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

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**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committees on
WATER AND LAND
and
WAYS AND MEANS**

**Tuesday, April 2, 2019
10:45 AM
State Capitol, Conference Room 211**

**In consideration of
HOUSE BILL 1326, HOUSE DRAFT 2, PROPOSED SENATE DRAFT 1
RELATING TO WATER RIGHTS**

House Bill 1326, House Draft 2, Proposed Senate Draft 1 proposes to allow for six consecutive one year holdovers of water permits under Section 171-58(c), Hawaii Revised Statutes (HRS). The measure also proposes to: 1) place conditions on holdovers that authorize the use of over two million gallons of water per day; 2) require holdovers to continue without Board of Land and Natural Resources (Board) action while a contested case hearing is pending; 3) make conforming amendments to the reporting requirement in Act 126, Session Laws of Hawaii (SLH) 2016; 4) require the Board, prior to authorizing holdovers after 1/1/2020, to hold a public hearing on the adoption of administrative rules on the disposition of water rights by lease at public auction and water valuation process and retain a certified appraiser who has sufficient understanding of real property and water law in the State; 5) exempt authorized instream, in-watershed use of water for wetland kalo cultivation done in a traditional manner; 6) require the Board, the Chairperson of the Board, and the Department of Land and Natural Resources' Commission on Water Resource Management to report to the Legislature on the effectiveness of Section 171-58, HRS; and 7) extend the repeal and reenactment provision for Act 126, SLH 2016, from June 30, 2019 to June 30, 2022. **The Department of Land and Natural Resources (Department) offers the following comments.**

Contextual Comments

Many questions have been raised about the water leasing process. It will be helpful to provide the overall context and facts.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Core questions must be answered for water use approvals:

- 1) First, *instream flow standards*: how much water must remain in the stream to protect instream and downstream public trust uses while weighing the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses. The **Commission on Water Resource Management** (CWRM) must decide this.
- 2) Second, *permitted diversions*: who can divert water from the stream which is in excess of the mandated instream flows, for what purpose, and how much. The **Board of Land and Natural Resources** (Board) must decide this.

Instream Flow Standards

In 1988, the new State Water Code (Chapter 174C, HRS) required CWRM to set interim instream flow standards for all streams in Hawaii. Because this is such a time consuming, data intensive process for each stream, CWRM at the time set the interim instream flows for each stream at the amount of water flowing in each stream on the effective date, i.e. status quo – as that flow may vary throughout the year without further amounts of water being diverted offstream through new or expanded diversions. The Department’s goal now is to establish meaningful, measureable, stream-specific instream flow standards, given public trust values and reasonable and beneficial offstream uses, not just status quo use.

Instream flow standards have now been set:

- for Waiahole/Windward O‘ahu streams by court and the CWRM decision in 2001 and 2006.
- for Na Wai ‘Ehā by stipulation in litigation in 2007.
- for West Kaua‘i by mediated settlement in litigation in 2017.
- for East Maui by the CWRM decision in June 2018, finalizing a contested case filed in 2001. No party appealed this decision.
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In recent years CWRM’s Stream Protection and Management Branch has initiated and established interim instream flow standards for Ukumehame, Olowalu, Launiupoko, Kauaula streams in West Maui, then for Kahoma and Kanahā streams in West Maui.

CWRM also initiated proceedings for interim instream flow standards on the Wailua River on Kaua‘i; this is now in contested case with an inclination of the parties to engage in mediation. CWRM is also awaiting the results expected later in 2019 of a survey of water resources in East Kaua‘i by the United States Geological Survey (USGS) which will better inform establishment of instream flow standards for East Kaua‘i streams, including the Wailua River.

The Department is very excited to be moving these interim instream flow standards proceedings forward on a pro-active basis, finally, after so many decades. This requires a huge amount of data and work for each stream, including stream flow measurements over time, stream monitoring, assessment of instream values and off-stream uses, public meetings to gather input on water uses both instream and off-stream, and scrambling through forest and stream, mapping, data analysis, and talking to hundreds of people about instream and downstream values and offstream uses. The Department awarded the CWRM

Stream Protection and Management Branch staff Team of the Year last year for their phenomenal efforts.

The East Maui decision establishing interim instream flow standards was truly groundbreaking. As it was done in a contested case proceeding, a hearing officer took testimony and heard arguments over many years until 2016, when he issued a draft decision. The CWRM Commissioners then spent many hours and days reviewing the record and issued a decision that addresses the values of each stream and sets meaningful interim instream flow standards for each. The Commissioners took great care to summarize the decision's reasoning in the Executive Summary for the decision, which I urge everyone to read. In summary:

- Ten streams which have historically supported significant kalo cultivation were returned to free flowing water, with no upstream diversions (Honopu, Huelo, Hanehoi, Pi'ina'au, Palauhulu, Ohia (Waiianui), Waiokamilo, Kualani, Wailuanui, Makapipi). The majority of these streams had been diverted for over 100 years.
- Seven additional streams identified as important habitat for native fish, shrimp, mollusks and insects (Honomanū, Waikamoi, East Wailuaiki, Kopiliula, Punalau/Kōlea, Waiohue, West Wailuaiki) now have limited or no water diversions.
- Public use streams were specifically identified for public trust offstream uses (Waikamoi, Puohokamoa, Ha'ipua'ena, and Honomanū streams).
- Other streams are available to support diversified agriculture offstream as long as instream flow standards are met (Waikamoi, East Wailuaiki, Hanawī, Wahinepe'e, Puohokamoa, Haīpua'ena, Nua'ailua, Pua'aka'a, Pa'akea, Waiaka, Kapaula). The Commission estimated this provided for about 90% of the irrigation needs for 23,000 acres of Important Agricultural Lands.

In short, the 2018 CWRM East Maui decision has resolved the question of what water should stay in each stream and what water may be available for use offstream. **All historically important East Maui taro streams have water fully restored.** Streams important for ecology, gathering, and recreation have been fully or partially restored. Water is available for offstream public trust uses including domestic use and Department of Hawaiian Home Lands (DHHL) reservations. Water in excess of established minimum flows is available for reasonable and beneficial use such as agriculture.

CWRM ordered the removal of some, but not all, diversions to ensure connectivity and flow. Some of these have been removed; some are going through United States Army Corps of Engineers permitting to ensure water quality standards are met for instream modifications.

CWRM and the Department's Division of Aquatic Resources staff are working together to build capacity to measure stream flows via gages in locations designated by CWRM and to monitor stream habitat.

For over a hundred years about 160 million gallons a day were diverted from East Maui to irrigate sugar in central Maui. Now it's about 20-25 million gallons per day (mgd), of which 8-12 mgd is for Maui County for domestic uses and upcountry agricultural and DHHL use.

The status of updated interim instream flow standards relevant to water users under revocable permits is as follows:

East Maui: set in 2018

Wailua: commenced 2018; in contested case & mediation

East Kaua'i: not commenced; pending USGS survey

Wailuku: not commenced, but water use is non-consumptive

Ka'ū: not applicable – water use is groundwater

The CWRM East Maui Interim Instream Flow Standards decision can be found here:

<http://files.hawaii.gov/dlnr/cwrn/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>

Permitted Diversions

In order for the Board to effectively meet its public trust obligations, a water lease for surface water diversions should not be issued until CWRM determines the interim instream flow standards. In the case of *Na Moku 'Aupuni O Ko 'Olau v. East Maui Irrigation, Limited and Board of Land and Natural Resources*, the First Circuit Court noted the following:

“In the process of determining whether there is any surplus water which would be in the best interest of the state to lease for 30 years, the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards...If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.”

Revocable permits for the use of water in East Maui were approved by the Board at its meeting on May 25, 2001, as requested by Alexander and Baldwin (A&B) and East Maui Irrigation (EMI) as part of their application for a long term water lease. Since that time, the long term lease application, the revocable permits and the interim instream flow standards have been the subject to numerous and ongoing contested cases and agency appeals. During this period, the Board has approved the continued holdover of the revocable permits. It was not until 2015 that the First Circuit Court determined that the Board exceeded its authority under Sections 171-10 and 171-55 HRS, in placing the revocable permits into holdover status for 13 years, and declared the revocable permits invalid. The decision is currently on appeal in the Intermediate Court of Appeals by the County of Maui, A&B, EMI and the State.

In light of this decision, Act 126, SLH 2016 was enacted in order to provide for an additional three year holdover period for all revocable permits for water use statewide in effect at that time. Upon inception of Act 126, the Department has informed the current permittees of the legislation and the statutory requirements for obtaining a water lease pursuant to Section 171-58, HRS.

The water leasing process is extensive and complex, requiring each lessee to:

- 1) comply with Chapter 343, HRS;
- 2) work with DHHL to develop a water rights reservation sufficient to support current and future homesteads needs;
- 3) work with the Department's Division of Forestry and Wildlife to develop and implement a watershed management plan; and
- 4) consult with the Department's Office of Conservation and Coastal Lands on whether a conservation district use application is required for the water lease.

Additionally, Section 171-58, HRS, requires water leases be disposed of by public auction, which is a time consuming process due to extensive public notice and bidder qualification requirements. Another issue is determining the fair market value of water rights. In order to satisfy its fiduciary obligations, the Board must charge fair market value for lease rent. Unlike a ground lease, the unique nature of water rights in Hawaii makes assigning a monetary value a significant challenge.

Since then the Department has had ongoing discussions with the applicants. Many of the smaller water users have expressed concerns about the costs of complying with the statutory requirements, such as preparing an environmental assessment or environmental impact statement. Adding to the insecurity is the possibility that the applicant would incur these significant costs and fail to obtain a lease if they are not the successful bidder at public auction.

The Department is currently developing potential options for complying with the watershed plan requirement, and potentially exempting certain small scale water leases from the preparation of an environmental assessment. However, no exemption can be approved by the Board until more information is received regarding the proposed use of water for each specific lease.

Comments on House Bill 1326 House Draft 2 Proposed Senate Draft 1

The Department acknowledges the need for additional time to convert existing water revocable permits to long term leases. As the State's public trust obligations are integral in the management of its water resources, the water leasing process is appropriately complex and time consuming, requiring oversight and approvals from several state agencies. Within the Department, staff from the Land Division, the Division of Forestry and Wildlife, and tCWRM are working in collaboration with the Department of the Attorney General and DHHL to establish and implement a water leasing process that is fair, transparent, compliant with statutory requirements and consistent with the public trust. Additionally, the permittees are working with the agencies to obtain long term leases.

The Department agrees with the proposed subsection (c), paragraph (2) added to Section 171-58, HRS by this measure. Allowing a holdover to continue without Board action pending the completion of a contested case hearing would resolve the potential dilemma where the Board approves a holdover and an additional contested case is requested. It would alleviate concerns about the availability of water for instances where the diversion includes public trust uses, such as domestic purposes. Further, this would serve to ensure due process to all parties to the contested case.

The Department objects to the proposed subsection (c), paragraph (5) added to Section 171-58, HRS, by this measure, to the extent it would require the Board to adopt administrative rules. Rulemaking would consume a significant amount of time and resources, and given the complexity of the subject matter, it is very likely that such a requirement would prevent the completion of the water leasing process before the expiration of the additional three year holdover period granted by this measure. At the direction of the Board, the Department will consult with the Attorney General to determine what legal obligation, if any, the Board may have to conduct rulemaking with respect to the water leasing process. Because any decision by the Board to approve holdovers or a water lease will be in an open, sun-shined meeting, there will be transparency and ample public engagement on these matters.

Additionally, the Department has concerns about a statutory requirement to retain the services of a certified appraiser.¹ The Department will work diligently to obtain the services of a qualified appraiser to determine the fair market value of the water rights subject to lease, in fulfillment of public trust obligations. However, as the Department cannot mandate that an appraiser enter into a contract, codifying such a requirement in statute is not appropriate.

Furthermore, requiring rulemaking is inconsistent with SECTION 4 that requires the Board to submit findings and recommendations regarding the effectiveness of the long-term disposition laws and whether this section is appropriate to guide the Board on the issuance of long-term water leases. The purpose of rulemaking is to implement, interpret, or prescribe law or policy. Requiring the Board to examine and analyze the effectiveness of the water leasing law while simultaneously requiring the Board to develop rules to interpret and implement that same law is both inconsistent and inefficient.

With respect to the proposed subsection (h) added to Section 171-58, HRS, by this measure, the Department does not object to exempting the use of water for traditional wetland kalo cultivation from a water lease, provided that is the intent of this provision. However, the Department suggests that the provision specify that the water must be used solely for traditional wetland kalo cultivation. This would avoid a potential loophole where a party that uses water for other uses in addition to kalo cultivation could be exempt from a water lease.

Finally, the Department respectfully requests that the committees consider amending Section 171-58, HRS to allow water leases for both consumptive and non-consumptive uses to be awarded by direct negotiation, provided the lease rent is set at fair market value by independent appraisal. The Department believes that this would address the concerns of smaller agricultural water users about having to incur significant costs to meet statutory water lease requirements (such as conducting an environmental study) without having any assurance that they would obtain the lease. The Department believes that this would also assist in expediting the water leasing process without compromising the State's public trust obligations. Allowing a direct lease would not absolve the applicant from complying with all applicable regulatory requirements, such as Chapter 343, HRS, nor the Board from its fiduciary duty to obtain compensation at fair market value regardless of who is the lessee.

Thank you for the opportunity to comment on this measure.

¹ HRS § 466K-4 provides that no person may practice as a real estate appraiser unless that person has been *licensed or certified*. There does not appear to be any reason to prefer a certified appraiser over a licensed appraiser. The Department suggests, at a minimum, changing the reference to "qualified appraiser."