

Report to the Twenty-First Legislature  
2002 Regular Session

On

THE PROGRESS OF ESTABLISHING THE REASONABLE COST TO BE  
ASSESSED TO THE PERMITTEES AS DEFINED BY WATER USE PERMIT  
APPLICATIONS (Waiahole Ditch) 94 Hawaii 97 (2000)



Prepared by the

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

In response to

ACT 259 Session Laws of Hawaii 2001  
(House Bill 200 House Draft 1, Senate Draft 1, Conference Draft 1  
RELATING TO THE STATE BUDGET) – SECTION 20

Honolulu, Hawaii

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INTRODUCTION

ACT 259 Session Laws of Hawaii 2001 (House Bill 200, House Draft 1, Senate Draft 1, Conference Draft 1, RELATING TO THE STATE BUDGET) – SECTION 20 reads as follows:

*"Provided That Of The General Fund Appropriation For The Water Resources (LNR 404), The Commission On Water Resource Management Shall Submit A Detailed Report On The Progress Of Establishing The Reasonable Cost To Be Assessed To The Permittees As Defined By Water Use Permit Applications (Waiahole Ditch) 94 Hawaii 97 (2000); Provided Further That This Report Shall Include A Listing Of All Meetings To Determine Reasonable Cost, Any Signed Agreement Between Both Parties Once A Reasonable Cost Has Been Established, Reasons Explaining Delays In Establishing A Reasonable Cost, If Any, & The Estimate Of Cost Including A Detailed Breakdown Of The Cost Procedures, To Comply With The Hawaii Supreme Court In-Stream Flow Survey; & Provide Further That The Report Shall Be Submitted To The Legislature No Later Than 20 Days Prior To The 02 Regular Session ."*

This 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

The Commission in its December 1997 Waiahole Ditch Combined Contested Case Hearing, Findings of Fact, Conclusions of Law, and Decision and Order (Waiahole Decision and Order), required “permittees on whose lands the water from the Waiahole Ditch System is used” to help fund studies and monitoring activities resulting from the Waiahole Decision and Order. The Commission also provided for the establishment of a committee (Funding Committee) to “recommend a reasonable amount for the funding, and coordinate and set up the mechanism for the collection, accounting, and distribution of the funds”. The Commission further provided that the funding “shall be based on the amount of water used and shall be on a pro rata basis”.

The Hawaii Supreme Court’s August 22, 2000 decision (Supreme Court Decision) upheld the Commission’s general authority to condition the permits upon compliance with the funding requirements.

The Commission, on May 16, 2001, appointed Messrs. Richard Cox and Peter Adler to the Funding Committee. Mr. Cox is a former Commissioner and sat on the Commission throughout the original Waiahole Ditch Combined Contested Case Hearing. Mr. Adler has often participated in Commission activities and facilitated the Molokai Working Group in 1993 and 1996, conducted the mediation on the Waiahole interim release issue in 1994, and most recently served as the hearing officer for the Kukui (Molokai), Inc. contested case hearing.

## MEETINGS TO DETERMINE REASONABLE COSTS

Prior to the establishment of the Funding Committee, Commission staff met on several occasions to discuss how to determine “reasonable” costs and the make up of the Funding Committee. In March, 2001, staff met with representatives from the Department of Agriculture, the Waiahole Water System – the operator of the Waiahole Ditch System, and the Waiahole water use permittees, to discuss “reasonable” costs.

The Funding Committee held its first meeting on July 27, 2001. The format of the meeting was a round table discussion, open to the public. Notice of the meeting was sent to all the parties in the case, any interested member of the public that requested notification, and was announced in the Commission’s Monthly Bulletin and on its web site. The Funding Committee invited Messrs. James Parham and Alfredo Lee to make presentations to open the round table discussion. Mr. Parham is under contract with the State Division of Aquatic Resources of the Department of Land and Natural Resources and presented an update of his Geographical Information System (GIS) modeling efforts related to the Waiahole case. Mr. Lee is with the Agribusiness Development Corporation, in charge the Waiahole Water System, and gave an overview of the system and its operation. Staff presented a very preliminary stream assessment budget, developed in coordination with the Division of Aquatic Resources, to give examples of the types of studies and monitoring activities that may be required as part of the Waiahole Decision and Order. A few of the many opinions offered during the round table session, and comments received by fax after the session included:

- the total cost of the studies and monitoring activities needs to be determined first, before determining the portion the permittees need to pay
- the Commission must know what studies are going to be done
- the design of the studies should be subject to public discussion
- the studies should not be limited to stream systems
- the studies should not be limited or “driven” by the amount of money available
- the permittees should contribute toward watershed studies
- a two-person committee is not going to work
- the United States Geological Survey (USGS) should be included as a “real partner”
- the Preliminary Report of the Aquatic Resources Technical Advisory Committee, May 21, 1999, should be used to determine the range of studies to be done
- this process is premature because the users of water have not yet been finally determined.

The Funding Committee held its second meeting on September 24, 2001. The main purpose of the second meeting was to hear testimony from the water use permittees and users of water from the Waiahole Ditch System. The Funding Committee was interested in hearing what the permittees and users believed “a reasonable amount” should be to help fund the studies and monitoring activities. Testimony was presented by the President of the Kunia Water Cooperative (KWC), as well as by others representing the permittees. Testimony was also presented by other interested parties. Some of the opinions offered included:

- there is no federal support system for the KWC; the KWC would consider a 5 to 10% increase of the average state water charges (state irrigation systems range from \$0.25 to \$0.3653 per 1000 gallons) as “reasonable”
- the permittees and users do not want to be “guinea pigs” regarding stream studies
- fees should be for Waiahole-related streams only
- fees should be only for a reasonable period of time – not open-ended
- studies for water reuse should be included
- studies should not be limited to streams only
- need to hear from other permittees before setting the rate.

The Funding Committee announced at the end of the meeting, and in the notices in the Monthly Bulletin and web site, that the public was invited to submit written testimony until October 8, 2001.

Kamehameha Schools Bishop Estate and the KWC submitted written testimony by the October 8 deadline. Kamehameha Schools reaffirmed its belief that it should not be responsible for funding any portion of the proposed studies. The KWC stated that they would consider a 5 to 10% increase on the average state water charges for surface water assessed on their actual use, as a reasonable amount, provided the funds are used to implement scientific protocols previously developed by competent scientists, not to fund any basic research in determining those protocols.

#### SIGNED AGREEMENT BETWEEN PARTIES ONCE A REASONABLE COST HAS BEEN ESTABLISHED

The Funding Committee is still in the process of determining a reasonable cost. The Commission does not believe additional written agreements between the Commission and the water use permit holders are necessary because it is a condition of the water use permits.

#### REASONS EXPLAINING DELAYS IN ESTABLISHING A REASONABLE COST, IF ANY

The greatest delay in establishing a reasonable cost was the uncertainties related to the appeal, by several parties, to the Hawaii Supreme Court from the December 1997 Final Decision and Order of the Commission. Several Leeward parties objected to and appealed the requirement that they contribute to subsequent stream studies and monitoring activities. They maintained that the State Water Code requires the Commission to fund the studies, and that this condition amounts to unconstitutional “regulatory leveraging” in violation of the Fifth Amendment to the United States Constitution and article I, section 20 of the Hawaii Constitution. The Commission felt it would be unwise to start collecting fees from the permittees when there was a possibility that the fee requirement could be reversed. Therefore, it was not until August 22, 2000, when the Hawaii Supreme Court issued its decision, upholding the Commission’s authority to condition the permits upon compliance with the funding requirements, that the Commission felt it was reasonable to proceed with the formation of the Funding Committee.

There was an additional delay in establishing the Funding Committee. The original staff recommendation early in 2001 was to have the Funding Committee members be Commissioners that were not recused from the Waiahole case and also who would not decide the remanded

Waiahole case. Staff recommended that Commissioners Robert Girald and David Nobriga be appointed to the Funding Committee because their terms were to be completed at the end of June 2001, and they could continue to serve on the Funding Committee after the end of June 2001 if necessary. It was not expected that the remanded Waiahole case would be completed by June 2001. However, Commissioners Girald and Nobriga were asked to stay on the Commission until the end of 2001. It was believed that the remanded case would be completed by the end of 2001. Therefore, the original staff recommendation was withdrawn. Staff later recommended Messrs. Adler and Cox to be appointed to the Funding Committee.

Another delay in establishing a reasonable cost has been the complexity of the issue in determining the instream flow standards for any Hawaiian stream. There is no standard method for determining instream flow standards. The State Water Code's definitions of instream flow standard and instream use from §174C-3, Hawaii Revised Statutes are:

***“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 fishery, 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 fish 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.***

Because there are no such instream flow standards, and because the Commission has unsuccessfully attempted to use continental United States methods, finding they generally do not work for our island stream conditions, there are varying opinions, even among the experts, as to the approach the Commission should take to set our own instream flow standards. Therefore, whenever the issue of setting instream flow standards is raised, there is no lack of suggestions as to what courses of action the Commission should take or what kinds of studies should be done. The process of determining which studies to undertake has been a time-consuming process, and is more of a work-in-progress activity where the Commission is discovering new methods and techniques as the Commission finds out more about the resource. Complicating matters even more are the multiple issues raised by the multiple uses included in the definition of instream use. These factors have made it difficult to determine what studies need to be done. The only

guidance given by the original Waiahole Decision and Order was that the Funding Committee's task was to recommend a "reasonable amount for the funding."

**THE ESTIMATE OF COST INCLUDING A DETAILED BREAKDOWN OF THE COST  
AND PROCEDURES, TO COMPLY WITH THE HAWAII SUPREME COURT IN-STREAM  
FLOW SURVEY**

The Commission staff, as instructed by the Funding Committee, is working with the USGS and the Division of Aquatic Resources to prepare a detailed breakdown of the costs and procedures to comply with the Hawaii Supreme Court requirements for the Waiahole-related streams. Preliminarily, USGS-related studies include operating, maintaining, and in some cases installing new continuous recording stream gages on the streams, low-flow measurements and seepage runs on various streams, and hydrograph-separation analysis and base flow computations. Division of Aquatic Resources-related studies include native fish studies, aquatic invertebrate studies, algae studies, insect studies, recruitment/drift studies, a Muliwai study, a hau removal study, a riparian study, GIS modeling, and maintenance of a GIS database. Some of the studies are short-term studies (1 to 2 years) related to specific streams, such as the hau removal study for Kahana Stream. However, most of the studies serve as a baseline component and will be an on-going study component. Details of the studies, including costs, sequencing, and duration, are being worked on by staff, and will be available for review following presentation to the Funding Committee. Final approval of the cost to be assessed to the permittees will be determined by the Commission.