Response to Public Comments on Proposed Hawaii Administrative Rules (HAR), Chapter 11-55 Docket No. CWB-1-21

The Department of Health (DOH), Clean Water Branch (CWB) solicited public comments from December 16, 2020 through February 1, 2021, on proposed amendments to HAR Chapter 11-55 (Water Pollution Control). HAR Chapter 11-55 contains the rules regarding issuance of National Pollutant Discharge Elimination System (NPDES) permits within the State of Hawaii.

A virtual public hearing was held at 9:00 a.m. on February 1, 2021. The DOH-CWB published notices of the comment period and public hearing on December 16, 2020 in the Honolulu Star Advertiser, The Garden Island, Maui News, West Hawaii Today, Hawaii Tribune-Herald, and Midweek newspapers. Below is a summary of the comments received and the DOH-CWB responses.

HAR 11-55 (WATER POLLUTION CONTROL)

Comments from Malama Pupukea-Waimea

Comment 1: 11-55-13(d) – Eliminating oral testimony – Oppose the deletion of the opportunity to provide oral testimony.

We can understand the desire for efficiency noted in the Rationale ("DOH does not believe requiring a written statement is unduly burdensome when it is mandated to address comments in making a permit determination. Instead, it will require DOH to address such comments in a more direct and discernable way."). We acknowledge that written-only testimony will be normal for more organized and engaged commenters (e.g., non-profit organizations).

However, given the history and cultural context of Hawai‘i and its diverse communities, with strong oral traditions, not allowing oral testimony reduces public participation particularly from those who are less inclined to use email and computers, or who have access limitations. This change unnecessarily raises an environmental justice issue. Eliminating oral testimony may also erode community support for an otherwise strong DOH initiative with these rule changes.

The number of public hearings at which oral testimony would be requested would likely be small and, to catch up with the times, oral submissions do not have to be in person, although that may be desirable to certain high public interest applications. At minimum, asynchronous oral submissions should be allowed using recordings and synchronous submissions should be allowed via videoconferencing (e.g., Zoom). A reasonable advance registration requirement to request synchronous oral testimony may limit the administrative burden of setting up for a hearing where no one shows up to testify.

One more note: this Rationale document comment – “This rule change should not be construed as prohibiting oral statements on written commentary.” – is really unclear and should be re-explained – what does that mean? That clarification may affect our comments on this issue.

Therefore, we suggest deleting the brackets around [and oral] and reverting the text back to: (*d) Any person may submit oral or written statements and data concerning the draft permit.* And adding for the sake of modernization the process and increasing access: *Oral testimony may be submitted electronically or by a videoconference system to the hearing officer.*

Response 1: The intent of the rule change was by limiting public statements to only written, DOH would be able to respond to public statements much more accurately. For statements that are only submitted orally, there was a risk of misinterpreting or transcription error when recording oral statements. This could cause the DOH to not accurately and effectively respond to a public statement. However, in response to the concerns outlined in this comment, the DOH has revised the proposed rule. The rule would now allow for oral statements submitted at the public hearing, provided that a written copy of the oral statements provided at the public hearing is submitted to the DOH prior to the close of the public comment period. This will allow the public to provide oral emphasis to key components of their written statements and an opportunity to voice their statement(s) in a public setting, while also providing DOH an exact written record of the statement from the public commenter. This should prevent any misinterpretations or transcription errors. It should be noted that public hearings are time-limited and rarely (if ever) allow for extensive oral testimony, while written testimony allows for a much more detailed and extensive comment.

Comment 2: 11-55-15(i) – Support denying applications to applicants in an open enforcement action, with outstanding penalties, or with a history of violations.

Response 2: Thank you for your comment of support.

Comment 3: 11-55-17(c)(5) – Support DOH‘s ability to terminate permits or deny renewals for violation of permit conditions or failure to pay penalties.

Response 3: Thank you for your comment of support.

Comment 4: 11-55-34.09(d) – Typo “it‘s” should be “its” (“The DOH will notify the permittee in writing that it’s administrative extension is being terminated and the reason(s) why.”)

Response 4: The typo has been corrected.

<u>Comments from EarthJustice</u>

Comment 5: Objections to Removing Water Sampling Requirement, HAR § 11-55-41(b)(6)(C). Removing the existing mandate for effluent and receiving water sampling in zones of mixing, and instead making it discretionary for the Department to require such sampling, could deprive the Department and public of critical information for determining whether a zone of mixing qualifies for renewal. Under both the existing and proposed rules, a zone of mixing application is subject to a public hearing and may be approved only if the application and supporting documentation "clearly show" that the zone of mixing "is in the public interest," "does not substantially endanger human health or safety," and "will not unreasonably interfere with any actual or probable use of the water areas for which it is classified." HAR § 11-54-9(c)(4), (5); HAR § 11-55-41(b)(4), (5). Over the course of a five-year zone of mixing permit, see HAR § 11-54-9(c)(6)(B); HAR § 11-55-41(b)(6)(B), discharges could substantially degrade water quality, and water use in and around the zone of mixing could change, such that renewing the zone of mixing would endanger human health and safety and disserve the public interest. The Department and public would have no way of knowing a zone of mixing is no longer warranted or safe if, for whatever reason, the Department has not specifically required the discharger to sample the effluent and receiving waters in the interim. The Department should, thus, not amend this provision and instead keep the existing language: "Every zone of mixing established under this section shall include, but not be limited to, conditions requiring the applicant to perform appropriate effluent and receiving water sampling including monitoring of bottom biological communities and report the results of each sampling to the director." HAR § 11-54-9(c)(6)(C).

Response 5: It should be noted that the current rule already does not automatically require all Permittees granted a ZOM to conduct receiving water monitoring. The rule currently reads: "Every zone of mixing established under this section shall include, but not be limited to, conditions requiring the applicant to perform appropriate effluent and receiving water sampling including monitoring of bottom biological communities and report the results of each sampling to the director." In DOH's interpretation, effluent and receiving water sampling requirements are qualified by the term appropriate, which already allows the CWB to determine appropriate monitoring requirements. Therefore, the proposed rule change was to clarify and codify this interpretation. In certain cases, certain monitoring requirements are not appropriate. Most notably, in certain situations, bottom biological communities monitoring is not appropriate due to conditions at the ZOM.

It should also be noted that if a discharge has reasonable potential to cause or contribute to an exceedance of water quality standards for a pollutant, regardless of whether the discharge has a ZOM for the pollutant, an effluent limit and effluent monitoring shall be established. Currently, CWB considers receiving water quality monitoring to be appropriate for pollutants for which a ZOM has been granted. Current procedures use ZOM receiving water data in the reasonable potential analysis procedures. Further, all individual NPDES permits are reviewed internally, by the EPA, and by the public during the public comment period and any concerns regarding appropriate monitoring will be addressed.

However, to address these concerns, the proposed rule has been revised. The rule now explicitly requires effluent monitoring for pollutants with effluent limitations and receiving water quality monitoring for pollutants for which the ZOM was granted. Bottom biological communities monitoring may be required as appropriate. This rule explicitly codifies current practice in regards to effluent and receiving water quality monitoring, while still allowing discretion for bottom biological communities monitoring as appropriate.

Comment 6: Objections to Removing EPA Concurrence Requirement, HAR § 11-54-9(c)(9). Requiring the U.S. Environmental Protection Agency's ("EPA's") concurrence on establishing a zone of mixing provides an important safeguard to ensure compliance with the Clean Water Act. EPA publishes extensive guidance for implementing zones of mixing2 and, as the federal agency charged with ensuring compliance with the Act nationwide, should have the opportunity to review and provide input regarding decisions that effectively allow dischargers to exceed water quality standards in designated areas. The Department should not remove the following provision from the Zone of Mixing rules: "The establishment of any zone of mixing shall be subject to the concurrence of the U.S. Environmental Protection Agency." HAR § 11-54-9(c)(9).

Response 6: There are no federal statutes requiring the EPA to approve or concur with the establishment of a ZOM. Currently, as part of the Memorandum of Agreement between the DOH and EPA, both parties have agreed to coordination and consultation. As a result of this, it is CWB practice to provide EPA contacts a chance to review and comment on all individual NPDES permits (regardless of the establishment or continuance of a ZOM) prior to public notice of a draft permit. Through this process, CWB receives comments, and suggestions from the EPA, to ensure that the proposed permit is in compliance with the Act and EPA guidance/policy. EPA, just like the public is also capable of providing comments during the public comment period for the permit, to further provide feedback in regards to draft permits. The proposed rule change is in accordance with current procedures and practices, and therefore has not been revised in response to this comment.

Comment 7: Objections to Removing Prohibition on Increasing Discharges, HAR § 11-55-41(b)(7). Prohibiting discharges that increase the quantity of mass emissions in zones of mixing is essential to avoid further impairing water quality. Zones of mixing already afford discharges special privileges to exceed water quality standards in designated areas; discharges should not be allowed to increase pollution levels in these waters, which, by definition, would not be meeting water quality standards. The Department, therefore, should re-insert this restriction to proposed HAR § 11-55-41(b)(7), as follows: Any zone of mixing established pursuant to this section may be renewed from time to time on terms and conditions and for periods not exceeding five years which would be appropriate on initial establishment of a zone of mixing, provided that the applicant for renewal meets the requirements in section 11-55-41. The renewal shall provide for the discharge not greater in quantity of mass emissions than that attained pursuant to the terms of the immediately preceding zone of mixing at its expiration.

Response 7: The intent of the rule change was to allow for increased mass emissions from facilities with a zone of mixing, which would be prohibited under the current rule. This was intended to address situations that may arise from needed increases (particularly flow) from discharges from critical infrastructure facilities. Under the current rule, unless the discharger is able to decrease the concentration of a pollutant in their effluent (which may be physically impossible or economically infeasible), they would not be able to increase their flow even if necessary, to provide critical public services. It should be noted that even if the proposed rule were to be adopted as written, anytime a permitted discharge may increase loading, the permittee is required to perform an anti-degradation study to either prove that the increased discharge shall not degrade the receiving water or such degradation is necessary to provide important socioeconomic benefits as allowed under federal regulations. Further, less stringent effluent limitations would only be allowed if in compliance with federal and state anti-backsliding regulations.

To address these concerns, the proposed rule has been revised. The rule now explicitly states that increases in mass emissions shall not be allowed unless in compliance with state and federal anti-degradation and anti-backsliding regulations as applicable. This change still allows for increases of mass emissions under conditions, while also explicitly prohibiting this increase if it cannot be justified/not in accordance with anti-degradation and anti-backsliding requirements as applicable.

Comments from HDOT Design Branch

Comment 8: Appreciate that DOH is now including intake credit for HAR 11-54 and recognizing the current water quality of water bodies, but how does this reconcile with the Modified Blanket WQC that the USACE has jurisdiction over?

Response 8: Intake credits are an NPDES implementation permitting tool that is not applicable to the Section 401 WQC program. As such, any changes to intake credits has no effect on WQCs.

Comment 9: 11-55-04(a) - Before discharging any pollutant,……,or for regulated small municipal separate storm sewers system,…, a person shall submit a complete NPDES permit application.

Is this requirement saying to small MS4 Permit holders to submit their NOI prior to their current permit expiring?

Response 9: The proposed language is intended for new or unpermitted MS4s as applicable. MS4s that are currently permitted or covered under a general permit must comply with the requirements in their permit regarding renewals.

Comment 10: 11-55-34.09(d) - The director may, automatically or by notification, administratively extend a notice of general permit coverage [upon receipt of a complete notice of intent for renewal of a notice of general permit coverage before the expiration

of the general permit coverage specifies, whichever occurs first. A notice of general permit coverage shall be considered to have been automatically extended unless the department informs the

How will the permittee certify that they will comply with the new general permit conditions if the new rules have not yet been issued?

Response 10: The CWB plans to add automatic administrative extension provisions to all general permits moving forward. This is in accordance with the rule change. The new general permits will have deadlines on when automatic administrative extensions begin and end. The deadline to submit an NOI for coverage under the new general permit for existing dischargers will be at some deadline after the effective date of the new general permit. The proposed rule change is to remove the current requirement of a renewal NOI prior to the expiration date of the general permit under which coverage was granted. This is in accordance with the new approach to general permit renewals. It should be noted that [bracketed] text in the Ramseyer format that the proposed rule is in, specifies that the bracketed text is to be removed. In the above referenced text, the current language regarding submittal of a renewal NOI prior to general permit expiration has been bracketed and marked for proposed removal.

Comment 11: 11-55-34.09(d) - The department will inform the Permittee of any deadlines to submit a complete NOI to request authorization to discharge under the new general permit. Any Permittee granted coverage under the general permit that receives an adminstrative extension for coverage, will remain covered by the general permit until the earlier of:....

How much notice willl DOH provide the permittees to submit a complete NOI for coverage under the new NGPC?

Response 11: The draft general permit shall be public noticed prior to being issued and will contain the deadlines to submit an NOI for existing covered discharges. Based on this, dischargers can estimate the timeframe for submittal of an NOI (e.g., 30 days after the effective date of the new general permit). Once the general permit is issued, DOH will notify existing dischargers (via email to permittee contact information and CWB's website) that the new general permit is effective, and dischargers must comply with the deadline established in the new general permit.

Comment 12: 11-55-34.09(d) - NOI needs to be in the effective general permit. The reason is so that the discharger will know what the permit conditions are, and it will allow them to certifuy that they will comply with these conditions.

Is the NOI for the new general permit provide for automatic administrative extension? What if your project only needs a few more months to be completed, do you still need to submit a NOI even though you may not need coverage under the new general permit?

Response 12: The CWB plans to add automatic administrative extension provisions to all general permits moving forward. This is in accordance with the rule change. The new general permits will have deadlines on when automatic administrative extensions begin and end. If a project will continue discharging, or otherwise needs to maintain NPDES permit coverage beyond the end of their administrative extension, they will need to submit an NOI for the new general permit or apply for an individual NPDES permit.

Comment 13: 11-55-34.09(e)(2), Rationale - The additional sentence clarifies that general permit automatic coverage provisions do not apply to small MS4. It should not apply because the general permit for these types of facilities will follow the Two-Step General Permit Approach ….

What is the two step general permit process? Does Maui District MS4 programs do that currently?

Response 13: The Two-Step General Permit approach allows the DOH to establish some requirements in the general permit and later establish other requirements applicable to specific MS4s through a second proposal and public comment process specific to that MS4. The first step of the Two-Step General Permit is to develop and issue the final small MS4 general permit, or "base general permit." The need for the second step arises because the base general permit does not include all of the terms and conditions necessary to meet the MS4 permit standard, and therefore has left the development of the additional requirements to a second step. This allows the DOH the flexibility to address unique circumstances, such as different maturity levels of the MS4s and for non-traditional MS4s (e.g. counties, state department of transportation, public universities, and military bases).

For more information please refer to 40 CFR 122.28(d) and FR Vol. 81, No. 237 pg. 89330, Section V.B.

Existing small MS4s, including the County of Maui and other Maui district MS4s do not follow the Two-Step approach because the HAR, Chapter 11-55, Appendix K has not yet been readopted. A future rules revision proposal is expected to include the revised Appendix K with the Two-Step approach.

Comment 14: DOH appears to be providing their Director more authority to revoke permits or renewals for non-compliance to permits.

Response 14: This is correct.

<u>Comments from Hart Crowser</u>

Comment 15: §11-55-15 Issuance of NPDES permits, Item (i) - Recommend clarification of this statement to tie it to adjudicated enforcement actions and history. The language in 11-55-17 items (C)(5) and (C)(6) is clearer. Recommend revising to:

(i) The director may deny applications for a permit from persons who are respondents in open enforcement [actions] orders associated with water pollution, who fail to make payments as required by law for permit fees or penalties, or who have a history of [violating water pollution laws] enforcement orders.

Response 15: The intent of the rule change was to allow for the Director to deny applications for permits from persons who failed to resolve certain enforcement actions issued from DOH. To further clarify this language and in response to the concerns above, the proposed rule has been revised. The revised language now reads: “The director may deny applications for a permit from persons who are respondents in DOH issued open enforcement actions associated with water pollution, who fail to make payments as required by law for permit fees or penalties, or who have a history of violating water pollution control laws such as failing to comply with permit requirements, effluent limits, or enforcement orders.” This revised language should further clarify the ability to deny issuing permits when there are unresolved enforcement actions issued from the DOH, require payment of fees and penalties as required by law, and clarify the types of considerations the Director can make for withholding or denying permits.

Comments from County of Hawaii, Planning Department

Comment 16: Thank you for the opportunity to provide comments to amendments to Hawaii Administrative Rules. The Hawai'i Department of Health (DOH) is responsible for monitoring and protecting the quality of waters themselves under the authority of the Federal Clean Water Act. To the degree designed by law, counties share this public trust responsibility with the State.

In addition to the Administrative Rule amendments proposed for water quality certifications, water quality standards, and water pollution control, we understand that DOH is proposing a new Administrative Rule that provides the regulatory framework for the prevention, abatement, and control of new and existing nonpoint sources of pollution.

The 2005 County of Hawaii General Plan (GP) calls for "work with the appropriate agencies to adopt appropriate measures and provide incentives to control point and non-point sources of pollution”. In furtherance of this, the GP also addresses:

- Policy 4.3(k) Implementation of the management measures contained in Hawaii's Coastal Nonpoint Pollution Control Program as a condition of land use permitting.
- Standard 4.4(a) Pollution prevention, abatement, and control at levels that will protect and preserve the public health and wellbeing, through the enforcement of appropriate Federal, State and County standards,
- Standard 4.4(b) Incorporate environmental quality controls either as standards in appropriate ordinances or as conditions of approval.

For similar reasons, improved environmental water quality, water quality monitoring and the human health considerations around the same are a recurring theme in the majority of our County's adopted Community Development Plans (CDPs):

- Complete a comprehensive water quality-monitoring program for the Planning Area's coastal waters
- "encourage growth management and environmental quality policies that use public infrastructure to influence the location and timing of growth; ensuring the same in a manner that reduces waste and pollution, conserves water, and generally minimizes environmental impacts;
- State law mandates that Class AA waters "remain in their natural pristine state as nearly as possible with an absolute minimum of pollution or alteration of water quality from any human-caused source or actions." For this reason, wastewater disposal in the coastal zone requires special precaution Encourage State legislation to prohibit the use of cesspools as a means for wastewater disposal in areas below 1,000 feet Mean Sea Level.
- Future development and uses need to take into consideration water quality and promote proper watershed management; including water quality monitoring on a district-wide basis.
- Whether intentionally or inadvertently, we degrade our resources by introducing sediments or chemicals to our water resources through non-point or point sources ... groundwater pollution from cesspools, septic systems, fertilizers and pesticides. Some of these same activities also threaten nearshore coastal waters.

We recommend ongoing collaboration with County Department of Water Supply (DWS), Dept of Environmental Management (DEM), Department of Public Works (DPW). Moreover, we also encourage increased engagement with our entire watershed and coastal partnerships and any projects to improve groundwater, stream and coastal water quality and encourage local communities to develop such projects.

Response 16: Thank you for your comments of support and continued collaboration.