

**CHAPTER 174C**  
**STATE WATER CODE**

Part I. Administrative Structure

Section

- 174C-1 Short title
- 174C-2 Declaration of policy
- 174C-3 Definitions
- 174C-4 Scope
- 174C-5 General powers and duties
- 174C-5.5 Water resource management fund
- 174C-6 Deputy to the chairperson of the commission on water resource management
- 174C-7 Commission on water resource management
- 174C-8 Adoption of rules concerning water resources by the commission
- 174C-9 Proceedings before the commission concerning water resources
- 174C-10 Dispute resolution
- 174C-11 Hearings officers
- 174C-12 Judicial review of rules and orders of the commission concerning the water code
- 174C-12.5 Contested cases; appeals
- 174C-13 Citizen complaints
- 174C-14 Acquisition of real property
- 174C-15 Penalties and common law remedies
- 174C-15.5 Administrative violation system
- 174C-16 Severability

Part II. Reports of Water Use

- 174C-26 Filing of declaration
- 174C-27 Issuance of certificate

Part III. Hawaii Water Plan

- 174C-31 Hawaii water plan
- 174C-32 Coordination

Part IV. Regulation of Water Use

- 174C-41 Designation of water management area
- 174C-42 Notice; public hearing required
- 174C-43 Investigations required
- 174C-44 Ground water criteria for designation
- 174C-45 Surface water criteria for designation
- 174C-46 Findings of fact; decision of commission
- 174C-47 Modifying and rescinding designated areas
- 174C-48 Permits required
- 174C-49 Conditions for a permit

- 174C-50 Existing uses
- 174C-51 Application for a permit
- 174C-51.5 Dual line water supply systems; installation in new industrial and commercial developments located in designated water management areas
- 174C-52 Notice
- 174C-53 Permit issuance
- 174C-54 Competing applications
- 174C-55 Duration of permits
- 174C-56 Review of permits
- 174C-57 Modification of permit terms
- 174C-58 Revocation of permits
- 174C-59 Transfer of permit
- 174C-60 Contested cases
- 174C-61 Fees
- 174C-62 Declaration of water shortage
- 174C-63 Appurtenant rights

#### Part V. Water Quality

- 174C-66 Jurisdiction over water quality
- 174C-67 Exchange of information
- 174C-68 Water quality plan

#### Part VI. Instream Uses of Water

- 174C-71 Protection of instream uses

#### Part VII. Wells

- 174C-81 Definitions
- 174C-82 Powers and duties of the commission
- 174C-83 Registration of all existing wells
- 174C-84 Permits for well construction and pump installation
- 174C-85 Well completion report
- 174C-86 Well construction and pump installation standards
- 174C-87 Abandonment of wells

#### Part VIII. Stream Diversion Works

- 174C-91 Definition
- 174C-92 Registration of existing stream diversion works
- 174C-93 Permits for construction or alteration
- 174C-94 Completion report
- 174C-95 Abandonment

#### Part IX. Native Hawaiian Water Rights

- 174C-101 Native Hawaiian water rights

### **Note**

The acquisition of the Waiahole water system shall not be construed to affect the powers and authority of the commission on water resource management or its powers to modify any water allocations. L 1998, c 111, §15.

Department of transportation's bridge rehabilitation and replacement program; temporary exemption from certain construction requirements of this chapter through June 30, 2017 or until completion. L 2012, c 218.

Judiciary report to 2019 legislature on change in judicial proceedings made by L 2016, c 48. L 2016, c 48, §12.

Standardized water audits of public water systems; reports. L 2016, c 169.

Two-year water security advisory group pilot program to enable public-private partnerships that increase water security; annual report to governor and 2017-2018 legislature (repealed June 30, 2018). L 2016, c 172.

### **Cross References**

Environmental courts, jurisdiction over proceedings arising under this chapter, see §604A-2.

Irrigation and water utilization projects, see chapter 168.

Irrigation water development, see chapter 167.

### **Law Journals and Reviews**

Testing the Current: The Water Code and the Regulation of Hawaii's Water Resources. 10 UH L. Rev. 205.

Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible? 18 UH L. Rev. 1.

Cultures In Conflict In Hawai'i: The Law and Politics of Native Hawaiian Water Rights. 18 UH L. Rev. 71.

Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine. 24 UH L. Rev. 21.

Water Regulation, Land Use and the Environment. 30 UH L. Rev. 49.

Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law. 33 UH L. Rev. 537 (2011).

### **Case Notes**

Although the public trust doctrine and the state water code share similar core principles, the code does not supplant the protections of the public trust doctrine. 94 H. 97, 9 P.3d 409.

Despite evidence that permit applicant violated chapter 340E, neither the water code nor the public trust precluded the commission on water resource management from allocating water to applicant to supply water to domestic end users from a delivery system that may not comply with chapter 340E; as this jurisdiction separately regulates water allocation and drinking water standards, and there was no discernable legislative intent to make water use permit applications subject to compliance with chapter 340E, violations of chapter 340E were not germane to a review of the propriety of water allocation under the water code and the public trust. 116 H. 481, 174 P.3d 320.

## "PART I. ADMINISTRATIVE STRUCTURE

[§174C-1] **Short title.** This chapter shall be known and may be cited as the State Water Code. [L 1987, c 45, pt of §2]

" **§174C-2 Declaration of policy.** (a) It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.

(b) There is a need for a program of comprehensive water resources planning to address the problems of supply and conservation of water. The Hawaii water plan, with such future amendments, supplements, and additions as may be necessary, is accepted as the guide for developing and implementing this policy.

(c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

(d) The state water code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing

water pollution and in the maintenance of high standards of water quality.

(e) The state water code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning. [L 1987, c 45, pt of §2; am L 1999, c 197, §1]

### **Case Notes**

As water code expressly reserves the counties' authority with respect to land use planning and policy, commission allegedly imposing a "directive" on the counties to designate priorities among proposed uses did not usurp counties' land use planning and zoning authority. 94 H. 97, 9 P.3d 409.

Commission did not err in excluding golf course irrigation from the category of "agricultural use". 94 H. 97, 9 P.3d 409.

Commission on water resource management's conclusion that "no evidence was presented" to suggest that the rights of native Hawaiians would be adversely affected by permit applicant's proposed use erroneously shifted the burden of proof to complainants; thus, commission failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians' traditional and customary gathering rights in discharging its public trust obligations. 116 H. 481, 174 P.3d 320.

### **Law Journals and Reviews**

Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law. 33 UH L. Rev. 537 (2011).

" **§174C-3 Definitions.** As used in this chapter, unless the context otherwise requires:

"Agricultural use" means the use of water for the growing, processing, and treating of crops, livestock, aquatic plants and animals, and ornamental flowers and similar foliage.

"Authorized planned use" means the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals.

"Board" means the board of land and natural resources.

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

"Change in use" means any modification or change in water use from or to domestic, municipal, military, agriculture (including agricultural processing), or industrial uses.

"Channel alteration" means: (1) to obstruct, diminish, destroy, modify, or relocate a stream channel; (2) to change the direction of flow of water in a stream channel; (3) to place any material or structures in a stream channel; and (4) 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 fish, 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.

"Domestic use" means any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.

"Emergency" means the absence of a sufficient quantity and quality of water in any area whether designated or not which threatens the public health, safety, and welfare as determined by the commission.

"Existing agricultural use" means replacing or alternating the cultivation of any agricultural crop with any other agricultural crop, which shall not be construed as a change in use.

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

"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" 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.

"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.

"Municipal use" means the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term "domestic use".

"Noninstream 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.

"Nonregulated use" means any use of water which is exempted from regulation by the provisions of this code.

"Person" means any and all persons, natural or artificial, including an individual, firm, association, organization, partnership, business trust, corporation, company, the United States of America, the State of Hawaii, and all political subdivisions, municipalities, and public agencies thereof.

"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 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 flowing 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 removing water from a stream into a channel, 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, reservoirs, and coastal waters subject to state jurisdiction--and diffused surface water--that is, water occurring upon the surface of the ground other than in contained water bodies. Water from natural springs is surface water when it exits from the spring onto the earth's surface.

"Sustainable yield" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission.

"Time of withdrawal or diversion" means, in view of the nature, manner, and purposes of a reasonable and beneficial use of water, the most accurate method of describing the time when the water is withdrawn or diverted, including description in terms of hours, days, weeks, months, or physical, operational, or other conditions.

"Water" or "waters of the State" means any and all water on or beneath the surface of the ground, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground.

"Watercourse" means a stream and any canal, ditch, or other artificial watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted.

"Water management area" means a geographic area which has been designated pursuant to section 174C-41 as requiring management of the ground or surface water resource, or both.

"Water source" means a place within or from which water is or may be developed, including but not limited to: (1) generally, an area such as a watershed defined by topographic boundaries, or a definitive ground water body; and (2) specifically, a particular stream, other surface water body, spring, tunnel, or well or related combination thereof.

"Well" means an artificial excavation or opening into the ground, or an artificial enlargement of a natural opening by



which ground water is drawn or is or may be used or can be made to be usable to supply reasonable and beneficial uses within the State. [L 1987, c 45, pt of §2; am L 1998, c 101, §2]

### Case Notes

Commission did not err in excluding golf course irrigation from the category of "agricultural use". 94 H. 97, 9 P.3d 409.

The "reasonable-beneficial use" standard and the related criterion of "consistent with the public interest" demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question; thus, permit applicants requesting water diverted from streams must duly take into account the public interest in instream flows. 94 H. 97, 9 P.3d 409.

Where it could not be said that closure of hotel and golf course would have no impact on applicant's proposed uses in light of commission on water resource management's findings and conclusions pursuant to the "reasonable-beneficial use" standard set forth in §174C-49 and defined in this section, commission's reliance on §174C-58(4), allowing applicant four years to fulfill its proposed uses before the commission may suspend or revoke a permit, was misplaced; as commission failed to consider the impact the closures may have on applicant's proposed uses when it made its proposed use allocation decision, proposed use permit vacated. 116 H. 481, 174 P.3d 320.

" **[§174C-4] Scope.** (a) All waters of the State are subject to regulation under the provisions of this chapter unless specifically exempted. No provision of this chapter shall apply to coastal waters. Nothing in this chapter to the contrary shall restrict the planning or zoning power of any county under chapter 46.

(b) No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after July 1, 1987, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46.

(c) No state or county government agency or other person having the power of eminent domain or condemnation under the laws of the State, may exercise the power with respect to condemning property if the condemnation will materially affect water resources in the State, without the written permission of the commission.

(d) No right, title, or interest in the use of any water resources of the State can be acquired by prescription. [L 1987, c 45, pt of §2]

#### **Note**

Interpretation of county function. L 1987, c 45, §6.

#### **Revision Note**

"July 1, 1987" substituted for "the effective date of this chapter".

#### **Case Notes**

As water code expressly reserves the counties' authority with respect to land use planning and policy, commission allegedly imposing a "directive" on the counties to designate priorities among proposed uses did not usurp counties' land use planning and zoning authority. 94 H. 97, 9 P.3d 409.

" **§174C-5 General powers and duties.** The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

- (1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality;
- (2) Shall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water;
- (3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State;
- (4) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons;
- (5) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting

- investigations and studies or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry;
- (6) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the State, and assist these organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with these organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts;
  - (7) Shall prepare, publish, and issue printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities;
  - (8) May appoint and remove agents, including hearings officers and consultants, necessary to carry out the purposes of this chapter, who may be engaged by the commission without regard to the requirements of chapter 76 and section 78-1;
  - (9) May hire employees in accordance with chapter 76;
  - (10) May acquire, lease, and dispose of such real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in section 174C-14;
  - (11) Shall identify, by continuing study, those areas of the State where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public;
  - (12) Shall provide coordination, cooperation, or approval necessary to the effectuation of any plan or project of the federal government in connection with or concerning the waters of the State. The commission shall approve or disapprove any federal plans or projects on behalf of the State. No other agency or department of the State shall assume the duties delegated to the commission under this paragraph; except that the department of health shall continue to exercise the powers vested in it with respect to water quality, and except that the department of business, economic development, and tourism shall continue to

carry out its duties and responsibilities under chapter 205A;

- (13) Shall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources, based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water;
- (14) Shall catalog and maintain an inventory of all water uses and water resources; and
- (15) Shall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter. [L 1987, c 45, pt of §2; am L 1988, c 141, §12; am L 1990, c 293, §8; am L 2000, c 253, §150; am L 2002, c 35, §1; am L 2006, c 300, §7]

#### **Case Notes**

Insofar as the commission on water resource management, as the agency authorized to administer the state water code, determines the contents of the Hawaii water plan, which includes the designation of hydrologic units and sustainable yields, and the commission's "interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose", it is within the commission's authority to limit reservations of water to specific aquifers. 103 H. 401, 83 P.3d 664.

" **[\$174C-5.5] Water resource management fund.** (a) There is established in the department a special fund to be designated as the water resource management fund. The fund shall be administered by the commission. The water resource management fund shall be used for the following:

- (1) Monitoring programs and activities concerning water resource quality, protection, and management;
- (2) Research programs and activities concerning water conservation and investigation of alternative sources of water;
- (3) Preparation and dissemination of information to the public concerning activities authorized under this chapter;
- (4) Data collection, development, and updating of long-range planning documents authorized under this chapter; and

- (5) Any other protection, management, operational, or maintenance functions authorized and deemed necessary by the commission, including but not limited to funding permanent or temporary staff positions.
- (b) The following shall be deposited into the water resource management fund:
  - (1) Appropriations by the legislature to the water resource management fund;
  - (2) All fees and administrative charges collected under this chapter or any rule adopted thereunder;
  - (3) Moneys collected as fines or penalties imposed under this chapter or any rule adopted thereunder;
  - (4) Moneys derived from public and private sources to benefit water resource protection and management;
  - (5) Any moneys collected from the sale of retail items by the department related to water resources;
  - (6) Any other moneys collected pursuant to chapter 174C; and
  - (7) Moneys derived from interest, dividend, or other income from the above sources. [L 2000, c 204, §1]

" **§174C-6 Deputy to the chairperson of the commission on water resource management.** (a) There shall be a first deputy to the chairperson of the commission on water resource management ("deputy for water resource management") who shall be in addition to any other first deputy to the chairperson as the chairperson of the board of land and natural resources. The deputy shall have experience in the area of water resources and shall be appointed by the chairperson with the approval of a majority of the commission.

(b) The duties of the deputy for water resource management shall be to administer and implement, under the direction of the commission, the state water code and all rules, and other directives promulgated in accordance therewith by the commission. Nothing in this provision shall be construed as limiting the authority of the commission as to matters regarding water resources.

(c) The position of deputy for water resource management is not subject to chapter 76.

(d) The salary of the deputy for water resource management shall be as provided in section 26-53 for first deputies or first assistants to the head of any department. [L 1987, c 45, pt of §2; am L 1992, c 87, §5; am L 2000, c 253, §150]

" **§174C-7 Commission on water resource management.** (a) There is established within the department a commission on water resource management consisting of seven members which shall have

exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as otherwise specifically provided in this chapter.

(b) Five members shall be appointed by the governor subject to confirmation by the senate in the manner prescribed in subsection (d). Each member shall have substantial experience in the area of water resource management; provided that at least one member shall have substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by section 174C-101. The chairperson of the board of land and natural resources shall be the chairperson of the commission. The director of health or the director's designee shall serve as an ex officio[, ] voting member.

(c) The members of the commission shall serve without compensation but shall be reimbursed for expenses, including travel expenses, necessary for the performance of their duties.

(d) In appointing a member to the commission, the governor shall select from a list submitted by a nominating committee. The nominating committee shall be composed of four individuals chosen as follows: two persons appointed by the governor; one person appointed by the president of the senate; and one person appointed by the speaker of the house. The committee shall solicit applications and send to the governor the names of at least three individuals for each open position.

(e) Except as otherwise provided in this chapter, the commission shall be subject to sections 26-34, 26-35, and 26-36. [L 1987, c 45, pt of §2; am L 2003, c 184, §1; am L 2016, c 54, §1]

#### **Note**

Standardized water audits of public water systems; reports. L 2016, c 169.

#### **Case Notes**

Adverse party's due process right to fair tribunal in a contested case hearing before commission not violated by land and natural resources department chairperson also serving as chairperson of commission under subsection (b) where legislature deemed it appropriate for one person to serve in both capacities and could override common law doctrine of incompatible offices which prohibited a person from serving in a dual capacity. 94 H. 97, 9 P.3d 409.

Department of land and natural resources chairperson's dual status as chairperson of the commission and the department did

not constitute a reversible due process violation where, although chairperson should have been precluded from presiding over the hearing, objecting party did not seek chairperson's disqualification, and where chairperson's disqualification would have prevented commission from acting on the case for lack of quorum, the "rule of necessity" demanded that chairperson preside over the hearing. 94 H. 97, 9 P.3d 409.

In denying permit application, commission did not wrongfully ignore and abridge petitioner's "ali'i rights" where, to the extent that the ali'i exercised sovereign authority over water, they received such authority by delegation from the sovereign; pursuant to constitutional and statutory mandate, final delegated authority presently resides in the commission, to be exercised for the benefit of the people of the State. 94 H. 97, 9 P.3d 409.

Where department of land and natural resources was a party in a contested case proceeding before the commission, constitutional mandate that tribunal be impartial precluded chairperson of the commission, who was also chairperson of the department, from presiding over the hearing. 94 H. 97, 9 P.3d 409.

#### **Law Journals and Reviews**

Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law. 33 UH L. Rev. 537 (2011).

" **[\$174C-8] Adoption of rules concerning water resources by the commission.** The commission shall adopt and enforce such rules as may be necessary or convenient to administer this chapter. The initial set of rules, subject to later amendment, revisions, or additions, shall be adopted no later than two years after July 1, 1987. Rules shall be adopted in conformity with chapter 91. [L 1987, c 45, pt of §2]

#### **Revision Note**

"July 1, 1987" substituted for "the effective date of this chapter".

" **[\$174C-9] Proceedings before the commission concerning water resources.** All proceedings before the commission concerning the enforcement or application of any provision of this chapter or any rule adopted pursuant thereto, or the issuance, modification, or revocation of any permit or license under this code by the commission, shall be conducted in accordance with chapter 91. Hearings regarding particular water

resources shall be conducted on the island where those water resources are located. [L 1987, c 45, pt of §2]

" **[\$174C-10] Dispute resolution.** The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final decision on any matter shall be made by the commission. [L 1987, c 45, pt of §2]

" **[\$174C-11] Hearings officers.** (a) The chairperson may appoint hearings officers, not subject to chapter 76, to hear and reach a preliminary decision on any matter concerning the implementation or administration of the state water code which the commission may refer to the hearings officers by rule or otherwise.

(b) In assigning matters to hearings officers, the chairperson shall make the assignments in a manner which ensures that hearings officers will develop familiarity and expertise with given geographic areas.

(c) In conducting a hearing on any matter referred by the commission, a hearings officer shall solicit and consider the views of the appropriate county officials responsible for planning, economic development, and resource management and such other county officials and others as the commission shall direct. Any affected county agency shall be admitted as a party upon request.

(d) Each hearings officer is deemed to be an agent of the commission with all powers associated with such designation.

(e) In order to facilitate dispute resolution, the commission may employ mediation methods where practicable including the use of masters.

(f) The commission shall adjudicate disputes where there is insufficient water to meet competing needs. [L 1987, c 45, pt of §2; am L 2000, c 253, §150]

" **§174C-12 Judicial review of rules and orders of the commission concerning the water code.** *[Repeal and reenactment on July 1, 2019. L 2016, c 48, §14.]* Except as otherwise provided in this chapter, judicial review of rules and orders of the commission under this chapter shall be governed by chapter 91. Trial de novo is not allowed on review of commission actions under this chapter. [L 1987, c 45, pt of §2; am L 2016, c 48, §6]



### **Note**

Judiciary report to 2019 legislature on change in judicial proceedings made by L 2016, c 48. L 2016, c 48, §12.

" **[\$174C-12.5 Contested cases; appeals.]** *[Section repealed July 1, 2019. L 2016, c 48, §14.]* (a) Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by section 91-14(a) upon the record directly to the supreme court for final decision. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the final decision and order or preliminary ruling. For the purposes of this section, the term "person aggrieved" includes an agency that is a party to a contested case proceeding before that agency or another agency.

(b) The court shall give priority to contested case appeals of significant statewide importance over all other civil or administrative appeals or matters and shall decide these appeals as expeditiously as possible. [L 2016, c 48, §1]

### **Note**

Judiciary report to 2019 legislature on change in judicial proceedings made by L 2016, c 48. L 2016, c 48, §12.

### **Cross References**

Contested cases; see §174C-60.

" **[\$174C-13] Citizen complaints.** The commission shall adopt, pursuant to chapter 91, procedural rules for the processing of citizen complaints including the right of appeal to the commission. If any person files a complaint with the commission that any other person is wasting or polluting water or is making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring within or outside of a water management area, not expressly exempted under this code, without a permit where one is required, the commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof. [L 1987, c 45, pt of §2]

" **[\$174C-14] Acquisition of real property.** (a) The legislature declares it to be necessary for the public health and welfare that water and water related resources be conserved and protected. The acquisition of real property for this objective shall constitute a public purpose for which public funds may be expended.

(b) The commission may acquire real property and easements by purchase, gift, devise, lease, eminent domain, or otherwise for flood control, water management, or water and water-related resource conservation.

(c) Land, water areas, and related resources which may be acquired for this purpose include, but are not limited to, streams and other watercourses, parks and recreation areas, beaches, submerged lands, and other open areas, as well as necessary access sites and rights-of-way.

(d) This section does not limit the exercise of similar powers delegated by statute to any state or local government agency. This section is not intended to limit, in any way, the powers of the commission in regards to the acquisition of real property under any other statute. [L 1987, c 45, pt of §2]

" **§174C-15 Penalties and common law remedies.** (a) The commission may enforce its rules and orders adopted pursuant to this chapter by suit for injunction or for damages or both.

(b) Any person who violates any provision of this chapter, or any rule adopted pursuant to this chapter, may be subject to a fine imposed by the commission. Such fine shall not exceed \$5,000. For a continuing offense, each day during which the offense is committed is a separate violation.

(c) 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.

(d) Except as otherwise provided by law, the commission or its authorized representative by proper delegation may set, charge, and collect administrative fines or bring legal action to recover administrative fees and costs as documented by receipts or affidavit, including attorneys' fees and costs; or bring legal action to recover administrative fines, fees, and costs, including attorneys' fees and costs, or payment for damages resulting from a violation of this chapter or any rule adopted pursuant to this chapter. [L 1987, c 45, pt of §2; am L 2004, c 142, §6]

#### **Case Notes**

Discussed: 782 F. Supp. 2d 1114 (2011).

" **[\$174C-15.5] Administrative violation system.** With the mutual consent of both the commission and the department, the commission may use the civil natural resource violations system of the department of land and natural resources; provided that the commission shall act whenever the board is authorized to act, to process violations of chapter 174C or any rules adopted thereunder. [L 2004, c 142, §5]

### **Cross References**

Civil natural resource violations act, see chapter 199D.

" **[\$174C-16] Severability.** If any provision of this chapter or the application thereof to any person or circumstance is held invalid, this invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [L 1987, c 45, pt of §2]

### **"PART II. REPORTS OF WATER USE**

**§174C-26 Filing of declaration.** (a) Any person making a use of water in any area of the State shall file a declaration of the person's use with the commission within one year from the effective date of rules adopted to implement this chapter.

(b) When the commission requires filing of declarations by rules, it shall cause public notice of the rule to be given statewide for filings in the city and county of Honolulu and areawide or countywide and statewide for filings in counties other than the city and county of Honolulu. The commission shall also cause notice of the rules to be given by mail to any person required to file of whom the commission has or could readily obtain knowledge or who has requested mailed notice to be given when the commission adopts rules requiring the filing of declarations.

(c) The declarations shall be in such form and contain such information as the commission by rule prescribes, including the quantity of water used, the purpose or manner of the use, the time of taking the water, and the point of withdrawal or diversion of the water. Each declaration shall contain a statement, signed and sworn to by the person required to file the declaration, or by some other person duly authorized in the person's behalf, to the effect that the contents thereof are true to the best of the person's knowledge and belief.

(d) If no declaration is filed, the commission, in its discretion, may conclusively determine the extent of the uses required of declaration.

(e) The commission shall act upon a declaration within six months after its filing. [L 1987, c 45, pt of §2; am L 1998, c 2, §42]

" **[\$174C-27] Issuance of certificate.** (a) When a declaration has been filed in accordance with this section and the commission has determined that the use declared is a reasonable, beneficial use, the commission shall issue a certificate describing the use. The certificate shall be deemed to constitute a description of the use declared. With respect to certificates for water use, the confirmed usage shall be recognized by the commission in resolving claims relating to existing water rights and uses including appurtenant rights, riparian and correlative use.

(b) The commission shall hold a hearing upon the request of any person adversely affected by the certification or the refusal to certify any water use.

(c) Whenever a certified use of water is terminated, the owner of the certificate shall file a report with the commission, providing all information prescribed in the rules of the commission. [L 1987, c 45, pt of §2]

### **Case Notes**

The rule of correlative rights applies to all ground waters of the State. 94 H. 97, 9 P.3d 409.

Where petitioners did not establish any "existing" correlative uses, under the controlling water code permitting provisions, they had no superior "right" to a permit. 94 H. 97, 9 P.3d 409.

### **"PART III. HAWAII WATER PLAN**

**§174C-31 Hawaii water plan.** (a) The Hawaii water plan shall consist of four parts:

- (1) A water resource protection plan which shall be prepared by the commission;
- (2) Water use and development plans for each county which shall be prepared by each separate county and adopted by ordinance, setting forth the allocation of water to land use in that county;
- (3) A state water projects plan which shall be prepared by the agency which has jurisdiction over such projects in conjunction with other state agencies; and

- (4) A water quality plan which shall be prepared by the department of health.
- (b) All water use and development plans shall be prepared in a manner consistent with the following conditions:
  - (1) Each water use and development plan shall be consistent with the water resource protection and water quality plans;
  - (2) Each water use and development plan and the state water projects plan shall be consistent with the respective county land use plans and policies including general plan and zoning as determined by each respective county;
  - (3) The water use and development plan for each county shall also be consistent with the state land use classification and policies;
  - (4) The cost to develop the initial water use and development plan for each county shall be funded by the State in an amount not exceeding \$150,000 per county;
  - (5) The cost of maintaining the water use and development plan shall be borne by the counties; state water capital improvement funds appropriated to the counties shall be deemed to satisfy article VIII, section 5 of the state constitution; and
  - (6) Each county in order to be eligible for state appropriations for county water projects must have developed an acceptable water use and development plan within the time frame established by this chapter.
- (c) To prepare the water resource protection and water quality plans, the commission shall:
  - (1) Study and inventory the existing water resources of the State and the means and methods of conserving and augmenting such water resources;
  - (2) Review existing and contemplated needs and uses of water including state and county land use plans and policies and study their effect on the environment, procreation of fish and wildlife, and water quality;
  - (3) Study the quantity and quality of water needed for existing and contemplated uses, including irrigation, power development, geothermal power, and municipal uses;
  - (4) Identify rivers or streams, or a portion of a river or stream, which appropriately may be placed within a wild and scenic rivers system, to be preserved and protected as part of the public trust. For the purposes 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; and

- (5) Study such other related matters as drainage, reclamation, flood hazards, floodplain zoning, dam safety, and selection of reservoir sites, as they relate to the protection, conservation, quantity, and quality of water.

(d) The water resource protection plan shall include, but not be limited to:

- (1) Nature and occurrence of water resources in the State;
- (2) Hydrologic units and their characteristics, including the quantity and quality of available resource, requirements for beneficial instream uses and environmental protection, desirable uses worthy of preservation by permit, and undesirable uses for which permits may be denied;
- (3) Existing and contemplated uses of water, as identified in the water use and development plans of the State and the counties, their impact on the resource, and their consistency with objectives and policies established in the water resource protection and water quality plans;
- (4) Programs to conserve, augment, and protect the water resource; and
- (5) Other elements necessary or desirable for inclusion in the plan.

Thereafter, the commission in coordination with the counties and the department of health shall formulate an integrated coordinated program for the protection, conservation, and management of the waters in each county based on the above studies. This program, with such amendments, supplements, and additions as may be necessary, shall be known as the water resource protection and water quality plans.

Thereafter, each county shall prepare a water use and development plan and the appropriate state agency shall prepare the state water projects plan.

(e) The department of agriculture shall prepare a state agricultural water use and development plan for agricultural uses in the State in accordance with chapter 167 and this chapter, and subsequently modify and update the plan as necessary. The state agricultural water use and development

plan shall include but not be limited to a master irrigation inventory plan that shall:

- (1) Inventory public and private irrigation water systems;
- (2) Identify the extent of rehabilitation needed for each system;
- (3) Identify sources of water used by agricultural operations and particularly those on lands identified and designated as important agricultural lands under part III of chapter 205;
- (4) Identify current and future water needs for agricultural operations and particularly those on lands identified and designated as important agricultural lands under part III of chapter 205;
- (5) Subsidize the cost of repair and maintenance of the systems;
- (6) Establish criteria to prioritize the rehabilitation of the systems;
- (7) Develop a five-year program to repair the systems; and
- (8) Set up a long-range plan to manage the systems.

The commission shall coordinate the incorporation of the state agricultural water use and development plan into the state water projects plan.

(f) Each county water use and development plan shall include but not be limited to:

- (1) Status of water and related land development, including an inventory of existing water uses for domestic, municipal, and industrial users, agriculture, particularly agriculture on lands designated as important agricultural lands under part III of chapter 205, aquaculture, hydropower development, drainage, reuse, reclamation, recharge, and resulting problems and constraints;
- (2) Future land uses and related water needs; and
- (3) Regional plans for water developments, including recommended and alternative plans, costs, adequacy of plans, and relationship to the water resource protection and water quality plans.

(g) The Hawaii water plan shall be directed toward the achievement of the following objectives:

- (1) The attainment of maximum reasonable-beneficial use of water for such purposes as those referred to in subsection (a);
- (2) The proper conservation and development of the waters of the State;
- (3) The control of the waters of the State for such public purposes as navigation, drainage, sanitation, and flood control;

- (4) The attainment of adequate water quality as expressed in the water resource protection and water quality plans;
- (5) The implementation of the water resources policies expressed in section 174C-2; and
- (6) The utilization of reclaimed water for uses other than drinking and for potable water needs in one hundred per cent of state and county facilities by December 31, 2045.

(h) The Hawaii water plan shall divide each county into sections which shall each conform as nearly as practicable to a hydrologic unit. The commission shall describe and inventory:

- (1) All water resources and systems in each hydrologic unit;
- (2) All presently exercised uses;
- (3) The quantity of water not presently used within that hydrologic unit; and
- (4) Potential threats to water resources, both current and future.

(i) Within each hydrologic unit the commission shall establish the following:

- (1) An instream use and protection program for the surface watercourses in the area; and
- (2) Sustainable yield. The sustainable yield shall be determined by the commission using the best information available and shall be reviewed periodically. Where appropriate the sustainable yield may be determined to reflect seasonal variation.

(j) The commission shall condition permits under part IV of this chapter in such a manner as to protect instream flows and maintain sustainable yields of ground water established under this section.

(k) The commission shall give careful consideration to the requirements of public recreation, the protection of the environment, and the procreation of fish and wildlife. The commission may prohibit or restrict other future uses on certain designated streams which may be inconsistent with these objectives.

(l) The commission may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would constitute an undesirable use for which the commission may deny a permit under the provisions of part IV.

(m) The commission may also designate certain uses in connection with a particular source of supply which, because of the nature of the activity or amount of water required, would result in an enhancement or improvement of the water resources



of the area. Such uses shall be preferred over other uses in any action pursuant to sections 174C-50(h) and 174C-54.

(n) The commission may add to the Hawaii water plan any other information, directions, or objectives it feels necessary or desirable for the guidance of the counties in the administration and enforcement of this chapter.

(o) In formulating or revising the plans, each county and the commission shall consult with and carefully evaluate the recommendations of concerned federal, state, and county agencies.

(p) The commission shall not adopt, approve, or modify any portion of the Hawaii water plan which affects a county or any portion thereof without first holding a public hearing on the matter on the island on which the water resources are located. At least ninety days in advance of such hearing, the commission shall notify the affected county and shall give notice of such hearing by publication within the affected region and statewide.

(q) In formulating or revising each county's water use and development plan, the state water projects plan, the water resource protection plan and the water quality plan, each county and the commission shall incorporate the current and foreseeable development and use needs of the department of Hawaiian home lands for water as provided in section 221 of the Hawaiian Homes Commission Act.

Each county shall update and modify its water use and development plans as necessary to maintain consistency with its zoning and land use policies. [L 1987, c 45, pt of §2; am L 1988, c 276, §1; am L 1991, c 325, §6; am L 1998, c 101, §1; am L 1999, c 197, §2; am L 2008, c 233, §10; am L 2016, c 170, §1]

### **Law Journals and Reviews**

Water Regulation, Land Use and the Environment. 30 UH L. Rev. 49.

" **§174C-32 Coordination.** (a) Respective portions of the water resource protection and water quality plans, and the water use and development plans of each county, shall be developed together to achieve maximum coordination.

(b) The development of the Hawaii water plan or any portion thereof shall proceed in coordination with and with attention to the Hawaii state plan described in chapter 226.

(c) The Hawaii water plan and its constituent parts, except for the water quality plan, shall be adopted by the commission not later than three years from July 1, 1987. The commission shall receive the water quality plan from the

department of health and incorporate this part in the Hawaii water plan. [L 1987, c 45, pt of §2; am L 1999, c 197, §3]

#### **Revision Note**

"July 1, 1987" substituted for "the effective date of this chapter".

### **"PART IV. REGULATION OF WATER USE**

#### **Case Notes**

A water management area designation may not be challenged in an original action pursuant to §91-7. 83 H. 484, 927 P.2d 1367.

**§174C-41 Designation of water management area.** (a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

(b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission. The chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall act upon the petition by making a recommendation for or against the proposed designation to the commission within sixty days after receipt of the petition or such additional time as may be reasonably necessary to determine that there is factual data to warrant the proposed designation.

(c) Designated ground water areas established under chapter 177, the Ground-Water Use Act, and remaining in effect on July 1, 1987, shall continue as water management areas. [L 1987, c 45, pt of §2; am L 1999, c 197, §4]

#### **Note**

Chapter 177 referred to in text is repealed.

Standardized water audits of public water systems; reports. L 2016, c 169.

## Revision Note

"On July 1, 1987" substituted for "at the effective date of this chapter".

" **§174C-42 Notice; public hearing required.** When a recommendation for designation of a water management area has been accepted, the commission shall hold a public hearing at a location in the vicinity of the area proposed for designation and give public notice of the hearing setting forth:

- (1) A description of the land area proposed to be designated in terms of appropriate legal subdivisions and tax map keys;
- (2) The purpose of the public hearing; and
- (3) The time, date, and place of the public hearing where written or oral testimony may be submitted and heard.

The notice shall be given once each week for three successive weeks in the appropriate county and the last notice shall be not less than ten days nor more than thirty days before the date set for the hearing. The notice of public hearing shall be considered as sufficient notice to all landowners and water users who might be affected by the proposed designation. [L 1987, c 45, pt of §2; am L 1998, c 2, §43]

" **§174C-43 Investigations required.** Before any proposed water management area is designated by the commission, the chairperson may conduct, cooperate with the appropriate federal or county water agency in conducting, or administer contracts for the conduct of, any scientific investigation or study deemed necessary for the commission to make a decision to designate a water management area. In connection with such investigation or study, the chairperson from time to time may require reports from water users as to the amount of water being withdrawn and as to the manner and extent of the beneficial use. Such reports shall be made on forms furnished by the commission. [L 1987, c 45, pt of §2; am L 1999, c 197, §5]

" **§174C-44 Ground water criteria for designation.** In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed ground water management area;
- (2) There is an actual or threatened water quality degradation as determined by the department of health;

- (3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;
- (4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water;
- (5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;
- (6) Whether excessive preventable waste of ground water is occurring;
- (7) Serious disputes respecting the use of ground water resources are occurring; or
- (8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Notwithstanding an imminent designation of a ground water management area conditioned on a rise in the rate of ground water withdrawal to a level of ninety per cent of the area's sustainable yield, the commission, when such level reaches the eighty per cent level of the sustainable yield, may invite the participation of water users in the affected area to an informational hearing for the purposes of assessing the ground water situation and devising mitigative measures. [L 1987, c 45, pt of §2; am L 1999, c 197, §6]

#### **Case Notes**

Commission did not err in regulating the Waiahole Ditch infrastructure as a unified system as independent designation of water management areas does not preclude consolidated regulation where a water delivery system draws water from several different water management areas and the consolidated regulation of a single diversion works comports entirely with the commission's function of comprehensive water planning and management. 94 H. 97, 9 P.3d 409.

Given the undisputed direct interrelationship between the surface and ground waters in the Waiahole Ditch case, the designation of Windward Oahu as a ground water management area subjects both ground and surface water diversions from the designated area to the statutory permit requirement. 94 H. 97, 9 P.3d 409.

" **[\$174C-45] Surface water criteria for designation.** In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;
- (2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or
- (3) Serious disputes respecting the use of surface water resources are occurring. [L 1987, c 45, pt of §2]

#### **Case Notes**

Commission did not err in regulating the Waiahole Ditch infrastructure as a unified system as independent designation of water management areas does not preclude consolidated regulation where a water delivery system draws water from several different water management areas and the consolidated regulation of a single diversion works comports entirely with the commission's function of comprehensive water planning and management. 94 H. 97, 9 P.3d 409.

Given the undisputed direct interrelationship between the surface and ground waters in the Waiahole Ditch case, the designation of Windward Oahu as a ground water management area subjects both ground and surface water diversions from the designated area to the statutory permit requirement. 94 H. 97, 9 P.3d 409.

" **§174C-46 Findings of fact; decision of commission.** After public hearing and any investigations deemed necessary have been completed, the chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall make a recommendation to the commission for decision. The commission shall render its decision within ninety days after the chairperson's recommendation to the commission. If the commission decides to designate a water management area, it shall cause a public notice of its decision to be given in the appropriate county and when so given, its decision shall be final unless judicially appealed. [L 1987, c 45, pt of §2; am L 1998, c 2, §44 and c 101, §3; am L 1999, c 197, §7]

" **[\$174C-47] Modifying and rescinding designated areas.** The modification of the boundaries or the rescinding of existing water management areas by the commission may be initiated by the chairperson or by a petition to the commission by any person with proper standing. The procedure for modifying the boundaries of an existing water management area or for rescinding an existing water management area shall be substantially similar to that for the designation of a water management area. [L 1987, c 45, pt of §2]

" **[\$174C-48] Permits required.** (a) No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water. An existing use in newly designated areas may be continued until such time as the commission has acted upon the application subject to compliance with section 174C-51.

(b) In its regulation of water resources in designated water management areas, the commission shall delegate to the county boards of water supply the authority to allocate the use of water for municipal purposes, subject to the limits of water supply allocated to the county boards of water supply in their role as water purveyors. [L 1987, c 45, pt of §2]

#### **Case Notes**

Given the undisputed direct interrelationship between the surface and ground waters in the Waiahole Ditch case, the designation of Windward Oahu as a ground water management area subjects both ground and surface water diversions from the designated area to the statutory permit requirement. 94 H. 97, 9 P.3d 409.

" **§174C-49 Conditions for a permit.** (a) To obtain a permit pursuant to this part, the applicant shall establish that the proposed use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a reasonable-beneficial use as defined in section 174C-3;
- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;

- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act.

(b) Within sixty days after receipt of a notice of a permit application, the county shall inform the commission if the proposed use is inconsistent with county land use plans and policies.

(c) The common law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it is taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties.

(d) The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected.

(e) All permits issued by the commission shall be subject to the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act, whether or not the condition is explicitly stated in the permit. [L 1987, c 45, pt of §2; am L 1991, c 325, §7]

### **Law Journals and Reviews**

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

### **Case Notes**

Permit applicants must demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs. 94 H. 97, 9 P.3d 409.

The "reasonable-beneficial use" standard and the related criterion of "consistent with the public interest" demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question; thus, permit applicants

requesting water diverted from streams must duly take into account the public interest in instream flows. 94 H. 97, 9 P.3d 409.

Waiahole Ditch water use permittees being required to fund subsequent stream studies and monitoring activities was not an illegal "tax" where the studies directly benefited permittees by helping them prove as required under this section that their uses were "reasonable-beneficial" and "consistent with the public interest" and by also allowing them exclusive use of public resources in the interim, despite the present absence of such proof. 94 H. 97, 9 P.3d 409.

Where permit applicant failed to obtain development plan approval, commission did not err in denying permit request and requiring compliance with county zoning classifications. 94 H. 97, 9 P.3d 409.

Although the Hawaii administrative rules denominate aquifer-specific reservations of water to the department of Hawaiian home lands, such a limitation for purposes of water resource management does not divest the department of its right to protect its reservation interests from interfering water uses in adjacent aquifers. 103 H. 401, 83 P.3d 664.

A "reservation" of water does not constitute an "existing legal use" within the meaning of subsection (a)(3). 103 H. 401, 83 P.3d 664.

As commission's findings of fact with respect to subsection (a)(4), (5), and (6) established the findings under subsection (c) that transport of water outside the watershed of origin was consistent with the public interest and the general plans and land use policies of the State and counties, applicant was allowed to transport and use ground water outside the original aquifer system. 103 H. 401, 83 P.3d 664.

Commission did not abuse its discretion in imposing a well monitoring program as a condition to granting applicant a water use permit, and utilizing a well located in a different aquifer system for such purpose. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management's findings supporting its conclusion that the proposed use of water would not interfere with department of Hawaiian home lands'



reservation rights under §221 of the Hawaiian Homes Commission Act failed to address whether the proposed user had adduced sufficient evidence with respect to the impact of the proposed use on the department's reservation in the adjacent aquifer system, commission erred in concluding that proposed user had met its burden under this section to obtain a water use permit. 103 H. 401, 83 P.3d 664.

Where proposed well constituted a "new" use, irrespective of whether a portion of the water derived therefrom would be utilized for existing purposes, commission erred in granting an "interim" use permit, ostensibly pursuant to subsection (a); §174C-50 provides for the issuance of an interim use permit only for "existing legal uses". 103 H. 401, 83 P.3d 664.

As the department of Hawaiian home lands' reservation of water did not constitute an "existing legal use" for purposes of subsection (a)(3) but a public trust "purpose", commission on water resource management was obligated to take this reservation into account in the planning and allocation of water resources and to protect it whenever feasible, as this public trust purpose status made it superior to private interests in the resources at any given time; however, commission was not precluded from approving uses which may compromise this reservation, as long as commission's decision was "made with a level of openness, diligence, and foresight". 116 H. 481, 174 P.3d 320.

Commission did not err by relying on the sustainable yield determination in spite of evidence that the aquifer may have been overdrawn and the sustainable yield actually lower where commission was mandated by this code to determine a sustainable yield for each hydrological unit within the State "using the best information available", and this code precluded the ad hoc revision of the sustainable yield such that it would have been inappropriate for the commission to reevaluate the sustainable yield figure in a permit application proceeding. 116 H. 481, 174 P.3d 320.

Commission on water resource management failed in its public trust duty to hold permit applicant to its burden of demonstrating the absence of other practicable alternative sources of water when it reserved consideration of feasible alternative sources of water until after the "new uses" water permit had been granted; commission thus failed to establish an adequate basis for the amount of "new uses" water allocated to applicant. 116 H. 481, 174 P.3d 320.

Despite evidence that permit applicant violated chapter 340E, neither the water code nor the public trust precluded the commission on water resource management from allocating water to applicant to supply water to domestic end users from a delivery

system that may not comply with chapter 340E; as this jurisdiction separately regulates water allocation and drinking water standards, and there was no discernable legislative intent to make water use permit applications subject to compliance with chapter 340E, violations of chapter 340E were not germane to a review of the propriety of water allocation under the water code and the public trust. 116 H. 481, 174 P.3d 320.

Where commission on water resource management's findings of fact with respect to subsection (a)(4), (5), and (6) established the findings as set forth in subsection (c)--the impact that permit applicant's use would have on the Molokai economy and environment, that applicant's uses were consistent with state and county general plans, land use designations, and county land use plans and policies, applicant was allowed to transport and use water from well overlying aquifer system. 116 H. 481, 174 P.3d 320.

Where it could not be said that closure of hotel and golf course would have no impact on permit applicant's proposed uses in light of commission on water resource management's findings and conclusions pursuant to the "reasonable-beneficial use" standard set forth in this section and defined in §174C-3, commission's reliance on §174C-58(4), allowing applicant four years to fulfill its proposed uses before the commission may suspend or revoke a permit, was misplaced; as commission failed to consider the impact the closures may have on applicant's proposed uses when it made its proposed use allocation decision, proposed use permit vacated. 116 H. 481, 174 P.3d 320.

" **§174C-50 Existing uses.** (a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).

(b) After publication as provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.

Whether the existing use is a reasonable-beneficial use and is allowable under the common law of the State shall be determined by the commission after a hearing; provided that the commission may make such a determination without a hearing, if the quantity of water applied for does not exceed an amount per month established by rule or if the quantity of water applied for exceeds an amount per month established by rule, but no objection to the application is filed by any person having standing to file an objection. In determining whether an

application does not exceed the amount per month established by rule, the commission shall consider an average of water use over the three-month period immediately preceding the filing of the application.

(c) An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation. Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use, and the user, if the user desires to revive the use, must apply for a permit under section 174C-51. If the commission determines that there is just cause for the failure to file, it may allow a late filing. However, the commission may not allow a late filing more than five years after the effective date of rules implementing this chapter. The commission shall send two notices, one of which shall be by registered mail, to existing users to file for an application for a permit to continue an existing use.

(d) An application shall be acted upon by the commission within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this subsection shall not be deemed to run for any period in which an application is not complete in all material respects in the judgment of the commission.

(e) The commission shall issue an interim permit; provided that the existing use meets the conditions of subsection (b). The commission shall also issue an interim permit for an estimated, initial allocation of water if the quantity of water consumed under the existing use is not immediately verifiable, but the existing use otherwise meets the conditions of subsection (b) for a permit or an interim permit. An interim permit is valid for such time period specified therein. The commission may issue successive interim permits of limited duration. Interim permits are subject to revocation under section 174C-58. Whenever interim permits are to be issued, the time periods specified in subsection (d) apply to the issuance or nonissuance of interim permits.

(f) A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use. The quantity being consumed shall be determined and verified by the best available means not unduly burdensome on the applicant, as determined by the commission. The commission may prescribe the installation of metering or gauging devices, and, if so prescribed, such metering or gauging devices shall be in place and operational for at least one year before a determination is made as to the quantity of water being consumed in an existing use and a final permit is issued.

(g) If an interim permit is issued pending verification of the actual quantity of water being consumed under the existing use, a final determination of that quantity shall be made within five years of the filing of the application to continue the existing use. In the final determination, the commission may increase or reduce the amount initially granted the permittee.

(h) Two or more existing uses of water are deemed to be competing when they draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. If applications are made to continue existing uses which are competing and the uses otherwise meet the requirements of subsection (b), the commission shall hold a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use.

(i) A permit user of water with a continuous reduced water usage shall be given priority to reobtain its permitted level of water usage over any other application; provided that the use remains the same and is reasonable and beneficial and water is available. [L 1987, c 45, pt of §2; am L 1999, c 197, §8; am L 2001, c 10, §1]

### **Case Notes**

The legislature (pre-2001 amendment) intended the term "existing use" to refer to uses existing on July 1, 1987, the effective date of the code. 94 H. 97, 9 P.3d 409.

Where proposed well constituted a "new" use, irrespective of whether a portion of the water derived therefrom would be utilized for existing purposes, commission erred in granting an "interim" use permit, ostensibly pursuant to §174C-49(a); this section provides for the issuance of an interim use permit only for "existing legal uses". 103 H. 401, 83 P.3d 664.

Despite evidence that permit applicant violated chapter 340E, neither the water code nor the public trust precluded the commission on water resource management from allocating water to applicant to supply water to domestic end users from a delivery system that may not comply with chapter 340E; as this jurisdiction separately regulates water allocation and drinking water standards, and there was no discernable legislative intent to make water use permit applications subject to compliance with chapter 340E, violations of chapter 340E were not germane to a review of the propriety of water allocation under the water code and the public trust. 116 H. 481, 174 P.3d 320.

Where, even assuming that subsequent landowner's application constituted a legitimate amendment of the timely existing use

application filed by former landowner, such an amendment did not preserve subsequent landowner's existing uses where subsequent landowner was not identified as an applicant for existing uses in the application filed within the statutory one-year deadline pursuant to subsection (c); thus, commission on water resource management erred by considering subsequent landowner's untimely request for existing uses. 116 H. 481, 174 P.3d 320.

" **[\$174C-51] Application for a permit.** All permit applications filed under this part shall contain the following:

- (1) The name and address of the applicant and landowner; provided that:
  - (A) In the event the applicant is an association, organization, partnership, trust, corporation, or any other legal entity doing business in Hawaii, the address of its principal place of business shall be stated in the application; and
  - (B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit;
- (2) The date of application;
- (3) The water source of the water supply;
- (4) The quantity of water requested;
- (5) The use of the water and any limitations thereon;
- (6) The location of the use of water;
- (7) The location of the well or point of diversion; and
- (8) Such other relevant information that the commission may request from time to time.

The commission in its discretion may allow a person to apply for several related withdrawals in the same application for a water permit. [L 1987, c 45, pt of §2]

" **[\$174C-51.5] Dual line water supply systems; installation in new industrial and commercial developments located in designated water management areas.** (a) The commission, as a condition for issuing permits pursuant to this part, may require the use of dual line water supply systems in new industrial and commercial developments located in designated water management areas. The commission shall not require the use of dual line water supply systems if:

- (1) There is a threat to existing water quality or to public health and safety, as determined by the department of health;

(2) A source of nonpotable water will not be reasonably available in the near future as determined by the commission; or

(3) There is a serious threat to permitted ground or surface water uses within a designated water management area as determined by the commission.

(b) The county boards of water supply, in consultation with the department of health, shall adopt standards for nonpotable water distributed through dual line water supply systems, and rules regarding the use of nonpotable water. The standards and rules shall be adopted in accordance with chapter 91 and shall protect existing water quality and the health and safety of the public.

(c) For the purposes of this section, the term:

"Developments" means one or more commercial or industrial subdivisions approved after May 30, 2000. It shall not apply to any modification, addition to, or replacement of, any commercial or industrial subdivision in existence prior to May 30, 2000.

"Dual line water supply system" means a supply system that distributes potable and nonpotable water through parallel but separate distribution lines. [L 2000, c 144, §2]

#### **Revision Note**

"May 30, 2000" substituted for "the effective date of this Act".

" **[\$174C-52] Notice.** (a) Upon receipt of the application, the commission shall cause a notice thereof to be published in a newspaper having general circulation within the affected area. The notice shall be published at least once a week for two consecutive weeks. In addition, the commission shall cause a copy of such notice to be sent to any person who has filed a written request for notification of any pending applications affecting a particular designated area and to the mayor and the water board of the affected county. This notification shall be sent by regular mail before the date of last publication. The commission shall also make available to the public, upon request, a monthly bulletin of all pending applications.

(b) The notice and the monthly bulletin shall contain the name and address of the applicant; the date of filing; the date set for a hearing, if any; the source of the water supply; the quantity of water applied for; the use to be made of the water and any limitations thereon; the place of the use; and the location of the well point or diversion.

(c) The notice shall state that written objections to the proposed permit may be filed with the commission by a specified

date. The commission shall establish by rules the time limits within which objections must be filed. The commission, at its discretion, may request further information from either applicant or objectors, and a reasonable time shall be allowed for such responses. Each applicant shall be notified by the commission of the objections filed to an application. [L 1987, c 45, pt of §2]

" **[§174C-53] Permit issuance.** (a) The commission shall determine, after a hearing, if required, whether the conditions set forth in section 174C-49(a) have been established; provided that the commission may make such determination without a hearing if the quantity of water applied for does not exceed an average amount per month to be established by rule or if the quantity of water applied for exceeds an average amount per month to be established by rule, but no objection to the application is filed by any person having standing to file an objection.

(b) In acting upon any application, the commission need consider only those objections filed by a person who has some property interest in any land within the hydrologic unit from which the water sought by the applicant is to be drawn or who will be directly and immediately affected by the water use proposed in the application. The commission shall adopt rules governing the filing of objections and the persons having standing to file objections.

(c) An application shall be acted upon within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this section shall not be deemed to run for any period in which an application is not complete in all material respects, in the judgment of the commission.

(d) As a condition for the issuance of a permit the commission may require the permittee to install meters, gauges, or other appropriate measuring devices. [L 1987, c 45, pt of §2]

#### **Case Notes**

Section allows for the consolidated regulation of a single diversion works such as the Waiahole Ditch System. 94 H. 97, 9 P.3d 409.

" **[§174C-54] Competing applications.** If two or more applications which otherwise comply with section 174C-49 are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the

commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest. [L 1987, c 45, pt of §2]

### Case Notes

Petitions for interim instream flow standard amendments are not among the water use permit applications "competing" under this section; the statute relating to instream use protection, §174C-71, operates independently of the procedures for water use regulation outlined in this part. 94 H. 97, 9 P.3d 409.

" **[§174C-55] Duration of permits.** Each permit for water use in a designated water management area shall be valid until the designation of the water management area is rescinded, unless revoked as provided in section 174C-58 or modified as provided in section 174C-57. [L 1987, c 45, pt of §2]

" **[§174C-56] Review of permits.** At least once every twenty years, the commission shall conduct a comprehensive study of all permits issued under this chapter to determine whether the conditions on such permits are being complied with. The commission shall prepare a formal report to the legislature which shall be available to the public. [L 1987, c 45, pt of §2]

" **[§174C-57] Modification of permit terms.** (a) A permittee may seek modification of any term of a permit. A permittee who seeks to change the use of water subject to the permit, whether or not such change in use is of a material nature, or to change the place of use of the water or to use a greater quantity of water than allowed under the permit or to make any change in respect to the water which may have a material effect upon any person or upon the water resource, shall make application pursuant to section 174C-51 in respect to such a change. Modification of one aspect or condition of a permit may be conditioned on the permittee's acceptance of changes in other aspects of the permit.

(b) All permit modification applications shall be treated as initial permit applications and be subject to sections 174C-51 to 174C-56; except that if the proposed modification involves an increase in the quantity of water not exceeding an average amount per month to be established by rule, the commission, at its discretion, may approve the proposed modification without a hearing provided that the permittee establishes that:



- (1) A change in conditions has resulted in the water allowed under the permit becoming inadequate for the permittee's needs; or
- (2) The proposed modification would result in a more efficient utilization of water than is possible under the existing permit.

(c) County agencies are exempt from the requirements of this section except where the modification involves a change in the quantity of water to be used or where the new use would adversely affect the quality of the water or quantity of use of another permittee. [L 1987, c 45, pt of §2]

" **[§174C-58] Revocation of permits.** After a hearing, the commission may suspend or revoke a permit for:

- (1) Any materially false statement in the application for the water permit, a modification of a permit term, or any materially false statement in any report or statement of fact required of the user pursuant to this part.
- (2) Any wilful violation of any condition of the permit.
- (3) Any violation of any provision of this chapter.
- (4) Partial or total nonuse, for reasons other than conservation, of the water allowed by the permit for a period of four continuous years or more. The commission may permanently revoke the permit as to the amount of water not in use unless the user can prove that the user's nonuse was due to extreme hardship caused by factors beyond the user's control. The commission and the permittee may enter into a written agreement that, for reasons satisfactory to the commission, any period of nonuse may not apply towards the four-year revocation period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section 174C-62 shall not apply towards the four-year period of forfeiture.

The commission may cancel a permit, permanently and in whole, with the written consent of the permittee. [L 1987, c 45, pt of §2]

### **Case Notes**

The state water code both expressly and impliedly authorizes the commission to issue a water use permit that allocates water in excess of a four-year time frame; paragraph (4) is an enforcement mechanism by which the commission may suspend or revoke a water use permit upon knowledge that a permitted allocation of water, which the commission has expected to be

used within a four-year time frame, has not been utilized. 103 H. 401, 83 P.3d 664.

Where it could not be said that closure of hotel and golf course would have no impact on applicant's proposed uses in light of commission on water resource management's findings and conclusions pursuant to the "reasonable-beneficial use" standard set forth in §174C-49 and defined in §174C-3, commission's reliance on paragraph (4), allowing applicant four years to fulfill its proposed uses before the commission may suspend or revoke a permit, was misplaced; as commission failed to consider the impact the closures may have on applicant's proposed uses when it made its proposed use allocation decision, proposed use permit vacated. 116 H. 481, 174 P.3d 320.

" **§174C-59 Transfer of permit.** A permit may be transferred, in whole or in part, from the permittee to another, if:

- (1) The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
- (2) The commission is informed of the transfer within ninety days.

Failure to inform the commission of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in section 174C-57, is also invalid and constitutes a ground for revocation. [L 1987, c 45, pt of §2; am L 1999, c 197, §9]

#### **Case Notes**

Where conditions of the permit remained unchanged upon transfer and the parties notified the commission of the transfer, the parties complied with the plain language of this section and, thus, the transfer was valid. 105 H. 1, 93 P.3d 643.

" **[§174C-60] Contested cases.** Chapter 91 shall apply except where it conflicts with this chapter. In such a case, this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision. [L 1987, c 45, pt of §2]

#### **Note**

The amendment made by L 2014, c 218, §8 is not included in this section.

### **Cross References**

Contested cases; appeals, see §174C-12.5.

### **Case Notes**

A water management area designation is not the product of a contested case hearing, under chapter 91, from which a direct appeal to the supreme court may be brought under this section. 83 H. 484, 927 P.2d 1367.

This section is inconsistent with and cannot stand together with §§602-5 and 602-57, as amended by Act 202, L 2004, and was deemed amended by implication, effective July 1, 2006, to authorize appeals from the water commission to the intermediate appellate court, not to the supreme court. 113 H. 52, 147 P.3d 836.

" **[§174C-61] Fees.** The commission shall promulgate a schedule of application and permit fees. The fees shall be used to defray the administrative costs of the permit systems established under this chapter. A public agency shall not be subject to the payment of any fees. [L 1987, c 45, pt of §2]

" **[§174C-62] Declaration of water shortage.** (a) The commission shall formulate a plan for implementation during periods of water shortage. As a part of the plan, the commission shall adopt a reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or a combination thereof.

(b) The commission, by rule, may declare that a water shortage exists within all or part of an area when insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm. The commission shall publish a set of criteria for determining when a water shortage exists.

(c) In accordance with the plan adopted under subsection (a), the commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous condition.

(d) A declaration of water shortage and any measures adopted pursuant thereto may be rescinded by rule by the commission.

(e) When a water shortage is declared, the commission shall cause a notice thereof to be published in a prominent place in a newspaper of general circulation throughout the area. The notice shall be published each day for the first week of the shortage and once a week thereafter until the declaration is rescinded. Publication of such notice shall serve as notice to all water users in the area of the condition of water shortage.

(f) The commission shall cause each permittee in the area to be notified by regular mail of any change in the conditions of the permittee's permit, any suspension thereof, or of any other restriction on the use of water for the duration of the water shortage.

(g) If an emergency condition arises due to a water shortage within any area, whether within or outside of a water management area, and if the commission finds that the restrictions imposed under subsection (c) are not sufficient to protect the public health, safety, or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses, the commission may issue orders reciting the existence of such an emergency and requiring that such actions as the commission deems necessary to meet the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area. Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters. [L 1987, c 45, pt of §2]

" **[§174C-63] Appurtenant rights.** Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62. [L 1987, c 45, pt of §2]

#### "PART V. WATER QUALITY

**[§174C-66] Jurisdiction over water quality.** The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law. [L 1987, c 45, pt of §2]

" **§174C-67 Exchange of information.** (a) The department of health shall submit to the commission such information as the

commission shall require as prescribed in its rules, provided it does not jeopardize any pending or ongoing enforcement action.

(b) The commission shall submit to the department of health such information as the department of health shall require, for the performance of its water quality functions. [L 1987, c 45, pt of §2; am L 1999, c 197, §10]

" **§174C-68 Water quality plan.** (a) The department of health shall formulate a state water quality plan for all existing and potential sources of drinking water and that plan shall become part of the Hawaii water plan described in part III. Requirements for the plan shall be governed by chapters 340E and 342. The state water quality plan shall include water quality criteria for the designation of ground water management areas and surface water management areas pursuant to section 174C-44 and 174C-45.

(b) The state water quality plan shall be periodically reviewed and revised by the department of health as needed.

(c) In formulating or revising the state water quality plan, the department of health shall consult with and carefully evaluate the recommendations of concerned federal, state, and local agencies, particularly county water supply agencies.

(d) The department of health may ban the importation into this State of any substances which the department of health reasonably believes may present a danger to the water quality of this State. [L 1987, c 45, pt of §2; am L 1999, c 197, §11]

#### **Note**

Chapter 342 referred to in text is repealed.

#### **Cross References**

Water pollution, see chapter 342D.

#### **"PART VI. INSTREAM USES OF WATER**

**§174C-71 Protection of instream uses.** The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission 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 the performance of its duties the commission shall:

- (1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;

- (A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;
- (B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be set for the stream, the reasons therefor, and the findings supporting the reasons;
- (C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately 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;
- (D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;
- (E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, the University of Hawaii cooperative fishery unit, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. 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 noninstream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of 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 solution;

- (F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;
- (2) Establish interim instream flow standards;
- (A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;
  - (B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;
  - (C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;
  - (D) 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 noninstream purposes, including the economic impact of restricting such uses;
  - (E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section 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 and subject to the approval of the commission;
- (F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;
- (3) Protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses;
- (A) The commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit;
  - (B) Projects which have commenced construction or projects reviewed and approved by the appropriate federal, state, or county agency prior to July 1, 1987, shall not be affected by this part;
  - (C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section 174C-93;
  - (D) The commission shall require filing fees by users to accompany each application for stream channel alteration;
- (4) Establish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water. The commission shall conduct investigations and collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements.

The commission shall implement its instream flow standards when disposing of water from state watersheds, including that removed by wells or tunnels where they may affect stream flow, and when regulating use of lands and waters within the state conservation district, including water development. [L 1987, c 45, pt of §2; am L 1988, c 276, §2]

#### **Case Notes**

Commission's designation of water otherwise available for instream purposes as a "nonpermitted ground water buffer" that



the commission could use to satisfy future permit applications without amending the interim instream flow standards for windward streams was not authorized by the code, offended the public trust, and the spirit of the instream use protection scheme. 94 H. 97, 9 P.3d 409.

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; thus neither the Hawaii constitution nor the code constrains the commission to wait for full scientific certainty in fulfilling its duty towards the public interest in minimum instream flows. 94 H. 97, 9 P.3d 409.

Petitions for interim instream flow standard amendments are not among the water use permit applications "competing" under §174C-54; this section, relating to instream use protection, operates independently of the procedures for water use regulation outlined in part IV. 94 H. 97, 9 P.3d 409.

The code allows the amendment of interim instream flow standards. 94 H. 97, 9 P.3d 409.

Commission erred in its consideration of alternative water sources for the fields and in its calculation of diverting parties' acreage and reasonable system losses where it: (1) went beyond taking judicial notice under HRE rule 201 of facts reported in the newspapers and improperly predicted the impact of those facts on the sugar company's water supply; (2) permitted the company to include marginal farm lands in its acreage; (3) assumed that companies' system losses could be halved; and (4) made its decision regarding a well as an alternative source based on cost while acknowledging it did not have the data to analyze the cost. 128 H. 228, 287 P.3d 129 (2012).

Commission erred in its consideration of viable alternatives to diverting the Maui stream waters for irrigation where, based solely on the fact that the county currently had no existing infrastructure to deliver the recycled wastewater to the sugar company's fields, it concluded that the practicability of using recycled wastewater from the wastewater treatment plant did not merit consideration; this decision did not evince "a level of openness, diligence, and foresight commensurate with the high priority these [public water] rights command under the laws of our state". 128 H. 228, 287 P.3d 129 (2012).

The Hawaii supreme court had appellate jurisdiction over, and petitioners had a due process right to a hearing and judicial review of the commission on water resource management's (CWRM) interim instream flow standards (IIFS) determination where: (1)

the analysis that the CWRM had to undertake in setting IIFS was complex and involved significant and thorough analysis and factfinding, taking into consideration the factors specified in paragraph (2)(D); and (2) the ramifications of an erroneous IIFS could offend the public trust, and was too important to deprive the parties of due process and judicial review. 128 H. 228, 287 P.3d 129 (2012).

Where the commission on water resource management (CWRM) did not explain in its findings of fact/conclusions of law (FOF/COL), and decision and order (D&O), its focus on Iao and Waikapu Streams' limited reproductive potential for amphidromous species above the evidence of other instream uses, and failed to weigh evidence that the streams can support other instream uses as against noninstream uses, as required by paragraph (2)(D), the CWRM erred in not considering this evidence, and on remand, needed to undertake and articulate that analysis. 128 H. 228, 287 P.3d 129 (2012).

## "PART VII. WELLS

**[\$174C-81] Definitions.** As used in this part, unless the context otherwise requires, the terms:

"Abandoned well" means any well that has been permanently discontinued. Any well shall be deemed abandoned which is in such a state of disrepair that continued use for the purpose of obtaining ground water is impractical.

"Installation of pumps and pumping equipment" means the procedure employed in the placement and preparation for operation of pumps and pumping equipment, including all construction involved in making entrance to the well, and establishing seals and repairs to existing installations.

"Pump installation contractor" means any person, firm, or corporation which is in the business of installing or repairing pumps and pumping equipment.

"Pumps and pumping equipment" means any equipment or materials utilized or intended for use in withdrawing or obtaining ground water. It includes seals, tanks, fittings, and controls.

"Repairs" means any change, replacement, or other alteration of any well, pump, or pumping equipment which requires a breaking or opening of the well seal.

"Well" shall be as defined in section 174C-3.

"Well construction" means the producing of any well, including the construction, alteration, or repair thereof, but excluding the installation of pumps and pumping equipment.

"Well driller" means any person, firm, or corporation which constructs, alters, or repairs wells.

"Well seal" means an approved arrangement or device used to cap a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent pollutants from entering the well at the other terminal. [L 1987, c 45, pt of §2]

" **[§174C-82] Powers and duties of the commission.** In addition to its other powers and duties, the commission shall:

- (1) Require registration of all existing wells, as provided in section 174C-83;
- (2) Require permits for well construction and for installation of pumps and pumping equipment as provided in section 174C-84;
- (3) Require well completion reports, as provided in section 174C-85;
- (4) Develop well construction and installation standards for pumps and pumping equipment, as provided in section 174C-86; and
- (5) Adopt, modify, and enforce all rules and orders necessary to carry out this part. [L 1987, c 45, pt of §2]

" **[§174C-83] Registration of all existing wells.** Any person owning or operating any well shall register the well with the commission. Registration shall be on the forms provided by the commission. The registration report shall include such information as prescribed by the commission, including the water use permit number; the location of the well; the diameter of the well; the maximum capacity of the well; the name of the well driller who constructed the well; and the name of the pump installation contractor who installed the pump and pumping equipment.

The commission may deny the issuance of a water use permit under part IV, until such time as the applicant registers all wells which the applicant owns or operates. [L 1987, c 45, pt of §2]

" **[§174C-84] Permits for well construction and pump installation.** (a) No well construction and no installation of pumps and pumping equipment shall commence without appropriate permit from the commission. An application for a permit for well construction shall be required for all areas of the State including water management areas and shall be made by the well driller who will construct the well. An application for a permit for installation of a pump and pumping equipment shall be

made by the pump installation contractor who will install the pump and pumping equipment.

(b) Every application shall contain such data prescribed by the commission, including the applicant's name; the applicant's license number; the name and address of the person who will control and operate the well; in water management areas, the water use permit number; the location of the well; the proposed depth and method of well construction; the size and expected capacity of the well; and a description of the pump and pumping equipment to be installed.

(c) The commission may issue a permit only if the proposed construction complies with all applicable laws, rules, and standards. Before acting on any application, the commission shall cause the application to be reviewed by the department of health for compliance with their rules and standards concerning, among other things, the appropriateness of the well location.

(d) Every permit shall direct the well driller and pump installation contractor to file a well completion report, as provided in section 174C-85. The permit shall be prominently displayed at the site of the well at all times until the well construction or the pump and pumping equipment installation is completed.

(e) The holder of a permit for well construction, with the approval of the commission, may change the location of the well before construction is completed. An application to change the location shall describe the location, the proposed depth and method of construction, and the size and expected capacity of the new well. It shall also describe the manner of sealing or plugging the incomplete and abandoned well. The commission shall cause all such applications to be reviewed by the department of health for compliance with their rules and standards concerning, among other things, the appropriateness of the location of the well. The commission may issue an amended permit if it determines that the proposed new well location will serve the same use as the original well and draw upon the same supply of water and will not be contrary to any applicable law, rule, order, or regulation, and that the incomplete and abandoned well will be sealed or plugged in a manner to prevent waste of water and damage to the water supply and to protect the public from harm.

(f) Any applicant whose application is rejected may obtain a hearing before the commission by filing within thirty days of the mailing of the notice of rejection a written petition requesting such a hearing. The hearing shall be conducted pursuant to part I.

(g) The commission may suspend or revoke a permit, after notice and hearing, on any of the following grounds:

- (1) Material misstatement or misrepresentation in the application for a permit;
- (2) Failure to comply with the provisions set forth in the permit;
- (3) Wilful disregard or violation of any provision of this part or any rule adopted pursuant thereto; or
- (4) Material change of circumstances or conditions existing at the time the permit was issued. [L 1987, c 45, pt of §2]

" **[\$174C-85] Well completion report.** Within thirty days after the completion of the well, the well driller and pump installation contractor shall file with the commission a written report containing such information prescribed by the commission, including, as appropriate: the depth, thickness, and character of the different strata penetrated and the location of water-bearing strata; the date of completion of the well; the length, size, and weight of the casing and a description of the placement of the casing; the size of the drilled hole; where the well is sealed off; the type of seal; the number of cubic feet per second or gallons per minute of flow from the well; the pressure in pounds per square inch, if a flowing well, and the static water level and water temperature, if a nonflowing well; and a chemical analysis of a water sample drawn from the well. [L 1987, c 45, pt of §2]

" **[\$174C-86] Well construction and pump installation standards.** (a) The commission shall adopt minimum standards for the construction of wells and the installation of pumps and pumping equipment. The standards shall be such as to ensure the safe and sanitary maintenance and operation of wells, the prevention of waste, and the prevention of contamination of the waters. The minimum standards for well construction shall include the criteria for well location and the procedures for grouting, sealing, capping, and plugging wells. They shall also provide for the installation of devices to measure the amount of ground water being withdrawn from the wells. The minimum standards for the installation of pumps and pumping equipment shall include the required equipment characteristics and construction.

(b) If any well construction or pump installation standard is violated and as a consequence ground water is wasted or any well is contaminated, the commission, after giving notice of the defect to the owner of the land on which the well is located and giving such owner a reasonable time to correct the defect, may itself correct the defect and charge the landowner for the cost of such correction. Such cost constitutes a lien on the land

until paid. The lien may be foreclosed in any court of competent jurisdiction, and in such foreclosure suit, the court shall allow the commission reasonable attorney's fees. [L 1987, c 45, pt of §2]

#### **Note**

The amendment made by L 2014, c 218, §8 is not included in this section.

" **§174C-87 Abandonment of wells.** When a well is abandoned, the owner shall fill and seal the well in a manner approved by the commission. Before abandonment, the owner shall file with the commission a report showing the owner's name and address; the water use permit number, if any; the name and address of the well driller who will be employed to perform the work required for abandonment; the reason for abandonment; a description of the work to be performed to effect the abandonment; and such other information as the commission may require. [L 1987, c 45, pt of §2; am L 1999, c 197, §12]

#### **"PART VIII. STREAM DIVERSION WORKS**

**[§174C-91] Definition.** In this part:

"Stream diversion works" means any artificial or natural structure emplaced within the stream for the purpose of diverting stream water. [L 1987, c 45, pt of §2]

" **[§174C-92] Registration of existing stream diversion works.** Any person owning or operating a stream diversion works within or outside of a water management area shall register such work with the commission. Registration shall be on the forms provided by the commission. Reporting requirements on the registration forms shall be reasonable. [L 1987, c 45, pt of §2]

" **[§174C-93] Permits for construction or alteration.** No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission. The commission may impose such reasonable conditions as are necessary to assure that the construction or alteration of such stream diversion works will not be inconsistent with the general plan and land use policies of the State and the affected county. Nothing in this section shall be construed to be inconsistent with part IV.

A person proposing to construct or alter a stream diversion work shall apply to the commission for a permit authorizing such

construction or alteration. The application shall contain the following:

- (1) Name and address of the applicant;
  - (2) Name and address of the owner or owners of the land upon which the works are to be constructed and a legal description of such land;
  - (3) Location of the work;
  - (4) Engineering drawings showing the detailed plans of construction;
  - (5) Detailed specifications of construction;
  - (6) Name and address of the person who prepared the plans and specifications for construction;
  - (7) Name and address of the person who will construct the proposed work;
  - (8) General purpose of the proposed work; and
  - (9) Such other information as the commission may require.
- [L 1987, c 45, pt of §2]

" **[\$174C-94] Completion report.** Within thirty days after the completion of construction or alteration of any stream diversion work, the permittee shall file a written statement of completion with the commission. The commission shall designate the form of such statement and such information as it shall require. [L 1987, c 45, pt of §2]

" **[\$174C-95] Abandonment.** Any owner of any stream diversion work wishing to abandon or remove such work shall first obtain a permit to do so from the commission. [L 1987, c 45, pt of §2]

#### "PART IX. NATIVE HAWAIIAN WATER RIGHTS

**§174C-101 Native Hawaiian water rights.** (a) Provisions of this chapter shall not be construed to amend or modify rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapters 167 and 168, relating to the Molokai irrigation system. Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

(b) No provision of this chapter shall diminish or extinguish trust revenues derived from existing water licenses unless compensation is made.

(c) Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter. [L 1987, c 45, pt of §2; am L 1991, c 325, §8]

### **Cross References**

Hand-pounded poi, see §321-4.7.

### **Law Journals and Reviews**

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson. 33 UH L. Rev. 99 (2010).

Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law. 33 UH L. Rev. 537 (2011).

### **Case Notes**

Although the Hawaii administrative rules denominate aquifer-specific reservations of water to the department of Hawaiian home lands, such a limitation for purposes of water resource management does not divest the department of its right to protect its reservation interests from interfering water uses in adjacent aquifers. 103 H. 401, 83 P.3d 664.

Insofar as the commission on water resource management, as the agency authorized to administer the state water code, determines the contents of the Hawaii water plan, which includes the designation of hydrologic units and sustainable yields, and the commission's "interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose", it is within the commission's authority to limit reservations of water to specific aquifers. 103 H. 401, 83 P.3d 664.



Pursuant to article XI, §§1 and 7 of the Hawaii constitution, §220(d) of the Hawaiian Homes Commission Act, and subsection (a), a reservation of water constitutes a public trust purpose. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management refused to permit cross examination of water use applicant's oceanography expert regarding the limu population along the shoreline, in effect precluding the commission from effectively balancing the applicant's proposed private commercial use of water against an enumerated public trust purpose, the commission failed adequately to discharge its public trust duty to protect native Hawaiians' traditional and customary gathering rights, as guaranteed by the Hawaiian Homes Commission Act, §220, article XII, §7 of the Hawaii constitution, and this section. 103 H. 401, 83 P.3d 664.

Commission on water resource management's conclusion that "no evidence was presented" to suggest that the rights of native Hawaiians would be adversely affected by permit applicant's proposed use erroneously shifted the burden of proof to complainants; thus, commission failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians' traditional and customary gathering rights in discharging its public trust obligations. 116 H. 481, 174 P.3d 320.