a minimum facility of the same general type.

(c) No later than the first working day after initiation of any emergency work, the person effecting the work shall notify the department and describe the nature and circumstances of the remedial work so that the department may issue an emergency authorization.

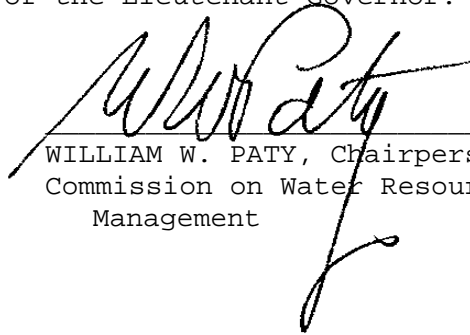
(d) Within thirty days of his notification to the department, the person effecting the emergency work shall submit to the commission a report describing the nature and extent of the emergency work performed, including relevant maps and diagrams showing the location and details of the channel alteration completed.

(e) No fee will be required for the filing of a report for emergency channel alteration work. [Eff. MAY 27, 1988]  
(Auth: HRS §174C-8) (Imp: HRS §§174C-5, 174C-71)

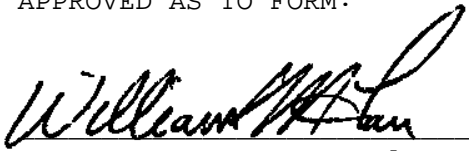
DEPARTMENT OF LAND AND NATURAL RESOURCES

Chapter 13-169, Hawaii Administrative Rules, on the Summary page dated April 20, 1988 was adopted on April 20, 1988; following public hearings held on Oahu on March 22, 1988; on Maui on March 17, 1988; on Molokai on March 21, 1988; on Kauai on March 23, 1988; and on Hawaii on March 15, 16, 1988; after public notice was given in the Honolulu Star Bulletin, Hawaii Tribune Herald, Maui News and the Garden Island on February 24, 1988 and March 8, 1988.

The adoption of chapter 13-169 shall take effect ten days after filing with the Office of the Lieutenant Governor.

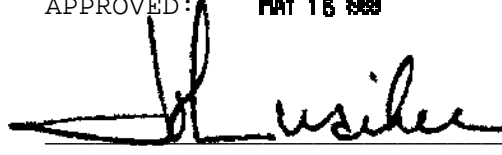
  
WILLIAM W. PATY, Chairperson  
Commission on Water Resource  
Management

APPROVED AS TO FORM:

  
Deputy Attorney General

Dated: 5/3/88

APPROVED: **MAY 16 1988**

  
JOHN WAIHEE, Governor  
State of Hawaii

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Date Filed