



# University of Hawaii at Manoa

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Dear Hawaii State Legislator:

The legislature is to be lauded for its strenuous efforts to pass a water code. The House version, while reflecting a spirit of compromise, compromises so much away that it seriously harms the ability of the state to respond to long-term water shortages.

The most glaring defect is the proposed code's issuance of perpetual permits. This gives away the power of the state to reallocate water as better uses arise. Moreover, perpetual permits provide no incentive for users to develop new technologies to conserve water. Thus, the status quo is favored and future, more desirable uses, must wait until existing users give up their water.

Thus, the proposed code leaves the choices of development, growth, or conservation in private hands. New housing technology and new uses will be stymied when water is tied up in perpetual permits. The code provides no means by which government can reacquire water from marginally efficient users and transfer it on the basis of rational planning. The code thus sacrifices the inherent power of the state over these resources in order to placate existing users who are demanding the security of perpetual use.

The power of the state to control natural resources is the single most important power of a state with finite resources such as Hawaii. It is unconscionable for the legislature to give up this power by granting away its power in the form of perpetual permits. The state fought a long and arduous battle in the courts to reaffirm the state's public trust powers and responsibilities. Granting perpetual permits gives away the rights bestowed on the state by the Hawaii Supreme Court decision in McBryde v. Robinson. Perpetual permits also violate the intent of the constitutional amendment by failing to insure conservation and protection of the water.

Proponents of the code defend the perpetual permits by noting that the code prevents the sale or transfer of such permits. However the attempt to marry the free market approach with prohibitions on transfer is simply a compromise that won't work. Both those who advocate a free market system allowing for the sale of water (see letter to the editor of Assoc. Prof. Jim Moncur, Department of Economics, U.H.--attached) and Hawaii's Thousand Friends which advocates strong government regulation through a limited duration permit system (see pp. 1 to 13 of attached article, "History and Analysis of Attempt to Develop a Water Code") agree that an attempt to combine both features results in a code which inhibits rational growth.

Under the proposed code those who receive the initial water will have that water for as long as they continue their use, regardless of how that use of water stacks up in the future vis-a-vis other important uses. For example, suppose that water is needed in the year 2010 for 40,000 new residents on the Ewa plain and that there is no available water. Suppose also that there are out-dated aquaculture farms that are merely breaking even yet consuming large amounts of water.

Under the present proposed code, water from the aquaculture farms cannot be obtained unless they decide to release it to the public--by going out of business. Even if both could profit by a purchase of water, the people who need the housing cannot buy the water from the aquaculture farm--the code prevents transfer. Moreover, the aquaculture farm has an unlimited permit--the government agency cannot reacquire the water unless the farm goes out of business.

What happens in such a situation under the proposed code? Proponents say that everyone on Oahu will be forced to conserve water. But why should substantial conservation be enforced on the whole population so that marginally efficient uses of water can be allowed to continue?

Proponents of the proposed code then argue that the government can condemn the water rights of the aquaculture farm. If condemnation is the tool to be used during water-short situations, the government is essentially creating limited duration permits--permits that limit to the extent that water becomes scarce.

Proponents of the code also argue that these water conflicts will never happen because agriculture on Oahu will

eventually go out of business and release large amounts of water. Yet, why do we need a code if such conflicts will never happen? Moreover, if sugar is going out of business in the next few years, why give perpetual permits--why not 15 year permits? The proposed code fails at the one real task charged it--designing a mechanism for making hard choices when water is short. It fudges the issue by saying there will never be such a conflict (then we don't need anything new) or that everybody suffers so that all marginally efficient uses can survive.

Finally, the code is inadequate in dealing with the issue of available water. Suppose that 10 mgd becomes available tomorrow in the Pearl Harbor aquifer--who gets it? Assume that in 2010 we will need it for the 40,000 new residents in Ewa. If we give it away now to another use (say aquaculture) we give it away forever--with no real authority to call it back. If we "reserve" it from use for the next 23 years, then nobody gets to use the water. Aquaculture operators would be happy to have the opportunity to make a profit for 20 years. As in the case of 20 year leases of property, many profitable businesses operate under 20 year permits.

This code puts our water fate in the hands of private business. It represents a complete disregard of the constitutional mandate to provide for the conservation management and protection of the water resources. The purpose of having a legislature is to make the hard choices or create mechanisms to make those hard choices. Forced conservation, the code's response in water short situations, is the alternative that a water code was designed to avoid.

The water code as proposed by the House protects all present users against all future uses no matter how important such future uses are in terms of creating jobs or providing houses. Let's not give away our water or our powers over water resources. Recently, the legislature was very upset about the loss of Coconut Island, but compare the loss of one island with the loss of all our water resources through the present code. We don't think this is how the late Speaker would want to be honored.

For these reasons, while we support the avoidance of the market system, we urge that passage of a water code be postponed until next session. There must be some means by which better

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competing uses in the future can be allocated water. Limited duration permits are the best means of achieving this goal. We also strongly urge the adoption of an independent board.

Very truly yours,

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