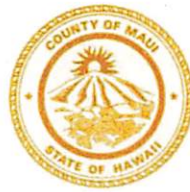


MICHAEL P. VICTORINO
Mayor
MICHELE CHOUTEAU MCLEAN, AICP
Director
JORDAN E. HART
Deputy Director



DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

April 29, 2022



Honorable Michael P. Victorino
Mayor, County of Maui
200 South High Street
Wailuku, Hawaii 96793

APPROVED FOR TRANSMITTAL

Michael P. Victorino *5/2/22*
Mayor **Date**

For Transmittal to:

Honorable Alice Lee, Chair
and Members of the Maui County Council
200 South High Street
Wailuku, Hawaii 96793

Dear Chair Lee and Council Members:

**SUBJECT: A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19
AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS
RESTORATION AND PROTECTION**

The Department of Planning (Department) received Resolution 21-171, adopted on November 5, 2021, transmitting a proposed bill to establish a program for wetlands restoration and protection. Comments were gathered from federal and state agencies, and public hearings were held with the Maui, Moloka'i and Lāna'i Planning Commissions.

Background information

Wetlands are described in Maui County Code (MCC) §2.80B.020 – General Plan and Community Plan, Definitions as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” The term is used but not defined in Title 19 – Zoning, and Title 20 – Environmental Protection, and currently there are no county guidelines on conservation and protection of these important ecosystems.

Hawaii Revised Statutes §342D-1 and the federal Clean Water Act §404 also have their own definitions of wetlands. The inter-jurisdictional oversight of wetlands makes developing a County policy somewhat challenging, especially considering that the County may supplement but not supplant state or federal requirements.

The Department is supportive of the stated purpose of the bill attached to Resolution 21-171, and based on input from Department staff, federal and state agencies, Corporation Counsel, and the planning commissions, proposes the following revisions to the bill:

SECTION 1: The stated purpose of the bill is not consistent with what the bill actually does; it does not create a “program” nor would it fundamentally “restore” wetlands. However, there is great value in identifying and protecting wetlands, as reflected in our edits.

SECTION 2: The proposed new definition for “overlay district” should be amended because the bill does not create a new zoning district; it creates a process to create an overlay in addition to existing zoning. A new definition for “protective buffer” is recommended because that term is used in the bill. The definition for “wetland” was revised based on agency comments.

SECTION 3: Because the bill truly does not create a new zoning district, the Department believes that the main content of the bill should be in Article IV of Title 19, Maui County Code (MCC) and not in Article II. Article II (“Comprehensive Zoning Provisions”) includes all basic zoning districts – Residential, Business, Industrial, Agriculture, etc. Article IV (“Regulation of Miscellaneous Areas”) includes regulations of flood hazard areas, home businesses and the various project districts throughout the County. As such, the Department recommends appropriate changes to the name and chapter number of the new chapter.

19.57.020 (Policy): The Department recommends additional language to further articulate the policy of wetlands protection. The commissions also wanted to ensure that culturally significant wetlands such as Moku’ula in West Maui are protected.

19.57.030 (Report): This section requires that a wetlands report be prepared prior to the granting of certain entitlements; two of these entitlement processes were removed from this section because they are not administered by the Department (but they are covered in other sections of the bill). The Department and commissions recommend that the report be prepared by a qualified environmental professional, not a qualified scientific professional. Also, additional issues and criteria be added to the report requirements.

19.57.040 (Decisions consistent with report): The Department recommends minor clarifications to facilitate how this section is applied and administered.

19.57.040 (Permitted uses): Additional language is recommended to clarify permitted and prohibited uses. Traditional agriculture and aquaculture are included, as recommended by the commissions and Corporation Counsel.

19.57.060 (Mapping): Additional and modified language is recommended to facilitate how this section is applied and administered.

19.57.070 (Establishment of wetlands overlays): This new section is recommended to create the process by which a wetlands overlay can be established. While the original bill states that the Council can establish wetlands overlays, the bill did not provide a process.

SECTION 4: This section amends Section 2.82.040 MCC relating to the Conservation Planning Committee. Revisions are recommended so that the language is consistent with this Committee's authority.

SECTION 10: The Department recommends revising this section so that the Department is not required to adopt administrative rules and so that the effective date of the ordinance is when the first wetlands map is created, which is what will drive the rest of the bill's provisions. The Maui Planning Commission recommended including a specific effective date, such as two years after the bill is adopted; however, at this time the Department is not certain of how long this process will take.

The Moloka'i Planning Commission also requested more opportunities for public input for their island. They stressed the importance of protecting traditional and cultural practices in all aspects of the bill, and want to ensure the bill does not conflict with state or federal laws that protect these practices.

Wetlands Protection Program

The definition of a "wetland" is a legally and ecologically nebulous concept. As it is currently written, the proposed bill reflects the national definition of wetlands found in Section 404 of the Clean Water Act (CWA), implemented federally by the United States Army Corps of Engineers (USACE) and United States Environmental Protection Agency (USEPA). At the state level, wetlands are further regulated by the Department of Health (DOH) for water quality matters and managed by the Department of Land and Natural Resources (DLNR) for habitat considerations. As such, the Department solicited and received comments from these regulatory partners, included as attachments, with key points summarized here to support clarification and development of a wetlands protection program.

In summary, if the County wishes to create a robust wetlands mapping, conservation, and management program, the definition of what a wetland is and how a management program should achieve goals specific to public health, safety, and wellbeing should be refined.

It is assumed that the intent of the proposed bill and a broader wetlands program is to mitigate flood hazards to protect life and property and to protect important wetlands and their associated ecosystems. This assumed intent reflects the larger need to address ecologically connected land use and development patterns, mauka to makai. While the original and redline versions of the bill seek to accomplish this through a regulatory approach, an operational approach would be more likely to result in consistent and comprehensive management of environmentally sensitive wetland areas and the ecosystem services they provide.

Clearly defining use priorities and management objectives would add clarity and provide direction to this effort. The Department, other County agencies and stakeholders could work with other wetland regulators to further develop a wetland classification and prioritization program that may include assessment of wetland functions to inform allowable and encouraged uses and restoration priorities.

While consistency with federal and state regulations is essential, Maui County may choose to supplement existing management programs. Other jurisdictions have approached efforts to supplement wetland and environmentally sensitive system management at the local level by removing requirements of a “federal nexus” to establish that a wetland is “jurisdictional,” instead relying on ecological features. However, as noted by the comments provided by DLNR’s Division of Forestry and Wildlife (DOFAW), “many of the wetlands in Hawai‘i that have the potential for functional restoration have been altered, filled with sediment, overgrown by invasive plants, or are otherwise not apparent as wetlands under that definition.” As such, DOFAW recommended that the definition of “wetlands” – and therefore, the scope of the program – be amended to include “...those areas that are currently or formerly inundated or saturated.” Similarly, the definition could be further revised to establish management criteria and define key components of management interventions that may be required to support the program’s efforts. One example, “ecologically protective buffers,” was included in the redline version of the bill presented to the commissions.

A wetlands program will require a realistic and clear process for programmatic development and implementation to truly reduce flood risk and protect environmentally sensitive systems. For example, comprehensive management standards for interconnected aquatic systems could be developed through interagency recommendations; or, to further ensure management of critical ecosystem services that wetlands and associated systems provide, additional direction could be incorporated to protect and enhance aquifer recharge functions that high-quality wetland systems perform. Such a program will facilitate collaborative planning, mapping, prioritization, and possibly restoration and acquisition programs.

In conclusion, beyond the recommended edits in the Department’s version of the bill, the County could develop a comprehensive wetlands management program that will respect the traditional mauka to makai, ahupua’a-based management systems that are unique to Hawaii, and that could reduce flood risk and improve the resiliency of our community and environmentally sensitive systems.

Consistency with Long-Range Plans

The proposed bill is consistent with the goals, policies and actions of the 2010 Countywide Policy Plan (as amended September 21, 2021), 2012 Maui Island Plan, 2018 Moloka‘i Island Community Plan, and 2016 Lāna‘i Island Community Plan which include the following:

- Countywide Policy Plan, page 46, Policy A.1.b: Preserve and reestablish indigenous and endemic species’ habitats and their connectivity.
- Countywide Policy Plan, page 46, Policy A.1.c: Restore and protect forests, wetlands, watersheds, and stream flows, and guard against wildfires, flooding, and erosion.
- Countywide Policy Plan, page 46, Policy A.1.e: Protect the natural state and integrity of unique terrain, valued natural environments, and geological features.
- Countywide Policy Plan, page 47, Policy A.2.a: Protect and restore near-shore reef environments and water quality.
- Countywide Policy Plan, page 47, Policy A.2.e: Mitigate the negative effects of upland uses on coastal wetlands, marine life, and coral reefs.

- Countywide Policy Plan, page 47, Policy A.2.h: Restore watersheds and aquifer-recharge areas to healthy and productive status, and increase public knowledge about the importance of watershed stewardship, water conservation, and groundwater protection.
- Countywide Policy Plan, page 47, Policy A.3.a: Preserve and protect natural resources with significant scenic, economic, cultural, environmental, or recreational value.
- Countywide Policy Plan, page 47, Policy A.3.b: Improve communication, coordination, and collaboration among government agencies, nonprofit organizations, communities, individuals, and land owners that work for the protection of the natural environment.
- Countywide Policy Plan, page 47, Policy A.3.d: Regulate access to sensitive ecological sites and landscapes.
- Countywide Policy Plan, page 48, Implementing Action A.3.b: Establish a baseline inventory of available natural resources and their respective carrying capacities.
- Countywide Policy Plan, page 49, Implementing Action B.1.a: Establish land use and overlay zoning designations that recognize and preserve the unique natural and cultural characteristics of each ahupua`a or district.
- Countywide Policy Plan, page 76, Policy K.1.g: Improve coordination among federal, state, and county agencies.
- Countywide Policy Plan, page 80, Policy L.1.e: Improve efforts to mitigate and plan for the impact of natural disasters and global warming.
- Countywide Policy Plan, page 81, Implementing Action L.1.g: Strongly support efforts to restore and improve Maui County's watersheds for the purpose of improving water supply, controlling carbon dioxide levels, decreasing soil runoff, and reducing coastal flooding.
- Countywide Policy Plan, page 81, Policy K.2.c: Protect undeveloped beaches, dunes, and ecosystems, and restore natural shoreline processes.
- Maui Island Plan, page 2-31, Objective 2.3.3: Preserve existing wetlands and improve and restore degraded wetlands.
- Maui Island Plan, page 2-32, Policy 2.3.3.a: Prohibit the destruction and degradation of existing upland, mid-elevation, and coastal wetlands.
- Maui Island Plan, page 2-32, Policy 2.3.3.b Support and fund wetland protection and improvement, and restoration of degraded wetlands.
- Maui Island Plan, page 2-32, Policy 2.3.3.c: Where applicable, require developers to provide a wetland protection buffer and/or other protective measures around and between development and wetland resources.
- Maui Island Plan, page 2-32, Implementing Action 2.3.3-Action 1: Develop standards for appropriate buffers and/or other protective measures for development near or around wetlands.
- Maui Island Plan, page 2-32, Implementing Action 2.3.3-Action 2: Enact ordinances to ensure no net loss of wetlands.
- Maui Island Plan, page 2-32, Implementing Action 2.3.3-Action 3: Enforce no net loss of wetlands and improve degraded wetlands.

- Maui Island Plan, page 2-32, Implementing Action 2.3.3-Action 4: Assist in the preservation and enhancement of Keālia and Kanahā-Mauoni Ponds; Lāʻie, Kalepolepo, Nuʻu, Ukumehame, Olowalu, Launiupoko, and Mākena wetlands; and other wetland areas.
- Maui Island Plan, page 2-33, Implementing Action 2.3.5-Action 2 Identify and map critical watersheds, sensitive habitats, and those areas susceptible to high erosion and sediment loss.
Maui Island Plan, page 2-41, Objective 2.4.3: Greater protection of sensitive lands, indigenous habitat, and native flora and fauna.
- Molokaʻi Island Community Plan page 32, Policy 1: Ensure collaboration and partnerships for natural resource management, watershed planning, funding, and action implementation.
- Molokaʻi Island Community Plan page 32, Policy 3: Encourage protection and restoration of the biodiversity of native plant and animal terrestrial, freshwater, and marine species and habitats through land conservation, resource management, education, invasive species prevention and control, wild fire prevention, and stewardship.
- Molokaʻi Island Community Plan page 55, Policy 9: Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation
- Molokaʻi Island Community Plan page 81, Policy 10: Encourage green belts, open space buffers, and riparian zones to minimize conflicts between agriculture, residential and industrial uses.
- Molokaʻi Island Community Plan page 100, Policy 14: Support the protection, restoration, and enhancement of surface and subsurface water resources, stream habitats, and priority watershed areas to support groundwater aquifer recharge, aquatic and environmental processes, and riparian, scenic, recreational, and Native Hawaiian cultural resources, as well as constitutionally protected Native Hawaiian traditional and customary practices.
- Lānaʻi Community Plan, page 3-5, Action 3.01: Compile data to create maps of primary water recharge areas requiring the highest protection and restoration efforts, and maps of secondary water recharge areas that may be susceptible to pollutant infiltration.
- Lānaʻi Community Plan, page 7-4, Strategies 1 and 2: Protect the Lānaʻihale watershed, groundwater, and aquifers through 1) programmatic measures, 2) federal, state and county regulatory requirements and 3) community involvement and education. Clearly identify recharge areas that are highly susceptible to pollution.
- Lānaʻi Community Plan, page 7-5, Policy 5: Protect the long-term health of the Lānaʻihale watershed for groundwater recharge.
- Lānaʻi Community Plan, page 9-10, Strategy 2: Identify and map natural and cultural resource areas, and provide guidelines for development, such as BMPs, to ensure protection of significant natural resources and traditional use lands.

Honorable Michael P. Victorino
For Transmittal to:
Honorable Alice Lee
April 29, 2021
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Commission Recommendations

All three planning commissions recommended approval of the Department's revised bill to the County Council. Modifications proposed by the commissions are included in the bill attached for your consideration. Here is a summary of the planning commissions' recommendations:

<u>Planning Commission</u>	<u>Date of Vote</u>	<u>Recommendations</u>	<u>Vote Count</u>
Maui	Mar. 22, 2022	Pass the bill with revisions.	7-0
Moloka'i	Mar. 23, 2022	Deferred.	No vote
Moloka'i	Apr. 13, 2022	Meeting canceled.	No vote
Lāna'i	Apr. 20, 2022	Pass the bill with revisions.	5-0
Moloka'i	Apr. 27, 2022	Pass the bill with revisions.	5-0

A revised proposed bill and the Department's memorandum to the commissions are attached for your consideration. The minutes will be sent to the County Council as soon as they are available.

Therefore, pursuant to Sections 8-8.3(6) and 8-8.4 of the Revised Charter of the County of Maui (1983), as amended, the Department respectfully recommends the Council's consideration and adoption of the attached proposed bill, "A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION."

Thank you for your attention and consideration. Should further clarification be necessary, please feel free to contact me.

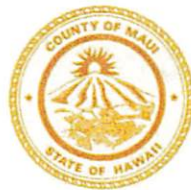
Sincerely,



MICHELE CHOUTEAU MCLEAN, AICP
Planning Director

Attachments
MCM:JEH:JMCT
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MICHAEL P. VICTORINO
Mayor
MICHELE CHOUTEAU MCLEAN, AICP
Director
JORDAN E. HART
Deputy Director




DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

March 22, 2022

MEMORANDUM

TO: MAUI PLANNING COMMISSION
MOLOKAI PLANNING COMMISSION
LANAI PLANNING COMMISSION

FROM: MICHELE CHOUTEAU MCLEAN, AICP, PLANNING DIRECTOR 

SUBJECT: **RESOLUTION NO. 21-171, REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL RELATING TO WETLANDS RESTORATION AND PROTECTION**

The Department of Planning (Department) is in receipt of Resolution No. 21-171, entitled *Referring to the Planning Commissions a Proposed Bill Relating to Wetlands Restoration and Protection*, which was adopted by the Maui County Council on November 5, 2021 and transmitted a proposed bill to create a Wetlands Overlay District.

Overall, the Department is supportive of the stated purpose of the bill; however, we find a number of flaws with the bill and have proposed revisions to address them. Attached, please find the following:

- Committee Report No. 21-98 which recommended adoption of the Resolution
- Resolution No. 21-171 and the original proposed bill that it transmitted
- The Department's "redline" revisions to the bill
- Agency comments on the original proposed bill

Below are the Department's specific concerns about the bill, recommendations on how these concerns could be addressed, and explanations of key recommended changes as noted in the "redline" version. Following this brief section-by-section discussion, the Department will offer ideas on how an actual wetlands protection program could work.

Discussion of Proposed and Redline Bills

SECTION 1: The stated purpose of the bill is not consistent with what the bill actually does; it does not create a “program” nor would it fundamentally “restore” wetlands. However, there is great value in identifying and protecting wetlands, as reflected in our edits.

SECTION 2: The proposed new definition for “overlay district” should be amended because the bill does not create a new zoning district; it creates a process to create an overlay in addition to existing zoning. A new definition for “protective buffer” is recommended because that term is used in the bill. The definition for “wetland” was revised based on agency comments.

SECTION 3: Because the bill truly does not create a new zoning district, the Department believes that the main content of the bill should be in Article IV of Title 19, Maui County Code (MCC) and not in Article II. Article II (“Comprehensive Zoning Provisions”) includes all basic zoning districts – Residential, Business, Industrial, Agriculture, etc. Article IV (“Regulation of Miscellaneous Areas”) includes regulations of flood hazard areas, home businesses and the various project districts throughout the County. As such, the Department recommends appropriate changes to the name and chapter number of the new chapter.

19.57.020 (Policy): The Department recommends additional language to further articulate the policy of wetlands protection.

19.57.030 (Report): This section requires that a wetlands report be prepared prior to the granting of certain entitlements; two of these entitlement processes were removed from this section because they are not administered by the Department (but they are covered in other sections of the bill). The Department also recommends that additional issues and criteria be added to the report requirements.

19.57.040 (Decisions consistent with report): The Department recommends minor clarifications to facilitate how this section is applied and administered.

19.57.040 (Permitted uses): Additional language is recommended to clarify permitted and prohibited uses.

19.57.060 (Mapping): Additional and modified language is recommended to facilitate how this section is applied and administered.

19.57.070 (Establishment of wetlands overlays): This new section is recommended to create the process by which a wetlands overlay can be established. While the original bill states that the Council can establish wetlands overlays, the bill did not provide a process.

SECTION 4: This section amends Section 2.82.040 MCC relating to the Conservation Planning Committee. Revisions are recommended so that the language is consistent with this Committee's authority.

SECTION 10: The Department recommends revising this section so that the Department is not required to adopt administrative rules and so that the effective date of the ordinance is when the first wetlands map is created, which is what will drive the rest of the bill's provisions.

Wetlands Protection Program

The definition of a "wetland" is a legally and ecologically nebulous concept. As it is currently written, the proposed bill reflects the national definition of wetlands found in Section 404 of the Clean Water Act (CWA), implemented federally by the United States Army Corps of Engineers (USACE) and United States Environmental Protection Agency (USEPA). At the state level, wetlands are further regulated by the Department of Health (DOH) for water quality matters and managed by the Department of Land and Natural Resources (DLNR) for habitat considerations. As such, the Department solicited and received comments from these regulatory partners, included as attachments, with key points summarized here to support clarification and development of a wetlands protection program.

In summary, if the County wishes to create a robust wetlands mapping, conservation, and management program, the definition of what a wetland is and how a management program should achieve goals specific to public health, safety, and wellbeing should be refined.

It is assumed that the intent of the proposed bill and a broader wetlands program is to mitigate flood hazards to protect life and property and to protect important wetlands and their associated ecosystems. This assumed intent reflects the larger need to address ecologically connected land use and development patterns, mauka to makai. While the original and redline versions of the bill seek to accomplish this through a regulatory approach, an operational approach would be more likely to result in consistent and comprehensive management of environmentally sensitive wetland areas and the ecosystem services they provide.

Clearly defining use priorities and management objectives would add clarity and provide direction to this effort. The Department, other County agencies and stakeholders could work with other wetland regulators to further develop a wetland classification and prioritization program that may include assessment of wetland functions to inform allowable and encouraged uses and restoration priorities.

While consistency with federal and state regulations is essential, Maui County may choose to supplement existing management programs. Other jurisdictions have approached efforts to supplement wetland and environmentally sensitive system management at the local level by removing requirements of a "federal nexus" to establish that a wetland is "jurisdictional," instead relying on ecological features. However, as noted by the comments provided by DLNR's Division of Forestry and Wildlife (DOFAW), "many of the wetlands in Hawai'i that have the potential for

functional restoration have been altered, filled with sediment, overgrown by invasive plants, or are otherwise not apparent as wetlands under that definition.” As such, DOFAW recommended that the definition of “wetlands” – and therefore, the scope of the program – be amended to include “...those areas that are currently or formerly inundated or saturated.” Similarly, the definition could be further revised to establish management criteria and define key components of management interventions that may be required to support the program’s efforts. One example, “ecologically protective buffers,” was included in the redline version of the bill.

A wetlands program will require a realistic and clear process for programmatic development and implementation to truly reduce flood risk and protect environmentally sensitive systems. For example, comprehensive management standards for interconnected aquatic systems could be developed through interagency recommendations; or, to further ensure management of critical ecosystem services that wetlands and associated systems provide, additional direction could be incorporated to protect and enhance aquifer recharge functions that high-quality wetland systems perform. Such a program will facilitate collaborative planning, mapping, prioritization, and possibly restoration and acquisition programs.

In conclusion, beyond the recommended edits in the redline version of the bill, the County could develop a comprehensive wetlands management program that will respect the traditional mauka to makai, ahupua’a-based management systems that are unique to Hawaii, and that could reduce flood risk and improve the resiliency of our community and environmentally sensitive systems.

Recommendation and Options

The Department supports the intent of the original proposed bill and recommends that the Commission consider the Department’s proposed edits as depicted in the redline version. The Department also seeks input on whether a broader wetlands management program is desired.

The Commission has the following options:

1. Recommend approval of the original proposed bill to the Maui County Council, with or without edits;
2. Recommend approval of the redline version of the bill to the Maui County Council, with or without additional edits;
3. Recommend denial of the proposed bill; or
4. Defer action on the matter in order to gather specific additional information.

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

October 22, 2021

Committee
Report No. 21-98

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Climate Action, Resilience, and Environment Committee, having met on September 1, 2021, and September 29, 2021, makes reference to County Communication 21-358, from Councilmember Kelly Takaya King, relating to wetlands restoration.

By correspondence dated August 26, 2021, the Chair of your Committee transmitted a proposed resolution entitled "REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL RELATING TO WETLANDS RESTORATION AND PROTECTION." Attached to the proposed resolution is a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLES 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION."

The purpose of the proposed resolution is to require the appropriate planning commissions to review proposed land use ordinances and provide findings and recommendations to the Council in accordance with Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983), as amended.

The purpose of the proposed bill is to establish a program for wetlands restoration and protection in Titles 18, 19, and 20 of the Maui County Code.

By correspondence dated September 23, 2021, the Chair of your Committee transmitted a revised proposed resolution with an attached revised proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION."

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

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Committee
Report No. 21-98

The revised proposed resolution includes references to:

- Establish a Wetlands Overlay District, similar in form and function to the bill that establishes a Wellhead Protection Overlay District; and
- Require the Conservation Planning Committee to evaluate wetlands criteria and provide advice on restoring and protecting wetlands through negotiated land acquisition, eminent domain, or conservation easements.

The purpose of the revised proposed bill is to establish a program for wetlands restoration and protection in Titles 2, 18, 19, and 20.

Your Committee notes the revised proposed bill protects all wetlands in Maui County, including those that are not adjacent to navigable waters, by amending Title 2, in addition to Titles 18, 19, and 20, as follows:

- Title 2, Administration and Personnel, to require the Conservation Planning Committee to review wetlands for possible acquisition;
- Title 18, Subdivisions, to ensure wetlands are restored and protected in the subdivision process;
- Title 19, Zoning, to update the Comprehensive Zoning Ordinance to establish the Wetlands Overlay District; and
- Title 20, Environmental Protection, to require a grading permit in the Wetlands Overlay District.

Your Committee further notes Title 33, Section 328.3 of the Code of Federal Regulations defines "wetlands" as "areas that are inundated or saturated by surface or ground water at a frequency and duration

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

Page 3

Committee
Report No. 21-98

sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

Your Committee further notes the definition of “wetland” is consistent with Section 2.80B.020, Maui County Code.

Your Committee further notes guidance and justification supporting a County wetlands restoration and protection program is evidenced in the Countywide Policy Plan, Maui Island Plan, Lānaʻi Community Plan, and Molokaʻi Island Community Plan.

The Maui County General Plan provides the following directives:

- “Restore and protect . . . wetlands . . .” (Countywide Policy Plan, page 46.)
- “Preserve existing wetlands and improve and restore degraded wetlands.” (Maui Island Plan, page 2-31.)
- “Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation.” (Molokaʻi Island Community Plan, page 55.)
- “Natural landscape features and environment, such as . . . wetlands, will be protected and restored.” (Lānaʻi Community Plan, page 2-12.)
- “Protect all wetland resources . . .” (Kihei-Mākena Community Plan, page 21.)

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

Page 4

Committee
Report No. 21-98

Despite these directives, the Maui County Code does not currently cover wetlands restoration and protection, nor does the State have a statute in place to restore and protect wetlands. Furthermore, the Federal Clean Water Act only protects wetlands that are adjacent to navigable waters.

Your Committee received information and analysis from the Department of the Corporation Counsel; Department of Public Works; Department of Planning; Department of Environmental Management; and the Mayor's Office of Climate Action, Sustainability, and Resilience on the proposed legislation. Your Committee also heard from Maui Environmental Consulting, LLC, an organization that deals with natural resource management solutions.

Your Committee received a computer-generated presentation from South Maui Save the Wetlands Hui ("Hui"). According to their website, the Hui's mission is "to conserve, protect, and restore" Maui County's remaining wetlands, and to "educate the public about the critically important role that wetlands play in our ecosystem."

The Hui's presentation provided information on projects that include wetlands inventory and mapping, wetlands restoration, public education, and stakeholder outreach. The presentation identified important functions of wetlands to include:

- Chemical, nutrient, and sediment attenuation and reduction;
- Habitat for fish and wildlife;
- Recharging and discharging groundwater; and
- Carbon sequestration.

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

Page 5

Committee
Report No. 21-98

The Director of Public Works supported clarifying permitted uses in the Wetlands Overlay District, and amending Chapter 20.08.040, Maui County Code, to require a grading permit.

Representatives from the Department of Planning supported clarifying within the bill:

- The criteria and process for determining areas subject to the Wetlands Overlay District;
- Conflicts with Chapter 19.47, and whether its provisions must be construed, if possible, to be in addition to relevant Federal or State regulations and statutes; and
- Whether the Planning Director must make decisions on applications that are consistent with any report required by Subsection 19.47.030(A) and the policy in Section 19.47.020, unless the Director reports to the Council in writing a need to make a contrary decision.

The Director of Environmental Management agreed wetland protection provides many environmental benefits. The Director supported clarifying the definition of wetlands.

Your Committee further revised the proposed bill to clarify that the Federal Clean Water Act does not regulate certain isolated wetlands and that the ordinance's effective date would commence after the Department of Planning adopts Administrative Rules relating to its implementation.

Your Committee voted 6-1 to recommend adoption of the revised proposed resolution. Committee Chair King, Vice-Chair Sinenci, and members Johnson, Lee, Molina, and Paltin voted "aye." Committee member Sugimura voted "no."

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

Page 6

Committee
Report No. 21-98

Your Committee is in receipt of a revised proposed resolution, approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee's recommended revisions and nonsubstantive revisions.

Your Climate Action, Resilience, and Environment Committee RECOMMENDS that Resolution 21-171, attached hereto, entitled "REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL RELATING TO WETLANDS RESTORATION AND PROTECTION," be ADOPTED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



KELLY TAKAYA KING, Chair

care:cr:21055aa:nas

COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that the recommendations contained in COMMITTEE REPORT NO. 21-98 were adopted by the Council of the County of Maui, State of Hawaii, on the 5th day of November, 2021, by the following vote:

MEMBERS	Alice L. LEE Chair	Keani N. W. RAWLINS- FERNANDEZ Vice-Chair	Gabriel JOHNSON	Natalie A. KAMA	Kelly T. KING	Michael J. MOLINA	Tamara A. M. PALTIN	Shane M. SINENCI	Yuki Lei K. SUGIMURA
ROLL CALL	Aye	Aye	Aye	Aye	Excused	Aye	Aye	Aye	Aye

RESOLUTION NO. 21-171 was amended prior to adoption.



COUNTY CLERK

Resolution

No. 21-171

REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL RELATING TO WETLANDS RESTORATION AND PROTECTION

WHEREAS, the Council is considering a proposed bill to establish a program for wetlands restoration and protection; and

WHEREAS, the bill would establish a Wetlands Overlay District, similar in form and function to the bill to establish a Wellhead Protection Overlay District, which has long been advocated for by the Department of Planning and is now pending in a Council committee; and

WHEREAS, the bill would also require the Conservation Planning Committee to evaluate wetlands criteria and provide advice on restoring and protecting wetlands through negotiated land acquisition, eminent domain, or conservation easements; and

WHEREAS, Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983) ("Charter"), as amended, require that the appropriate planning commissions review proposed land use ordinances and provide findings and recommendations to the Council; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it refers the proposed bill, entitled "A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION," a copy of which is attached as Exhibit "1," to the Lānaʻi Planning Commission, Maui Planning Commission, and Molokaʻi Planning Commission for appropriate action, in accordance with Charter Sections 8.8.4 and 8.8.6;
2. That it respectfully requests that the Lānaʻi, Maui, and Molokaʻi Planning Commissions transmit their findings and recommendations to the Council as expeditiously as possible; and

Resolution No. 21-171

3. That certified copies of this Resolution be transmitted to the Mayor, the Planning Director, the Lānaʻi, Maui, and Molokaʻi Planning Commissions, the Director of Public Works, and the Conservation Planning Committee.

APPROVED AS TO FORM AND LEGALITY



Keola Whittaker
Deputy Corporation Counsel
County of Maui

care:misc:055areso03:nas

ORDINANCE NO. _____

BILL NO. _____ (2021)

A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this Ordinance is to conserve the natural environment, mitigate climate change, and work toward resilience by establishing a program for wetlands restoration and protection in Titles 2, 18, 19, and 20 of the Maui County Code.

The Council finds that the Maui County General Plan provides the following directives:

- “Restore and protect . . . wetlands . . .” (Countywide Policy Plan, page 46.)
- “Preserve existing wetlands and improve and restore degraded wetlands.” (Maui Island Plan, page 2-31.)
- “Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation.” (Moloka‘i Island Community Plan, page 55.)
- “Natural landscape features and environment, such as . . . wetlands, will be protected and restored.” (Lanai Community Plan, page 2-12).

- “Protect all wetland resources . . .” (Kihei-Makena Community Plan, page 21.)

Despite these directives, which were enacted in ordinances from 1998 to 2016, Maui County did not have a program for wetlands restoration and protection prior to this Ordinance.

A Maui County program is necessary because the Clean Water Act does not regulate certain isolated wetlands. Only those wetlands that are adjacent to navigable waters are protected by the Clean Water Act.

The Council’s intent is to protect all wetlands in Maui County, including those that are not adjacent to navigable waters.

This Ordinance amends the following Titles of the Maui County Code:

- Title 2, Administration and Personnel, to require the Conservation Planning Committee to review wetlands for possible acquisition.
- Title 18, Subdivisions, to ensure wetlands are restored and protected in the subdivision process.
- Title 19, Zoning, to update the Comprehensive Zoning Ordinance to establish the Wetlands Overlay District.
- Title 20, Environmental Protection, to require a grading permit in the Wetlands Overlay District.

SECTION 2. Section 19.04.040, Maui County Code, is amended by adding the following definitions:

“Overlay district” means an area where certain additional requirements are superimposed upon a base zoning district or

underlying district and where the requirements of the base or underlying district may or may not be altered.

"Wetland" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

SECTION 3. Article II, Title 19, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

"Chapter 19.47

WETLANDS OVERLAY DISTRICT

Sections:

- | | |
|-----------|-----------------------------------|
| 19.47.010 | Establishment. |
| 19.47.020 | Policy. |
| 19.47.030 | Report. |
| 19.47.040 | Decisions consistent with report. |
| 19.47.045 | Permitted uses. |
| 19.47.060 | Mapping. |
| 19.47.070 | Interpretation. |

19.47.010. Establishment. The council may establish wetlands overlay district zoning on any property for the purpose of restoring or protecting a wetland on the property.

19.47.020. Policy. It is the policy of the County of Maui that wetlands be restored or protected. The council's intent is to restore and protect wetlands beyond what is required by the Clean Water Act, Coastal Zone Management Act, or any other law. All discretionary permits issued by the County must be consistent with this policy.

19.47.030. Report. A. The planning director must produce, or cause to be produced, a report on the feasibility and advisability of wetlands restoration or protection on the property prior to approval of any of the following in the wetlands overlay district:

1. Community plan amendment under section 2.80B.110.
2. Subdivision approval under section 18.08.100.
3. Change in zoning under section 19.510.040.

4. Conditional zoning under section 19.510.050.
5. District boundary amendment under chapter 19.68.
6. Special use permit under section 19.510.070.
7. Grading or grubbing permit under chapter 20.08.

B. Any report required by subsection A must be shared with the decision-making officer or agency and any relevant advisory agency. The report must include the following:

1. The ability of the wetland to filter harmful toxins, nutrients, and sediment from surface and stormwater runoff.
2. The ability of the wetland to store floodwaters and reduce the magnitude of flood events.
3. The ability of the wetland to provide valuable habitat for a diverse array of flora and fauna, including any existing rare, threatened, or endangered species.
4. The ability of the wetland to maintain surface-water flow during dry periods.
5. The impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.
6. The impact of pollution by garbage, litter, and refuse.
7. The impact of a reduction in the flow of watercourses due to destruction of wetlands.

19.47.040. Decisions consistent with report. A. The decision-making officer or agency on an application referenced in subsection 19.47.030(A) must make decisions consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020 unless the officer or agency reports to the council in writing a need to make a contrary decision.

B. Any ordinance for an approval referenced in section 19.47.030(A) must include the council's finding that either:

1. The property does not include any wetlands for which restoration or protection is feasible or advisable; or
2. The property owner has executed a unilateral agreement, to be recorded with the bureau of conveyances or land court, for adequate wetlands restoration or protection.

19.47.045. Permitted uses. The following uses are permitted in the wetlands overlay districts:

A. Conservation of soil, vegetation, water, fish, and wildlife.

B. Scientific research and educational activities teaching principles of ecology and conservation.

C. General outdoor recreation and leisure activities that are not inconsistent with the intent of this chapter.

D. Uses permitted in the base zoning district that are not inconsistent with the intent of this chapter.

19.47.060. Mapping. A. The planning director must transmit to the planning commissions, council, conservation planning committee, and director of public works a map that shows the location of wetlands throughout the County.

B. The map must be updated and transmitted at least annually.

C. The planning director must initiate changes to zoning as needed to ensure wetlands depicted in the map are placed in the wetlands overlay district.

19.47.070. Interpretation. A. Nothing in this chapter is intended and may not be interpreted to conflict with State or federal law on the same subject matter.

B. Conflicting provisions of this chapter must be abrogated to the extent of the conflict.

C. The provisions of this chapter must be construed, if possible, to be consistent with and in addition to relevant federal or State regulations and statutes.

D. The provisions of this chapter must be construed liberally in favor of wetlands restoration and protection."

SECTION 4. Subsection J of Section 2.82.040, Maui County Code, relating to the Conservation Planning Committee, is amended to read as follows:

“J.

1. The committee must assist with and oversee the creation of the countywide greenprint and provide recommendations to the mayor, council, and agencies related to this chapter's purpose.

2. The committee must advise the mayor to authorize the county acquire land containing wetlands, by negotiated acquisition or by eminent domain, or to seek execution of a conservation easement to restore or protect wetlands after evaluating the following criteria for restoration or protection:

a. Areas where water is the primary factor controlling the environment and the associated animal and plant life; where for any duration of time, at a frequency including nonconsecutive years:

i. The water table is at or near the surface and the land is saturated by subsurface water including the water table, subsurface kahawai, or springs; or

ii. The land is covered by water.

b. Areas of marsh, fen, peatland, or water. The waterbody can be:

i. natural or artificial;

ii. permanent, temporary, intermittent, or ephemeral;

iii. static or flowing;

iv. fresh, brackish, or salt;

v. above or below ground; or

vi. groundwater, precipitation, or surface water-driven hydrology.

c. Areas of marine water the depth of which at low tide does not exceed six meters, including fishponds and coral reefs.

d. Areas of riparian zone and floodplain, including flowing, intermittent, or ephemeral streams, and streambeds.

e. Areas of coastal zones adjacent to wetlands, islands, or bodies of marine water deeper than six meters at low tide lying within the wetlands.

f. Areas where hydric soils are present.

g. Areas where there is surface or subsurface water that is hydrologically connected to wetlands.

h. Areas described by the six wetlands classifications including:

i. Marine: coastal wetlands, coastal lagoons, rocky shores, seagrass beds, coral reefs, and anchialine pools;

ii. Estuarine: muliwai, deltas, tidal marshes, mudflats, and mangrove swamps;

iii. Lacustrine: wetlands near natural lakes or ponds;

iv. Riverine: wetlands near rivers, streams, and gulches;

v. Palustrine: marshes, swamps, and bogs; and

vi. Human-made: Loko i'a (Hawaiian fish ponds), Lo'i kalo, shrimp ponds, farm ponds, paddies, and dams.

i. Areas that provide wetland functions including:

i. Conveyance of stormwater;

ii. Flood attenuation and storage;

iii. Sediment attenuation and reduction;

iv. Nutrient and chemical attenuation and reduction;

v. Plant community abundance and diversity;

vi. Fish and wildlife habitat;

vii. Groundwater recharge and discharge;

viii. Shoreline or stream bank anchoring;

and

ix. Carbon sequestration.

j. Areas that formerly had wetland characteristics or functions but have been altered or degraded by channelization, filling, draining, dredging, grading, grubbing, deep ripping, groundwater pumping, hardening of surfaces, or introduction of non-native or aggressive-invasive plant and animal species."

SECTION 5. Section 18.08.100, Maui County Code, is amended to read as follows:

**"18.08.100 Approval. A. [Director's review period.]
Review period.**

1. Within thirty days after submission of the preliminary plat of a subdivision to be processed as an affordable housing project, the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

2. Within forty-five days after submission of the preliminary plat of a subdivision for a long-term residential development [which] that is not to be processed as an affordable housing project or after submission of the preliminary plat of a subdivision [which] that is outside of the scope of subsection [18.08.100.A.1] 18.08.100(A)(1), the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

B. The director may also defer consideration of the preliminary plat pending receipt of additional information, in which case the running of time is suspended.

C. Approval of the preliminary plat [shall] must indicate the director's directive to prepare detailed drawings on the plat submitted, [provided] as long as there is no change in the plan of subdivision as shown on the preliminary plat and there is full compliance with all requirements of this chapter. The action of the director with reference to any attached documents describing any conditions [shall] must be noted on two copies of the preliminary plat. One copy [shall] must be returned to the subdivider and the other retained by the director. At such time the director [shall] must stamp the two preliminary plats[;], as follows:

1. "Subdivider authorized to prepare detailed drawings on plat as submitted including corrections noted;"

2. "Recordation with the Bureau of Conveyances, State of Hawaii, or State Department of Taxation, not authorized until approved for recordation at a later date."

D. If no action (approval, disapproval, modification or deferral) is taken by the director within the review period identified in subsection [18.08.100.A] 18.08.100(A), or such longer period as

may have been agreed upon in writing, the preliminary plat [shall] will be [deemed] automatically approved, and it [shall] must be the duty of the director to endorse [his] approval of the preliminary plat, [upon the face thereof. Such] The director's approval [by the director shall] must not exempt the subdivider from compliance with the mandatory requirements of this [ordinance] chapter.

E. In the wetlands overlay district, the director must make decisions on applications that are consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020, unless the director reports to the council in writing a need to make a contrary decision."

SECTION 6. Section 19.06.010, Maui County Code, is amended to read as follows:

"19.06.010 Districts designated. The County [shall be] is divided into the following use zone districts:

- A. Open space districts:
 - 1. OS-1.
 - 2. OS-2.
- B. Residential districts:
 - 1. R-1.
 - 2. R-2.
 - 3. R-3.
- C. R-0 zero lot line residential district.
- D. Two-family districts:
 - 1. D-1.
 - 2. D-2.
- E. Apartment districts:
 - 1. A-1.
 - 2. A-2.
- F. Hotel districts:
 - 1. H-1.
 - 2. H-M.
 - 3. H-2 and hotel.
- G. Business districts:
 - 1. SBR service.
 - 2. B-CT country town.
 - 3. B-1 neighborhood.
 - 4. B-2 community.
 - 5. B-3 central.
 - 6. B-R resort commercial district.
- H. Industrial districts:
 - 1. M-1 light.
 - 2. M-2 heavy.

- 3. M-3 restricted.
- I. Park districts:
 - 1. PK.
 - 2. GC.
- J. Airport district.
- K. Agricultural district.
- L. Rural districts:
 - 1. RU-0.5.
 - 2. RU-1.
 - 3. RU-2.
 - 4. RU-5.
 - 5. RU-10.
 - 6. County rural.
- M. Public/quasi-public districts:
 - 1. P-1.
 - 2. P-2.
- N. Kihei research and technology park district.
- O. Maui research and technology park district.
- P. Napili Bay civic improvement district.
- Q. Urban reserve district.
- R. Interim.
- S. Maui County historic districts.
- T. Project districts.
- U. Wetlands overlay district.

SECTION 7. Section 20.08.040, Maui County Code, is amended to read as follows:

"20.08.040 Permit—Required. Unless otherwise provided in this chapter:

A. [No] A person [shall] must not commence or perform any grading or stockpiling without a grading permit [; and].

B. [No] A person [shall] must not commence or perform any grubbing without a grubbing permit, except where grubbing concerns land for which a grading permit has been issued.

C. [No] A person [shall] must not commence or perform any cut or fill activity on land located within any special management areas, as defined by chapter 205A, Hawaii Revised Statutes, which exceeds fifty cubic yards of material on any one site or exceeds two feet in the vertical height at its highest point, including [but not limited to] single-family residential construction, without a grading permit.

D. A permit or exclusion [pursuant to] under this chapter does not [obviate] eliminate the need to obtain other permits or approvals.

E. A person must not commence or perform any cut or fill activity or grubbing on land located in the wetlands overlay district without a grading permit."

SECTION 8. Section 20.08.080, Maui County Code, is amended to read as follows:

"20.08.080 Grading and grubbing permit review. Drainage, engineering slope hazard report, and erosion control plans [shall] must be submitted to the applicable soil and water conservation [district(s)] district and to the department of land and natural resources' state historic preservation division for review and comment. Applicants [shall] must provide information sufficient to enable the reviewing agencies to determine that the proposed work will be in conformance with the most current standards on file at the department of public works [of the] soil and water conservation [district(s)] district and will meet the requirements of chapter 6E, Hawaii Revised Statutes, and related administrative rules. Final approval or disapproval [shall] must be made by the County within ten days after receiving the reviewing agencies' comments. In the wetlands overlay district, the director must make decisions consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020 unless the director reports to the council in writing a need to make a contrary decision."

SECTION 9. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 10. The Department of Planning must adopt administrative rules to implement this Ordinance. This Ordinance takes effect upon the adoption of administrative rules by the Department of Planning.

paf:lcm:21-331b

COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that RESOLUTION NO. 21-171, was adopted by the Council of the County of Maui, State of Hawaii, on the 5th day of November, 2021, by the following vote:

MEMBERS	Alice L. LEE Chair	Keani N. W. RAWLINS- FERNANDEZ Vice-Chair	Gabriel JOHNSON	Natalie A. KAMA	Kelly T. KING	Michael J. MOLINA	Tamara A. M. PALTW	Shane M. SINENCI	Yuki Lei K. SUGIMURA
ROLL CALL	Aye	Aye	Aye	Aye	Excused	Aye	Aye	Aye	Aye



COUNTY CLERK

ORDINANCE NO. _____

BILL NO. _____ (2022)

A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this Ordinance is to conserve and protect sensitive ecosystems and ecosystem functions and values ~~[the natural environment, mitigate climate change,]~~ and work toward building environmental resilience by establishing ~~[a program for]~~ requirements to map and protect wetlands ~~[restoration and protection in Titles 2, 18, 19, and 20 of the Maui County Code]~~.

The Council finds that the Maui County General Plan provides the following directives:

- “Restore and protect . . . wetlands . . .” (Countywide Policy Plan, page 46.)
- “Preserve existing wetlands and improve and restore degraded wetlands.” (Maui Island Plan, page 2-31.)
- “Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation.” (Moloka‘i Island Community Plan, page 55.)
- “Natural landscape features and environment, such as . . . wetlands, will be protected and restored.” (Lanai Community Plan, page 2-12).

- “Protect all wetland resources . . .” (Kihei-Makena Community Plan, page 21.)

Despite these directives, which were enacted in ordinances from 1998 to 2016, Maui County did not have ~~[a program]~~ requirements for wetlands ~~[restoration and]~~ protection prior to this Ordinance.

A Maui County ~~[program]~~ ordinance is necessary because the federal Clean Water Act is in flux, and at the time of this legislation, does not regulate certain isolated wetlands or reflect county-specific goals relative to protecting and enhancing environmental resilience by protecting environmentally sensitive ecosystems such as wetlands. ~~[Only those wetlands that are adjacent to navigable waters are protected by the Clean Water Act.]~~

The Council’s intent is to protect all wetlands in Maui County, including those that are not adjacent to navigable waters.

This Ordinance amends the following Titles of the Maui County Code:

- Title 2, Administration and Personnel, to require the Conservation Planning Committee to review wetlands for possible acquisition.
- Title 18, Subdivisions, to ensure wetlands are restored and protected in the subdivision process.
- Title 19, Zoning, to update the Comprehensive Zoning Ordinance to establish ~~[the]~~ Wetlands Overlays ~~[District]~~.
- Title 20, Environmental Protection, to require a grading permit in the Wetlands Overlay District.

SECTION 2. Section 19.04.040, Maui County Code, is amended by adding the following definitions:

“Overlay ~~[district]~~” means ~~[an area]~~ a layer of regulation where certain additional requirements are ~~[super]~~imposed upon a property beyond its ~~[base]~~ zoning ~~[district or underlying district] or other land use or construction standards[and where the requirements of the base or underlying district may or may not be altered].~~

“Protective buffer” means a uniform area that applies management standards and use restrictions to proposed activities to avoid significant negative physical or chemical impacts to identified wetlands and environmentally sensitive systems and preserve ecosystem services including controlling flooding, providing habitat for wetland species, sequestering carbon, and allowing for wetland migration.

“Wetland” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and estuarine systems; flowing, intermittent, or ephemeral streams and associated drainages; and similar areas, but does not include agricultural ditches or reservoirs.[”]

SECTION 3. Article ~~[H]~~ IV, Title 19, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 19.~~[47]~~57

WETLANDS OVERLAYS ~~[DISTRICT]~~

Sections:

19.[47]<u>57</u>.010	Establishment.
19.[47]<u>57</u>.020	Policy.
19.[47]<u>57</u>.030	Report.
19.[47]<u>57</u>.040	Decisions consistent with report.
19.[47.045]<u>57.050</u>	Permitted uses.
19.[47]<u>57</u>.060	Mapping.
19.[47]<u>57</u>.070	<u>Establishment of wetlands overlays</u>
<u>19.57.080</u>	Interpretation.

19.[47]57.010. Establishment. The council may establish a wetlands overlay ~~[district zoning]~~ on any property for the purpose of restoring or protecting a wetland on the property.

19.[47]57.020. Policy. It is the policy of the County of Maui that wetlands be restored or protected. The council's intent is to identify, restore, and protect wetlands beyond what is required by the Clean Water Act, Coastal Zone Management Act, or any other law, to protect environmentally sensitive ecosystems and their services including flood control, water quality enhancement, species protection, and climate adaptation and mitigation benefits. All discretionary permits issued by the County must be consistent with this policy.

19.[47]57.030. Report. A. The planning director must produce, or cause to be produced by a qualified scientific professional, a report on the feasibility and advisability of wetlands restoration or protection on the property prior to approval of any of the following in the wetlands overlay district:

1. Community plan amendment under section 2.80B.110.
- ~~[2. Subdivision approval under section 18.08.100.]~~
- ~~[3]~~2. Change in zoning under section 19.510.040.
- ~~[4]~~3. Conditional zoning under section 19.510.050.
- ~~[5]~~4. District boundary amendment under chapter 19.68.
- ~~[6]~~5. Special use permit under section 19.510.070.
- ~~[7. Grading or grubbing permit under chapter 20.08.]~~

B. Any report required by subsection A must be shared with the decision-making officer or agency and any relevant advisory agency. The report must outline ecosystem values, determine any potential impacts to wetlands, provide how wetlands will be maintained and even enhanced, and establish protective buffers to identified wetland systems, and include information and conclusions on the following:

1. The ability of the wetland to filter harmful toxins, nutrients, and sediment from surface and stormwater runoff.

2. The ability of the wetland to store floodwaters and reduce the magnitude of flood events.

3. The ability of the wetland to provide valuable habitat for a diverse array of flora and fauna, including any existing rare, threatened, or endangered species.

4. The ability of the wetland to maintain surface-water flow during dry periods.

5. The prior impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.

6. The prior impact of pollution by garbage, litter, and refuse.

7. The prior impact of a reduction in the flow of watercourses due to destruction of wetlands.

8. Any potential significant adverse impact on natural drainage patterns, the destruction of important habitat or the discharge of toxic substances.

9. Measures to ensure that wetland functions and habitat shall be maintained and, where possible, enhanced so as to increase the potential for survival of rare and endangered flora and fauna;

10. Identification of public lands in or adjacent to the wetland so that these can be identified for maintenance and possible hazard mitigation;

11. Proposed protective buffers, with a minimum requirement of 50 feet and a maximum of 200 feet based on the report's assessment of wetland functions, valuation, and the need for protection.

19.[47]57.040. Decisions consistent with report. A. The decision-making officer or agency on an application referenced in subsection 19.[47]57.030(A) must make decisions consistent with any report required by subsection 19.[47]57.030(A) and the policy in section 19.[47]57.020. ~~[unless]~~ If the officer or agency [reports to the council in writing a need to] makes a contrary decision, the officer or agency must notify the council in writing.

B. Any ordinance for an approval referenced in section 19.47.030(A) must include the council's finding that either:

1. The property does not include any wetlands for which restoration or protection is feasible or advisable; or

2. The property owner has executed a unilateral agreement, to be recorded with the bureau of conveyances or land court, for ~~[adequate]~~ wetlands restoration or protection determined to be sufficient to fulfill the purpose of this bill as determined by the council.

19.~~[47]~~57. ~~[045]~~050. Permitted uses. A. Wetland resources shall be utilized for appropriate agriculture, recreation, education, public open space and other compatible uses that would not degrade ecosystem functions and productivity. The following uses are permitted ~~[in the]~~ under a wetlands overlay ~~[districts]~~:

1[A]. Conservation of soil, vegetation, water, fish, and wildlife.

2[B]. Scientific research and educational activities teaching principles of ecology and conservation.

3[C]. General outdoor recreation and leisure activities that are not inconsistent with the intent of this chapter.

4[D]. Traditional plant cultivation.

5. Restoration and management activities including removal of invasive species, restoration of previously altered or impacted hydrology, and planting of native and beneficial non-invasive vegetation.

6. Uses permitted in the base zoning district that are not inconsistent with the intent of this chapter and are consistent with the conclusions of the report required by 19.57.030.

B. **Prohibited Uses.** Proposed activities not listed in 19.57.050.A are prohibited unless they demonstrate the proposed activity is consistent with the conclusions of the report required by 19.57.030.

19.[47]57.060. Mapping. A. The planning director must ~~[transmit to the planning commissions, council, conservation planning committee, and director of public works]~~ prepare a map that shows the approximate location of wetlands throughout the County and likely migration areas reflected by passive flooding data based on best currently available data, and must immediately transmit the map to the planning commissions, council, conservation planning committee, and director of public works.

B. The map must be updated and transmitted at least ~~[annually]~~ every five years and when updates to the proposed wetland and wetland buffer overlay area are proposed. These updates will include delineations and site-specific reports created to support proposed activities or development as detailed in the report required by 19.57.030.

~~[C.—The planning director must initiate changes to zoning as needed to ensure wetlands depicted in the map are placed in the wetlands overlay district.]~~

19.57.070. Establishment of wetlands overlays. A. The council may establish a wetlands overlay on any property to restrict the uses to those identified in sec. 19.57.050 or based on the map prepared in accordance with sec. 19.57.060. The council may also establish a wetlands overlay when it considers any of the actions listed in sec. 19.57.030.A that are under its authority.

B. The council must follow the criteria of sec. 19.510.040.A.4, and sec. 19.510.050 if applicable, in establishing a wetlands overlay.

C. After the initial map required pursuant to sec. 19.47.060.A is prepared and transmitted, the planning director must initiate the process to establish wetlands overlays for the wetlands depicted on the map, in accordance with sec. 19.510.040.

19.[47.070]57.080. Interpretation. A. Nothing in this chapter is intended and may not be interpreted to conflict with State or federal law on the same subject matter.

B. Conflicting provisions of this chapter must be abrogated to the extent of the conflict.

C. The provisions of this chapter must be construed, if possible, to be consistent with and in addition to relevant federal or State regulations and statutes.

D. The provisions of this chapter must be construed liberally in favor of wetlands restoration and protection.”

SECTION 4. Subsection J of Section 2.82.040, Maui County Code, relating to the Conservation Planning Committee, is amended to read as follows:

“J.

1. The committee must assist with and oversee the creation of the countywide greenprint and provide recommendations to the mayor, council, and agencies related to this chapter's purpose.

2. The committee must advise the mayor on priorities for high-value wetland acquisition or development of collaborative management agreements based on recommendations from the Planning Department and supporting data and reports ~~to authorize the county acquire land containing wetlands, by negotiated acquisition or by eminent domain, or to seek execution of a conservation easement~~ to restore or protect wetlands after evaluating the following criteria for restoration or protection:

a. Areas where water is the primary factor controlling the environment and the associated animal and plant life; where for any duration of time, at a frequency including nonconsecutive years:

i. The water table is at or near the surface and the land is saturated by subsurface water including the water table, subsurface kahawai, or springs; or

ii. The land is covered by water.

b. Areas of marsh, fen, peatland, or water. The waterbody can be:

- i. natural or artificial;
- ii. permanent, temporary, intermittent, or ephemeral;
- iii. static or flowing;
- iv. fresh, brackish, or salt;
- v. above or below ground; or
- vi. groundwater, precipitation, or surface water-driven hydrology.
- c. Areas of marine water the depth of which at low tide does not exceed six meters, including fishponds and coral reefs, if within county jurisdiction.
- d. Areas of riparian zone and floodplain, including flowing, intermittent, or ephemeral streams, and streambeds.
- e. [Areas of coastal zones] Coastal areas adjacent to wetlands, islands, or bodies of marine water deeper than six meters at low tide lying within the wetlands.
- f. Areas where hydric soils are present.
- g. Areas where there is surface or subsurface water that is hydrologically connected to wetlands.
- h. Areas described by the six wetlands classifications including:
 - i. Marine: coastal wetlands, coastal lagoons, rocky shores, seagrass beds, coral reefs, and anchialine pools;
 - ii. Estuarine: muliwai, deltas, tidal marshes, mudflats, and mangrove swamps;
 - iii. Lacustrine: wetlands near natural lakes or ponds;
 - iv. Riverine: wetlands near rivers, streams, and gulches;

v. Palustrine: marshes, swamps, and bogs; and

vi. Human-made: Loko i'a (Hawaiian fish ponds), Lo'i kalo, shrimp ponds, farm ponds, paddies, and dams.

i. Areas that provide wetland functions including:

i. Conveyance of stormwater;

ii. Flood attenuation and storage;

iii. Sediment attenuation and reduction;

iv. Nutrient and chemical attenuation and reduction;

v. Plant community abundance and diversity;

vi. Fish and wildlife habitat;

vii. Groundwater recharge and discharge;

viii. Shoreline or stream bank [anchoring stabilization]; and

ix. Carbon sequestration.

j. Areas that formerly had wetland characteristics or functions but have been altered or degraded by channelization, filling, draining, dredging, grading, grubbing, deep ripping, groundwater pumping, hardening of surfaces, or introduction of non-native or aggressive-invasive plant and animal species."

SECTION 5. Section 18.08.100, Maui County Code, is amended to read as follows:

**“18.08.100 Approval. A. [Director's review period.]
Review period.**

1. Within thirty days after submission of the preliminary plat of a subdivision to be processed as an affordable housing project, the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

2. Within forty-five days after submission of the preliminary plat of a subdivision for a long-term residential development [which] that is not to be processed as an affordable housing project or after submission of the preliminary plat of a subdivision [which] that is outside of the scope of subsection [18.08.100.A.1] 18.08.100(A)(1), the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

B. The director may also defer consideration of the preliminary plat pending receipt of additional information, in which case the running of time is suspended.

C. Approval of the preliminary plat [shall] must indicate the director's directive to prepare detailed drawings on the plat submitted, [provided] as long as there is no change in the plan of subdivision as shown on the preliminary plat and there is full compliance with all requirements of this chapter. The action of the director with reference to any attached documents describing any conditions [shall] must be noted on two copies of the preliminary plat. One copy [shall] must be returned to the subdivider and the other retained by the director. At such time the director [shall] must stamp the two preliminary plats[;], as follows:

1. “Subdivider authorized to prepare detailed drawings on plat as submitted including corrections noted;”

2. “Recordation with the Bureau of Conveyances, State of Hawaii, or State Department of Taxation, not authorized until approved for recordation at a later date.”

D. If no action (approval, disapproval, modification or deferral) is taken by the director within the review period identified in subsection [18.08.100.A] 18.08.100(A), or such longer period as may have been agreed upon in writing, the preliminary plat [shall] will be [deemed] automatically approved, and it [shall] must be the duty of the director to endorse [his] approval of the preliminary plat, [upon the face thereof. Such] The director's approval [by the director

shall] must not exempt the subdivider from compliance with the mandatory requirements of this [ordinance] chapter.

E. In the wetlands overlay district, the director must make decisions on applications that are consistent with any report required by subsection 19.[47]57.030[(A)] and the policy in section 19.47.020, unless the director reports to the council in writing a need to make a contrary decision."

SECTION 6. Section 19.06.010, Maui County Code, is amended to read as follows:

"19.06.010 Districts designated. The County [shall be] is divided into the following use zone districts:

- A. Open space districts:
 - 1. OS-1.
 - 2. OS-2.
- B. Residential districts:
 - 1. R-1.
 - 2. R-2.
 - 3. R-3.
- C. R-0 zero lot line residential district.
- D. Two-family districts:
 - 1. D-1.
 - 2. D-2.
- E. Apartment districts:
 - 1. A-1.
 - 2. A-2.
- F. Hotel districts:
 - 1. H-1.
 - 2. H-M.
 - 3. H-2 and hotel.
- G. Business districts:
 - 1. SBR service.
 - 2. B-CT country town.
 - 3. B-1 neighborhood.
 - 4. B-2 community.
 - 5. B-3 central.
 - 6. B-R resort commercial district.
- H. Industrial districts:
 - 1. M-1 light.
 - 2. M-2 heavy.
 - 3. M-3 restricted.

- I. Park districts:
 - 1. PK.
 - 2. GC.
- J. Airport district.
- K. Agricultural district.
- L. Rural districts:
 - 1. RU-0.5.
 - 2. RU-1.
 - 3. RU-2.
 - 4. RU-5.
 - 5. RU-10.
 - 6. County rural.
- M. Public/quasi-public districts:
 - 1. P-1.
 - 2. P-2.
- N. Kihei research and technology park district.
- O. Maui research and technology park district.
- P. Napili Bay civic improvement district.
- Q. Urban reserve district.
- R. Interim.
- S. Maui County historic districts.
- T. Project districts.
- U. Wetlands overlays ~~district~~.

SECTION 7. Section 20.08.040, Maui County Code, is amended to read as follows:

“20.08.040 Permit—Required. Unless otherwise provided in this chapter:

A. [No] A person [shall] must not commence or perform any grading or stockpiling without a grading permit [; and].

B. [No] A person [shall] must not commence or perform any grubbing without a grubbing permit, except where grubbing concerns land for which a grading permit has been issued.

C. [No] A person [shall] must not commence or perform any cut or fill activity on land located within any special management areas, as defined by chapter 205A, Hawaii Revised Statutes, which exceeds fifty cubic yards of material on any one site or exceeds two feet in the vertical height at its highest point, including [but not limited to] single-family residential construction, without a grading permit.

D. A permit or exclusion [pursuant to] under this chapter does not [obviate] eliminate the need or constitute compliance with the requirements to obtain other permits or approvals.

E. A person must not commence or perform any cut or fill activity or grubbing on land located [in the] under a wetlands overlay [district] without a grading or grubbing permit."

SECTION 8. Section 20.08.080, Maui County Code, is amended to read as follows:

"20.08.080 Grading and grubbing permit review.

Drainage, engineering slope hazard report, and erosion control plans [shall] must be submitted to the applicable soil and water conservation [district(s)] district and to the department of land and natural resources' state historic preservation division for review and comment. Applicants [shall] must provide information sufficient to enable the reviewing agencies to determine that the proposed work will be in conformance with the most current standards on file at the department of public works [of the] soil and water conservation [district(s)] district and will meet the requirements of chapter 6E, Hawaii Revised Statutes, and related administrative rules. Final approval or disapproval [shall] must be made by the County within ten days after receiving the reviewing agencies' comments. In the wetlands overlay district, the director must make decisions consistent with any report required by subsection 19.47.030 and the policy in section 19.47.020 unless the director reports to the council in writing a need to make a contrary decision."

SECTION 9. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 10. The Department of Planning ~~[must]~~ may adopt administrative rules to implement this Ordinance. This Ordinance takes effect upon ~~[the adoption of administrative rules by]~~ the Department of Planning's

transmittal of the wetlands map to the planning commissions, council,
conservation planning committee and director of public works.

DAVID Y. IGE
GOVERNOR OF
HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

December 22, 2021

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

ROBERT K. MASUDA
FIRST DEPUTY

KALEO L. 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

OFFICE OF THE COUNTY CLERK
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793

SUBJECT: Comments on Maui County Council Resolution No. 21-171 adopted by the
Council of the County of Maui on November 5, 2021

The State of Hawai'i Department of Land and Natural Resources Division of Forestry and Wildlife, Maui Branch (DOFAW) submits the following comments on the County of Maui's adopted bill amending Titles 2, 18, 19, and 20, Maui County Code, relating to wetland restoration and protection.

DOFAW supports the intent of the added overlay and protection for Maui County wetlands proposed under Resolution No. 21-171. Wetlands comprise a small percentage of the land mass in the Hawaiian Islands covering an estimated 1.3% to 2.7% of the total land area. Estimates of wetland loss in Hawaii have ranged from 12% to 31% but are likely underestimated as large-scale land use changes occurred shortly after European contact before many historical records were maintained. It is estimated that approximately 75% of remaining wetlands throughout the state are degraded by non-native invasive plant species and altered hydrology due to urbanization and agriculture. With continued development projected throughout the state, remaining functioning wetlands are further threatened to become degraded. Added protection by the County of Maui through a wetland district overlay will ensure protection of these important ecosystems especially in the face of climate change and increased development.

DOFAW understands that Maui County would like to establish a program for wetland restoration and protection which includes mapping, updating zoning, and establishing a wetland overlay district. Regarding the definition of a "wetland" in Section 2, however, as noted above, many of the wetlands in Hawai'i that have the potential for functional restoration have been altered, filled with sediment, overgrown by invasive plants, or are otherwise not apparent as wetlands under that definition. We therefore recommend that the definition be amended to include, "...those areas that are currently or formerly inundated or saturated ..." (additions

underlined). With regard to mapping, we note that accurate wetland overlays may not currently exist and could require extensive studies to determine the existence and delineation of wetlands. Additionally, National Wetland Inventory maps are not accurate at depicting wetlands in Hawai'i. We therefore recommend that an objective, science-based process be established to map wetlands through consultation with qualified experts.

Based on Section 19.47.030 (B) of the County bill, the planning director must produce, or cause to be produced, a report on the feasibility and advisability of wetland specific restoration or protection to determine if a wetland should be identified in the wetland overlay. For clarity, we suggest that criteria be identified as to what constitutes feasible or advisable and who is advising on that aspect and with what expertise. Clear criteria for exclusion may help to avoid subjective and potentially disputed recommendations.

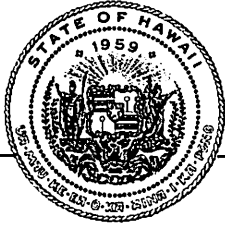
Finally, DOFAW understands that under Title 20, Environmental Protection, anyone interested in grading over an area under the Wetlands Overlay District would be required to obtain a grading permit. Although we agree with this, we note that wetland restoration work often requires grading to restore an area to its natural ecosystem because many wetlands have a buildup of unhealthy sedimentation and runoff. We recommend that grading permits for restoration work be considered under an exclusion or less intensive permitting process as often wetland restoration work gets hampered by the cost of permits intended for destruction rather than restoration of wetlands.

We appreciate the opportunity to provide comments on the Maui County Council bill and welcome an opportunity to discuss the comments.

Sincerely,



Scott Fretz
Maui Branch Manager
Division of Forestry and Wildlife



**STATE OF HAWAII
OFFICE OF PLANNING
& SUSTAINABLE DEVELOPMENT**

DAVID Y. IGE
GOVERNOR

MARY ALICE EVANS
DIRECTOR

235 South Beretania Street, 6th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

Telephone: (808) 587-2846
Fax: (808) 587-2824
Web: <https://planning.hawaii.gov/>

DTS 202112281600HE

Coastal Zone
Management
Program

January 6, 2022

Environmental
Review Program

Land Use
Commission

Land Use Division

Special Plans
Branch

State Transit-
Oriented
Development

Statewide
Geographic
Information System

Statewide
Sustainability
Program

Ms. Michele McLean
Planning Director
County of Maui
Wailuku, Hawaii 96793

Dear Ms. McLean:

Subject: Comments on Resolution No. 21-1711, Adopted by the Council of the
County of Maui, Proposed Bill Relating to Wetlands Restoration and
Protection

Thank you for the opportunity to provide comments on Resolution No. 21-171, Wetlands Restoration and Protection, which was adopted by the Council of the County of Maui on November 5, 2021.

It is our understanding that this resolution calls for the establishment of a Wetlands Overlay District to establish a program for wetlands restoration and protection. The bill will require the Conservation Planning Committee to evaluate wetlands criteria and provide advice on restoring and protecting wetlands through negotiated land acquisition, eminent domain, or conservation easements. This resolution will require that the appropriate County of Maui planning commissions to review proposed land use ordinances, provide findings, and make recommendations to the Council of Maui.

The Office of Planning and Sustainable Development (OPSD) has reviewed the transmitted material. We have the following comments to offer for consideration:

Recommendations to Ordinance Amending Titles 2, 18, 19, and 20 of the Maui County Code We offer below the following narrative changes offered by Resolution No. 21-1711 to Maui County Code for clarity and accuracy:

- Proposed changes to Section 2. 19.04.040, Maui County Code reads as follows: "'Wetland" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, [estuarine] and similar areas."

We recommend the addition of the bracketed term “estuarine” to the definition of Wetlands.

- Proposed changes to Section 7, 20.08.040 Permit-Required; reads as follows: “A person must not commence or perform any cut or fill activity or grubbing on land located in the wetlands overlay district without a grading permit [and/or a grubbing permit as required].”

We recommend that the bracketed phrase [and/or a grubbing permit as required.] be added to this amendment.

- Proposed changes to Section 7, 20.08.040.D - Permit—Required; “A permit or exclusion [pursuant to] under this chapter does not [obviate] [eliminate the need] constitute compliance with the requirements to obtain other permits or approvals.”

We recommend the following amendment to this ordinance as underlined and bracketed.

If you have any questions regarding this comment letter, please contact Joshua Hekekia of our office at (808) 587-2845.

Sincerely,

Mary Alice Evans

Mary Alice Evans
Director

From: "Hekeia, Joshua K" <joshua.k.hekeia@hawaii.gov>
To: Michele McLean <Michele.McLean@co.maui.hi.us>
CC: Clayton Yoshida <Clayton.Yoshida@co.maui.hi.us>, Erin Derrington <Erin.Derrington@co.maui.hi.us>, Jacky Takakura <Jacky.Takakura@co.maui.hi.us>, Jordan Hart <Jordan.Hart@co.maui.hi.us>
Date: 1/7/2022 1:37 PM
Subject: RE: OPSD Comments on Resolution No. 21-171 - Wetlands Restoration and Protection

Ms. McLean,

My editing comments were an amalgamation of edits from other OPSD staff for this County of Maui Resolution. As I was trying to write our comment letter in laymans terms (apologies as I am not versed in editing formatting) my letter may have been as clear as it should have been.

The brackted terminology in our comment letter is our recommendation that the word should be deleted, and the underlined term is our suggested replacement.

Below is the language that was originally provided to me, prior to my attempt to write in layman's terms, our recommended edits, and the pertinent sections in the County of Maui Code of Ordinances that our recommendations applied too. Our edits, to the propsed changes (from Res. No. 21-171) to the County of Maui Code of Ordinances are highlighted in yellow. I beleive in the OPSD comment letter I used descriptive terms in lieu of the highlighted wording.

* D. A permit or exclusion [pursuant to] under this chapter does not [obviate] [eliminate the need] constitute compliance with the requirements to obtain other permits or approvals.

* "Wetland" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, estuarine, bogs, and similar areas."

* e. [Areas of coastal zones] Coastal areas adjacent to wetlands, islands, or bodies of marine water deeper than six meters at low tide lying within the wetlands.

* E. A person must not commence or perform any cut or fill activity or grubbing on land located in the wetlands overlay district without a grading permit and/or a grubbing permit as required."

If you need a redrafted agency comment letter that is makes our our recommended edits more clear, please let me know.

I aplogize for any confusion that our comment letter on Res. No 21-171 may have caused.

I can be reached via the contact information listed below.

Thank you.

[cid:image004.png@01D803CB.B6E7F950]

Joshua K. Hekeia
Office of Planning & Sustainable Development
Planner, Coastal Zone Management Program
235 S. Beretania Street, 6th Floor
Honolulu, Hawaii 96813
Ph.: (808) 587-2845
Joshua.k.hekeia@hawaii.gov<mailto:Joshua.k.hekeia@hawaii.gov>

From: Michele McLean <Michele.McLean@co.maui.hi.us>
Sent: Friday, January 7, 2022 11:43 AM
To: Hekeia, Joshua K <joshua.k.hekeia@hawaii.gov>
Cc: Clayton Yoshida <Clayton.Yoshida@co.maui.hi.us>; Erin Derrington <Erin.Derrington@co.maui.hi.us>; Jacky Takakura <Jacky.Takakura@co.maui.hi.us>; Jordan Hart <Jordan.Hart@co.maui.hi.us>
Subject: Re: Fwd: OPSD Comments on Resolution No. 21-171 - Wetlands Restoration and Protection

Mahalo, Joshua.

Can you please clarify the formatting of your comments? Usually [bracketed] means deleted text and underlined means added text.

In your first bullet, you recommend the addition of "estuarine" to the definition.

In your second bullet, you recommend adding "and/or a grubbing permit as required" to the end of the sentence.

In your third bullet, you recommend that the final language read "A permit or exclusion under this chapter does not constitute compliance with the requirements to obtain other permits or approvals."

Is all of that correct?

Thanks again,
Michele.

Michele Chouteau McLean, AICP, Planning Director
County of Maui
One Main Plaza, Suite 315
2200 Main Street
Wailuku, Hawaii 96793
Office: 808/270-7735
Fax: 808/270-7634

>>> planning 1/7/2022 10:48 AM >>>

FYI~

>>>

From:

"Hekekia, Joshua K" <joshua.k.hekekia@hawaii.gov<mailto:joshua.k.hekekia@hawaii.gov>>

To:

"planning@mauicounty.gov<mailto:planning@mauicounty.gov>" <planning@mauicounty.gov<mailto:planning@mauicounty.gov>>

CC:

"Nakano, Mei-Lynn E" <mei-lynn.e.nakano@hawaii.gov<mailto:mei-lynn.e.nakano@hawaii.gov>>

Date:

1/7/2022 8:58 AM

Subject:

OPSD Comments on Resolution No. 21-171 - Wetlands Restoration and Protection

Dear Sirs,

Please see the attached comment letter on Maui County Council Resolution No. 21-171 from our Director, Mary Alice Evans. If you have any questions or concerns, please contact me via the information listed below.

Thank you.

[cid:image001.png@01D803C7.FE4E28E0]

Joshua K. Hekekia
Office of Planning & Sustainable Development
Planner, Coastal Zone Management Program
235 S. Beretania Street, 6th Floor
Honolulu, Hawaii 96813
Ph.: (808) 587-2845
Joshua.k.hekekia@hawaii.gov<mailto:Joshua.k.hekekia@hawaii.gov>

From: Shayne Agawa
To: Erin Derrington; Takakura, Jacky
Date: 1/12/2022 9:17 AM
Subject: Re: proposed bill relating to wetlands restoration and protection

Hi Jacky,

Apologies for the late response. DEM has no additional comments regarding the subject matter other than what was discussed at committee.

Thank you,
Shayne

Shayne R. Agawa, P.E.
Deputy Director

County of Maui
Department of Environmental Management
2050 Main Street, Suite 2B
Wailuku, HI 96793
Phone: (808)270-8230
Fax: (808)270-8234

>>> Jacky Takakura 11/30/2021 11:56 AM >>>
Good morning

The Maui County Council has transmitted the attached proposal to create a wetlands overlay, and we are seeking agency comment. The bill is also online at <https://www.mauicounty.gov/1127/Legislation---Proposed> (see bottom of list).

Please let Planner Erin Derrington and me know if you have any comments and recommendations you would like the Department of Planning to consider. If you have no comments, please let us know that too!
We hope to take this to the Planning Commissions early next year, so please reply by January 4, 2022.

Erin's contact information: email Erin.Derrington@mauicounty.us and phone (808) 270-8205

My contact information: email jacky.takakura@mauicounty.us and phone (808) 270-7743

Thank you!
Jacky

Jacky Takakura
Administrative Planning Officer
Zoning Administration & Enforcement Division
Maui County Department of Planning
2200 Main Street, Suite 335
Wailuku, HI 96793
phone (808) 270-7743

Agency Comments on Proposed Bill relating to Wetlands Restoration and Protection

Hudson Slay

US Environmental Protection Agency, Region 9

Wetlands & Oceans Section, Water Division

300 Ala Moana Blvd, Rm 5-152

P. O. Box 50003

Honolulu, HI 96850

(808) 541-2717

slay.hudson@epa.gov

Resolution

No. 21-171

REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL RELATING TO WETLANDS RESTORATION AND PROTECTION

WHEREAS, the Council is considering a proposed bill to establish a program for wetlands restoration and protection; and

WHEREAS, the bill would establish a Wetlands Overlay District, similar in form and function to the bill to establish a Wellhead Protection Overlay District, which has long been advocated for by the Department of Planning and is now pending in a Council committee; and

WHEREAS, the bill would also require the Conservation Planning Committee to evaluate wetlands criteria and provide advice on restoring and protecting wetlands through negotiated land acquisition, eminent domain, or conservation easements; and

WHEREAS, Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983) ("Charter"), as amended, require that the appropriate planning commissions review proposed land use ordinances and provide findings and recommendations to the Council; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it refers the proposed bill, entitled "A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION," a copy of which is attached as Exhibit "1," to the Lānaʻi Planning Commission, Maui Planning Commission, and Molokaʻi Planning Commission for appropriate action, in accordance with Charter Sections 8.8.4 and 8.8.6;
2. That it respectfully requests that the Lānaʻi, Maui, and Molokaʻi Planning Commissions transmit their findings and recommendations to the Council as expeditiously as possible; and

Resolution No. 21-171

3. That certified copies of this Resolution be transmitted to the Mayor, the Planning Director, the Lānaʻi, Maui, and Molokaʻi Planning Commissions, the Director of Public Works, and the Conservation Planning Committee.

APPROVED AS TO FORM AND LEGALITY



Keola Whittaker
Deputy Corporation Counsel
County of Maui

care:misc:055areso03:nas

ORDINANCE NO. _____

BILL NO. _____ (2021)

A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this Ordinance is to conserve the natural environment, mitigate climate change, and work toward resilience by establishing a program for wetlands restoration and protection in Titles 2, 18, 19, and 20 of the Maui County Code.

The Council finds that the Maui County General Plan provides the following directives:

- “Restore and protect . . . wetlands . . .” (Countywide Policy Plan, page 46.)
- “Preserve existing wetlands and improve and restore degraded wetlands.” (Maui Island Plan, page 2-31.)
- “Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation.” (Molokaʻi Island Community Plan, page 55.)
- “Natural landscape features and environment, such as . . . wetlands, will be protected and restored.” (Lanai Community Plan, page 2-12).

- “Protect all wetland resources . . .” (Kihei-Makena Community Plan, page 21.)

Despite these directives, which were enacted in ordinances from 1998 to 2016, Maui County did not have a program for wetlands restoration and protection prior to this Ordinance.

A Maui County program is necessary because the Clean Water Act does not regulate certain isolated wetlands. Only those wetlands that are adjacent to navigable waters are protected by the Clean Water Act.

The Council’s intent is to protect all wetlands in Maui County, including those that are not adjacent to navigable waters.

This Ordinance amends the following Titles of the Maui County Code:

- Title 2, Administration and Personnel, to require the Conservation Planning Committee to review wetlands for possible acquisition.
- Title 18, Subdivisions, to ensure wetlands are restored and protected in the subdivision process.
- Title 19, Zoning, to update the Comprehensive Zoning Ordinance to establish the Wetlands Overlay District.
- Title 20, Environmental Protection, to require a grading permit in the Wetlands Overlay District.

SECTION 2. Section 19.04.040, Maui County Code, is amended by adding the following definitions:

“Overlay district” means an area where certain additional requirements are superimposed upon a base zoning district or

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this is a fair statement but Clean Water Act protections continue to evolve. See:
<https://www.epa.gov/wotus>

underlying district and where the requirements of the base or underlying district may or may not be altered.

"Wetland" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

SECTION 3. Article II, Title 19, Maui County Code, is amended by adding new chapter to be appropriately designated and to read as follows:

"Chapter 19.47

WETLANDS OVERLAY DISTRICT

Sections:

19.47.010	Establishment.
19.47.020	Policy.
19.47.030	Report.
19.47.040	Decisions consistent with report.
19.47.045	Permitted uses.
19.47.060	Mapping.
19.47.070	Interpretation.

19.47.010. Establishment. The council may establish wetlands overlay district zoning on any property for the purpose of restoring or protecting a wetland on the property.

19.47.020. Policy. It is the policy of the County of Maui that wetlands be restored or protected. The council's intent is to restore and protect wetlands beyond what is required by the Clean Water Act, Coastal Zone Management Act, or any other law. All discretionary permits issued by the County must be consistent with this policy.

19.47.030. Report. A. The planning director must produce, or cause to be produced, a report on the feasibility and advisability of wetlands restoration or protection on the property prior to approval of any of the following in the wetlands overlay district:

1. Community plan amendment under section 2.80B.110.
2. Subdivision approval under section 18.08.100.
3. Change in zoning under section 19.510.040.

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consistent with federal definition

Review of the Hawaii Department of Health Hawaii Administrative Rules 11-54 definitions for different wetland types might also be helpful. See 11-54-1 https://health.hawaii.gov/cwb/files/2013/04/Clean_Water_Branch_HAR_11-54_20141115.pdf

relevant definitions include: anchialine pools, coastal wetlands, elevated wetlands, hydric soils, hydrophytic vegetation, low wetlands, and wetlands. these definitions might prove helpful in the implementation of the overlay district.

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are wetland restoration and wetland protection defined--just to be clear what is meant/actions expected, etc?

4. Conditional zoning under section 19.510.050.
5. District boundary amendment under chapter 19.68.

6. Special use permit under section 19.510.070.

7. Grading or grubbing permit under chapter 20.08.

B. Any report required by subsection A must be shared with the decision-making officer or agency and any relevant advisory agency. The report must include the following:

1. The ability of the wetland to filter harmful toxins, nutrients, and sediment from surface and stormwater runoff.

2. The ability of the wetland to store floodwaters and reduce the magnitude of flood events.

3. The ability of the wetland to provide valuable habitat for a diverse array of flora and fauna, including any existing rare, threatened, or endangered species.

4. The ability of the wetland to maintain surface-water flow during dry periods.

5. The impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.

6. The impact of pollution by garbage, litter, and refuse.

7. The impact of a reduction in the flow of watercourses due to destruction of wetlands.

19.47.040. Decisions consistent with report. A. The decision-making officer or agency on an application referenced in subsection 19.47.030(A) must make decisions consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020 unless the officer or agency reports to the council in writing a need to make a contrary decision.

B. Any ordinance for an approval referenced in section 19.47.030(A) must include the council's finding that either:

1. The property does not include any wetlands for which restoration or protection is feasible or advisable; or

2. The property owner has executed a unilateral agreement, to be recorded with the bureau of conveyances or land court, for adequate wetlands restoration or protection.

19.47.045. Permitted uses. The following uses are permitted in the wetlands overlay districts:

A. Conservation of soil, vegetation, water, fish, and wildlife.

B. Scientific research and educational activities teaching principles of ecology and conservation.

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unclear if this report will include wetland type, size/extent, landscape position to accompany this list which largely includes information regarding potential performance of wetland functions.

this is a good list of what seems like relevant wetland functions. As written, it is not clear how this information should be included in the report--e.g., is an objective determination of function 'performance' based upon data/wetland characteristics/proxy of function expected or is a subjective evaluation acceptable? perhaps this is included elsewhere

C. General outdoor recreation and leisure activities that are not inconsistent with the intent of this chapter.

D. Uses permitted in the base zoning district that are not inconsistent with the intent of this chapter.

19.47.060. Mapping. A. The planning director must transmit to the planning commissions, council, conservation planning committee, and director of public works a map that shows the location of wetlands throughout the County.

B. The map must be updated and transmitted at least annually.

C. The planning director must initiate changes to zoning as needed to ensure wetlands depicted in the map are placed in the wetlands overlay district.

19.47.070. Interpretation. A. Nothing in this chapter is intended and may not be interpreted to conflict with State or federal law on the same subject matter.

B. Conflicting provisions of this chapter must be abrogated to the extent of the conflict.

C. The provisions of this chapter must be construed, if possible, to be consistent with and in addition to relevant federal or State regulations and statutes.

D. The provisions of this chapter must be construed liberally in favor of wetlands restoration and protection."

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what data will feed/support development of the wetland location map? the broad wetland definition included in Section 2 may prove challenging to map. Could consider use of Corps of Engineers 1987 Wetland Delineation Manual to better direct mapping, incorporate field observations, etc.

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as mentioned before it would probably be good to be very clear about what is meant/expected re wetland restoration and wetland protection.

SECTION 4. Subsection J of Section 2.82.040, Maui County Code, relating

o the Conservation Planning Committee, is amended to read as follows:

"J.

1. The committee must assist with and oversee the creation of the countywide greenprint and provide recommendations to the mayor, council, and agencies related to this chapter's purpose.

2. The committee must advise the mayor to authorize the county acquire land containing wetlands, by negotiated acquisition or by eminent domain, or to seek execution of a conservation easement to restore or protect wetlands after

evaluating the following criteria for restoration or protection:

a. Areas where water is the primary factor controlling the environment and the associated animal and plant life; where for any duration of time, at a frequency including nonconsecutive years:

i. The water table is at or near the surface and the land is saturated by subsurface water including the water table, subsurface kahawai, or springs; or

ii. The land is covered by water.

b. Areas of marsh, fen, peatland, or water. The waterbody can be:

i. natural or artificial;

ii. permanent, temporary, intermittent, or ephemeral;

iii. static or flowing;

iv. fresh, brackish, or salt;

v. above or below ground; or

vi. groundwater, precipitation, or surface water-driven hydrology.

c. Areas of marine water the depth of which at low tide does not exceed six meters, including fishponds and coral reefs.

d. Areas of riparian zone and floodplain, including flowing, intermittent, or ephemeral streams, and streambeds.

e. Areas of coastal zones adjacent to wetlands, islands, or bodies of marine water deeper than six meters at low tide lying within the wetlands.

f. Areas where hydric soils are present.