

**Fact Sheet, Hawaii Administrative Rules (HAR) Chapter 11-53 Section 401 Water Quality Certification (WQC)**

<b>Current</b>	<b>Proposed</b>	<b>Rationale</b>
<p>Section 401 WQC rules are in HAR 11-54-9.1.</p>	<p>DOH proposes to remove the Section 401 WQC rules in HAR 11-54-9.1 and incorporate the substance in a new chapter (HAR 11-53) for certifications.</p>	<p>HAR 11-54 is the body of State Water Quality Standards (WQS) approved by EPA that describe the desired condition of water bodies and certain means by which that condition will be protected or achieved. The certification is issued by the State for projects requiring a federal license or permit that may result in a water pollutant discharge into State waters. The certification does not require EPA approval and does not belong in the WQS. Therefore, DOH proposes to create a new chapter for the certification rules.</p> <p>DOH also proposes revisions to the certification rules, as described below, to streamline processing.</p>
<p>11-54-9.1 Definitions.</p>	<p>11-53-1 Definitions are imported from 11-54-9.1 with certain revisions.</p> <p>Adds definition of “blanket Section 401 WQC” and “pre-approved SOP”.</p> <p>Updates CFR reference dates.</p>	<p>New definitions were added as needed.</p> <p>This change references the most current relevant federal regulations.</p>

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	Removes definitions of “agent”, “duly authorized representative”, “navigable waters”, “territorial seas”, and “Waters of the United States”.	These definitions are no longer referenced in the proposed rules. For example, a duly authorized representative is no longer needed with the streamlined certification process.
None.	11-53-2 General Policy of Section 401 Water Quality Certifications.	Added Section 401 WQC background information to clarify its relationship with the federal license or permit.
<p>11-54-9.1.02 Water quality certification; contents of water quality certification application.</p> <p>None.</p> <p>11-54-9.1.02(e)</p>	<p>11-53-3 Application.</p> <p>Adds a requirement in the application to include a description of Best Management Practices (BMPs).</p> <p>Eliminates the filing fee for applications based on DOH pre-approved Standard Operating Procedures (SOPs).</p>	<p>The contents of the application are revised to match minimum federal requirements in 40 CFR 121.3.</p> <p>The description of BMPs that will be used to comply with proposed requirements in 11-53-7 are a tool to ensure protection of State waters. See also the rationale for 11-53-7.</p> <p>DOH has a streamlined Section 401 WQC process where applicants can develop SOPs for their different activities, get the SOPs pre-approved by DOH, then use the pre-approved SOPs in their applications. Since the pollution control measures in the SOPs would already have been reviewed and approved, DOH does not need to review the SOPs again with every application. Therefore, processing time is streamlined. DOH is proposing to eliminate filing fees for applications with pre-approved SOPs to incentivize SOP development.</p>

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<p>11-54-9.1.02(c).</p> <p>11-54-9.1.01(c).</p> <p>None.</p>	<p>Establishes deadlines for informing applicants that their application is deficient or complete.</p> <p>Proposes a simplified application for Hawaiian fishponds.</p> <p>Clarifies that Hawaiian fishponds that have DLNR authorization to proceed do not require an application.</p>	<p>The current Section 401 WQC rules have a 1-year deadline to act on a complete application. Shortening this time frame ensures that DOH's processing does not delay important government projects requiring Section 401 WQCs.</p> <p>HRS 342D-6.5(a) requires DOH to prioritize and expedite processing of applications for the reconstruction, restoration, repair, or reuse of any loko i'a or Hawaiian fishpond (as defined in HRS 183B-1). Drawing from DOH experience to date, a simplified application will provide sufficient information. Coupled with BMP requirements in 11-53-7, DOH believes water quality can still be adequately protected while allowing DOH to comply with HRS 342D-6.5(a).</p> <p>HRS 342D-6.5(b) provides that DOH waives the certification requirement. This provision makes it clear to qualifying persons that DOH will not require an application in a situation where DOH will not even be required to consider the content. See also 11-53-12(c) which clarifies that a certification is not required.</p>
<p>None.</p>	<p>11-53-4 Determination.</p>	<p>This section proposes deadlines for DOH to act on a complete application. As noted above, shortening this time frame ensures that DOH's processing does not delay important government projects requiring Section 401 WQCs.</p>
<p>11-54-9.1.03 Water quality certification; notice and hearing.</p>	<p>11-53-5 Public Notice and Hearing.</p>	<p>Proposed rules maintain public notice and hearing requirements substantially similar to existing requirements.</p>
<p>11-54-9.1.01 Water quality certification; contents of certification.</p>	<p>11-53-6 Certification.</p>	<p>Subsection (a) specifies the contents of the certification and matches minimum federal requirements set forth in 40 CFR 121.2. The maximum 5-year term of the certification parallels the term of NPDES permits under HRS 342D-6.</p>

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None.	11-53-7 General Conditions.	Proposed conditions and BMP requirements are based on control measures DOH believes to be protective of water quality and broad enough to address water pollutant issues from different types of projects/activities. BMP conditions are included in the proposed rule to reform the practice of allowing applicants to propose BMPs with no performance metrics or guidelines. This practice has resulted in long application processing times when DOH found the proposed BMPs to be deficient.
11-54-9.1.06 Water quality certification; inspection of facility or activity before operation.	11-53-8 Right to Inspect.	Replaces current inspection language with a reference to HRS 342D-8, which allows DOH to enter and inspect any facility or activity.
None.	11-53-9 Modification.	Proposed rule outlines the circumstances when a certification can be modified. A filing fee is proposed for all modifications requested by the applicant.
11-54-9.1.08 Water quality certification; termination or suspension.	11-53-10 Revocation.	Proposed rule outlines the circumstances when a certification can be revoked.
11-54-9.1.09 Water quality certification; review and advice.	11-53-11 Review and Advice.	Proposed rule does not substantively revise requirements for review and advice to the federal licensing and permitting agency.
11-54-9.1.04 Water quality certification; waiver.	11-53-12 Activities That Do Not Require Certification.	Clarifies that DOH can waive or not require a Section 401 WQC, which is a discretionary action allowed under the Clean Water Act. The proposed rules also clarify that the State's WQS must still be complied with even if a person is issued a certification or if the certification is waived.

<b>Current</b>	<b>Proposed</b>	<b>Rationale</b>
11-54-9.1.02(f)	11-53-13 After-The-Fact Activities. Added requirements to handle after-the-fact activities.	DOH does not condone after-the fact activities. The proposed rule now limits certifications to only be issued for portions of the activity that are not already initiated. Also, DOH is explicitly authorized to inform the federal agency that a Section 401 WQC is not required for after-the-fact activities so that the federal agency can move forward with their enforcement of the activity. In the past, the lack of this clarification to EPA resulted in delays in their enforcement.
None.	11-53-14 Severability.	Added severability clause.
11-54-9.1.05 Water quality certification; adoption of new water quality standards.	Did not carry over to proposed rules.	Once a Section 401 WQC is issued or waived, it is not fair to the discharger to have to comply with new water quality standards for their activity. This treatment is similar to National Pollutant Discharge Elimination System (NPDES) permits in HAR 11-55 where, after the NPDES permit is issued, the discharger is not required to comply with new water quality standards until DOH issues a renewal or modification to the NPDES permit.
11-54-9.1.07 Water quality certification; notification to licensing or permitting agency.	Did not carry over to proposed rules.	Proposed 11-53-7 requires the owner and operator of an activity or facility for which a certification is issued to report to the federal licensing or permitting agency any non-compliance with the condition of the certification. DOH also has broad enforcement authority over the WQS. If DOH determines after an inspection is performed that the activity or facility will violate applicable WQS, DOH can exercise its enforcement powers.