

**Department of Health, Clean Water Branch
Response to Public Comments on the Hawaii Administrative Rule
Amendment, Published on August 28, 2014**

On August 28, 2014, the State of Hawaii (State), Department of Health (DOH), Clean Water Branch (CWB) published a hearing notice for the proposed revisions to Hawaii Administrative Rules (HAR), Chapters 11-54 (Water Quality Standards) and 11-55 (Water Pollution Control) in the *Honolulu Star-Advertiser*, *Hawaii Tribune-Herald*, *West Hawaii Today*, *The Maui News*, and *The Garden Isle* newspapers, Docket No. R-1-14. The proposed revisions were available for public review between August 28, 2014, the publication date of the hearing notice, and October 2, 2014, date of the hearing. Comments were accepted by email, mail, and hand delivery, and were received by the Department until 4:30 pm on October 2, 2014.

The DOH received seven (7) sets of comments on the proposed revisions (see Attachment). As a result of comments received, the following were revised:

"Discharge" means the discharge of a water pollutant.

["Discharge of a water pollutant" means any addition of any water pollutant or combination of water pollutants to State waters.] (removed)

HAR Section 11-54-1

"Water pollution control system" means a system designed and constructed specifically for the purpose of collecting, handling, storing, treating, or disposing of storm water, domestic wastewater, and/or industrial wastewater, to prevent water pollution.

HAR Section 11-54-5.1(a)(1)(A)

[end of section]

As listed in Appendix A dated July 1, 2014, entitled "Class 1, Inland Waters", located at the end of this chapter.

HAR Section 11-54-5.1(a)(3)(A)

[end of section]

As listed in Appendix A dated July 1, 2014, entitled "Class 1, Inland Waters", located at the end of this chapter.

HAR Section 11-54-5.1(b)(1)

[end of section]

As listed in Appendix A dated July 1, 2014, entitled "Class 1, Inland Waters", located at the end of this chapter.

HAR Section 11-54-11(a)

A schedule of compliance is an NPDES implementation tool that applies to the implementation of water quality standards through NPDES permits only.

HAR Section 11-54-11(d)(1)

Comply with the provisions in 40 CFR section 122.47, revised as of July 1, 2014, and;

HAR Section 11-54-11(d)(3)

Require compliance as soon as possible.

HAR Section 11-54-11(e)

A schedule of compliance that exceeds one year in duration must set forth interim requirements, specific dates to meet interim requirements, and a date by which the required water quality-based effluent limitation must be achieved.

HAR Section 11-54-12(a)

An intake credit is an NPDES implementation tool that applies to the implementation of water quality standards through NPDES permits only.

HAR Section 11-55-19(a)(10)

Recreational criteria for all state waters in HAR section 11-54-8. To comply with HAR sections 11-54-8(b) and (c) requirements, at least one sample shall be collected on every fifth day of the thirty day sampling period. Each sample shall be collected and analyzed pursuant to 40 CFR Part 136. The director may require samples to be collected more frequently within the thirty day period.

The DOH acknowledges and appreciates all of the comments that were received. The public hearing comments and DOH responses to these comments are as follows:

Comment Set 1 – Mr. Sean M. O’Keefe, Alexander & Baldwin, Inc.

Comment 1.a:

Proposed new definition of “discharge of a water pollutant”

The proposed HAR Section 11-54-1 contains a new definition for the term “discharge of a water pollutant”. Under the proposal, the term means “any addition of any water pollutant or combination of water pollutants to state waters”.

The proposed definition is inconsistent with the existing definition for the term “discharge of a pollutant” in HAR Chapter 11-55, Water Pollution Control, even though the terms themselves are essentially identical (“water pollutant” means the same thing as “pollutant”, just as “water pollution” means the same thing as “pollution”). The term “discharge of a pollutant” is defined in HAR Section 11-55-1 to mean “any addition of any pollutant or combination of pollutants to any state waters from any point source, or any addition of any pollutant or combination of pollutants to the water of the contiguous zone or the ocean from any point source other than a vessel or other floating craft used as a means of transportation. This includes additions of pollutants to state waters from: surface runoff that is collected or channeled by man; or discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.” (Emphasis added.) This definition is excerpted from federal regulations implementing the Clean Water Act at 40 CFR Section 122.2.

In addition, the proposed definition is inconsistent with the existing definition for the terms “discharge of a pollutant” and “discharge of pollutants” already included in the water quality standards at HAR Section 11-54-9.1, which definition is identical to that found in Section 502(12) of the Clean Water Act. The Clean Water Act defines these terms as “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft” (that is, essentially the same definition as is found in 40 CFR Section 122.2).

Thus, the Department is proposing to add a “new definition” for a term that is already defined in the existing rule, as well as in the companion water pollution control regulations. Moreover, the Department is proposing to make the new definition inconsistent with the existing definitions. Most importantly, the proposed new definition is much broader than the existing definitions, as it omits any reference to point sources.

At best, the proposed new definition will cause considerable confusion regarding the meaning of the term by having differing definitions in the state's two sets of rules regulating water pollution, and by having differing definitions within HAR Chapter 11-54.

The broader implications of this proposed change are uncertain but potentially severe, as it could result in requirements that are currently only applicable to point sources being imposed upon other sources of water pollution. Importantly, this definition is not mentioned in the Rationale for the Proposed Revisions, nor is any rationale provided for this proposed change. Not only is the Department's intent therefore unclear, but it is arguable whether this proposed change has been adequately noticed.

The Department of Health should retain the existing definition for the term "discharge of a (water) pollutant". If such a change is proposed in the future, the Department should provide a rationale for the change and provide adequate opportunity for the public to comment on the proposal.

Response to Comment 1.a:

In view of the comments, DOH is removing the proposed definition for "discharge of a water pollutant". DOH may reconsider the proposed definition in future revisions.

Comment 1.b:

Proposed new definition of "water pollution control system"

The proposed rule includes a new definition for the term "water pollution control system" which means "a facility which collects, handles, stores, treats, or disposes of domestic wastewater, and/or industrial wastewater, to prevent water pollution". This term is used in the definition of "state waters" contained in HAR Section 11-54-1, and in Chapter 342D, Hawaii Revised Statutes. "State waters" excludes drainage ditches, ponds, and reservoirs required as part of a water pollution control system. As such, the applicability of the State's water quality standards does not extend to water pollution control systems. That is, water in drainage ditches, ponds, and reservoirs required as part of a water pollution control system is not required to meet water quality standards (although any discharge from such a system would be subject to the standards).

By restricting the definition of water pollution control system to systems which manage "wastewater", the proposed definition appears to exclude systems which manage, and prevent water pollution from, stormwater. Thus, settling basins designed to reduce the amount of sediment in stormwater runoff prior to its discharge into a state water would, under the proposed definition, themselves be considered state waters subject to the water quality standards. Similarly, the drainage ditches upstream of such basins, designed to carry potentially polluted stormwater to the basins for

settling, would also be considered state waters, and would need to meet basic water quality criteria before the discharge has reached the settling basin. This nonsensical result appears to be unintended and should be corrected. The proposed definition should be revised to clarify that the term “water pollution control system” applies to systems for the treatment of stormwater discharges as well as wastewater.

Response to Comment 1.b:

The DOH agrees. The proposed definition for “water pollution control system” has been revised to include systems for the treatment of storm water.

Comment 1.c:

Proposed list of Class 1.a waters in Appendix A

Under the proposed rule, HAR Section 11-54-5.1 identifying inland waters to be protected has been amended to include reference to a new Appendix A. According to the rationale document, this change is intended to clarify existing classification of state waters by listing specific Class 1.a water body names. According to the Department, this change will allow the public and applicants for permits and water quality certifications to identify specific water bodies that are Class 1 without having to “research other regulations” (e.g., HRS Chapter 195 (sic)).

Under HAR Section 11-54-5.1, Class 1 inland waters include waters within reserves, preserves, sanctuaries, and refuges established by the Department of Land and Natural Resources (DLNR) under Chapter 195, HRS (that is, within the Natural Area Reserves System), waters within national and state parks and state and federal wildlife refuges, waters that have been identified as unique or critical habitat for threatened or endangered species by the U.S. Fish and Wildlife Service, and waters within Waimanu National Estuarine Research Reserve.

It is important to note that Chapter 195, HRS relates solely to the Natural Area Reserves System, and that only waters within reserves, preserves, sanctuaries, and refuges established under Chapter 195, HRS are considered Class 1.a waters. Other reserves, preserves, sanctuaries, and refuges established under other authorities, including by private landowners, do not necessarily meet this criteria for identification as Class 1.a waters and should not be included in Appendix A unless they meet one or more other criteria for such identification. The same is true of other areas which are not either state parks or national parks. The proposed Appendix A appears to include areas that were not previously identified as Class 1.a waters in the Department’s 1987 Water Quality Standards Maps and/or would not meet any of the criteria of Section 11-54-5.1. All areas identified as Class 1.a waters must meet one or more of the specific criteria in HAR Section 11-54-5.1. Any expansion or re-interpretation of these

criteria must be identified and noticed, and the public provided with an opportunity to comment.

Proposed list of Class 1.b waters in Appendix A

HAR Section 11-54-5.1 also references Appendix A with respect to identification of Class 1.b inland waters. Class 1.b inland waters include all waters located within protective subzones designated under HAR Chapter 13-5 by DLNR. The extent of areas within the protective subzones is considerably broader than the areas listed in Appendix A. It appears that by including the phrase “as listed in Appendix A” the department has inadvertently reduced the extent of Class 1.b inland waters, thereby reducing the level of protection afforded to these waters under the water quality standards. Reference to Appendix A with respect to identification of Class 1.b inland waters should be deleted, since it is not practicable to individually list all areas within the protective subzone.

Response to Comment 1.c:

The waterbodies listed in Appendix A of Class 1, Inland Waters were taken from the Department of Land and Natural Resource’s (DLNR) HAR chapters adopted pursuant to HRS Chapters 190 and 195 as of July 1, 2014. This list combines Class 1.a. and 1.b. waterbodies but does not distinguish these subclasses.

No changes to the proposed rules have been made as a result of this comment.

Comment Set 2 – Mr. John McHugh, Hawaii Farm Bureau

Note: Several of the comments by the Hawaii Farm Bureau (HFB) covered similar topics to comments submitted by Alexander & Baldwin, Inc. (A&B, Inc.) and responses to those similar comments may be found in the responses to A&B, Inc. Therefore, the responses below address comments that are unique to HFB.

Comment 2.a:

In addition, we are extremely concerned that the public, including our members, have not had sufficient notice of the proposed change (significantly, it was not even identified by the Department and no rationale was provided for the revision), and therefore have not had the opportunity to fully understand and provide comment on how the proposal will affect them.

The Department is proposing to add a “new definition” for a term already defined in the existing rule, as well as in the companion water pollution control regulations. This change will apparently suddenly and unfairly broaden existing regulations to apply to non-point sources, without adequate notice, while making the new definition inconsistent with existing definitions.

Response to Comment 2.a:

In view of the comments, DOH is removing the proposed definition for “discharge of a water pollutant”. DOH may reconsider the proposed definition in future revisions.

Comment 2.b:

Because our farmer and rancher members across the islands may be negatively impacted by some of these changes, we request that the Department extend the comment period while holding informational meetings to explain the rationale justifying the changes and to allow for a better understanding of the potential impact to their livelihoods.

Response to Comment 2.b:

The rules revision process allows for comments on all proposed changes. These changes were public noticed and comments accepted longer than the minimum 30-day requirement. The public comment period has not been extended.

No changes to the proposed rules have been made as a result of this comment.

Comment Set 3 – Ms. Lisa Woods Munger, Goodsill Anderson Quinn & Stifel

Comment 3:

The proposed rule, HAR § 11-54-12(d)(1), states that the director shall grant intake credits only if “[o]ne hundred percent of the intake water containing the intake pollutant is withdrawn from the same body of water into which the discharge is made[.]” We urge the Department of Health to revise this provision and its counterpart in Chapter 11-55 to make them consistent with EPA’s rule. While 40 CFR § 122.45(g)(4) similarly provides that “[c]redit shall be granted only if discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made[.]” 40 CFR 122.45(g)(4) continues to provide that:

“The Director may waive this requirement if he finds that no environmental degradation will result.”

We urge the Department of Health to include this language in both Chapters 11-54 and 11-55. The Director of the Department should have the same authority and discretion afforded to the Director or the Regional Administrator of the EPA to waive the “same body of water” requirement in appropriate cases, provided that no environmental degradation will result.

Response to Comment 3:

The language will remain as is. The water quality standards as written ensure that no waterbody degradation will result, therefore, if intake water is taken from a waterbody that does not meet water quality standards and discharges effluent into a different waterbody, environmental degradation will occur. Furthermore, different waterbodies may have pollutants other than the pollutants of concern being exchanged and, therefore, the effluent may add pollutants that were otherwise not present or not causing impairment to the discharge waterbody.

No changes to the proposed rules have been made as a result of this comment.

Comment Set 4 – Peter Landry, General Contractors Association of Hawaii

Comment 4.a:

We request that the CWB take action to clarify and/or simplify the "wet" and "dry" definitions that apply to specific water quality criteria for various types of water bodies. This problem has arisen since the December 6, 2013 revisions to HAR 11-54 and 11-55.

Response to Comment 4.a:

Thank you for your comment. The DOH has taken your comments into consideration and clarification of these issues will be evaluated in future rules revisions.

No changes to the proposed rules have been made as a result of this comment.

Comment 4.b:

The DOH 1977 report is out-of-print and difficult to access - it isn't readily available on the internet, nor is it on file at the Hawaii State Library.

Response to Comment 4.b:

The report, "An Ecosystem Approach to Water Quality Criteria" published by the DOH in 1977 is available from the Clean Water Branch upon request.

No changes to the proposed rules have been made as a result of this comment.

Comment 4.c:

- ***The maps provided in the reference document are inadequate - they only provide an outline of each island, with no shoreward landmarks such as terrain features, rivers, etc. It could be difficult to differentiate the boundary between wet areas and dry areas.***
- ***The maps indicating dry and wet areas were established more than 30 years ago, and are likely based on data 40 to 50 years old. We recommend that the maps be updated using the Rainfall Atlas of Hawaii, published by the University of Hawaii Geography Department in 2013 (<http://rainfall.geography.hawaii.edu/>) and incorporated into the Water Quality Standards maps that are currently available on the DOH website.***

Response to Comment 4.c:

Thank you for your comment. The DOH has taken your comments into consideration and these map issues will be evaluated in future rules revisions.

Comment 4.d:

Correction to Table 34.1

As mentioned previously, one of the parameters listed in chapter 11-55 Appendix B, Table 34.1 that refers to Note {3} is Quantity of Discharge. Prior to the December 6, 2013 updates to HAR 11-54 and 11-55, the requirement was simply to report on this parameter, since no limitation was in place. However, the revised wording for Note {3} is nonsensical with respect to Quantity of Discharge, since chapter 11-54 does not regulate the quantity of discharges, only the presence of contaminants or pollutants. We recommend that Table 34.1 be updated with a new note that applies to the Quantity of Discharge parameter.

Response to Comment 4.d:

Chapter 11-54 does not currently limit quantity of discharge. The DOH disagrees that “Note {3} is nonsensical with respect to Quantity of Discharge” simply because it is not currently regulated under HAR Chapter 11-54. Note {3} is pertinent to any parameter without an explicit water quality effluent limitation in HAR Chapter 11-54.

No changes to the proposed rules have been made as a result of this comment.

Comment Set 5 – City and County of Honolulu, Department of Environmental Services

Comment 5:

Proposal: Revise 11-54-8 (a) to read as follows:

(a) These criteria are designed to protect the public from exposure to harmful levels of pathogens while participating in primary water-contact activities. The specific criteria for enterococcus shall be expressed in colony forming units (CFU) per one hundred milliliters or as a most probable number (MPN) per one hundred milliliters, as specified by the analytical method used. Primary contact activities in marine waters occur within 500 meters from shore. The number of samples taken will be as specified in §11-55-19(10).

Rationale: The proposed revision would lead to an unintended and inconsistent result whereby the same enterococcus criteria would apply at the shoreline, nearshore, and offshore, and in areas where there is no natural public swimming, bathing or wading.

Response to Comment 5:

All State waters are recreational waters. The Clean Water Act 101(a)(2) states: “It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved....” This is consistent with Section 11-54-3 that designates each waterbody classification as recreational (e.g. Class 1, Class 2, Class AA, Class A).

No changes to the proposed rules have been made as a result of this comment.

Comment 6 – Ms. Janet Hashimoto, Water Quality Assessment Section Manager and Mr. David Smith, NPDES Permits Section Manager, Environmental Protection Agency, Region 9

Comment 6.a:

Regarding the proposed revisions to HAR 11-54:

- 1. We are concerned with the proposed language for compliance schedules and intake credits, as these provisions are applied to water quality criteria or standards in addition to effluent limitations. Compliance schedules and intake credits are NPDES permit implementation tools, which apply to effluent limitations implementing water quality standards, not the standards themselves. DOH should clarify in the HAR that compliance schedules and intake credits apply only to implementation of water quality standards through NPDES permits.***

- 2. Regarding the proposed language in HAR 11-54 for a schedule of compliance, DOH should clarify the following:***
 - a. Pursuant to 40 CFR 122.47, a schedule of compliance must require compliance as soon as possible. The proposed language currently states that a compliance schedule must "include an enforceable final effluent limitation that is within the timeframe allowed as specified in sections 11-55-08(a)(l)(b), 11-55-15(d), 11-55-21, 11-55-22, 11-55-23(10), and 11-55-34.07(3)(B)." DOH should specify in HAR 11-54 that a compliance schedule must require compliance as soon as possible.***
 - b. Also pursuant to 40 CFR 122.47, a schedule of compliance must set forth interim requirements and dates for their achievement. Currently the proposed language only requires "interim requirements and a date by which the required water quality criteria must be achieved." The HAR should be clear that specific dates for each interim requirement must be included in addition to a final compliance date. Also, as described above, the latter part of the sentence should be changed from "water quality criteria" to water quality-based effluent limitations, as compliance schedules apply to effluent limitations that implement water quality criteria, not the criteria themselves.***
 - c. The proposed language should include the most updated CFR date (2014).***

Response to Comment 6.a:

The DOH agrees. The language in the rule was revised to clarify and correct the issues brought up by the EPA in the comments.

Comment 6.b:

Regarding the proposed revisions to HAR 11-55:

- 1. We recommend DOH remove the following language in HAR 11-55-19 regarding implementation of the new recreational criteria: "Recreational criteria for all state waters in HAR section 11-54-8. A minimum of six samples collected on every fifth day over the thirty day sampling period as specified in the permit, shall be required to comply with HAR sections 11-54-S(b) and (c)." This would require collection of 36 samples/month for assessment of compliance with the water quality standard. Removal of this language will allow DOH the flexibility to consider the amount of data needed to assess compliance for each specific NPDES permitted facility.***

Response to Comment 6.b:

The language in the rule was revised to require a minimum of six samples over a thirty day sampling period rather than the 36 samples as previously worded. The six sample minimum is in keeping with HAR Sections 11-54-8(b) and (c). As the six samples over thirty days is a minimum requirement, the DOH retains the flexibility to increase the number of samples, as necessary.

Comment Set 7 – David Penn

Comment 7:a.

I. DOH's proposed "Clarification on Existing Classification of State Waters" would actually blur and add new tension to the classification scheme; misrepresent the identity and location of certain waters; and aggravate, rather than relieve, the research burden on users of the WQS.

A. Blurring and tension in the proposed classification scheme

DOH's WQS rationale (page 8) states that "DOH is proposing to revise § 11-54-5.1 for clarification purposes only by listing the specific [inland] water bodies that are Class 1." The proposal to add "are/as listed in Appendix A" throughout § 11-54-5.1 implies that DOH would regulate as Class 1 only the specific water bodies listed in Appendix A. This implication raises questions about (1) why DOH would retain the existing text of the rule that provides for the future operation of "other regulations ... to determine Class 1 waters" (see DOH WQS Rationale, page 8), and (2) whether or not DOH would abide by the existing text of the rule and amend Appendix A whenever one of the "other regulations" produces a new determination of Class 1 waters. The analysis and questions presented here with regard to § 11-54-5.1 and Appendix A also apply to DOH's proposal to revise § 11-54-6 by listing in Appendix B and Appendix D the specific marine water bodies that are Class AA.

If DOH intends to shut the door on the decades-old operation of "other regulations ... to determine Class 1 [and Class AA] waters," then the most straightforward and transparent solution would be for DOH to initiate consultation with the agencies that operate the "other regulations;" propose removing the offending text from the existing rule; and explain publicly why this should occur, including an account of the agency consultations. On the other hand, if DOH intends to continue allowing the operation of "other regulations ... to determine Class 1 [and Class AA] waters," then DOH should revise the proposed language to clarify that intent, and to explicitly provide for future amendment of Appendices A, B, and D. Regardless, it is curious why DOH, given its interest "to be consistent with the proposed revision in HAR 11-54-5.1 and to improve the readability of HAR 11-54" (WQS Rationale, page 8), did not propose similar revisions and appendices for the classification of marine bottom types in § 11-54-7, which is also determined by the operation of "other regulations" and includes long lists of named areas for certain bottom types that could be moved to an appendix.

DOH proposes in its Appendix A that Class 1 inland waters include, for example, a waterbody that is located on lands within a national historical park, national historical site, state recreational area, state monument, state historical park, state wayside, or state recreational pier. However, DOH does not identify or explain its basis for determining that such lands fall within the narrower terminology of the rule's main text, such as "national park" or "state park." Although it would be good administrative practice for DOH to make such determinations in consultation with an agency that implements an "other regulation" that affects the classification, DOH does not provide evidence of such consultation.

Response to Comment 7:a.

The DOH based the list of Class 1 waters on existing language provided in HAR Chapter 11-54-5.1.

For example existing language in HAR Section 11-54-5.1(a)(1)(A) sets the criteria for a waterbody to achieve Class 1.a. status as:

- (i) All flowing waters within the natural reserves, preserves, sanctuaries, and refuges established by the department of land and natural resources under chapter 195, HRS, or similar reserves for the protection of aquatic life established under chapter 195, HRS.
- (ii) All flowing waters in national and state parks.
- (iii) All flowing waters in state or federal fish and wildlife refuges.
- (iv) All flowing waters which have been identified as a unique or critical habitat for threatened or endangered species by the U.S. Fish and Wildlife Service.
- (v) All flowing waters in Waimanu National Estuarine Research Reserve (Hawai'i).

Hence, Appendix A includes those areas that correspond to at least one of the categories (i) through (v).

Similarly, existing language in HAR Section 11-54-5.1(a)(1)(B), sets the criteria for a waterbody to achieve Class 1.b. status as:

All flowing waters in protective subzones designated under chapter 13-5 by the state department of land and natural resources

Hence, Appendix A has added to it those areas designated as protective subzones in DLNR's HAR Chapter 13-5.

This method is followed using existing language in 11-54-5.1(a)(2)(A), 11-54-5.1(a)(2)(B), 11-54-5.1(b)(1), and 11-54-5.1(b)(2) to determine all Class 1 waters.

Furthermore, by adding the text "as listed in Appendix A dated July 1, 2014, entitled "Class 1, Inland Waters", located at the end of each section, the list of Class 1 waters are being established based on the existing language in the rule

along with consultation with other agency promulgated rules and/or determinations as of July 1, 2014.

Appendices B,C, and D were similarly determined using existing text in the rule. An appendix for marine bottom types was not created as the DOH is not aware of a listing of these waterbodies meeting the requirements of HAR Section 11-54-7.

The goal in creating the appendices is to establish a set list of waterbodies that is both practical and functional for public use. It does not, however, disallow any person from submitting a request with justification to the Director of Health for consideration in changing a waterbody classification and/or adding to these lists in the future.

Finally, the appendices are evidence of agency consultation, as they are based on rules or decisions promulgated by other agencies (e.g. DLNR, NMFS, etc.) following established processes. The selection of waterbodies is, therefore, unprejudiced and does not rely on the discretion or agreement of parties in the absence of transparency.

No changes to the proposed rules have been made as a result of this comment.

Comment 7.b.:

Under these circumstances, given that § 11-54-6 contains provisions that explicitly tie Class AA waters to "waters in ... federal ... marine sanctuaries" and "waters in ... sanctuaries established by the National Marine Fisheries Service," it does not make sense for DOH to omit the Hawaiian Humpback Whale National Marine Sanctuary (HHWNMS) from its proposed list of Class AA marine waters, particularly when DOH does not identify or explain a reason for this omission. Similarly, an argument that Sanctuary waters do not need Class AA protection to fulfill the Sanctuary purpose seems ridiculous when weighed against DOH's proposed determination that a state historical park or a state wayside needs Class 1 protection to fulfill its historical or rest area purpose. Although the National Marine Fisheries Service (NMFS) is no longer the agency that establishes a federal marine sanctuary, authority for this task remains within the parent agency (U.S. Department of Commerce, National Oceanic and Atmospheric Administration), it would be absurd, internally inconsistent, and contrarian for DOH to conclude that waters in the HHWNMS are not Class AA merely because a federal marine-focused agency other than NMFS established the Sanctuary. Even if the NMFS reference has become ambiguous overtime, DOH did not produce historical evidence of its own intent for the original language (when first adopting that language, what did DOH say that it meant?), which could be dispositive of the issue.

Response to Comment 7.b.:

The anti-degradation provisions of HAR Chapter 11-54 protect high-quality class A waters from significant deterioration without a strict showing and thus protect the water quality feature of the whales current habitat. Also, current science does not require class AA waters; the final federal rule establishing the sanctuary and the latest available Hawaiian Islands Humpback Whale National Marine Sanctuary Management Plan (National Marine Sanctuary Program, 2002) do not indicate that water quality meeting class A standards is inadequate or risky for the protection of the whales.

As mentioned previously, any person may submit a written request with justification to the Director of Health for consideration to change a waterbody classification and/or add to the lists in the future

No changes to the proposed rules have been made as a result of this comment.

Comment 7.c.:

B. Misrepresented identity and location of waterbodies

Although DOH proposes that Class 1 inland waters are "listed in Appendix A," proposed Appendix A does not list waterbodies, it lists land areas on which a waterbody may occur. Moreover, DOH (1) does not identify or explain the assumptions, criteria, and data sources that it used to generate the list of land areas in Appendix A; (2) does not provide geospatial information (e.g. property descriptions, maps, or geocodes) for the areas listed in Appendix A; and (3) does not link each area listed in Appendix A with particular "other regulations" that determine its classification.

In many cases, the overbroad adoption of an entire land area, by name only, would misrepresent the identity and location of Class 1 waterbodies. For example, in order for a "Forest Reserve" area to include a Class 1 waterbody, that area must be subject to an "other regulation" that determines Class 1 classification, such as Conservation District Protected Subzone. In other cases, the omission from proposed Appendix A of land areas that are determined by the operation of certain "other regulations," such as critical habitat, also contributes to the incompleteness and inaccuracy of Appendix A. In order to facilitate user understanding and agency accuracy concerning the identity and location of waterbodies listed in Appendix A, DOH must, at the very least, explain its methodology for creating Appendix A and the appropriate factual basis that supports each classification decision listed therein.

Response to Comment 7.c.

Thank you for your comment. We have revised the text in appropriate areas of 11-54-5.1 to remove the word "waters" and keep the phrase "...as listed in

Appendix A dated July 1, 2014, entitled "Class 1, Inland Waters", located at the end of this chapter."

As outlined in Response to Comment 7.a., the method for determining Appendix A was provided.

Comment 7.d.

C. Aggravation of research burden DOH's WQS Rationale (page 8) states that DOH is "listing the specific waterbodies that are Class 1 . . . so that the public and the applicants for NPDES permits and Section 401 WQCs do not have to research other regulations to determine the Class 1 water bodies." While this is a worthy objective, the proposed revisions would not achieve it. For example, proposed Appendix A does not distinguish between Class I.a and Class I.b waterbodies, for which different designated uses and different discharge prohibitions apply under other sections of the WQS. Similarly, the omission of critical habitat areas from Appendix A-along with the lack of additional rules or guidance to describe the selective manner in which DOH actually applies critical habitat determinations to waterbody classifications-requires the public and applicants to research other regulations to determine Class 1 waterbodies, then wade into the poorly mapped territory of DOH discretion.

Unlike proposed Appendix A, which identifies a Class 1 waterbody by naming the protected land area on which the waterbody occurs, Appendix B and Appendix D identify a Class AA waterbody by the waterbody's actual geographic name or hydrographic boundaries, while omitting a list of the protected marine areas where Class AA status was determined by the operation of "other regulations." Therefore, even if a waterbody is not within the areas listed in Appendix Band D, it may have attained Class AA status through the past operation of "other regulations;" DOH may have honored that status in its previous decisions concerning that waterbody; and the public and applicants must research other regulations to verify waterbody classification.

Response to Comment 7.d.

Class 1.a. and Class 1.b. are subclasses of Class 1 waters. Both subclasses have the same level of water chemistry protection and, therefore, are included in a single Appendix A. The public does not need to research other regulations to determine Class 1 waters as Appendix A provides the comprehensive list of areas for Class 1 waters.

Comment 7.e.

Before further engaging in changes to waterbody classification by rule, it would be useful for DOH to create a comprehensive inventory of state waters and waterbody segments, displayed and navigable in map-based

and database forms, to which underlying classifications would be applied. This is the basic organizing concept for the National Hydrography Dataset, a waterbody addressing and information system endorsed and funded by the U.S. Environmental Protection for utilization in DOH, and would provide a useful basis for DOH to do a better job of explaining its proposed administrative decisions.

Response to Comment 7.e.

Thank you for your comment. Please note that this rule revision does not change any waterbody classifications. The DOH understands that the National Hydrography Dataset has been created as a comprehensive inventory of state waters and waterbody segments and may consider your suggestions in future rules revisions.

Attachment

**Comments on Proposed Amendments to Hawaii
Administrative Rules Chapters 11-54 Water Quality
Standards and 11-55 Water Pollution Control, Public
Notice Published on August 28, 2014**



ALEXANDER & BALDWIN, INC.

October 2, 2014

Hawaii Department of Health
Environmental Management Division
Clean Water Branch
919 Ala Moana Boulevard, Room 301
Honolulu, Hawaii 96814

Attention: Docket Number R-1-14

**Subject: Proposed Changes to HAR Chapter 11-54, Water Quality Standards
and HAR Chapter 11-55, Water Pollution Control**

Alexander & Baldwin, Inc. (A&B) offers the following comments on the proposed revisions to Hawaii Administrative Rules (HAR) Chapter 11-54, Water Quality Standards.

Proposed new definition of “discharge of a water pollutant”

The proposed HAR Section 11-54-1 contains a new definition for the term “discharge of a water pollutant”. Under the proposal, the term means “any addition of any water pollutant or combination of water pollutants to state waters”.

The proposed definition is inconsistent with the existing definition for the term “discharge of a pollutant” in HAR Chapter 11-55, Water Pollution Control, even though the terms themselves are essentially identical (“water pollutant” means the same thing as “pollutant”, just as “water pollution” means the same thing as “pollution”). The term “discharge of a pollutant” is defined in HAR Section 11-55-1 to mean “any addition of any pollutant or combination of pollutants to any state waters *from any point source*, or any addition of any pollutant or combination of pollutants to the water of the contiguous zone or the ocean *from any point source* other than a vessel or other floating craft used as a means of transportation. This includes additions of pollutants to state waters from: surface runoff that is collected or channeled by man; or discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.” (Emphasis added.) This definition is excerpted from federal regulations implementing the Clean Water Act at 40 CFR Section 122.2.

In addition, the proposed definition is inconsistent with the existing definition for the terms “discharge of a pollutant” and “discharge of pollutants” already included in the water quality standards at HAR Section 11-54-9.1, which definition is identical to that found in Section 502(12) of the Clean Water Act. The Clean Water Act defines these terms as “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft” (that is, essentially the same definition as is found in 40 CFR Section 122.2).

Thus, the Department is proposing to add a “new definition” for a term that is already defined in the existing rule, as well as in the companion water pollution control regulations. Moreover, the Department is proposing to make the new definition inconsistent with the existing definitions. Most importantly, the proposed new definition is much broader than the existing definitions, as it omits any reference to point sources.

At best, the proposed new definition will cause considerable confusion regarding the meaning of the term by having differing definitions in the state’s two sets of rules regulating water pollution, and by having differing definitions within HAR Chapter 11-54.

The broader implications of this proposed change are uncertain but potentially severe, as it could result in requirements that are currently only applicable to point sources being imposed upon other sources of water pollution. Importantly, this definition is not mentioned in the Rationale for the Proposed Revisions, nor is any rationale provided for this proposed change. Not only is the Department’s intent therefore unclear, but it is arguable whether this proposed change has been adequately noticed.

The Department of Health should retain the existing definition for the term “discharge of a (water) pollutant”. If such a change is proposed in the future, the Department should provide a rationale for the change and provide adequate opportunity for the public to comment on the proposal.

Proposed new definition of “water pollution control system”

The proposed rule includes a new definition for the term “water pollution control system” which means “a facility which collects, handles, stores, treats, or disposes of domestic wastewater, and/or industrial wastewater, to prevent water pollution”. This term is used in the definition of “state waters” contained in HAR Section 11-54-1, and in Chapter 342D, Hawaii Revised Statutes. “State waters” excludes drainage ditches, ponds, and reservoirs required as part of a water pollution control system. As such, the applicability of the State’s water quality standards does not extend to water pollution control systems. That is, water in drainage ditches, ponds, and reservoirs required as part of a water pollution control system is not required to meet water quality standards (although any discharge from such a system would be subject to the standards).

By restricting the definition of water pollution control system to systems which manage “wastewater”, the proposed definition appears to exclude systems which manage, and prevent water pollution from, stormwater. Thus, settling basins designed to reduce the amount of sediment in stormwater runoff prior to its discharge into a state water would, under the proposed definition, themselves be considered state waters subject to the water quality standards. Similarly, the drainage ditches upstream of such basins, designed to carry potentially polluted stormwater to the basins for settling, would also be considered state waters, and would need to meet basic water quality criteria before the discharge has reached the settling basin. This nonsensical result appears to be unintended and should be corrected. The proposed definition

should be revised to clarify that the term “water pollution control system” applies to systems for the treatment of stormwater discharges as well as wastewater.

Proposed list of Class 1.a waters in Appendix A

Under the proposed rule, HAR Section 11-54-5.1 identifying inland waters to be protected has been amended to include reference to a new Appendix A. According to the rationale document, this change is intended to clarify existing classification of state waters by listing specific Class 1.a water body names. According to the Department, this change will allow the public and applicants for permits and water quality certifications to identify specific water bodies that are Class 1 without having to “research other regulations” (e.g., HRS Chapter 195 (*sic*)).

Under HAR Section 11-54-5.1, Class 1 inland waters include waters within reserves, preserves, sanctuaries, and refuges established by the Department of Land and Natural Resources (DLNR) under Chapter 195, HRS (that is, within the Natural Area Reserves System), waters within national and state parks and state and federal wildlife refuges, waters that have been identified as unique or critical habitat for threatened or endangered species by the U.S. Fish and Wildlife Service, and waters within Waimanu National Estuarine Research Reserve.

It is important to note that Chapter 195, HRS relates solely to the Natural Area Reserves System, and that only waters within reserves, preserves, sanctuaries, and refuges *established under Chapter 195, HRS* are considered Class 1.a waters. Other reserves, preserves, sanctuaries, and refuges established under other authorities, including by private landowners, do not necessarily meet this criteria for identification as Class 1.a waters and should not be included in Appendix A unless they meet one or more other criteria for such identification. The same is true of other areas which are not either state parks or national parks. The proposed Appendix A appears to include areas that were not previously identified as Class 1.a waters in the Department’s 1987 Water Quality Standards Maps and/or would not meet any of the criteria of Section 11-54-5.1. All areas identified as Class 1.a waters must meet one or more of the specific criteria in HAR Section 11-54-5.1. Any expansion or re-interpretation of these criteria must be identified and noticed, and the public provided with an opportunity to comment.

Proposed list of Class 1.b waters in Appendix A

HAR Section 11-54-5.1 also references Appendix A with respect to identification of Class 1.b inland waters. Class 1.b inland waters include all waters located within protective subzones designated under HAR Chapter 13-5 by DLNR. The extent of areas within the protective subzones is considerably broader than the areas listed in Appendix A. It appears that by including the phrase “as listed in Appendix A” the department has inadvertently reduced the extent of Class 1.b inland waters, thereby reducing the level of protection afforded to these waters under the water quality standards. Reference to Appendix A with respect to identification of Class 1.b inland waters should be deleted, since it is not practicable to individually list all areas within the protective subzone.

Alexander & Baldwin, Inc.
Comments on Proposed Changes to HAR Chapters 11-54 and 11-55
Docket Number R-1-14
October 2, 2014; Page 4 of 4

Thank you for considering our comments on the proposed revisions.

Sincerely,

Sean M. O'Keefe
Director, Environmental Affairs
Alexander & Baldwin, Inc.



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October 2, 2014

**Department of Health
Environmental Management Division
Clean Water Branch
919 Ala Moana Boulevard, Room 301
Honolulu, Hawaii 96814**

Attention: Docket Number R-1-14

**Subject: Proposed Changes to HAR Chapter 11-54, Water Quality Standards
and HAR Chapter 11-55, Water Pollution Control**

Organized since 1948, the Hawaii Farm Bureau (HFB) is comprised of 1,832 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of Hawaii's diverse agricultural community.

HFB submits the following comments outlining our significant concerns regarding the proposed revisions to the State Water Quality Standards, Hawaii Administrative Rules (HAR) Chapter 11-54.

Proposed new definition of "discharge of a water pollutant"

The State is proposing a new definition for the term "discharge of a water pollutant." Under the proposal, the term means "any addition of any water pollutant or combination of water pollutants to state waters." For the reasons below, we strongly believe that the Department of Health should retain the existing definition for the term "discharge of a (water) pollutant."

In addition, we are extremely concerned that the public, including our members, have not had sufficient notice of the proposed change (significantly, it was not even identified by the Department and no rationale was provided for the revision), and therefore have not had the opportunity to fully understand and provide comment on how the proposal will affect them.

The Department is proposing to add a "new definition" for a term already defined in the existing rule, as well as in the companion water pollution control regulations. This change

will apparently suddenly and unfairly broaden existing regulations to apply to non-point sources, without adequate notice, while making the new definition inconsistent with existing definitions.

We are concerned that this proposed new definition will cause confusion due to the different definitions within the state's rules regulating water pollution, and within HAR Chapter 11-54.

The proposed definition is inconsistent with the existing definition for the term "discharge of a pollutant" in HAR Chapter 11-55, Water Pollution Control, even though the terms themselves are essentially identical ("water pollutant" means the same thing as "pollutant", just as "water pollution" means the same thing as "pollution"). The term "discharge of a pollutant" is defined in HAR Section 11-55-1 (excerpted from federal regulations implementing the Clean Water Act at 40 CFR Section 122.2.) to mean "any addition of any pollutant or combination of pollutants to any state waters *from any point source*, or any addition of any pollutant or combination of pollutants to the water of the contiguous zone or the ocean *from any point source* other than a vessel or other floating craft used as a means of transportation. This includes additions of pollutants to state waters from: surface runoff that is collected or channeled by man; or discharges through pipes, sewers, or other conveyances leading into privately owned treatment works."

The proposed definition is inconsistent with the existing definition for the terms "discharge of a pollutant" and "discharge of pollutants" already included in the water quality standards at HAR Section 11-54-9.1 (identical to the definition found in Section 502(12) of the Clean Water Act). The Clean Water Act defines these terms as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft" (the same definition that is found in 40 CFR Section 122.2).

Proposed new definition of "water pollution control system"

The proposed rule includes a new definition for the term "water pollution control system" which means "a facility which collects, handles, stores, treats, or disposes of domestic wastewater, and/or industrial wastewater, to prevent water pollution". This term is used in the definition of "state waters" contained in HAR Section 11-54-1, and in Chapter 342D, Hawaii Revised Statutes. Because the definition of "State waters" excludes drainage ditches, ponds, and reservoirs required as part of a water pollution control system, the applicability of the State's water quality standards does not extend to water pollution control systems. Water in drainage ditches, ponds, and reservoirs required as part of a water pollution control system is not required to meet water quality standards.

However, by restricting the definition of water pollution control system to systems which manage "wastewater", the proposed definition apparently will exclude systems which manage and prevent water pollution from stormwater. Settling basins designed to reduce

the amount of sediment in stormwater runoff prior to its discharge into a state water would, under the proposed definition, be considered state waters subject to the water quality standards. Also, the drainage ditches upstream of those basins, designed to carry potentially polluted stormwater to the basins for settling, would also be considered state waters, and would therefore need to meet water quality criteria before the discharge has reached the settling basin. Although this requirement may be unintended, it will have absurd consequences and should be corrected to clarify that the term “water pollution control system” applies to systems for the treatment of stormwater discharges, as well as wastewater.

Proposed list of Class 1.a waters in Appendix A

According to the rationale document, HAR Section 11-54-5.1 identifying inland waters to be protected has been amended to include reference to a new Appendix A. According to the Department, the change is intended to clarify existing classification of state waters by listing specific Class 1.a water body names to allow the public and applicants for permits and water quality certifications to identify specific water bodies that are Class 1 without having to “research other regulations.”

Under HAR Section 11-54-5.1, Class 1 inland waters include waters within reserves, preserves, sanctuaries, and refuges established by the Department of Land and Natural Resources under Chapter 195, HRS (within the Natural Area Reserves System), waters within national and state parks, and state and federal wildlife refuges, waters that have been identified as unique or critical habitat for threatened or endangered species by the U.S. Fish and Wildlife Service, and waters within the Waimanu National Estuarine Research Reserve.

HRS Chapter 195 relates solely to the Natural Area Reserves System, and that only waters within reserves, preserves, sanctuaries, and refuges *established under Chapter 195, HRS* are considered Class 1.a waters. Significantly, other reserves, preserves, sanctuaries, and refuges established under other authorities, including by private landowners, may not meet this criteria for identification as Class 1.a waters and should not be included in Appendix A unless they meet one or more other criteria for such identification. The same is true of other areas which are not either state parks or national parks. The proposed Appendix A appears to include areas that were not previously identified as Class 1.a waters in the Department’s 1987 Water Quality Standards Maps and/or would not meet any of the criteria of Section 11-54-5.1.

All areas identified as Class 1.a waters must meet one or more of the specific criteria in HAR Section 11-54-5.1. The expansion of these criteria is wholly inappropriate without first being identified to the public and properly noticed so as to ensure that the public is provided with a real opportunity to comment.

Proposed list of Class 1.b waters in Appendix A

HAR Section 11-54-5.1 also references Appendix A with respect to identification of Class 1.b inland waters. Class 1.b inland waters include all waters located within protective subzones designated under HAR Chapter 13-5 by DLNR. The extent of areas within the protective subzones is broader than the areas listed in Appendix A. It appears that by including the phrase “as listed in Appendix A” the department may have inadvertently reduced the extent of Class 1.b inland waters; reducing the level of protection afforded to these waters.

Because our farmer and rancher members across the islands may be negatively impacted by some of these changes, we request that the Department extend the comment period while holding informational meetings to explain the rationale justifying the changes and to allow for a better understanding of the potential impact to their livelihoods.

Thank you for your serious consideration of our comments on the proposed revisions.

Sincerely,

**John McHugh
Chair
Environmental Stewardship Committee**

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October 2, 2014

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Clean Water Branch
Environmental Management Division
Hawai'i State Department of Health
919 Ala Moana Boulevard
Room 301
Honolulu, Hawai'i 96814-4920

Re: Comments on Proposed Changes to Hawai'i Administrative Rules
Chapter 11-54 and Chapter 11-55

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed changes to Hawai'i Administrative Rules ("HAR") Chapters 11-54 and 11-55. I am writing on behalf of the Chevron Hawai'i Refinery and Hawaiian Electric Company.

The proposed changes to Chapters 11-54 and 11-55 include provisions permitting the use of intake credits based on the Environmental Protection Agency ("EPA") rule found in 40 CFR § 122.45(g). Chevron and Hawaiian Electric support the use of intake credits for the water quality-based effluent limits in Chapter 11-54 and the technology-based effluent limits in Chapter 11-55.

The proposed rule, HAR § 11-54-12(d)(1), states that the director shall grant intake credits only if "[o]ne hundred percent of the intake water containing the intake pollutant is withdrawn from the same body of water into which the discharge is made[.]" We urge the Department of Health to revise this provision and its counterpart in Chapter 11-55 to make them consistent with EPA's rule. While 40 CFR § 122.45(g)(4) similarly provides that "[c]redit shall be granted only if discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made[.]" 40 CFR § 122.45(g)(4) continues to provide that:

"The Director may waive this requirement if he finds that no environmental degradation will result."

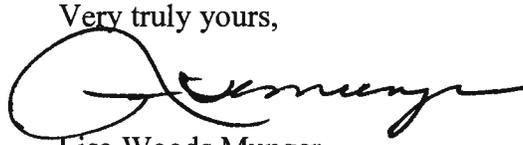
We urge the Department of Health to include this language in both Chapters 11-54 and 11-55. The Director of the Department should have the same authority and discretion

Clean Water Branch
Environmental Management Division
October 2, 2014
Page 2

afforded to the Director or the Regional Administrator of the EPA to waive the “same body of water” requirement in appropriate cases, provided that no environmental degradation will result. In addition, aligning the Department’s rules with the EPA’s rules allows for greater consistency and clarity.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Woods Munger". The signature is fluid and cursive, with a large initial "L" and "M".

Lisa Woods Munger

LWM

cc: K. Kelly
K. Mitchum
B. Wall

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GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

October 2, 2014

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VIA HAND DELIVERY

Honorable Linda Rosen, M.D., M.P.H.
Director
Department of Health, State of Hawaii
919 Ala Moana Boulevard
Honolulu, Hawaii 96813

**SUBJECT: Comments Regarding Proposed Revisions to Hawaii
Administrative Rules, Sections 11-54 Water Quality Standards and
11-55 Water Pollution Control**

Dear Director Rosen,

On behalf of the General Contractors Association of Hawaii (GCA), thank you for the opportunity to provide comments regarding the proposed rules changes to Hawaii Administrative Rules (HAR), Chapters 11-54 Water Quality Standards and Chapter 11-55, Water Pollution Control. The GCA is an organization comprised of approximately six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA commends the Department of Health for attempting to correct some of the language that was not clear in the adoption of the respective chapters during the 2013 proposed rulemaking process. In August 2013 GCA submitted comments regarding the administrative rule changes affecting the same chapters and we are hopeful that GCA's proposed changes can be incorporated into the proposed administrative rules.

GCA appreciates several aspects of the proposed changes to HAR 11-54 and 11-55, such as clarifying the designation of various classes of water bodies by consolidating this information into an easy-to-read set of appendices. However, the proposed rulemaking does not go far enough in correcting a few problems that were created with the revisions of HAR 11-54 and 11-55 that were finalized on December 6, 2013.

Clarification of Wet Criteria and Dry Criteria Is Needed

We request that the CWB take action to clarify and/or simplify the "wet" and "dry" definitions that apply to specific water quality criteria for various types of water bodies. This problem has arisen since the December 6, 2013 revisions to HAR 11-54 and 11-55.

Table 34.1 of HAR 11-55, Appendix B provides storm water discharge limitations for various parameters. For the parameters listed below, instead of providing specific discharge limitations, Table 34.1 refer to note {3}:

- Quantity of Discharge

2014A491

- Biochemical Oxygen Demand (5-day)
- Chemical Oxygen Demand
- Total Suspended Solids
- Total Phosphorus
- Total Nitrogen
- Nitrate+Nitrite

Prior to the December 6, 2013 revisions to HAR 11-54 and 11-55, Note {3} stated “No limitation at this time. Only monitoring and reporting is required.”

The December 6, 2013 update to HAR 11-55 revised Note {3} to state that “The value shall not exceed the applicable not to exceed the given value more than ten per cent of the time wet or dry season limit as specified in chapter 11-54 for the applicable classification of the receiving state waters...”

Depending on the classification of the receiving state waters, chapter 11-54 includes three different sets of definitions for wet and dry criteria:

- 11-54-5.2(b) Inland Water Criteria – Specific criteria for streams
 - Clearly defines Wet Season (Nov. 1 through April 30) vs. Dry Season (May 1 through October 31).
- 11-54-6(a)(3) Uses and Specific Criteria Applicable to Marine Waters - criteria for all embayments excluding those described in subsection (d)
 - “Wet” criteria apply when the average fresh water inflow from the land equals or exceeds one percent of the embayment volume per day.
 - “Dry” criteria apply when the average fresh water inflow from the land is less than one per cent of the embayment volume per day.
- 11-54-6(b)(3) Open Coastal Waters – criteria for open all open coastal waters, excluding those described in subsection (d)
 - “Wet” criteria apply when the open coastal waters receive more than three million gallons per day fresh water discharge per shoreline mile.
 - “Dry” criteria apply when the open coastal waters receive less than three million gallons per day of fresh water discharge per shoreline mile.

The criteria for inland waters provided in 11-54-5.2(b) are clearly defined and can be easily utilized by the regulated community. However, the criteria for marine embayments (11-54-6(a)(3)) and open coastal waters (11-54-6(b)(3)) are problematic. HAR 11-54 does not provide any reference by which the regulated community can determine which waters meet the wet criteria, and which waters meet the dry criteria.

There is only one known report that provides information on wet vs. dry criteria, “An Ecosystem Approach to Water Quality Criteria,” published by the Hawaii Department of Health in 1977 (hereinafter referred to as the DOH 1977 report). The DOH 1977 report provides low-resolution maps of each island that define perennially wet, perennially dry, and seasonally wet open coastal waters and embayments.

HAR 11-54 does not directly provide sufficient information for the regulated community to identify the water quality criteria that discharges of storm water associated with industrial activity must meet. Instead, the public must rely on an obscure report that is difficult to obtain. One possible solution would be to incorporate the DOH 1977 report by reference into chapter 11-54. However, there are additional problems with the report itself that need to be addressed.

- The DOH 1977 report is out-of-print and difficult to access – it isn't readily available on the internet, nor is it on file at the Hawaii State Library.
- The criteria provided in the DOH 1977 report are misleading and inadequate.
 - For open coastal waters, the maps indicate “Perennially Wet” areas, “Perennially Dry” areas, and “Seasonally Wet” areas. Only upon careful examination of the text does it become apparent that the “Seasonally Wet” areas indicated in the DOH 1977 report actually meet the “dry” criteria of less than 3 million gallons per day of fresh water discharge per shoreline mile as established in 11-54-6(b)(3).
 - For embayments, the maps indicate “Wet,” “Dry,” and “Seasonally Wet” embayments. However, the description of seasonally wet embayments does not provide specific time periods that the embayments would be considered “Wet.” Instead, it simply states that these conditions “...may form only during periods of high rainfall...” This is an insufficient basis upon which to define regulatory thresholds that dischargers of storm water associated with industrial activity must meet.
 - Many of the embayments identified in the DOH 1977 report are given a provisional status as “Suspected Embayments.” Again, this is an insufficient basis upon which to define regulatory thresholds that dischargers of storm water associated with industrial activity must meet.
 - The DOH 1977 report does not include all of the embayments listed in the proposed Appendix C of chapter 11-54, such as Kaunakakai Harbor on Molokai, and Heeia Kea Boat Harbor, Haleiwa Boat Harbor, and Ko Olina on Oahu. Based on the information available, it is exceedingly difficult for the regulated community to determine whether and when these embayments would be considered “wet” or “dry,” and to determine the appropriate numeric water quality limits that should apply.
- The maps provided in the reference document are inadequate – they only provide an outline of each island, with no shoreward landmarks such as terrain features, rivers, etc. It could be difficult to differentiate the boundary between wet areas and dry areas.
- The maps indicating dry and wet areas were established more than 30 years ago, and are likely based on data 40 to 50 years old. We recommend that the maps be updated using the Rainfall Atlas of Hawaii, published by the University of Hawaii Geography Department in 2013 (<http://rainfall.geography.hawaii.edu/>) and incorporated into the Water Quality Standards maps that are currently available on the DOH website.

Correction to Table 34.1

As mentioned previously, one of the parameters listed in chapter 11-55 Appendix B, Table 34.1 that refers to Note {3} is Quantity of Discharge. Prior to the December 6, 2013 updates to HAR 11-54 and 11-55, the requirement was simply to report on this parameter, since no limitation was in place. However, the revised wording for Note {3} is nonsensical with respect to Quantity of Discharge, since chapter 11-54 does not regulate the quantity of discharges, only the presence of contaminants or pollutants. We recommend that Table 34.1 be updated with a new note that applies to the Quantity of Discharge parameter.

In summary, the December 6, 2013 revisions to HAR 11-54 and 11-55 have created a set of requirements that are difficult, if not impossible, to precisely determine. For facilities that discharge storm water associated with industrial activity into embayments or open coastal waters, it is not clear how they are to determine whether the wet or the dry water quality criteria should be used as a limitation. The definitions for wet and dry criteria provided in 11-54-6(a)(3) and 11-54-6(b)(3) is vague and extremely challenging to interpret. Although we do not offer any specific wording to fix this problem, it should be addressed.

We respectfully request that the proposed changes be considered for incorporation into the proposed administrative rules. Thank you for the opportunity to share our recommendations.

With best regards,



Peter Landry, CHST
Chair, Legislative Committee

DEPARTMENT OF ENVIRONMENTAL SERVICES
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



LORI M.K. KAHIKINA, P.E.
DIRECTOR

TIMOTHY A. HOUGHTON
DEPUTY DIRECTOR

ROSS S. TANIMOTO, P.E.
DEPUTY DIRECTOR

IN REPLY REFER TO:
EMC 14-145

October 2, 2014

Honorable Linda M. Rosen, M.D. Ph.D.
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State Department of Health
Environmental Management Division
Clean Water Branch
919 Ala Moana Boulevard, Room 301
Honolulu, Hawaii 96814-4920

Dear Director Linda M. Rosen, M.D., Ph.D.:

Subject: Public Hearing on Changes to HAR 11-54 and 11-55
on October 2, 2014, Docket No. R-1-14

Enclosed are two (2) copies of the City's written comments on proposed changes to Hawaii Administrative Rules (HAR), Chapter 11-54, Water Quality Standards, and Chapter 11-55, Water Pollution Control.

If you have any questions, please contact Jerome Ababa of the Department of Environmental Services, Division of Environmental Quality, at (808) 768-3255.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lori M.K. Kahikina".

Lori M.K. Kahikina, P.E.
Director

Enclosures: Written comments (2 copies)

2014A492

CITY AND COUNTY OF HONOLULU COMMENTS TO PROPOSED HAR 11-54-8 REVISIONS

The City objects to the HAR 11-54-8 revision and instead proposes the following:

Proposal: Add a definition for Coastal Recreational Waters in 11-54-1:

“Coastal Recreational Waters” means “waters up to 3 miles from shore to a depth of 33 meters, excluding areas where water contact recreational activities are prohibited by state or federal law or regulation.”

Proposal: Revise 11-54-8 (a) to read as follows:

(a) These criteria are designed to protect the public from exposure to harmful levels of pathogens while participating in primary water-contact activities. The specific criteria for enterococcus shall be expressed in colony forming units (CFU) per one hundred milliliters or as a most probable number (MPN) per one hundred milliliters, as specified by the analytical method used. Primary contact activities in marine waters occur within 500 meters from shore. The number of samples taken will be as specified in §11-55-19(10).

Rationale: The proposed revision would lead to an unintended and inconsistent result whereby the same enterococcus criteria would apply at the shoreline, nearshore, and offshore, and in areas where there is no natural public swimming, bathing or wading.

1) EPA’s 2012 RWQC Applies to Primary Contact Recreational Waters Only

First, the purpose of EPA’s 2012 Recreational Water Quality Criteria (RWQC) is to establish criteria only for primary contact recreational waters; that is, to protect peoples’ health during visits to beaches where a high degree of bodily contact with the water, immersion and ingestion are likely. Indeed, DOH’s statement that “[this] proposed revision is to be consistent with [RWQC] recommendations” is erroneous and misleading because DOH’s proposed revision effectively ignores EPA’s intent by establishing recreational criteria for all state waters without regard to whether the recreation classification is primary or secondary contact.

Clearly, the scope of the EPA study was primary contact recreational waters. In developing the RWQC, EPA analyzed data obtained from four freshwater located in the Great Lakes and five marine bathing beach sites located in Alabama, Mississippi, Rhode Island, South Carolina and Boquerón, Puerto Rico. The studies were conducted on weekends and holidays over the summer, required that the subject beaches were attended by more than 300 people per weekend day, and included a wide range of the population, including families with children age 10 and under.

2) DOH’s Definition of Primary Contact Recreational Waters

Second, the proposed revision further contradicts DOH’s long-standing definition of primary contact recreational waters. Since 2009, DOH’s publicly-noticed position (through web posting, rule-making and legislative action) and accompanying rationale define the scope of Hawaii’s “coastal recreational waters” and determines the zone for “primary water-contact activities” as follows:

- excludes from coastal recreational waters areas where water contact recreational activities are prohibited by state or federal law or regulation;
- designates only the areas within 33 meters of the surface as coastal recreational waters; and

- designates areas beyond 500 meters from shore as infrequent use coastal recreational waters and apply a single sample maximum value of 501.

These are not controversial amendments and are consistent with EPA's 2012 Recreational Water Quality Criteria guidance. Recreational uses have traditionally been divided into primary contact and secondary contact recreation.

DOH has always been clear that it would retain a boundary demarcating the more frequently used primary contact recreational waters from less frequently used secondary contact recreational waters. The designation for primary contact recreational waters in the current Hawaii water quality standards (HAR § 11-54-8 (b)) is 300 meters. However, since at least 2005, DOH has indicated its clear intent (through study groups, public hearings, and its rule-making efforts and legislative hearings for Act 126 in 2009) to amend the Hawaii water quality standards to extend the boundary for primary contact recreational waters to 500 meters. DOH's rationale documents contain the supporting analyses for this position.

The only proposed revision from DOH's prior 2009 position that may no longer be applicable is the establishment of a single sample maximum of 501, as DOH's current position appears to contemplate replacing the single sample maximum criteria with appropriate Statistical Threshold Values (STV).

Naturally then, DOH must complete the rule revision process it began in 2009 as a prerequisite to establishing the proposed geometric mean and STV for enterococcus.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

SEP 12 2014

Certified Mail No. 7003 2260 0000 8873 1230

Darryl Lum
Engineering Section Supervisor
Clean Water Branch
State of Hawaii Department of Health
P.O. Box 3378
Honolulu, HI 96801-3378

Re: Proposed revisions to Hawaii Administrative Rules, Title 11, Chapters 54 and 55

Dear Mr. Lum:

Thank you for the opportunity to review and comment on the proposed revisions to the Hawaii Administrative Rules (HAR), Title 11, Chapter 54, entitled "Water Quality Standards" and Chapter 55, entitled "Water Pollution Control," which were public noticed on August 28, 2014. Our comments focus primarily on the proposed language changes regarding compliance schedules, intake credits, and implementation of the recreational criteria.

Regarding the proposed revisions to HAR 11-54:

1. We are concerned with the proposed language for compliance schedules and intake credits, as these provisions are applied to water quality criteria or standards in addition to effluent limitations. Compliance schedules and intake credits are NPDES permit implementation tools, which apply to effluent limitations implementing water quality standards, not the standards themselves. DOH should clarify in the HAR that compliance schedules and intake credits apply only to implementation of water quality standards through NPDES permits.
2. Regarding the proposed language in HAR 11-54 for a schedule of compliance, DOH should clarify the following:
 - a. Pursuant to 40 CFR 122.47, a schedule of compliance must require compliance as soon as possible. The proposed language currently states that a compliance schedule must "include an enforceable final effluent limitation that is within the timeframe allowed as specified in sections 11-55-08(a)(1)(b), 11-55-15(d), 11-55-21, 11-55-22, 11-55-23(10), and 11-55-34.07(3)(B)." DOH should specify in HAR 11-54 that a compliance schedule must require compliance as soon as possible.

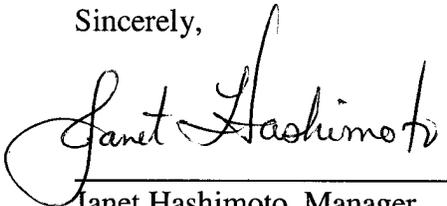
- b. Also pursuant to 40 CFR 122.47, a schedule of compliance must set forth interim requirements and dates for their achievement. Currently the proposed language only requires “interim requirements and a date by which the required water quality criteria must be achieved.” The HAR should be clear that specific dates for each interim requirement must be included in addition to a final compliance date. Also, as described above, the latter part of the sentence should be changed from “water quality criteria” to water quality-based effluent limitations, as compliance schedules apply to effluent limitations that implement water quality criteria, not the criteria themselves.
- c. The proposed language should include the most updated CFR date (2014).

Regarding the proposed revisions to HAR 11-55:

1. We recommend DOH remove the following language in HAR 11-55-19 regarding implementation of the new recreational criteria: “Recreational criteria for all state waters in HAR section 11-54-8. A minimum of six samples collected on every fifth day over the thirty day sampling period as specified in the permit, shall be required to comply with HAR sections 11-54-8(b) and (c).” This would require collection of 36 samples/month for assessment of compliance with the water quality standard. Removal of this language will allow DOH the flexibility to consider the amount of data needed to assess compliance for each specific NPDES permitted facility.

We appreciate the opportunity to provide input on the proposed revisions. If you have any questions regarding our comments, please contact Janet Hashimoto at (415) 972-3452 and David Smith at (415) 972-3464, or our staff, Sara Roser at (415) 972-3513 and Elizabeth Sablad at (415) 972-3044.

Sincerely,



Janet Hashimoto, Manager
Water Quality Assessment Section



David Smith, Manager
NPDES Permits Section

130.56

October 02, 2014

2014 OCT 2 1:18PM /hp

Linda Rosen, MD, MPH
Director, State of Hawai'i Department of Health
c/o Clean Water Branch, Environmental Management Division, Environmental Health
Administration
919 Ala Moana Boulevard, Room 301
Honolulu, HI 96814-4920.

DCU
GH

SUBJECT: Written Testimony of David Penn, Department of Health DOCKET NO. R-1-14,
Hawai'i Administrative Rules Title 11, Chapter 54 (Water Quality Standards) and
Chapter 55 (Water Pollution Control)

Aloha Director Rosen,

The Department of Health (DOH) should not adopt proposed changes to the following
sections of Hawai'i Administrative Rules (HAR) Title 11, Chapter 54 (Water Quality Standards,
or WQS) and Chapter 55 (Water Pollution Control):

- HAR §§ 11-54-5.1(a)(1)(A) and (B)
- HAR §§ 11-54-5.1(a)(2)(A) and (B)
- HAR §§ 11-54-5.1(a)(3)(A) and (B)
- HAR §§ 11-54-5.1(b)(1) and (2)
- HAR §§ 11-54-6(a)(2)(A)(i), (ii), (iii), and (iv)
- HAR § 11-54 Appendix A

As explained below (pages 2-), the proposed changes to the sections listed above (1) would not
achieve the outcomes promoted in the accompanying DOH rationale documents (Rationale); (2)
would result in additional confusion, controversy, and mistake in the interpretation and
application of the rules; and (3) are based—improperly—on conclusory statements, erroneous
data analysis, and missing or unsatisfactory explanations for proposed action that lack a rational
connection between the facts found and the choices made.

I hereby incorporate into this testimony on Department of Health Docket No. R-1-14 the
attached testimony, dated May 21, 2014, that I submitted to the State of Hawai'i Small Business
Regulatory Review Board (SBRRB). Please note that the DOH rationale documents for Docket
No. R-1-14 do not address questions that I presented to DOH via the SBRRB. Moreover, the
materials that DOH published for Docket No. R-1-14, along with other department information,
suggest that once again, as in 2013, DOH did not convene an advisory group to assist with
reviewing and revising the WQS and did not initiate direct consultation with agencies that would
be directly affected by the proposed changes. These kinds of systemic shortcomings in DOH's
public participation program are further illustrated by the fact that DOH held the public hearing
for Docket No. R-1-14 during normal business hours (10-12 AM) when many everyday working
citizens are not able to participate without sacrificing several hours of their hard-earned vacation
time.

2014A493

Thank you for considering my testimony on Department of Health DOCKET NO. R-1-14, and please call anytime to talk about the department's implementation of federal Clean Water Act requirements and related state law.

Sincerely,



David Penn, JD, PhD
(Total Maximum Daily Load Coordinator and water quality standards author, State of Hawai'i Department of Health, 2001-2011)

copy: Gary Gill, Environmental Health Administration
Stuart Yamada, Environmental Management Division
Jessica Wooley, Office of Environmental Quality Control
Laura McIntyre, Environmental Planning Office
Genevieve Salmonson, Compliance Assistance Office
William Tam, State of Hawai'i Commission on Water Resource Management
Jesse Souki, State of Hawai'i Department of Land and Natural Resources
Malia Chow, Hawaiian Islands Humpback Whale National Marine Sanctuary
Terry Fleming, U.S. Environmental Protection Agency, Region 9, Water Division
David Forman, University of Hawai'i at Manoa, William S. Richardson School of Law
Edward Grau, University of Hawai'i at Manoa, Water Resources Research Center

attached: David Penn to Small Business Regulatory Review Board, dated May 21, 2014, Small Business Regulatory Review Board Agenda for May 21, 2014, Items IV.A. & IV.B., Hawaii Administrative Rules Title 11, Chapters 54 & 55, Department of Health (three pages)

I. DOH's proposed "Clarification on Existing Classification of State Waters" would actually blur and add new tension to the classification scheme; misrepresent the identity and location of certain waters; and aggravate, rather than relieve, the research burden on users of the WQS.

A. Blurring and tension in the proposed classification scheme

DOH's WQS rationale (page 8) states that "DOH is proposing to revise § 11-54-5.1 for clarification purposes only by listing the specific [inland] water bodies that are Class 1." The proposal to add "are/as listed in Appendix A" throughout § 11-54-5.1 implies that DOH would regulate as Class 1 only the specific water bodies listed in Appendix A. This implication raises questions about (1) why DOH would retain the existing text of the rule that provides for the future operation of "other regulations . . . to determine Class 1 waters" (see DOH WQS

Rationale, page 8), and (2) whether or not DOH would abide by the existing text of the rule and amend Appendix A whenever one of the "other regulations" produces a new determination of Class 1 waters. The analysis and questions presented here with regard to § 11-54-5.1 and Appendix A also apply to DOH's proposal to revise § 11-54-6 by listing in Appendix B and Appendix D the specific marine water bodies that are Class AA.

If DOH intends to shut the door on the decades-old operation of "other regulations . . . to determine Class 1 [and Class AA] waters," then the most straightforward and transparent solution would be for DOH to initiate consultation with the agencies that operate the "other regulations;" propose removing the offending text from the existing rule; and explain publicly why this should occur, including an account of the agency consultations. On the other hand, if DOH intends to continue allowing the operation of "other regulations . . . to determine Class 1 [and Class AA] waters," then DOH should revise the proposed language to clarify that intent, and to explicitly provide for future amendment of Appendices A, B, and D. Regardless, it is curious why DOH, given its interest "to be consistent with the proposed revision in HAR 11-54-5.1 and to improve the readability of HAR 11-54" (WQS Rationale, page 8), did not propose similar revisions and appendices for the classification of marine bottom types in § 11-54-7, which is also determined by the operation of "other regulations" and includes long lists of named areas for certain bottom types that could be moved to an appendix.

DOH proposes in its Appendix A that Class 1 inland waters include, for example, a waterbody that is located on lands within a national historical park, national historical site, state recreational area, state monument, state historical park, state wayside, or state recreational pier. However, DOH does not identify or explain its basis for determining that such lands fall within the narrower terminology of the rule's main text, such as "national park" or "state park." Although it would be good administrative practice for DOH to make such determinations in consultation with an agency that implements an "other regulation" that affects the classification, DOH does not provide evidence of such consultation.

Under these circumstances, given that § 11-54-6 contains provisions that explicitly tie Class AA waters to "waters in . . . federal . . . marine sanctuaries" and "waters in . . . sanctuaries established by the National Marine Fisheries Service," it does not make sense for DOH to omit the Hawaiian Humpback Whale National Marine Sanctuary (HHWNMS) from its proposed list of Class AA marine waters, particularly when DOH does not identify or explain a reason for this omission. Similarly, an argument that Sanctuary waters do not need Class AA protection to fulfill the Sanctuary purpose seems ridiculous when weighed against DOH's proposed determination that a state historical park or a state wayside needs Class 1 protection to fulfill its historical or rest area purpose. Although the National Marine Fisheries Service (NMFS) is no longer the agency that establishes a federal marine sanctuary, authority for this task remains within the parent agency (U.S. Department of Commerce, National Oceanic and Atmospheric Administration), it would be absurd, internally inconsistent, and contrarian for DOH to conclude that waters in the HHWNMS are not Class AA merely because a federal marine-focused agency other than NMFS established the Sanctuary. Even if the NMFS reference has become ambiguous overtime, DOH did not produce historical evidence of its own intent for the original language (when first adopting that language, what did DOH say that it meant?), which could be dispositive of the issue.

B. Misrepresented identity and location of waterbodies

Although DOH proposes that Class 1 inland waters are "listed in Appendix A," proposed Appendix A does not list waterbodies, it lists land areas on which a waterbody may occur. Moreover, DOH (1) does not identify or explain the assumptions, criteria, and data sources that it used to generate the list of land areas in Appendix A; (2) does not provide geospatial information (e.g. property descriptions, maps, or geocodes) for the areas listed in Appendix A; and (3) does not link each area listed in Appendix A with particular "other regulations" that determine its classification.

In many cases, the overbroad adoption of an entire land area, by name only, would misrepresent the identity and location of Class 1 waterbodies. For example, in order for a "Forest Reserve" area to include a Class 1 waterbody, that area must be subject to an "other regulation" that determines Class 1 classification, such as Conservation District Protected Subzone. In other cases, the omission from proposed Appendix A of land areas that are determined by the operation of certain "other regulations," such as critical habitat, also contributes to the incompleteness and inaccuracy of Appendix A. In order to facilitate user understanding and agency accuracy concerning the identity and location of waterbodies listed in Appendix A, DOH must, at the very least, explain its methodology for creating Appendix A and the appropriate factual basis that supports each classification decision listed therein.

C. Aggravation of research burden

DOH's WQS Rationale (page 8) states that DOH is "listing the specific waterbodies that are Class 1 . . . so that the public and the applicants for NPDES permits and Section 401 WQCs do not have to research other regulations to determine the Class 1 water bodies." While this is a worthy objective, the proposed revisions would not achieve it. For example, proposed Appendix A does not distinguish between Class 1.a and Class 1.b waterbodies, for which different designated uses and different discharge prohibitions apply under other sections of the WQS. Similarly, the omission of critical habitat areas from Appendix A—along with the lack of additional rules or guidance to describe the selective manner in which DOH actually applies critical habitat determinations to waterbody classifications—requires the public and applicants to research other regulations to determine Class 1 waterbodies, then wade into the poorly mapped territory of DOH discretion.

Unlike proposed Appendix A, which identifies a Class 1 waterbody by naming the protected land area on which the waterbody occurs, Appendix B and Appendix D identify a Class AA waterbody by the waterbody's actual geographic name or hydrographic boundaries, while omitting a list of the protected marine areas where Class AA status was determined by the operation of "other regulations." Therefore, even if a waterbody is not within the areas listed in Appendix B and D, it may have attained Class AA status through the past operation of "other regulations;" DOH may have honored that status in its previous decisions concerning that waterbody; and the public and applicants must research other regulations to verify waterbody classification.

Before further engaging in changes to waterbody classification by rule, it would be useful for DOH to create a comprehensive inventory of state waters and waterbody segments, displayed and navigable in map-based and database forms, to which underlying classifications would be applied. This is the basic organizing concept for the National Hydrography Dataset, a waterbody addressing and information system endorsed and funded by the U.S. Environmental Protection for utilization in DOH, and would provide a useful basis for DOH to do a better job of explaining its proposed administrative decisions.

May 21, 2014

State of Hawaii Small Business Regulatory Review Board
Department of Business, Economic Development & Tourism
No. 1 Capitol District Bldg., 250 South Hotel St. 5th Fl.
Honolulu, Hawaii 96813
Via email to sbrrb@dbedt.hawaii.gov

SUBJECT: Small Business Regulatory Review Board Agenda for May 21, 2014, Items IV.A. & IV.B., Hawaii Administrative Rules Title 11, Chapters 54 & 55, Department of Health

Aloha Board members,

I suggest that the Small Business Regulatory Review Board recommend that the Department of Health (DOH) go back to the drawing board rather than proceed to public hearing.

The proposed revisions to the Department of Health (DOH), Hawaii Administrative Rules (HAR), Title 11, Chapters 54 & 55, are deficient, technically and procedurally, in ways that could result in negative impacts to small business. In addition, the proposed revisions would implement poorly-explained DOH policy choices for resolving competing interpretations of ambiguous language found in the existing rules, and reduce the existing potential for certain waters to be regulated as Class 1 and Class AA, without first vetting those policy choices through the usual, pre-release advisory consultations that include small business representation, as outlined in federal regulations that govern public participation in Clean Water Act programs.

The proposed intake credit system would be a new feature that also seems deserving of pre-release advisory consultations. Likewise, the proposed revisions to the numeric criteria for recreational waters introduce a new statistical threshold value (STV) that lacks a Hawaii-specific supporting technical rationale that would justify its application in Hawaii waters. In addition, the recreational waters proposal includes language that would absolutely prohibit degradation (proposed § 11-54-8(d)), which seems inconsistent with the state's antidegradation rules and policy that allow for degradation when DOH accepts the socioeconomic justification presented in an antidegradation analysis. Also, the proposed increase in the geometric mean criterion for inland water (which may be viewed as "backsliding" by the U.S. Environmental Protection Agency) lacks a supporting technical rationale. DOH is not required to be strictly consistent with all federal guidelines, and is free to implement regulations that are more stringent than EPA requirements.

Finally, the proposed non-compliance measures would be dependent upon the exercise of the director's discretion against a potential multiplicity of dischargers who operate within a single contributing area of a receiving water segment. Without additional DOH policy that explains how DOH would exercise its discretion to make decisions in such compliance situations, the proposal is fraught with uncertainty for small business, individually and on a collective basis within a contributing area. The total maximum daily load (TMDL) process required under the

Clean Water Act provides one way of structuring these kinds of decisions. However, DOH efforts to conduct this process appear to be non-existent.

DOH's proposed clarification on the existing classification of State waters remains murky

DOH's proposed "clarification on the existing classification of State waters" has two new features: a list of lands that define the location of Class 1 inland waters (Appendix A) and new language that appears to restrict Class 1 inland waters and Class AA marine water to those lands and waterbodies listed within Appendix A (inland waters) and Appendix B (marine waters), only. See "as listed in" throughout proposed §§ 11-54-5.1 and 11-54-6. These features would be useful for small business if based on a comprehensive, parcel-based inventory of state waters, displayed and navigable in map-based and database forms.

As is, the proposed DOH classification scheme would not reduce the burden on small business for determining a waterbody classification because a party must still dig deeper into the appended information to determine the status of a single parcel. Importantly, Appendix A does not distinguish between Class 1.a. and Class 1.b., which is critical information for compliance purpose. Also, for example, it is unclear whether or not DOH analyzed all listed "forest reserves" to determine the distribution of conservation subzones within each forest reserve unit (i.e. Preservation subzone indicates Class 1.b. waters, while other subzones indicate Class 2 waters unless other Class 1 criteria apply). Similarly, it is unclear whether or not DOH included private lands in the Preservation subzone in Appendix A.

DOH's proposed clarification on the existing classification of State waters is inappropriately unilateral and dispositive of previously-known ambiguities

DOH's proposed "clarification on the existing classification of State waters" has two new features: a list of lands that define the location of Class 1 inland waters (Appendix A) and new language that appears to restrict Class 1 inland waters and Class AA marine water to those lands and waterbodies listed within Appendix A (inland waters) and Appendix B (marine waters), only. See "as listed in" throughout proposed §§ 11-54-5.1 and 11-54-6. The proposed use of the "as listed in" language would eliminate the flexibility provided by the existing language that immediately precedes "as listed in," through which the ongoing decisions of other agencies to designate land and water preservation status are coupled with changes in the classification of associated state waters. The water bodies in the proposed Appendix A and Appendix B are based on DOH's preferred interpretation of the existing requirements, however DOH did not explain the legal and policy basis for its preferred interpretation in the rationale document. Does DOH intend to continually update Appendix A and Appendix B to incorporate the ongoing preservation designations of other agencies?

Interpretation of ambiguous issues depends in part upon the legislative intent of the agency when it adopted the existing regulation. For example, issues that should be discussed during pre-release consultation include:

1. Is private land that is enrolled in a private-public Natural Area Reserve Partnership a "natural reserve . . . established under chapter 195, HRS" with Class 1 waters?

2. For water quality standards purposes, is there a legal difference between “X National Park” and a unit of the National Park system that carries a different categorization, e.g. “Y National Historical Park” and “Z National Historic Landmark District?”
3. Similarly, is there a legal difference between “X State Park,” “Y State Recreation Area,” “Z State Wayside,” etc.? All are administered by the Division of State Parks, but are they all “State Parks” under the water quality standards?
4. If a state sanctuary, mitigation area, preserve, etc. is not established under HRS 195 (Natural Area Reserve), then what is the legal basis for designating it as Class 1? How expansive is the definition of a state wildlife refuge, a term that does not appear in state wildlife conservation statutes and designations? Why isn't the Hawaii Humpback Whale National Marine Sanctuary listed in Appendix B?

General housekeeping

The proposed definitions of "drainage ditch" and "water pollution control system" are not consistent with each other in certain regards and contain some typographical/grammatical errors. The status of agricultural drainage ditches may be unclear.

Thank you for considering my comments on DOH's proposal to amend its administrative rules governing water quality standards and point source pollution control. Please contact me if you would like to discuss the issues presented.

/s/ David Penn

David Penn
Small business manager and consultant
(State of Hawaii TMDL Coordinator, 2001-2011)