

ACT 185

H.B. NO. 1882

A Bill for an Act Relating to Protection of Instream Uses of Water.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read:

**“CHAPTER  
PROTECTION OF INSTREAM USES OF WATER**

§ -1 **Short title.** This chapter shall be known and may be cited as the “Hawaii Instream Use Protection Act of 1982.”

§ -2 **Declaration of purpose.** The legislature finds and declares that the people of the State have a vital interest in the protection and enhancement, where practicable, of beneficial instream uses of water. Existing laws authorize only fragmented protection and enhancement measures and do not provide a comprehensive planning process for the protection and enhancement where practicable of beneficial instream uses of water such as fishery, water-related wildlife resources, recreational, aesthetic, scenic, and other environmental opportunities.

The legislature further finds and declares that the health, safety, and welfare of the people of the State require that there be a comprehensive program to

provide for the protection and enhancement, where practicable, of beneficial instream uses.

It is the intent of the legislature that the State shall develop instream flow standards and instream flow programs to protect and enhance, where practicable, beneficial instream uses of water.

§ -3 **Definitions.** The following terms, whenever used and referred in this chapter, shall have the following respective meanings, unless a different meaning clearly appears in the context:

"Alteration" means to obstruct, diminish, destroy, alter, modify, relocate, or change the natural existing shape of the channel or to change the direction of flow of water of any stream channel. It will include the removal of material from the stream channel and replacement of material or structures in other stream channels.

"Instream use" means the beneficial use of water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Beneficial instream uses include, but are not necessarily limited to, the maintenance of fisheries and water-related wildlife resources; outdoor recreational activities; ecosystems such as estuaries, wetlands, and stream vegetation; aesthetic values such as waterfalls and scenic waterways; navigation; hydro-power generation; water quality maintenance; and the conveyance of irrigation and domestic water supplies to downstream points of diversion. The diversion of irrigation and domestic uses of stream waters are considered beneficial uses of stream waters.

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

"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.

"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.

"Person" means any person, firm, association, organization, partnership, business trust, corporation, company, the State of Hawaii and its agencies and departments, political subdivisions of the State of Hawaii, and the United States of America and any of its agencies and department.

"Stream channel" means a natural watercourse with definite beds and banks which confines and conducts continuous 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 system" includes stream, lake, or other body of water, and tributaries and contributory sources, or a segment of any of these.

§ -4 **General powers and duties of the board of land and natural resources.** The board of land and natural resources shall establish and administer the instream use protection program provided by this chapter for windward Oahu districts. In carrying out the provisions of this chapter, the board will

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 board shall:

- (1) Establish instream flow standards for the windward Oahu districts whenever necessary to protect the public interest in waters of the State.
  - (A) The board may, on its own motion, determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams in windward Oahu districts.
  - (B) In acting upon the establishment of instream flow standards, the board 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.
  - (D) Establishment or modification of an instream flow standard shall be initiated by the board 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, and to persons who have previously requested such notice.
  - (E) After giving notice of its intention to set an instream flow standard, the board or other agencies in participation with the board shall investigate the stream. During the process of this investigation, the board shall consult with and consider the recommendations of the department of health, the United States Fish and Wildlife Service, 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 board shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the board shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, and 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 board shall give notice and hold a hearing on its proposed standard or modification.
- (2) Establish interim instream flow standards.

- (A) Any person may petition the board to adopt an interim instream flow standard for streams of the windward Oahu districts 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 standard was 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 board.
  - (D) In considering a petition to adopt an interim instream flow standard, the board shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes.
  - (E) The board shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eight 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 board.
- (3) Protect stream channels from alteration whenever practicable in windward Oahu to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.
    - (A) The board shall require persons to obtain a permit from the board prior to undertaking a stream channel alteration in windward Oahu.
    - (B) The board shall establish guidelines for processing and considering applications for stream channel alterations.
    - (C) The board shall require filing fees by users to accompany each application for stream channel alteration.
  - (4) Establish an instream flow program for windward Oahu to protect, enhance, reestablish, where practicable, beneficial instream uses of water. The board shall conduct investigations, collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements.

§ **-5 Enactment of rules and regulations.** The department shall enact necessary rules and regulations within one and one-half years from the effective date of this chapter.

§ **-6 Violations; penalties.** Any person violating any provision of this chapter or any permit condition or limitation established pursuant to this chapter or negligently or willfully failing or refusing to comply with any final order of the board issued as provided herein, shall be liable for a civil penalty not to exceed \$1,000 for such violation and an additional civil penalty not to exceed \$500 for each day during said violation continues.

§ -7 **Administrative and judicial review.** Any person who is aggrieved or adversely affected by an order or action by the board shall be entitled to judicial review in accordance with chapter 91, Hawaii Revised Statutes.”

SECTION 2. This Act shall not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 3. **Effective date.** This Act shall take effect on July 1, 1982, and shall expire upon the enactment of a statewide Water Code.

(Approved June 9, 1982.)