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**SB 39, SB 40, HB 1038, and HB 1061
RELATING TO A WATER RESOURCES AGENCY
(OR WATER USE CONTROL BOARD)**

**Statement for
Senate Committee on
Economic Development
Public Hearing, 9 March 1979**

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The purpose of both SB 39 and SB 40, as indicated in the bills, is to implement Section 7 of Article XI of the State Constitution, a new section resulting from the constitutional amendments adopted in 1978 that calls for expansion and consolidation of State regulatory powers over the use of water resources. Two bills that have been introduced in the House, HB 1038 and HB 1061 would accomplish the same purpose. The needs for water resource use regulation were intensively studied for more than a year by the State Water Commission which has recently recommended passage of a bill almost identical to SB 40, its companion in the House, HB 1038, and a similar House bill, HB 1061. Because of the similarities of intent among all of the bills and similarities of means proposed by most of them, all of the bills are addressed in this statement.

Both of the authors of this statement were members of the State Water Commission, and hence were intimately involved in the preparation of the bill recommended by the commission that seems to have served directly as a model for SB 40 and HB 1038 and less directly as a model for HB 1061. Ordinarily the Environmental Center would rely on persons less directly involved in the preparation of proposed legislation for the review of the legislation. However, the scope of the bills considered here is so great, and the time available for this review has been so limited, that we have undertaken the preparation of this statement ourselves, and have limited ourselves to comparisons among the provisions of the several bills.

The statement does not reflect an institutional position of the University.

SB 39

In attempting to implement the new constitutional provision regarding a water resources agency, this bill would set up the agency and give it certain powers and duties not significantly detailed beyond what is in the constitutional amendment itself.

The duties identified for the new Water Resources Agency (WRA) in section 1 of the law that is proposed are the very general duties prescribed in the constitutional amendment itself. The bill does not appear to recognize that most of these duties are already responsibilities of other agencies. For example, among the responsibilities proposed for the new agency are, in subsection (3) the protection of the water resources, watersheds, and stream environments, and in subsection (5) the establishment of procedures for regulatory (sic, regulation is intended) and uses of the resources. These duties are to a very considerable extent already in the areas of responsibility of DLNR, DOH, and the county BWS's. Yet the bill provides neither for reconciling the duties of the new agency with those of existing agencies nor for repealing the duties of existing agencies.

In contrast, SB 40, HB 1038, HB 1061 and the bill recommended by the State Water Commission would place in the new agency only certain parts of the regulatory authority now held by other agencies, and would explicitly take those parts of the authority away from the agencies now holding it. The other bills would also provide the new agency with certain advisory or overriding approval powers concerning other parts of the existing regulatory authority.

Subsection (1) of section 1 of the law proposed in SB 39 would empower the WRA to "set overall water conservation, quality and use policies." It is appropriate that an agency recommend policies of this sort, but the establishment of the policies should be by the legislature itself.

Section 2 of the law proposed in SB 39, would require that the WRA include an as yet unspecified number of commissioners, among whom at least one each should be appointed from the counties of Hawaii, Maui, and Kauai. The omission of the City and County of Honolulu is not explained.

In summary SB 39 would establish the water resources agency called for in the constitutional amendment; would give it very broad powers, in one case not appropriately delegated to the agency by the legislature, and in other cases in conflict with powers now held by other agencies; and would require representation on the governing commission from only three of the four counties of Hawaii. We suggest consideration of the alternative means for implementing the constitutional amendment proposed in the other bills discussed in this statement.

SB 40, HB 1038, AND WATER COMMISSION BILL

Introduction

SB 40, which is identified as "Relating to the Water Use Control Board (Constitutional Amendments of Article XI, Section 7)" and HB 1038, which is identified as "Relating

to water use regulation," propose very similar versions of a new chapter of Hawaii Revised Statutes that would be entitled a "Water Use Control Act". In spite of the differences in the titles of the bills and other differences discussed below, the bills seem substantively identical to each other and to the bill proposed by the State Water Commission (Appendix A in the Commission's report) in which the new water agency would have the same title as that proposed in SB 40 and HB 1038. We therefore call attention again to the efforts of the State Water Commission in preparing the bill that it recommended, and discuss SB 40, HB 1038, and the Commission bill only in terms of the minor differences among them.

Relation to Constitutional amendment

Section 1 of SB 40 indicates the purpose of implementing the new constitutional provision, Article XI, Section 7. Neither the Commission bill nor HB 1038 explicitly refer to that constitutional provision. However, as indicated in the Commission report, the Commission's bill would implement the Constitutional amendment, and HB 1038 would also.

Enactment

Neither the Water Commission bill nor HB 1038 contains a provision calling specifically for amendment of Hawaii Revised Statutes. Section 2 of SB 40 would specifically amend HRS by adding a new chapter containing the substantive provisions.

Part designation

All three bills separate the proposed law into parts. However, HB 1038 fails to indicate a number or title for the first part.

Numbering

Sections are numbered serially in each part in all three bills. However, the numbers of sections in part I, II, III, etc. are 101, 201, 301, etc. in the Commission bill; 1, 21, 31, etc. in SB 40; and the section numbering starts with 1 in each section in HB 1038.

Order of definitions

The definitions in section 3 in SB 40 and HB 1038 are in alphabetical order. There are some departures from alphabetic order in the Commission bill.

Effective date

The effective date is prescribed in the last section of part V of the Commission bill, but in section 3 of SB 40 and HB 1038.

Summary

In summary, either SB 40 or HB 1038 would implement the new Section 7 or Article XI of the State Constitution in essentially the way recommended by the State Water Commission. HB 1038, however, has a minor editorial flaw in lacking a number and title for the first part of the proposed Act.

Rather than discuss the identical substantive provisions of SB 40 and HB 1038 by themselves, it seems most instructive to compare them with the provisions of HB 1061.

HB 1061 (In comparison with above bills)

Introduction

HB 1061, like SB 40, HB 1038, and the bill recommended by the State Water Commission, would implement the new Section 7 or Article XI of the State Constitution, by establishing a new water agency and providing it with regulatory powers. Instead of "Water Use Control Board" (WUCB) as in SB 40 and HB 1038 (and as proposed by the State Water Commission), the new agency would be titled Water Resources Commission (WRC) in HB 1061. The substantive differences between HB 1061 and SB 40 or HB 1038 are more important than the differences in the title of the agency.

Direct regulatory powers

Like the Water Use Control Board, the Water Resources Commission (WRC) under HB 1061 would be given certain direct regulatory powers that now rest in other agencies. However, where the WUCB would be given certain new regulatory powers as well, the WRC would be given only existing powers by transfer.

The only direct regulatory powers that would be given to the WRC are those relating to groundwater use in HRS Chapter 177. These powers are given to the WRC in subsection 3(5) of the new HRS chapter that is proposed in section 2 of HB 1061, and taken away from the Department of Land and Natural Resources, which now holds them, in the amendments of HRS 177 proposed in section 8 of the bill. In contrast, the direct regulatory powers of the WUCB would extend to all water resource uses, including surface water as well as ground water resources, and its regulatory powers would replace those of the Honolulu Board of Water Supply as well as those of DLNR.

The rationale for HB 1061 indicated in section 1 indicates not only the need for "power to protect Hawaii's natural resources but also the responsibility to do so long before an crises develops." Because no new regulatory powers would be given to the WRC under HB 1061, this bill would not represent any improvement in authorizing controls before crises develop.

As pointed out by the State Water Commission, ground water and surface water are interrelated, and fully effective control of one of these resources cannot be achieved unless the uses of both are subject to regulation. In comparison with SB 40 and HB 1038, HB1061 would provide less comprehensive powers to regulate water resource uses.

One of the reasons given by the State Water Commission for creating a new, independent WUCB was to divorce general regulatory powers from specific responsibilities for water development, thereby removing the bias of a water developing agency in regulating the developments of other parties competing for the use of the same water resources. In transferring the groundwater use controls from DLNR, which has certain water development responsibilities, to the WRC, HB 1061, would accomplish a part of what SB 40 and HB 1038 would in this respect. However, the water resource development competition of the Honolulu Board of Water Supply is more critical than that of DLNR, and unlike the WUCB, the WRC regulatory powers over groundwater use would not supercede those of the Honolulu BWS.

So far as direct regulatory powers are concerned, then, HB 1038 would be more comprehensive and more effective in terms of the rationale indicated both by the State Water Commission and HB 1061 than HB 1061 would be.

Indirect regulatory powers

Under HB 1061, the WRC would be given, in addition to direct regulatory powers, the power "to review and determine" certain specific matters that include the regulatory powers of a number of other agencies, and thus indirectly to control those regulatory powers. As identified in section 3 of the proposed new chapter establishing the WRC (section 2 of the bill) these indirect regulatory powers of the WRC would be:

<u>Subsection of proposed new chapter</u>	<u>Agency</u>	<u>Actions</u>	<u>Statutory authority, HRS</u>
3 (1)	County BWS's	Policy determinations (probably excluding specific regulatory actions)	54-19
3 (2)	DLNR	Management of water resources under public water rights	171-58
3 (3)	DLNR	State water developments	174
3 (9)	DLNR	Water development related to forest reserve management	183
3 (12)	County Planning Commission	Special land use permits	205-6
3 (13)	DOH	Water pollution control	342

In all except the last of these matters, consistent revisions of the present statutory authority are proposed in later sections of the bill. However, in relation to the water pollution control regulations, section 15 of the bill provides merely that the DOH shall consider the advice and recommendations of the WRC, and not that the DOH shall follow this advice and recommendations.

With respect to the "action of other government agencies" SB 40 and HB 1038 would provide that "no state or local government agency may enforce any ordinance, rule, or regulation that affects the development of water...without the written approval of the Board (WUCB)" and, further, that none of these agencies shall condemn any water rights without the written consent of the WUCB. In these alternative bills, then, the indirect regulatory powers are not limited to the seven or eight specific kinds of regulation to which they are limited in HB 1061.

Collateral and subservient powers

In addition to the indirect regulatory powers, the WRC would be provided, under HB 1061, with several powers collateral or subservient to those of other agencies, as indicated below:

<u>Subsection of proposed new chapter</u>	<u>Agency</u>	<u>Powers</u>	<u>Statutory authority, HRS</u>
3 (4)	DLNR	Water resource use and development planning	176-3
3 (6)	DLNR	Well-water waste control	178
3 (7)	DLNR	Flood control coordination	179-4
3 (8)	DLNR	Guidance to water development by soil and water conservation districts	180
3 (10)	DPED	Water system development planning	201-30
3 (11)	LUC	Land Use District boundary changes	205-4
3 (13)	DOH	Water pollution control	342*

*Included in this table as well as earlier table for reasons given in previous section.

With respect to actual implementation, as distinct from planning and policy making, the powers of the WUCB under SB 40 and HB 1038 would be overriding, although indirect, in all of these matters except possibly the Land Use District boundary changes. Whether the Land Use District boundary changes effected by the LUC are considered effected by "ordinance, rule, or regulation" is not clear.

The actions of the WRC and the WUCB may be considered as constituting use allocations of water supply. The actions of the LUC constitute use allocations of land. Consistency in the allocations of land and water are already important and will become increasingly important in the future.

Composition of new body

The proposed size of, and representation from the counties in, the WRC would be identical to that of the WUCB under SB 40 and HB 1038. However, the latter bills require that the appointments be by the Governor, and that the representatives from the counties be selected from nominees of the respective mayors. These requirements do not appear in HB 1061. In addition, SB 40 and HB 1038 require that the members of the WUCB should be selected "on the basis of their general knowledge of and experience with problems relating to the use of water," a requirement not made in the case of the WUC under HB 1061.

Other matters

Under SB 40 and HB 1038, the WUCB would have certain broad powers related to investigation, hearings, subpoenas, and initiation of injunctive relief that would not be granted to the WRC under HB 1061 unless already existing in HRS 177.

SB 40 and HB 1038 in addition contain penalty provisions that are not provided in HB 1061.

Summary

HB 1061 deals less comprehensively with the needs for regulation of water use and development than SB 40 and HB 1038.

Overall Summary

SB 39 would provide the Water Resources Agency (WRA) that it would establish with the broad powers indicated in the new Section 7 of Article XI of the State Constitution. However, some of those powers are now held by existing agencies; hence the bill would give rise to inter-agency jurisdictional conflicts. In addition it would give the WRA policy making powers that should be retained by the Legislature itself.

The needs for regulation of water resource useage recognized in the new constitutional provision would be met better by SB 40 or HB 1038 or by HB 1061.

HB 1061 would provide the Water Resources Commission (WRC), which it proposes, with a broader range of explicitly enumerated powers than SB 40 or HB 1038 would provide

the Water Use Control Board (WUCB) which they propose. However, with the exception of regulatory powers over groundwater use, the WRC's powers under HB 1061 would be entirely indirect, that is they would be exercised directly by agencies other than the WRC. Under SB 40 and HB 1061, the WUCB would have as broad a range of indirect powers as the WRC, although these are not explicitly enumerated. No regulatory powers would be provided in HB 1061 that some agency does not now exercise. However, under SB 40 and HB 1038, the WUCB would have direct regulatory powers over surface water uses that are not now possessed by any agency.

Of the several bills, then, SB 40 and HB 1038 would provide most comprehensively for the regulation of water resource uses without providing the agency they would create with powers properly retained by the legislature or powers in conflict with those of other agencies.