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COMMENTS ON ENVIRONMENTAL IMPLICATIONS OF PROPOSED STATE CONSTITUTIONAL AMENDMENTS

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Several of the amendments to the Hawaii State Constitution that have been proposed by the Constitutional Convention deal explicitly or implicitly with environmental questions. The amendments proposed represent distillations from a much larger number of initial proposals. The Environmental Center commented on a number of these at hearings held by the Committee on Environment, Conservation, Agriculture and Land. There may be some interest in the following comments on the amendments that have been approved by the Convention and will be voted on in the General Election. Our comments do not reflect an institutional position of the University of Hawaii.

The proposed amendments that deal with environmental questions are appended to these comments.

Preamble

The State motto is ordinarily translated as: "The life of the land is preserved in righteousness." However, the word "pono" means excellence, well-being, prosperity, and welfare as well as goodness, uprightness, and morality. The proposed new second paragraph in the preamble establishes the right "to preserve the quality of life that we desire. In incorporating the State motto in the preamble of the constitution and in adding in the new second paragraph, the proposed amendments provide additional support to the principle that the purpose of the government is to promote human welfare.

This principle is not new. The Federal Constitution, which was adopted in the State Constitution when it was first passed, recognized the purpose "to promote the general welfare."

Public Health and Welfare
(Article VIII, to be renumbered Article IX)

Management of State Population Growth

Under its police powers and powers to promote the public welfare, the State already has considerable power to manage population growth. This power would perhaps be extended and probably be made more secure if it were stated as a duty as is proposed in new Section 6 of Article IX. The exercise of this duty, as appropriate, must be "as provided by general law." How effective the proposed provision may be remains to be seen.

As yet, there is little evidence of a consensus as to the extent to which population growth should be restricted or as to appropriate means for restriction. Until there is such evidence, the control of population growth might better have been made a power rather than a duty of the State.

Public sightedness

The power "to conserve and develop (the State's) natural beauty" is proposed to be deleted from the present Section 5 of Article VIII. However, this power is merely to be transferred to Section 1 of Article X.

Preservation of a healthful environment

In the proposed new Section 8 of Article IX, there would be an explicit statement of the State's "power to promote and maintain a healthful environment, including the prevention of excessive demands upon the environment and the State's resources". This power is reinforced by the environmental rights provision proposed in Section 9 of Article XI.

Conservation, Control, and Development of Resources
(Article X, to be renumbered Article XI)

The title of Article XI is proposed to be changed by adding the process of "control" to the processes of "conservation and development" as applied to the resources of the State. The proposed wording of Section 1 may suggest the intent of controlling the development of resources rather than controlling the resources themselves. Actually, the control of natural resources is very largely supplied by nature. What was probably intended is control of the development of resources.

Conservation and development

The proposed new Section 1 of Article XI, if adopted, would make it the duty of the State as a whole, including the executive and judicial branches of government and not merely the legislature, to promote resource conservation. In addition, the rephrasing of this section would emphasize the protection end of the conservation spectrum (ranging from protection to development and use) and qualify the development and utilization of natural resources to be promoted as that which is consistent with the conservation

and the furtherance of State self-sufficiency. Conservation and protection of natural beauty would be a duty of the State, and not merely a power as it is in the present old Section 5 of Article VIII (to be Section 7 of Article IX).

In the proposed new second paragraph of Section 1, the public trust concept would be applied to natural resources as it has been in several other states. The implications of the application are somewhat uncertain. However, the effects of the uncertainties would be minimized by restriction of the application to only those resources that are "public."

Agricultural lands

Protection of agricultural lands would be made explicit by the adoption of the proposed new Section 3 of Article XI. The present requirement for a two-thirds vote for reclassification of agricultural lands by the body responsible for reclassification (the Land-Use Commission) would be placed in the Constitution. A two-thirds vote would also be required in the council of the county in which the land to be reclassified is located.

Public land banking

The proposed new Section 4 of Article XI would empower the State to acquire lands in order to control future growth, development, and land use. This power could be exercised, of course, only if the owners were compensated in accordance with the present constitutional provision regarding eminent domain (Article I, Section 18, to be renumbered Section 20). Land-use control is already exercised by the State. The intent of the provision is to eliminate any possible present constitutional barrier to such acquisitions of land for this purpose or for the purpose of controlling population growth in accordance with the duty expressed in the new Section 6 of Article IX that is proposed.

Marine resources

By the proposed revision of old Section 3 (to be renumbered Section 6 of Article XI), the powers of the State would be extended from merely those over fisheries to those over marine resources generally, and a claim would be staked to the resources of the "archipelagic waters of the State," (including those parts of the channels between the islands that are more than 3 miles from land). The claim would be made even more explicitly by an amendment of Section 1 of Article XIII (to be renumbered Article XV). The extent of the State's jurisdiction over its archipelagic waters is an issue that probably cannot be resolved simply by a State claim, even in its constitution.

Explicit provision would be made for state control of mariculture operations. The power of condemnation of vested fishing rights that would be made explicit in the proposed amendment is not actually a new power.

Water resources

The proposed new Section 7 of Article X would make it a specific duty of the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

This new section would further require the legislature to provide for a "water resources agency." Because this agency is to be established by the legislature and is to have statewide powers, it must presumably be a State agency. It could be a present agency. The report of the Committee on Environment, Conservation, Agriculture and Land indicates the intent that the "agency" might be a commission, but the definition of "agency" as including commissions, etc. is in statute and not binding on the Constitution.

The duties expressed for the agency would include: i) setting certain overall water policies; ii) defining beneficial and reasonable uses; iii) protecting water resources and watersheds; iv) establishing priorities among water uses; and v) establishing procedures for regulating uses of the water resources.

The power to set overall policies (specifically those relating to conservation, quality, and use of the waters) should rest in the legislature itself, and not be delegated to an agency or commission, but presumably the Legislature will establish general policies and look to the agency or Commission merely to detail those policies.

The establishment of criteria for water-use priorities would be qualified in the section by the requirement that there be assurance of "appurtenant rights and existing correlative and riparian uses." Certain appurtenant water rights appear firmly established in law. The extent of riparian and correlative water rights is uncertain in the light of recent court cases. Presumably the Constitutional Convention wished to provide some protection to uses in accordance with such rights without necessarily sanctioning the rights themselves. However, outright abolition of vested rights would be inconsistent with the right to possess property in Section 2 of Article I and the requirement of compensation for condemnation of private property in Section 20 of Article I. It might have been better if the qualification had referred to the assurance of "water supplies under appurtenant and other vested rights."

The regulatory duty to be placed in the agency is essential, but the legislature was authorized to delegate this power to an agency under the Constitution without amendment.

Nuclear energy

Both the construction of nuclear fission power plants and the disposal of radioactivity in the State would be prohibited under the proposed new Section 8 of Article XI unless approved two-thirds votes in both houses of the Legislature. Wisely, the prohibition does not apply to the nuclear fusion power plants that might some day be developed. Radioactive waste disposal is already prohibited by State law and regulation.

Environmental rights

Under the proposed Section 9 of Article XI, a broad standing would be provided to bring suit in the courts for infringement of a "right to a clean and healthful environment." However, the extent of cleanliness and healthfulness to which the right would be established is wisely qualified as that "defined by laws."

Overall comments

Few new environmental management powers would be placed in the State under the proposed amendments of the Constitution. However, certain powers would be converted to duties, and certain powers or duties would be reinforced by their explicit or specific statement. Furthermore, in the spectrum of resource conservation, the emphasis would clearly be shifted away from the development and use end toward the protection end. In line with this shift, an explicit duty would be placed on the State to manage the growth of its population (or at least to attempt such management), and the State would be empowered to acquire land for this purpose.

The intent of promoting the welfare of the people clearly underlies these changes. This intent is given more or less explicit expression in several of the proposed amendments. With respect to water resources, it is expressed as providing for the benefit of future as well as present generations.

A broad standing to bring suit in the courts for the encouragement of environmental rights would be provided. However, these rights are to a clean and healthful environment as defined by law, so that suits cannot be brought under the provision for minor environmental degradations that are legally permissible.

In detail, the wisdom of some of the provisions may be questioned:

- 1) Making it a duty of the State to manage population growth as in IX, 6, rather than leaving this as simply a power of the State, may be considered unwise until there is some consensus as to how stringent the controls of growth should be and how population growth may appropriately be managed.
- 2) The claim to a State right to manage the resources of its archipelagic waters, as in XI, 3, may be questioned. Jurisdiction over the channels between the islands has not been settled and cannot be settled by the State unilaterally.
- 3) Requirement that the legislature vest the power to regulate water development and use in an agency, as in XI, 7, may be questioned. The appropriate regulatory body may be a commission. However, in statute an agency is defined as including a commission.
- 4) Granting an agency the power to establish overall water policies as in XI, 7 is not appropriate. This should be the function of the Legislature. However, the Legislature may presumably establish broad policies to which the policy details established by the agency would have to conform.
- 5) The failure to recognize that there are other water rights than appurtenant water rights in XI, 7 may be questioned, but will probably have little practical importance.

With the possible exception of these questionable matters, the environmental proposals for amendment of the Constitution are appropriate in substance and phraseology. The Committee on Environment, Conservation, Agriculture and Land and the Committee on style deserve commendation for their efforts.

Environmental Amendments to
THE CONSTITUTION OF THE STATE OF HAWAII
Proposed by the 1978 Con-Con

Reproduced here are only the Preamble, parts of the present Article VIII on "Public Health and Welfare" which is proposed to be renumbered IX, and the present Article X on "Conservation and Development of Resources" which is proposed to be renumbered XI and retitled "Conservation, Control and Development of Resources."

Proposed deletions are placed in brackets. Proposed additions are underlined.

PREAMBLE

We, the people of [the State of] Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage[,]
and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."

We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

FEDERAL CONSTITUTION ADOPTED

The Constitution of the United States of America is adopted on behalf of the people of the State of Hawaii.

ARTICLE [VIII] IX
PUBLIC HEALTH AND WELFARE
PUBLIC HEALTH

Section 1. The State shall provide for the protection and promotion of the public health.

HOUSING, SLUM CLEARANCE, DEVELOPMENT AND
REHABILITATION [AND HOUSING]

Section [4.] 5. The State shall have the power to provide for, or assist in, housing, slum clearance and the development or rehabilitation of substandard areas[, and the]. The exercise of such power is deemed to be for a public use and purpose.

MANAGEMENT OF STATE POPULATION GROWTH

Section 6. The State and its political subdivisions, as provided by general law, shall plan and manage the growth of the population to protect and preserve the public health and welfare; except that each political subdivision, as provided by general law, may plan and manage the growth of its population in a more restrictive manner than the State.

PUBLIC SIGHTLINESS AND GOOD ORDER

Section [5.] 7. The State shall have the power to conserve and develop [its natural beauty,] objects and places of historic or cultural interest[, and provide for public sightliness and physical good order[, and for that purpose]. For these purposes private property shall be subject to reasonable regulation.

PRESERVATION OF A HEALTHFUL ENVIRONMENT

Section 8. The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources.

CULTURAL RESOURCES

Section 9. The State shall have the power to preserve and develop the cultural, creative and traditional arts of its various ethnic groups.

ARTICLE [X] XI
CONSERVATION, CONTROL AND DEVELOPMENT
OF RESOURCES

[RESOURCES; CONSERVATION, DEVELOPMENT AND USE

Section 1. The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.]

CONSERVATION AND DEVELOPMENT OF RESOURCES

Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

[NATURAL RESOURCES;] MANAGEMENT AND
DISPOSITION OF NATURAL RESOURCES

Section 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be [authorized]

provided by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The mandatory provisions of this section shall not apply to the natural resources owned by or under the control of a political subdivision or a department or agency thereof.

AGRICULTURAL LANDS

Section 3. The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

PUBLIC LAND BANKING

Section 4. The State shall have the power to acquire interests in real property to control future growth, development and land use within the State. The exercise of such power is deemed to be for a public use and purpose.

[FARM AND HOME OWNERSHIP

Section 5. The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.]

GENERAL LAWS REQUIRED; EXCEPTIONS

Section [4.] 5. The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

[SEA FISHERIES] MARINE RESOURCES

Section [3.] 6. The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law.

All fisheries in the sea waters of the State not included in any fish pond [or], artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same[.]; provided that mariculture operations shall be established under guidelines enacted by the legislature, which shall protect the public's use and enjoyment of the

reefs. The State may condemn such vested rights for public use.

WATER RESOURCES

Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

NUCLEAR ENERGY

Section 8. No nuclear fission power plant shall be constructed or radioactive material disposed of in the State without the prior approval by a two-thirds vote in each house of the legislature.

ENVIRONMENTAL RIGHTS

Section 9. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.