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RL:01240

HB 1763 RELATING TO HAWAIIAN FISHPONDS

House Committee on
Hawaiian Affairs and Housing

Public Hearing - February 4, 1995
8:30 A.M., Room 1111, SOT

By
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Richard Brock, Sea Grant
Jacquelin Miller, Environmental Center
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HB 1763 would exempt Hawaiian fishponds from all laws, ordinances and regulatory requirements of the state and counties, would transfer management responsibility for fishpond oversight to a new program within the department of Agriculture, and would appropriate funds for the implementation of the new program.

Our statement on this measure does not constitute an institutional position of the University of Hawaii.

The present measure recapitulates a bill introduced in the last session (HB 3010, 1994) which was held in committee, and other than specifying Agriculture rather than DLNR as the parent agency for the program, the bill is virtually identical to HB 1401. The following testimony similarly recalls our prior analysis of the merits of these proposed exemptions and reorganizations.

Our reviewers note that it is not the intent of existing regulations to "inhibit [the] revitalization" of fishponds. These regulatory provisions were enacted by due process to implement Constitutional and statutory mandates for the protection of sensitive coastal environments, adjacent properties, and public coastal lands and resources. Irrespective of the beneficial aspects of fishpond restoration and use, any structure in the coastal zone will have an impact on natural shoreline dynamics. Thus, a more fundamental issue confronted by this proposed measure is that Constitutional guarantees of protection and preservation of

natural resources and of customary aboriginal rights are mutually exclusive.

The proposed remedy to exempt fishpond activities from all state and county rules and to substitute a permit program devoted exclusively to fishpond oversight exhibits a fatal flaw. The fishpond program will embody both advocacy and regulatory functions. Both rigorous administrative theory and common sense dictate that the conjoining of advocacy and regulation in a single office is bad public policy.

It is clear from the provisional descriptions of the duties of the program that the advocacy role is predominant in this measure. Nowhere in the list of the program's duties is there any assurance that actions undertaken in pursuit of fishpond programs will account for environmental sensitivities. No mention is made of protection of the rights and property of the public adjacent to proposed fishpond sites, nor of the sequestering of public submerged lands and the exclusion of public access or navigation. Furthermore, the definition of Hawaiian fishpond is so broad that terrestrial agricultural practices which create irrigated wetland terraces would appear to be exempted from all regulatory oversight as well.

Apart from these fundamental problems, we found the proposed exemption from impact assessments particularly ill-advised. Assessment pursuant to Chapter 343 is not a permit, but rather a disclosure process whose sole intent is to improve the quality of decisionmaking. Public review provides the opportunity to make fully informed decisions and is an entirely beneficial process. Substantive issues surrounding an action in a sensitive environment will not magically disappear as a result of the administrative device of exempting the action from public scrutiny. As noted earlier, actions in the coastal zone will permanently alter and may permanently destroy large expanses of coastal resources.

Efforts to implement fishpond restoration have been extensive, and much valuable information has been gained. Rather than a sweeping rejection of existing protections, we suggest that the existing experience be directed towards identifying precisely what is the most serious barrier to action. If a particular area of permitting is problematic, then focus attention there. If, however, the problem is a Constitutional dilemma, then the conflicting Constitutional provisions must be examined and public debate must center on reconciliation of the apparent conflicts.