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DEPARTMENT OF HEALTH

Compilation of Chapter 11-271
Hawaii Administrative Rules

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SUMMARY

1. Chapter 11-271 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 271

HAZARDOUS WASTE MANAGEMENT

PROCEDURES FOR DECISIONMAKING

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SUBCHAPTER A

RULES GOVERNING INFORMATIONAL PUBLIC HEARINGS

§11-271-1 Purpose and scope. (a) This subchapter contains the department procedures for issuing, modifying, revoking and reissuing, or terminating all hazardous waste management "permits" other than "emergency permits" (see section 11-270-61) and "permits by rule" (section 11-270-60). The latter kinds of permits are governed by chapter 11-270. Hazardous waste management interim status is not a "permit" and is covered by specific provisions in chapter 11-270. The procedures of this subchapter also apply to denial of a permit for the active life of a hazardous waste management facility or unit under section 11-270-29.

(b) All references in tables and appendices to provisions of the code of federal regulations shall be construed to mean the State rule analogue of the referenced federal regulation (for example, 40 CFR 260.1 shall be construed to mean section 11-260-1 of the Hawaii Administrative Rules). [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §271.1)

§11-271-2 Definitions. In addition to the definitions given in sections 11-270-2 and 11-260-10, the definitions below apply to this subchapter.

"Application" means the EPA standard national forms (see Appendix I of chapter 11-270) for applying for a permit. Application also includes the information required by the director under sections 11-270-14 through 11-270-29 (contents of Part B of the hazardous waste management permit application).

"Appropriate Act and regulations" means the federal Clean Water Act (CWA); the federal Solid Waste Disposal Act, as amended by the federal Resource Conservation and Recovery Act (RCRA); or the federal Safe Drinking Water Act (SDWA), whichever is applicable; applicable federal regulations promulgated under those statutes; HRS chapter 342J; rules promulgated pursuant to HRS chapter 342J; HRS chapters 340E and 342D and the rules promulgated thereunder.

"Department" means the Hawaii department of health.

"Director" means the director of the department of health or the director's authorized representative.

"Draft permit" means a document prepared under section 11-271-6 indicating the director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a

"permit." A notice of intent to terminate a permit and a notice of intent to deny a permit as discussed in section 11-271-5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in section 11-271-5, is not a ''draft permit.'' A "proposed permit" is not a "draft permit."

"Environmental Protection Agency" means the United States Environmental Protection Agency.

"EPA" means the United States Environmental Protection Agency.

"Facility" or "activity" means any "HWM facility" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under HRS chapter 342J and the rules adopted thereunder.

"Major facility" means any facility or activity classified as such by the Regional Administrator in conjunction with the director.

"Owner" or "operator" means owner or operator of any facility or activity subject to regulation under HRS chapter 342J and the rules adopted thereunder.

"Permit" means an authorization, license, or equivalent control document issued by EPA or the State to implement the requirements of 40 CFR parts 270, 271, and 124 or chapters 11-270 and 11-271. "Permit" includes "permit by rule" (section 11-270-60), and emergency permit (section 11-270-61). Permit does not include hazardous waste management interim status (section 11-270-70), or any permit which has not yet been the subject of final department action, such as a "draft permit" or a "proposed permit."

"Person" means any individual, partnership, firm, joint stock company, association, public or private corporation, federal agency, the State or any of its political subdivisions, any state and any of its political subdivisions, trust, estate, interstate body, or any other legal entity.

"Regional Administrator" means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

"Schedule of compliance" means a schedule of remedial measures included in a "permit," including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with HRS chapter 342J and the rules promulgated thereunder.

"Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

"State" means the State of Hawaii.

[Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.2)

§11-271-3 Application for a permit.

(a)(1) Any person who requires a permit under the hazardous waste management program shall complete, sign, and submit to the director an application for a permit required under section 11-270-1. Applications are not required for hazardous waste management permits by rule (section 11-270-60).

(2) The director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. See sections 11-270-10 and 11-270-13.

(3) Permit applications must comply with the signature and certification requirements of section 11-270-11.

(b) [Reserved]

(c) The director shall review for completeness every application for a permit. Each application for a permit submitted by a new hazardous waste management facility should be reviewed for completeness by the director within thirty days of its receipt. Each application for a permit submitted by an existing hazardous waste management facility (both Parts A and B of the application), should be reviewed for completeness within 60 days of receipt. Upon completing the review, the director shall notify the applicant in writing whether the application is complete. If the application is incomplete, the director shall list the information necessary to make the application complete. When the application is for an existing hazardous waste management facility, the director shall specify in the notice of deficiency a date for submitting the necessary information. The director shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the director may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable rules and statutory provisions, including HRS section 342J-7.

(e) If the director decides that a site visit is necessary for any reason in conjunction with the processing of an application, the director shall notify the applicant and a date shall be scheduled.

(f) The effective date of an application is the date on which the director notifies the applicant that the application is complete as provided in subsection (c).

(g) For each application from a major new hazardous waste management facility, the director shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. The schedule shall specify target dates by which the director intends to:

(1) Prepare a draft permit;
(2) Give public notice;
(3) Complete the public comment period, including any public hearing; and
(4) Issue a final permit. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.3)

§11-271-4 [Reserved]

§11-271-5 Modification, revocation and reissuance, or termination of permits. (a) Permits may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in section 11-270-41 or 11-270-43. All requests shall be in writing and shall contain facts or reasons supporting the request.

(b) If the director decides the request is not justified, the director shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings.

(c)(1) If the director tentatively decides to modify or revoke and reissue a permit under section 11-270-41 or subsection 11-270-42(c), the director shall prepare a draft permit under section 11-271-6 incorporating the proposed changes. The director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, the director shall require the submission of a new application.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) "Classes 1 and 2 modifications" as defined in subsections 11-270-42(a) and (b) are not subject to the requirements of this section.

(d) If the director tentatively decides to terminate a permit under section 11-270-43, the director shall issue a notice

of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under section 11-271-6.

(e) All draft permits (including notices of intent to terminate) prepared under this section shall be based on the administrative record as defined in section 11-271-9. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.5)

§11-271-6 Draft permits. (a) Once an application is complete, the director shall tentatively decide whether to prepare a draft permit or to deny the application.

(b) If the director tentatively decides to deny the permit application, the director shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section. See subsection 11-271-6(e). If the director's final decision (section 11-271-15) is that the tentative decision to deny the permit application was incorrect, the director shall withdraw the notice of intent to deny and proceed to prepare a draft permit under subsection (d) of this section.

(c) [Reserved]

(d) If the director decides to prepare a draft permit, the director shall prepare a draft permit that contains the following information:

(1) All conditions under sections 11-270-30 and 11-270-32;
(2) All compliance schedules under section 11-270-33;
(3) All monitoring requirements under section 11-270-31; and
(4) Standards for treatment, storage, and/or disposal and other permit conditions under section 11-270-30.

(e) All draft permits prepared by the department under this section shall be accompanied by a statement of basis (section 11-271-7) or fact sheet (section 11-271-8), and shall be based on the administrative record (section 11-271-9), publicly noticed (section 11-271-10) and made available for public comment (section 11-271-11). The director shall give notice of opportunity for a public hearing (section 11-271-12), issue a final decision (section 11-271-15) and respond to comments (section 11-271-17). Draft permits shall be accompanied by a fact sheet if required under section 11-271-8. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.6)

§11-271-7 Statement of basis. The department shall prepare a statement of basis for every draft permit for which a fact sheet under section 11-271-8 is not prepared. The statement of

basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. The statement of basis shall be sent to the applicant and, on request, to any other person. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.7)

§11-271-8 Fact sheet. (a) A fact sheet shall be prepared for every draft permit for a major hazardous waste management facility or activity, and for every draft permit which the director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1) A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) [Reserved]

(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by section 11-271-9;

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6) A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under section 11-271-10 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the final decision.

(7) Name and telephone number of a person to contact for additional information. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.8)

§11-271-9 Administrative record for draft permits. (a) The provisions of a draft permit prepared by the department under section 11-271-6 shall be based on the administrative record

defined in this section.

(b) For preparing a draft permit under section 11-271-6, the record shall consist of:

(1) The application, if required, and any supporting data furnished by the applicant;

(2) The draft permit or notice of intent to deny the application or to terminate the permit;

(3) The statement of basis (section 11-271-7) or fact sheet (section 11-271-8);

(4) All documents cited in the statement of basis or fact sheet; and

(5) Other documents contained in the supporting file for the draft permit.

(6) [Reserved]

(c) Material readily available at the department or published material that is generally available, and that is included in the administrative record under subsections (b) and (c), need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis or the fact sheet. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.9)

§11-271-10 <u>Public notice of permit actions and public comment period.</u> (a) Scope.

(1) The director shall give public notice that the following actions have occurred:

(i) A permit application has been tentatively denied under subsection 11-271-6(b);

(ii) A draft permit has been prepared under subsection 11-271-6(d); or

(iii) A hearing has been scheduled under section 11-271-12.

(2) No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under subsection 11-271-5(b). Written notice of that denial shall be given to the requester and to the permittee.

(3) Public notices may describe more than one permit or permit actions.

(b) Timing.

(1) Public notice of the preparation of a draft permit (including a notice of intent to deny a permit application) required under subsection (a) shall allow at least 45 days for public comment.

(2) Public notice of a public hearing shall be given at least thirty days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

(c) Methods. Public notice of activities described in paragraph (a)(1) shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this subsection may waive his or her rights to receive notice for any classes and categories of permits);

(i) The applicant;

(ii) Any other agency which the director knows has issued or is required to issue a hazardous waste management permit, UIC, PSD (or other permit under the federal Clean Air Act), NPDES, 404, sludge management permit, or ocean dumping permit under the federal Marine Research Protection and Sanctuaries Act for the same facility or activity (including EPA);

(iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, and State historic preservation officers.

(iv) [Reserved]

(v) [Reserved]

(vi) [Reserved]

(vii) [Reserved]

(viii) [Reserved]

(ix) Persons on a mailing list developed by:

(A) Including those who request in writing to be on the list;

(B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters, environmental bulletins, or State law journals. (The director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The director may delete from the list the name of any person who fails to respond to such a request.)

(x) (A) To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

(B) To each State agency having any authority under State law with respect to the construction or operation of such facility.

(2) (i) For major permits, publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity.

(ii) Publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations.

(3) In a manner constituting legal notice to the public under State law; and

(4) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(d) Contents.

(1) All public notices. All public notices issued under this subchapter shall contain the following minimum information:

(i) Name and address of the office processing the permit action for which notice is being given.

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit.

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit.

(iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit, statement of basis or fact sheet, and the application.

(v) A brief description of the comment procedures required by sections 11-271-11 and 11-271-12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

(vi) The location of the administrative record required by section 11-271-9, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant is available as part of the administrative record.

(vii) [Reserved]

(viii) [Reserved]

(ix) Any additional information considered necessary or proper.

(2) Public notices for hearings. In addition to the general public notice described in paragraph (d)(1), the public notice of a hearing under section 11-271-12 shall

contain the following information:

(i) Reference to the date of previous public notices relating to the permit;

(ii) Date, time, and place of the hearing; and

(iii) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(e) In addition to the general public notice described in paragraph (d)(1), all persons identified in paragraphs (c)(1)(i), (ii) and (iii) of this section shall be mailed a copy of the fact sheet or statement of basis, the permit application (if any) and the draft permit (if any). [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.10)

§11-271-11 Public comments and requests for public hearings. During the public comment period provided under section 11-271-10, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in section 11-271-17. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.11)

§11-271-12 Public hearings.

(a)(1) The director shall hold a public hearing whenever the director finds, on the basis of requests, a significant degree of public interest in a draft permit(s);

(2) The director may also hold a public hearing at the director's discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision;

(3) (i) The director shall hold a public hearing whenever the director receives written notice of opposition to a draft permit and a written request for a hearing within 45 days of public notice under paragraph 11-271-10(b)(1);

(ii) Whenever possible the director shall schedule a hearing under this section at a location convenient to the nearest population center to the proposed facility;

(4) Public notice of the hearing shall be given as specified in section 11-271-10.

(b) Whenever a public hearing will be held, the director shall designate a presiding officer for the hearing who shall be

responsible for its scheduling and orderly conduct.

(c) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under section 11-271-10 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.12)

§11-271-13 Obligation to raise issues and provide information during the public comment period. All persons, including the applicants, who believe any condition of a draft permit is inappropriate or that the director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under section 11-271-10. Any supporting materials which are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or federal statutes, regulations, or rules, EPA or State documents of general applicability, or other generally available reference materials. Commenters shall make supporting materials not already included in the administrative record available to the department as directed by the director. (A comment period longer than forty-five days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted under section 11-271-10 to the extent that a commenter who requests additional time demonstrates the need for such time.) [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.13)

§11-271-14 Reopening of the public comment period.

(a)(1) The director may order the public comment period reopened if the procedures of this subsection could expedite the decisionmaking process. When the public comment period is reopened under this subsection, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the director's tentative decision to deny an application, terminate a permit, or prepare a draft

permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting materials, by a date, not less than sixty days after public notice under paragraph (a)(2), set by the director. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than twenty days after the date set for filing of the material, set by the director.

(2) Public notice of any comment period under this subsection shall identify the issues to which the requirements of subsection (a) shall apply.

(3) On his own motion or on the request of any person, the director may direct that the requirements of paragraph (a)(1) shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying the requirements of paragraph (a)(1) will substantially expedite the decisionmaking process. The notice of the draft permit shall state whenever this has been done.

(4) A comment period of longer than sixty days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they shall be granted under section 11-271-10 to the extent they appear necessary.

(b) If any data information or arguments submitted during the public comment period, including information or arguments required under section 11-271-13, appear to raise substantial new questions concerning a permit, the director may take one or more of the following actions:

(1) Prepare a new draft permit, appropriately modified, under section 11-271-6;

(2) Prepare a revised statement of basis under section 11-271-7, a fact sheet or revised fact sheet under section 11-271-8 and reopen the comment period under section 11-271-14; or

(3) Reopen or extend the comment period under section 11-271-10 to give interested persons an opportunity to comment on the information or arguments submitted.

(c) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under section 11-271-10 shall define the scope of the reopening.

(d) [Reserved]

(e) Public notice of any of the above actions shall be issued under section 11-271-10. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.14)

§11-271-15 Issuance and effective date of permit. (a) After the close of the public comment period under section 11-271-10 on a draft permit, the director shall issue a final permit decision (or a decision to deny a permit for the active life of a hazardous waste management facility or unit under section 11-270-29). The director shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice of final permit decision shall inform the persons authorized by subsection (c) to request a contested case hearing of the procedures for requesting such a hearing. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

(b) A final permit decision (or a decision to deny a permit for the active life of a hazardous waste management facility or unit under section 11-270-29) shall become effective thirty days after the service of notice of the decision unless:

(1) A later effective date is specified in the decision; or

(2) A written request for a contested case hearing is made within thirty days of the date of issuance of the final permit decision by a person authorized by subsection (c) of this section to request a contested case hearing; or

(3) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

(c) After the issuance of a final permit decision, a contested case hearing may be requested by:

(1) The permittee whose permit has been modified, or revoked and reissued, or terminated;

(2) The person whose application for a permit is denied; and

(3) Any person whose legal rights, duties, or privileges will be specially, personally, and adversely affected by the permit decision and who has participated as an adversary during the public comment period or public hearing in the manner provided by sections 11-271-11, 11-271-12, 11-271-13, and 11-271-14.

(d) A request for a contested case hearing must be made in writing.

(e) The director shall approve, or approve with conditions, or deny a complete application for a State hazardous waste management permit required under chapter 11-270, and notify the applicant, within one hundred and eighty days of the effective date of the permit application per section 11-271-3(f). Otherwise, the application is deemed approved on the one hundred and eightieth day.

(f) Subsection (e) shall terminate upon the effective date of federal authorization to Hawaii to administer and enforce a hazardous waste program in the State in lieu of the federal

program. [Eff 6/18/94; am 3/13/99; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35, Act 164, 1998 Haw. Sess. Laws) (Imp: 40 C.F.R. §124.15)

§11-271-16 [Reserved]

§11-271-17 Response to comments. (a) At the time that any final permit is issued under section 11-271-15, the director shall issue a response to comments. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(b) Any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in section 11-271-18. If new points are raised or new material supplied during the public comment period, the department may document its response to those matters by adding new materials to the administrative record.

(c) The response to comments shall be available to the public. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.17)

§11-271-18 Administrative record for final permit. (a) The director shall base final permit decisions under section 11-271-15 on the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and:

(1) All comments received during the public comment period provided under section 11-271-10 (including any extension or reopening under section 11-271-14);

(2) The tape or transcript of any hearing(s) held under section 11-271-12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by section 11-271-17 and any new material placed in the record under that section;

(5) [Reserved];

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

(c) The additional documents required under subsection (b) should be added to the record as soon as possible after their receipt or publication by the department. The record shall be complete on the date the final permit is issued.

(d) This section applies to all final hazardous waste management permits when the draft permit was subject to the administrative record requirements of section 11-271-9.

(e) Material readily available at the department, or published materials which are generally available and which are included in the administrative record under the standards of this section or of section 11-271-17 ("response to comments"), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.18)

§11-271-19 -- §11-271-30 [Reserved]

§11-271-31 Pre-application public meeting and notice.

(a) Applicability. The requirements of this section shall apply to all applicants seeking initial permits for hazardous waste management units. The requirements of this section shall also apply to applicants seeking renewal of permits for such units, where the renewal application is proposing a significant change in facility operations. For the purposes of this section, a "significant change" is any change that would qualify as a class 3 permit modification under section 11-270-42. The requirements of this section do not apply to permit modifications under section 11-270-42 or to applications that are submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

(b) Prior to the submission of a part B permit application for a facility, the applicant must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

(c) The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under subsection (b), and copies of any written comments or materials submitted at the meeting, to the department as a part of the part B application, in accordance with section 11-270-14(b).

(d) The applicant must provide public notice of the pre-application meeting at least 30 days prior to the meeting. The applicant must maintain, and provide to the department upon request, documentation of the notice.

(1) The applicant shall provide public notice in all of the following forms:

(i) A newspaper advertisement. The applicant shall

publish a notice, fulfilling the requirements in paragraph (d)(2), in a newspaper of general circulation in the county that hosts the proposed location of the facility. In addition, the director shall instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties, where the director determines that such publication is necessary to inform the affected public. The notice must be published as a display advertisement.

(ii) A visible and accessible sign. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in paragraph (d)(2). If the applicant places the sign on the facility property, then the sign must be large enough to be readable from the nearest point where the public would pass by the site.

(iii) A broadcast media announcement. The applicant shall broadcast a notice, fulfilling the requirements in paragraph (d)(2), at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the director.

(iv) A notice to the department. The applicant shall send a copy of the newspaper notice to the department and to the appropriate units of State and local government, in accordance with section 11-271-10(c)(1)(x).

(2) The notices required under paragraph (d)(1) must include:

(i) The date, time, and location of the meeting;

(ii) A brief description of the purpose of the meeting;

(iii) A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location;

(iv) A statement encouraging people to contact the facility at least 72 hours before the meeting if they need special access to participate in the meeting; and

(v) The name, address, and telephone number of a contact person for the applicant. [Eff 3/13/99; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.31)

§11-271-32 <u>Public notice requirements at the application stage.</u> (a) Applicability. The requirements of this section shall apply to all applicants seeking initial permits for hazardous waste management units. The requirements of this

section shall also apply to applicants seeking renewal of permits for such units under section 11-270-51. The requirements of this section do not apply to permit modifications under section 11-270-42 or permit applications submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

(b) Notification at application submittal.

(1) The director shall provide public notice as set forth in section 11-271-10(c)(1)(ix), and notice to appropriate units of State and local government as set forth in section 11-271-10(c)(1)(x), that a part B permit application has been submitted to the department and is available for review.

(2) The notice shall be published within a reasonable period of time after the application is received by the director. The notice must include:

(i) The name and telephone number of the applicant's contact person;

(ii) The name and telephone number of the department's contact office, and a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process;

(iii) An address to which people can write in order to be put on the facility mailing list;

(iv) The location where copies of the permit application and any supporting documents can be viewed and copied;

(v) A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location on the front page of the notice; and

(vi) The date that the application was submitted.

(c) Concurrent with the notice required under section 11-271-32(b), the director must place the permit application and any supporting documents in a location accessible to the public in the vicinity of the facility or at the department's office. [Eff 3/13/99; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.32)

§11-271-33 <u>Information repository.</u> (a) Applicability. The requirements of this section apply to all applicants seeking permits for hazardous waste management units.

(b) The director may assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the director shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the director determines, at any time after submittal of a permit

application, that there is a need for a repository, then the director shall notify the facility that it must establish and maintain an information repository. (See section 11-270-30(m) for similar provisions relating to the information repository during the life of a permit).

(c) The information repository shall contain all documents, reports, data, and information deemed necessary by the director to fulfill the purposes for which the repository is established. The director shall have the discretion to limit the contents of the repository.

(d) The information repository shall be located and maintained at a site chosen by the facility. If the director finds the site unsuitable for the purposes and persons for which it was established, due to problems with the location, hours of availability, access, or other relevant considerations, then the director shall specify a more appropriate site.

(e) The director shall specify requirements for informing the public about the information repository. At a minimum, the director shall require the facility to provide a written notice about the information repository to all individuals on the facility mailing list.

(f) The facility owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the director. The director may close the repository at the director's discretion, based on the factors in subsection (b) of this section. [Eff 3/13/99; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §124.33)

§§11-271-34 -- 11-271-100 [Reserved]

SUBCHAPTER B

RULES GOVERNING CONTESTED CASE HEARINGS

§11-271-101 Scope of these rules. (a) Notwithstanding any other rules to the contrary, the rules in this subchapter govern all contested case hearings conducted under HRS chapter 342J. Any other rules relating to contested case hearings shall not apply to contested case hearings conducted under HRS chapter 342J unless expressly incorporated by the rules in this subchapter.

(b) Questions arising at any stage of a contested case proceeding which are not addressed in the rules in this subchapter shall be resolved at the discretion of the hearing officer.

(c) The rules in this subchapter shall not apply to hearings relating to claims arising from chapter 11-280 or HRS chapter 92F. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS

§342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.01)

§11-271-102 Use of number and gender. As used in this subchapter, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.
[Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.02)

§11-271-103 Definitions. (a) The following definitions apply to this subchapter:

"Complainant" means any person authorized to issue a complaint on behalf of the department.

"Complaint" means a written communication, alleging one or more violations of specific provisions of HRS chapter 342J, any rules adopted thereunder, or a permit promulgated thereunder; or stating a final permit decision from which a contested case hearing is requested under paragraph 11-271-15(b)(2).

"Consent agreement" means any written document, signed by the parties, containing stipulations or conclusions of fact or law and other terms and conditions acceptable to both complainant and respondent.

"Hearing" means a hearing on the record open to the public and conducted under the rules in this subchapter.

"Party" means any person who participated in a hearing as complainant, respondent, or intervenor.

"Respondent" means any person proceeded against in the complaint.

(b) Terms not defined in this section have the meaning given by chapters 11-260, 11-270, subchapter A of chapter 11-271, and HRS chapter 342J. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.03)

§11-271-104 Powers and duties of the hearing officer; disqualification. (a) The director delegates authority under HRS chapters 342J and 26 and HRS section 92-16 to the hearing officer to perform the functions assigned to him or her in the rules of this subchapter. Except as provided in subsection (b) of this section, an appeal or motion under this subchapter directed to the director, rather than to the hearing officer, will not be considered. The hearing officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The hearing officer shall have authority to:

(1) Conduct administrative hearings under the rules of this subchapter;

(2) Rule upon motions, requests, and offers of proof,

dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by State law; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by the rules in this subchapter.

(b) Disqualification; withdrawal. The hearing officer may not perform functions provided for in the rules in this subchapter regarding any matter in which he (i) has a financial interest or (ii) has any relationship with a party or with the subject matter which would make it inappropriate for him to act. Any party may at any time request that the hearing officer disqualify himself or herself from the proceeding or by motion made to the director request that the hearing officer be disqualified from the proceeding. The hearing officer may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.04)

§11-271-105 <u>Filing, service, and form of pleadings and documents.</u> (a) Filing of pleadings and documents.

(1) The original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the hearing officer clerk.

(2) A certificate of service shall accompany each document filed or served. A party filing documents with the hearing officer clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the hearing officer. The hearing officer shall maintain a duplicate file during the course of the proceeding.

(3) When the hearing officer corresponds directly with the

parties, the original of the correspondence shall be sent to the hearing officer clerk, a copy shall be maintained by the hearing officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the hearing officer shall in addition to serving all other parties send a copy of all such correspondence to the hearing officer clerk. A certificate of service shall accompany each document served under this subsection.

(b) Service of pleadings and documents --

(1) Service of complaint.

(i) Service of a copy of the signed original of the complaint, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by State or applicable federal law to receive service of process.

(iii) [Reserved]

(iv) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) Service of documents other than complaint, rulings, orders, and decisions. All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

(c) Form of pleadings and documents.

(1) Except as provided in this subchapter, or by order of the hearing officer, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are

true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing officer clerk, hearing officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under the rules in this subchapter.

(5) The hearing officer or the hearing officer clerk may refuse to file any document which does not comply with this section. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the hearing officer. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.05)

§11-271-106 Filing and service of rulings, orders, and decisions. All rulings, orders, decisions, and other documents issued by the director or hearing officer, as appropriate, shall be filed with the hearing officer clerk. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the director or the hearing officer, as appropriate. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.06)

§11-271-107 Computation and extension of time. (a) Computation. In computing any period of time prescribed or allowed by the rules in this subchapter, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and State holidays shall be included. When a stated time expires on a Saturday, Sunday or State holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. The hearing officer may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) Service by mail. Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.07)

§11-271-108 Ex parte discussion of proceeding. At no time after the issuance of the complaint shall the hearing officer discuss ex parte the merits of the proceeding with any interested person outside the department, with any department staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the hearing officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.08)

§11-271-109 Examination of documents filed. (a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during department business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the hearing officer clerk.

(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The department may waive this cost in accordance with chapter 11-280. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.09)

§11-271-110 Appearances. Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel must conform to the standards of conduct and ethics required of practitioners before the courts of the State. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.10)

§11-271-111 Intervention. (a) Motion. A motion for leave to intervene in any proceeding conducted under the rules of this subchapter must set forth the grounds for the proposed

intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and subsection (c) of this section, within twenty days after service of the motion for leave to intervene.

(b) When filed. A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under subsection 11-271-119(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in subsection (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.

(c) Disposition. Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be specially, personally, and adversely affected by the department's decision; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(d) Amicus curiae. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the hearing officer shall issue an order setting the time for filing such brief. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.11)

§11-271-112 Consolidation and severance.

(a) Consolidation. The hearing officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under the rules of this subchapter where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) Severance. The hearing officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.12)

§11-271-113 [Reserved]

§11-271-114 Content and amendment of the complaint. (a) Complaint for the assessment of a civil penalty. Each complaint for the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of HRS chapter 342J authorizing the issuance of the complaint;
(2) Specific reference to each provision of HRS chapter 342J and implementing regulations which respondent is alleged to have violated;
(3) A statement of the factual basis for alleging the violation;
(4) The amount of the civil penalty which is proposed to be assessed;
(5) Notice of respondent's right to request a hearing, unless a request for a hearing has been made.

(b) Complaint for department action other than the assessment of a civil penalty. Each complaint for a department action other than the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of HRS chapter 342J, regulations, and/or permit authorizing the issuance of the complaint;
(2) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;
(3) A statement of the factual basis for such allegations;
(4) A request for an order and a statement of the terms and conditions of the requested order;
(5) Notice of the respondent's right to request a hearing, unless a request for a hearing has been made.

(c) [Reserved]

(d) Amendment of the complaint. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the hearing officer. Respondent shall have twenty additional days from the date of service of the amended complaint to file his answer.

(e) Withdrawal of the complaint. The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the hearing

officer. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.14)

§11-271-115 Answer to the complaint. (a) General. Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the order proposed in the complaint is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the hearing officer clerk. Any such answer to the complaint must be filed with the hearing officer clerk within twenty days after service of the complaint.

(b) Contents of the answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) Request for hearing. A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer, or if a request for a contested case hearing has been made in writing before the filing of the answer.

(d) Failure to admit, deny, or explain. Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) Amendment of the answer. The respondent may amend the answer to the complaint upon motion granted by the hearing officer. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.15)

§11-271-116 Motions. (a) General. All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph 11-271-105(b)(2).

(b) Response to motions. Response to motions shall be filed with the hearing officer clerk within thirty days after service of the motion. The hearing officer may set a shorter time for response, or make such other orders concerning the disposition of motions as he deems appropriate. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to

have waived any objection to the granting of the motion.

(c) Oral argument on motions will be permitted where the hearing officer considers it necessary or desirable. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.16)

§11-271-117 Default order. (a) Default. A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the hearing officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the hearing officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings thirty days after a final order issued upon default. If the complaint is for a department action other than the assessment of a civil penalty, the department action proposed in the complaint shall become effective without further proceedings on the date of service of the default order unless a different effective date is specified by the hearing officer in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) Procedures upon default. When the hearing officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the final decision, and shall be filed with the hearing officer clerk.

(c) Contents of a default order. A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, the penalty to be assessed, and other terms and conditions, as appropriate.

(d) For good cause shown the hearing officer may set aside a default order. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.17)

§11-271-118 Informal settlement; consent agreement and

order. (a) Settlement policy. The department encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objective of HRS chapter 342J and applicable regulations. The respondent may confer with complainant concerning settlement at any time after receipt of a complaint. Settlement conferences shall not affect the respondent's obligation to file a timely answer under section 11-271-115.

(b) Consent agreement. The parties shall forward a written consent agreement and a proposed consent order to the director whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated department action, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their duly authorized representatives, and counsel.

(c) Consent order. No settlement or consent agreement shall dispose of any proceeding without a consent order from the director. In preparing such an order, the director may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.18)

§11-271-119 Prehearing conference. (a) Purpose of prehearing conference. Unless a conference appears unnecessary, the hearing officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

(1) The settlement of the case;
(2) The simplification of issues and stipulation of facts not in dispute;
(3) The necessity or desirability of amendment to pleadings;
(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;
(5) The limitation of the number of expert or other witnesses;
(6) Settling a time and place for the hearing; and
(7) Any other matters which may expedite the disposition of the proceeding.

(b) Exchange of witness lists and documents. Unless otherwise ordered by the hearing officer, each party at the prehearing conference shall make available to all other parties

(1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the hearing officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the hearing officer. The hearing officer shall allow the parties reasonable opportunity to review new evidence.

(c) Record of the prehearing conference. No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the hearing officer upon motion of a party or sua sponte. The hearing officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) Location of prehearing conference. The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, unless the hearing officer determines that there is good cause to hold it at another location or by telephone.

(e) Unavailability of a prehearing conference. If a prehearing conference is unnecessary or impracticable, the hearing officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) Other discovery.

(1) Except as provided by subsection (b) of this section, further discovery, under this section, shall be permitted only upon determination by the hearing officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The hearing officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:
  (i) The circumstances warranting the taking of the discovery;
  (ii) The nature of the information expected to be discovered; and
  (iii) The proposed time and place where it will be taken.

  If the hearing officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this subsection may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under subsection 11-271-117(a). [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.19)

§11-271-120 <u>Accelerated decision; decision to dismiss.</u>

(a) General. The hearing officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the hearing officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) Effect.

(1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes a final decision of the hearing officer, and shall be filed with the hearing officer clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the hearing officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order

specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.20)

§11-271-121 Scheduling the hearing. (a) When an answer is filed, the hearing officer clerk shall forward copies of the complaint, the answer, any other documents filed thus far in the proceeding, and the case file to the hearing officer.

(b) Notice of hearing. If the respondent requests a hearing in his answer, the hearing officer shall serve upon the parties a notice of hearing setting forth a date, time, and place for the hearing. A copy of the complaint shall be attached to, incorporated, and made a part of the notice of hearing. The hearing officer may issue the notice of hearing at any appropriate time, but not later than twenty days prior to the date set for the hearing.

(c) Postponement of hearing. No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) Location of the hearing. The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under subsection 11-271-119(d). [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.21)

§11-271-122 Evidence. (a) General. The hearing officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the State courts under Rule 408 of the Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, is not admissible. In the presentation, admission, disposition, and use of evidence, the hearing officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The hearing officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(b) Examination of witnesses. Witnesses shall be examined orally, under oath, except as otherwise provided in the rules of this subchapter. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-

examination is not unduly repetitious.

(c) Verified statement. The hearing officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the hearing officer, the reporter, if any, and opposing counsel. The witness presenting the statement shall swear to the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) Admission of affidavits where the witness is unavailable. The hearing officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes.

(e) Exhibits. Where practicable, an original and one copy of each exhibit shall be filed with the hearing officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) Official notice. Official notice may be taken of any matter judicially noticed in the State courts and of other facts within the specialized knowledge and experience of the department. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.22)

§11-271-123 <u>Objections and offers of proof.</u> (a) Objection. Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the hearing officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) Offer of proof. Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony, documents, or exhibits shall consist of a brief statement describing the nature of the evidence excluded. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.23)

§11-271-124 [Reserved]

§11-271-125 [Reserved]

§11-271-126 Proposed findings, conclusions, and order. Within thirty days after the conclusion of the hearing, or within such longer time as may be fixed by the hearing officer, any party may submit for the consideration of the hearing officer, proposed findings of fact, conclusions of law, and a proposed order. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.26)

§11-271-127 Recommendations of the hearing officer and final decision. (a) Filing and contents. The hearing officer shall issue his or her written recommendations to the director as soon as practicable after the period for filing proposed findings of fact, conclusions of law, and proposed order under section 11-271-126 has expired. The hearing officer shall retain a copy of the complaint in the duplicate file. The recommendations shall contain his or her findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a civil penalty assessment and other terms and conditions. If any party to the proceeding has filed proposed findings of fact, the hearing officer shall incorporate in his or her recommendations a ruling upon each proposed finding so presented.

(b) Amount of civil penalty. If the hearing officer determines that a violation has occurred, the hearing officer shall recommend the dollar amount of the civil penalty to be assessed in the final decision in accordance with any criteria set forth in chapter 342J, HRS relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines of the department. If the hearing officer proposes a penalty different in amount from the penalty recommended to be assessed in the complaint, the hearing officer shall set forth in his or her recommendations the specific reasons for the increase or decrease. The hearing officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) Payment of a civil penalty. The respondent shall pay the full amount of the civil penalty assessed in the final decision within thirty days after receipt of the final decision unless otherwise specified in the final decision. Payment shall be made by forwarding to the hearing officer clerk a cashier's check or certified check in the amount of the penalty assessed in the final decision, payable to the "Director of Health, State of Hawaii."

(d) All terms and conditions of a final decision not related to the payment of a civil penalty shall become effective upon service of the final decision, unless a different effective date is specified in the final decision. [Eff 6/18/94; am 3/13/99; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: None)

§11-271-128 Motion to reopen a hearing. (a) Filing and content. A motion to reopen a hearing to take further evidence must be made no later than twenty days after service of the final decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the hearing officer and filed with the hearing officer clerk.

(b) Disposition of motion to reopen a hearing. Within twenty days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the hearing officer clerk and serve on all other parties an answer thereto. The hearing officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of the rules of this subchapter. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under the rules in this subchapter until such time as the motion is denied or the reopened hearing is concluded. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §342J-4, 342J-31, 342J-35) (Imp: 40 C.F.R. §22.28)

§§11-271-129 -- 11-271-200 [Reserved]

SUBCHAPTER C

DECLARATORY RULINGS

§11-271-201 Declaratory rulings. (a) Any interested person may petition the department for a declaratory order as to the applicability of any statutory provision or of any rule or order of the department.

(b) The petition shall be prepared on a form furnished by the department.

(c) The petition shall contain the following:

(1) The name, address, and telephone number of the

petitioner;

(2) A statement of the nature of the petitioner's interest, including reasons for submission of the petition;

(3) A designation of the specific statute, rule, or order in question;

(4) A clear and concise statement of the position or contention of the petitioner;

(5) A memorandum of authorities, containing a full discussion of the reasons, including legal authorities, in support of such position or contention; and

(6) The signature of each petitioner.

(d) Any petition which does not conform to the foregoing requirements may be rejected.

(e) Any party may intervene subject to the provisions of section 11-271-111.

(f) The department may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the department may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future;

(2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief;

(3) The issuance of the declaratory order may adversely affect the interests of the department or any of its officers or employees in a litigation or administrative matter which is pending or may reasonably be expected to arise; or

(4) The matter is not within the jurisdiction of the department.

(g) The department shall consider each petition submitted and, within a reasonable time after the submission thereof, either deny the petition in writing, stating its reason for such denial, or issue a declaratory order on the matters contained in the petition.

(h) Hearing.

(1) Although in the usual course of processing a petition for a declaratory ruling no formal hearing shall be granted to the petitioner, the department may, sua sponte, order a contested case hearing on the petition.

(2) Any petitioner who desires a hearing on a petition for declaratory ruling shall set forth in detail in a written request the reasons why the matters alleged in the petition, together with supporting affidavits or other written evidence and briefs or memoranda or legal authorities, will not permit the fair and expeditious disposition of the petition and, to the extent that such request for hearing is dependent upon factual assertion, shall accompany such request by affidavit establishing such facts.

(i) Any hearing held on a petition for declaratory ruling shall comply with the rules in subchapter B of this chapter except that the petitioner shall be the complainant and the petition filed in compliance with this section shall be treated as the complaint.

(j) An order disposing of a petition shall be applicable only to the factual situation alleged in the petition or set forth in the order. The order shall not be applicable to different factual situations or where additional facts not considered in the order exist. Such order shall have the same force and effect as other orders issued by the department. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35, 91-8) (Imp: None)

§§11-271-202 - 11-271-300 [Reserved]

SUBCHAPTER D

APPENDICES

§11-271-301 Appendix. Appendix I of chapter 11-270 entitled "Application for a Hazardous Waste Permit - Part A (January 1990)" is made a part of this chapter. [Eff 6/18/94; comp SEP 20 1999] (Auth: HRS §§342J-4, 342J-31, 342J-35) (Imp: None)

DEPARTMENT OF HEALTH

The compilation of chapter 11-271, Hawaii Administrative Rules, on the Summary page dated SEP 2 1999, was adopted on SEP 2 1999. No public notice was provided and no public hearing was conducted.

This compilation shall take effect ten days after filing with the Office of the Lieutenant Governor.

BRUCE S. ANDERSON, Ph.D., M.P.H.
Director of Health

APPROVED AS TO FORM:

Adina L.K. Cunningham
Deputy Attorney General

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Date: 9/8/99

SEP 09 1999

Filed

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