

**Response to Public Comments on Proposed
Hawaii Administrative Rules (HAR),
Chapter 11-56
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 new HAR, Chapter 11-56 (Nonpoint Source Pollution Control). 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, and Hawaii Tribune-Herald. Below is a summary of the comments received and the DOH-CWB responses.

HAR 11-56 (NONPOINT SOURCE POLLUTION CONTROL)

The DOH received eight (8) sets of comments on the proposed rule, HAR, Title 11, Chapter 11-56. All comments were in support. No comments were in opposition. However, multiple commentors proposed to expand the scope of the proposed rule or provided suggestions on how the rule could be strengthened. The Hawaii Legislative Resources Bureau provided input regarding formatting for conformance with State standards. The responses below are the DOH's formal responses to the testimony received.

EarthJustice Written Testimony, February 1, 2021

Summary: As stated in the first page of comments, "Earthjustice commends the Clean Water Branch for undertaking the work to develop and propose regulations to reduce nonpoint source pollution from agriculture, forestry, and marina operations which together generate a significant portion of runoff pollution in our State waters." However, Earthjustice provided comments to address its stated belief that, "... the proposed regulatory regime is severely limited in applicability because the private property is not subject to regulation, except at the discretion of the Director, or where it can be shown affirmatively that the privately-owned entity is contributing to nonpoint source pollution. HAR 11-56-03(a), (b) Additionally, agricultural parcels smaller than 1,000 acres are not regulated under the proposed rules, creating significant regulatory gaps."

In reviewing Earthjustice's written testimony, the DOH identified three (3) comments and a set of suggestions which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Appendix A

On page 3 of the written testimony provided by Earthjustice, under Section II, titled "The Regulatory Gaps Undermine the Effectiveness of the entire Program," Earthjustice states that, "First, and most significantly, a large percentage of agricultural lands in Hawai'i are privately owned. Statewide figures summarizing fee ownership of agricultural lands are not readily available. However, the GIS data referenced by the

Clean Water Branch in its NPS Program Proposal illustrate the problem with a piecemeal approach to regulation.”

DOH Response to General Comment No. 1.

The DOH concurs that a large amount of agricultural land in Hawaii is privately owned and operated. While the DOH concurs that all agricultural operations (i.e., publicly owned or privately owned) may present risk of water pollution, this first set of nonpoint sources rules target the large agricultural parcels/activities owned by State agencies as those properties are the ones most likely to cause water pollution for the following reasons.

The DOH recognizes that owners of large agricultural parcels, some of which may have only recently come into possession by a public entity, often lease smaller portions of these parcels to impermanent agricultural interests. As such, the variable nature of agricultural activities as well as a lack of permanent occupancy reduces the likelihood of implementation and maintenance of effective management practices due to a lack of long-term economic interest. In contrast, large privately held agricultural parcels in Hawaii have historically been operated by a limited number of owners who had/have long-term vested interests in implementing management practices which preserve soil and reduce the potential for water pollution. Because of this dichotomy, the proposed rules do not treat public and private potential nonpoint source polluting generating activities equally. As drafted, the proposed rules categorically require publicly-owned entities to become subject to nonpoint source pollution prevention requirements, but relies instead on a targeted approach for private entities.

In sections 11-56-03(a)(2) and 11-56-03(b) of the proposed rule, privately-owned entities who cause or contribute to nonpoint source pollution, either from conducting activities similar to those which have categorial requirements or other, may be required to register and implement pollution preventing management measures. This approach does not create a “piecemeal approach” but rather an initially conservative approach based on pollution risk. The proposed rule establishes that the DOH may obligate both public and private entities to prevent nonpoint source pollution, while not categorically obligating those privately-owned entities which have voluntarily implemented successful pollution control, to register and become subject of the proposed rules.

DOH’s proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Appendix A

On page 5 of the written testimony provided by Earthjustice, under Section II, titled “The Regulatory Gaps Undermine the Effectiveness of the entire Program,” Earthjustice states that, “Second, requiring that public parcels be both contiguous and under common ownership to meet the 1,000-acre threshold for agricultural lands creates regulatory gaps that fail to take advantage of economies of scale and other efficiencies. Under the proposed regulatory framework, a 500-acre parcel owned by the Agricultural Development Corporation (“ADC”) and leased to a large multi-national seed corporation

is not subject to regulation. This would remain true even if an adjacent 1,000-acre parcel owned by the Department of Land and Natural Resources (“DLNR”) were leased to the same seed corporation for identical agricultural use, and the two parcels were in fact “farmed as a single unit” by the corporate lessee. Not requiring an operator to apply for an approved Water Pollution Plan to lands that are “farmed as a single unit” lacks any rational basis and fails to maximize the benefits of developing a pollution control plan in the first place.”

DOH Response to Comment No. 2.

The DOH does not intend to craft a “loophole” in terms of applicability of the program. It was the intent of HAR Chapter 11-56, Appendix A, to obligate responsible persons who own or operate publicly-owned parcels or facilities which span a total of 1,000 acres to register and participate in the nonpoint source pollution control program. In the example provided in the comment above, the DOH concurs that a clarification of both the definition of “Facility” in HAR section 11-56-1, and to the general applicability section of HAR Chapter 11-56, Appendix A, is required. The proposed amendments clarify the intent of the originally proposed rule and address the comment above.

The DOH is proposing amending the definition for “Facility” in HAR section 11-56-1 from:

“Facility” means any facility (including land or appurtenances thereto) that is subject to regulation under this chapter.”

To:

“Facility” means any facility, physical operation, collection of buildings, parcel(s), or farm operated as a single unit, (including land or appurtenances thereto) that is subject to regulation under this chapter.

The DOH is proposing amending the HAR 11-56, Appendix A, Section 1(a)(1) from:

- (1) The requirements of this Appendix apply to all publicly-owned agricultural lands comprising 1,000 or more contiguous acres under common ownership and with operations identified in the specific applicability paragraphs in section 3.

To:

- (1) The requirements of this Appendix apply to all publicly-owned agricultural lands or facilities comprising 1,000 or more contiguous acres under common ownership or purpose and with operations identified in the specific applicability paragraphs in section 3.

DOH’s proposed action: These proposed changes are non-substantive but are clarifications of the proposed rule made in response to the comment above.

Comment No. 3. Proposed HAR, Title 11, Chapter 56, Appendix A

On page 5 of the written testimony provided by Earthjustice, under Section II, titled “The Regulatory Gaps Undermine the Effectiveness of the entire Program,” Earthjustice states that, “Finally, the 1,000-acre threshold for agricultural lands is arbitrary and does not meet the program’s stated goal of reducing the financial burden on “small farms.” As an initial matter, acreage is not an accurate proxy for the financial viability of agricultural operations in Hawai’i. Of the 77 parcels listed in seed production in the 2015 Agricultural Baseline dataset, all but six are less than 1,000 acres in size. See Hawai’i Statewide GIS Program data: Agricultural Land Use Baseline (2015). Yet the Hawai’i seed industry is known to be lucrative, with a cash value of \$120,800,000 in 2017. Furthermore, the management measures to be implemented through the Water Pollution Control Plans are largely based on CNPCP management measures, which have already been identified as “economically achievable.”¹³ Accordingly, while economic hardship may be a valid policy consideration, a variance type procedure would more effectively address this concern, rather than a one-size-fits all cut-off which alone (without the additional limitations based on ownership) exempts 98.3% of Hawai’i’s farms from the obligation to implement economically feasible conservation measures to protect our state’s waters.”

DOH Response to Comment No. 3.

The DOH determined that for the initial proposed nonpoint source rules, the public-entity owned or operated 1,000 acre threshold for categorically requiring registration (HAR Chapter 11-56, Appendix A) was based on the analysis described in the proposed rules’ fact sheet dated March 2020 (Fact Sheet, Appendix A: Nonpoint Source Pollution Control Requirements for Agriculture, page 19). While having a large acreage trigger does omit smaller agricultural parcels or facilities from categorial registration requirements, it does not exempt smaller agricultural parcels or facilities from being required to register and implement water pollution prevention plans should the smaller parcel or facility be found to be causing or contributing to nonpoint source pollution. If the DOH were to reduce the categorical acreage trigger, the universe of required registrants would increase outside of the DOH’s allotted resources to effectively manage the initial implementation of the proposed rules. Should there be future findings that suggest a lower acreage trigger is needed to effectively address nonpoint source pollution from agricultural parcels or facilities, the DOH will propose the reduction in a future rule proposal.

DOH’s proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Suggestions made by Earthjustice in Testimony: Three (3) Suggestions made to Strengthen the Proposed Rules

Beginning on page 6 of the written testimony, Earthjustice provided three (3) suggestions to strengthen the proposed HAR Chapter 11-56. The suggestions included: A) Amending the proposed rules to apply equally to both publicly and privately owned properties; B) Amend the proposed rules so that all farms, regardless of size, are

required to implement Best Management Practices; and, C) Other suggestions to improve program effectiveness, including considering practices from other states.

DOH Response to Suggestions

The DOH appreciates both the critical input as well as the suggestions provided in the written testimony.

Regarding amending the proposed rule to apply equally to both public and private entities, the DOH sought to apply new requirements equitably. As stated in previous responses, the DOH believes there to be a difference between the level of pollution risk from a publicly-owned versus private entity, with respect to nonpoint source pollution. Should the proposed rules be put into effect and the State's nonpoint source pollution control program be established, the DOH will be able to gain a better understanding of whether equal application of regulatory requirements are required for public and private entities.

Similarly, the DOH's approach to management measure implementation for agricultural parcels reflects differences between pollution risks from small farms and larger facilities. While implementation of management measures should be conducted at all farms, larger landowners are expected to have the resources necessary to formally develop Water Pollution Prevention Plans and complete the monitoring and reporting required under the registry program. Smaller farms, unless identified as requiring registration, are encouraged to implement management practices. As part of the DOH nonpoint source pollution program, smaller farms can receive technical assistance even when registration is not required.

Lastly, while not directly addressed in the proposed rules, the DOH is in the process (subject to Legislative funding) of establishing positions to continue to evaluate technical approaches and strategies to expand nonpoint source pollution control. This includes technical positions to explore other strategies such as protection of riparian ecosystems, standards for hydromodifications, and other potential nonpoint sources of pollution. When the positions are authorized/funded, the DOH will be conducting the types of activities suggested.

Lauren Blickley on Behalf of Surfrider Foundation, January 25, 2021

Summary: As stated in the first page of comments, "...Surfrider Foundation and its four Hawaii Chapters support the proposed new HAR Chapter 11-56." Surfrider Foundation's written testimony included comments to address its stated belief that, "While we welcome DOH's efforts to move forward on implementing regulations to reduce nonpoint source pollution, there are a few concerning loopholes in the applicability of the proposed regulations."

In reviewing Surfrider Foundation's written testimony, the DOH identified two (2) comments which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Appendix A, Section 1(a)(1) On page 2 of the written testimony provided by L. Blickley, Surfrider Foundation commented that, “Appendix A, Section 1. (a)1 states that the requirements of Appendix A apply to “all publicly-owned agricultural lands comprising 1,000 or more contiguous acres...” As read, the requirements of this section only apply to 1,000 acre parcels under common ownership. This provision excludes many state and county lands that are smaller or are a patchwork of contiguous parcels under the control of different agencies. There are also concerns that current 1,000 acre agricultural parcels may be purposely split into smaller parcels in an attempt to circumvent new nonpoint source rules. We therefore request that the DOH carefully review and consider strengthening this provision to ensure that large parcels of publicly and privately-owned agricultural lands adhere to proposed nonpoint source rules.”

DOH Response to Comment No. 1.

As stated in the DOH’s response to Earthjustice’s Comment No. 2, the DOH did not intend to create a potential “loophole” in the regulations that would allow a required registrant to evade mandatory participation in the nonpoint source pollution control program when circumstances such as those described in the Surfrider Foundation’s comments exist.

The DOH is clarifying “generally applicability” in HAR Chapter 11-56, Appendix A, and providing an amended definition of “Facility” in HAR section 11-56-1, as stated in the DOH’s response Earthjustice’s Comment No. 2, above.

DOH’s proposed action: These proposed changes are non-substantive but are clarifications of the proposed rule made in response to the comment above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Appendix A, Section 1(a)(2) On page 2 of the written testimony provided by L. Blickley, Surfrider Foundation commented that, “Appendix A, Section 1. (a) 2 provides absolute discretion to the Director as to whether or not to regulate run-off from private lands. The largest polluters on most of Hawaii’s islands, however, are private landowners. We are concerned that this provision represents a significant loophole in addressing the primary sources of nonpoint source water pollution in Hawai’i. West Moloka’i and Lana’i, for example, both have obvious nonpoint source pollution issues stemming from private landowners. On Maui, over 30,000 acres are owned and controlled by the private company Mahi Pono, in addition to thousands of acres still held by Alexander and Baldwin. Nonpoint source pollution rules should therefore be strengthened to ensure that privately owned agricultural lands, particularly well known problem areas for nonpoint source pollution stemming from private lands, are prioritized and more specifically addressed.”

DOH Response to Comment No. 2.

The DOH recognizes that in the proposed rule, publicly-owned and privately-owned agricultural activities are treated differently in that large publicly owned parcels are categorically required to register whereas privately-owned activities are required only

subject to a determination by the Director. While this difference excludes privately-owned agricultural activities for categorical requirements, it does not create a loophole; privately-owned agricultural entities may still be subject to both nonpoint source pollution prevention program requirements as well as enforcement actions. As discussed in the DOH's response to Earthjustice's Comment No. 1, the DOH believes this initial approach is supported by the nature of land use and ownership in Hawaii. Should the DOH find that privately-owned agricultural parcels or facilities should be categorically subject to HAR Chapter 11-56, the DOH will consider amending the general applicability of the rule in the future.

Of note, as part of the DOH's approach to reducing nonpoint source pollution, the DOH has proposed technical positions (subject to Legislative authorization/funding) that would reach out to both public and private agricultural landowners to inform and encourage implementation of management measures even when these landowners are not required to register with the DOH under the proposed rule. Should these outreach efforts be found to be inadequate, the DOH will have a better understanding of which types of potential nonpoint sources of pollution must be included in mandatory requirements (i.e., expansion of general applicability sections of appendices).

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Tova Callender on Behalf of West Maui Ridge to Reef Initiative, January 26, 2021

Summary: As stated in the first page of comments, Ms. Callender, "wrote to provide support for and comments on the proposed nonpoint source rules HAR 11-56."

In reviewing West Maui Ridge to Reef Initiative's written testimony, the DOH identified four (4) comments which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Appendix A, General Applicability

On page 1 of the written testimony provided by T. Callender, West Maui Ridge to Reef Initiative asked/commented that, "Was data used to determine the pollution threshold warranting inclusion in the program at 1000 acres for agricultural uses and 5 acres for silviculture? Observations based on farmland in West Maui would suggest a lower threshold for inclusion of agriculture would be appropriate, and it seems unlikely forestry is 200x more polluting."

DOH Response to General Comment No. 1.

Data regarding the 1000 acre and 5 acre triggers for agriculture and forestry, respectively, were provided in the HAR Chapter 11-56 Fact Sheet included in the public notice package. The DOH agrees that it is unlikely forestry is 200x more polluting than agricultural activity; however, silviculture in Hawaii is far less common than agricultural activity. As such, the DOH was able to lower the regulatory size trigger for silviculture without dramatically increasing the number of likely registrants beyond what is able to

be effectively managed by the DOH. Further, the 5 acre trigger is consistent with the Coastal Zone Act Reauthorization Amendments of 1990, Section 6217(g) forestry management measure requirements.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Section 5

On page 1 of the written testimony provided by T. Callender, West Maui Ridge to Reef Initiative asked, "Might a lower registration fee and higher penalties for infractions create more incentive for participation and compliance?"

DOH Response to General Comment No. 2.

The DOH believes that a \$500 registration fee, which is good for up to five (5) years, is acceptable and should not pose an economic disincentive for registration. Penalties of up to \$10,000 per day per violation are authorized under HRS 342E. Given that participation in the registration program is not voluntary, the DOH does not foresee a need for incentives for participation and compliance. However, while not included in this rule, part of the existing DOH nonpoint source pollution control strategy is to offer Federal Clean Water Act grants to entities with a DOH approved watershed-based plan. Those persons who voluntarily implement management measures consistent with this proposed rule (and are associated with a DOH approved watershed-based plan) may receive grant funding as an incentive to implement nonpoint source pollution control practices.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 3. Proposed HAR, Title 11, Chapter 56, Appendix A and B

On page 1 of the written testimony provided by T. Callender, West Maui Ridge to Reef Initiative asked/commented that, "It was good to see the linkages in the appendix to agricultural guidance materials for BMPs from NRCS and CTAHR. Might there be more opportunity for partnership and leveraging NRCS and the Soil and Water Conservation Districts Conservation planning processes since this is their focus and they are arguably the experts in this area? Increasingly, NRCS has added programs to explicitly address water quality concerns."

DOH Response to General Comment No. 3.

At present, the DOH is partnering with the NRCS to implement the National Water Quality Initiative and will continue to partner and include SWCDs in the management of nonpoint source pollution going forward. The DOH hopes to continue to both partner and leverage the NRCS and Soil and Water Conservation Districts in future planning processes. In fact, as proposed in multiple locations within the proposed rule, the DOH recognizes conservation plans approved by the local Soil and Water Conservation Districts as meeting the requirements of the proposed rule if certain conditions are met.

The DOH concurs that the NRCS and Soil and Water Conservation Districts have significant expertise in this area and fully intends to coordinate efforts to reduce any potential water quality protecting requirements.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 4. Proposed HAR, Title 11, Chapter 56, Appendix A and B

On page 1 of the written testimony provided by T. Callender, West Maui Ridge to Reef Initiative commented that, "Thank you for including streamside management zones (SMZs) in the guidance for silviculture. Observations during field work on Maui suggest that creating buffers along streams and gulches for agriculture would also be beneficial for protecting water quality. The historic practice of building earthen farm roads along the gulch edge and using road BMPs as a mechanism for shedding sediment-laden water into waterways has left a legacy of very turbid coastal waters following rain events. Adding more specific language to include the need for gulch-edge buffers (not just stream buffers) would be helpful."

DOH Response to General Comment No. 4.

The DOH concurs that having streamside management zones are best practices for the reduction of polluted discharges to State waters. When DOH begins to review Water Pollution Prevention Plans pursuant to the proposed rule, the DOH will consider adding specific language to include the need for gulch-edge buffers where appropriate.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Denise Antolini on Behalf of Malama Pupukeya-Waimea (MPW), January 31, 2021

Summary: As stated in the first page of comments, Ms. Antolini wrote to, "express our strong support for the proposed amendments by the Clean Water Branch to Hawai'i Administrative Rules (HAR) Chapters 11-53, 11-54, 11-55, and particularly 11-56. In many areas, the proposed rules promise to strengthen protection for nearshore water quality while maintaining strong monitoring requirements, transparency, and opportunities for public participation. We do have a few comments and suggestions."

In reviewing Malama Pupukeya-Waimea's written testimony, the DOH identified three (3) comments which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Sections 06 and 07

On page 4 of the written testimony provided by D. Antolini, MPW commented that, "MPW recommends that DOH ensure public web access to these materials broadly and 24/7 without a specific request, in order to (a) increase transparency, (b) increase compliance by other applicants who can view the files of other applicants, and (c) avoid

the need for in-person inspection, particularly given that such documents are likely to be submitted and maintained electronically, and the risks of in-person contact that we learned from COVID. This may also save agency staff time in the longrun.”

DOH Response to Comment No. 1.

The DOH fully agrees with the comment and intends to provide electronic access to all non-Confidential Business Information. While not addressed in the proposed rule, in preliminary budget proposals (subject to Legislative authorization/funding), the DOH requested resources to create an online document management system similar to what is maintained by other programs in the DOH, Environmental Health Administration (e.g., the Water Pollution Control viewer).

DOH’s proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Section 12

On page 4 of the written testimony provided by D. Antolini, MPW commented that, “MPW recommends that DOH add a provision for enhanced penalties for entities who are repeat violators or for egregious situations.”

DOH Response to Comment No. 2.

The DOH agrees that there should be escalating penalties for repeat or egregious violators. HRS 342E authorizes non-criminal penalties of up to \$10,000 per day per violation. Prior to the issuance of enforcement actions which include monetary penalties exercising authority to seek penalties of up to \$10,000 per day, the DOH intends to develop a penalty guidance. This approach is similar to what is used with the point source regulatory program. The DOH expects the nonpoint source penalty guidance to follow a similar logic as the point source penalty guidance in that the culpability of the violator is considered in penalty development. Aspects of culpability include egregiousness of the situation and whether the violation is a repeat offense.

DOH’s proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 3. HAR Proposed HAR, Title 11, Chapter 56, Section 16

On page 4 of the written testimony provided by D. Antolini, MPW commented that, “MPW recommends that settlement of field citations not be allowed for less than 30% of the daily penalty amount. Too much discretion for the field inspectors combined with in-person pressures from the landowner naturally leads to weaker enforcement and reduces transparency and public accountability.”

DOH Response to Comment No. 3.

Field Citations are unto themselves rule-based offers for settlement and as such are not allowed to be reduced further. Field citations may be withdrawn when additional facts

are provided such that the basis of the violation is no longer valid, but such circumstance is expected to be rare. In practice, field citations will not be issued in the "field," as the authorization to issue field citations will not be delegated to field personnel but to the Branch/program manager.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Kasamoto on Behalf of Hawaii Department of Transportation, Highways Division, Design Branch, February 1, 2021

Summary: K. Kasamoto provided a table of specific comments and questions regarding HAR Chapter 11-56.

In reviewing K. Kasamoto's written testimony, the DOH identified four (4) comments which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Section 3

On page 2 of the written testimony provided by K. Kasamoto, HDOT commented that, "Oahu and Maui District currently have MS4 Permits. Does this regulation affect the other Districts? The enforcement of non-point source stormwater discharge does not have a density or population requirement."

DOH Response to Comment No. 1.

The proposed rule applies statewide and is not triggered by population or density. However, as the proposed rule principally address nonpoint source pollution associated with agriculture, forestry, and marinas, it is unlikely that HDOT, Hawaii Division will be impacted by the proposed rule. As noted in the comment, if an area that would be subject to the proposed rule is instead regulated under an NPDES permit, no further action by the NPDES permittee would be necessary to fulfill the requirements of the proposed rule.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Section 05(b)

On page 3 of the written testimony provided by K. Kasamoto, HDOT asked, "If it is the responsibility of the owner with non-point discharge to register with the department, how does the owner know if they meet the definition of whom should be applying?"

DOH Response to Comment No. 2.

The final rule will be posted on a DOH website. Potential registrants should monitor if new rules/laws are put into effect. If a potential registrant is uncertain if HAR Chapter 11-56 requires them to register, the potential registrant should contact the DOH. Due to the new nature of the rule, the DOH plans to reach out to those public entities who are most likely to be impacted (required to register) once the final rule is in effect.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 3. Proposed HAR, Title 11, Chapter 56, Section 05(e)
On page 3 of the written testimony provided by K. Kasamoto, HDOT asked, "How will existing and new facilities become aware of the requirement to register in these timeframes?"

DOH Response to Comment No. 3.
Please see response to Comment No. 2 (above).

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Comment No. 4. Proposed HAR, Title 11, Chapter 56, Section 05(h)(1)(B)
On page 3 of the written testimony provided by K. Kasamoto, HDOT asked, "What is a facility identification number and does DOH assign this number?"

DOH Response to Comment No. 4.
Facility Identification Numbers are being proposed as a record keeping method for facility registrations. The DOH will not be issuing "permits" for registered nonpoint sources and will instead issue Facility Identification Numbers to track the status of the registered nonpoint source.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Klayton Kubo on Behalf of himself, February 1, 2021

Summary: K. Kubo testified in support of HAR 11-56.

In reviewing K. Kubo's written testimony, the DOH did not identify comments which require responses, but does thank Mr. Kubo for the support and participation in the rule making process.

Janice Marsters on Behalf of Hart Crowser, February 1, 2021

Summary: J. Marsters provided two (2) comments regarding HAR 11-56.

In reviewing Hart Crowser's written testimony, the DOH identified two (2) comments which require responses.

Comment No. 1. Proposed HAR, Title 11, Chapter 56, Section 3
On page 1-2 of the written testimony, J. Marsters commented that, "We recommend clarification that the applicability statement in item (a). As currently written, it indicates

that any publicly-owned entities that own land (not restricted to the activities identified in Appendices A through C) could be subject to the chapter. The language of Appendices A through C is clearer and indicates the intent.

Recommend revising to: (1) Publicly-owned entities owning land [or] and conducting the activities below, as identified in Appendices A through C of this chapter

We also note that, as written, the rules require privately-owned entities that cause or contribute to nonpoint source pollution due to operation or management of lands used for the activities identified, as determined by the Director, to comply with the provisions of this chapter [11-56-03(a)(2), 11-56-03(b)]. It is unclear how the Director will determine a cause or contribution to nonpoint source pollution. Recommend revising to indicate specific parameters for how the Director will make the determination of a cause or contribution to nonpoint source pollution.”

DOH Response to Comment No. 1.

Regarding the deletion of “or” and the replacement with “and” in HAR 11-56-03(a)(1), the DOH concurs that it was the intent for only public lands with the specific applicability requirements detailed in Appendices A-C to be categorically required to register. As such, “or” will be deleted and “and” will be substituted.

Regarding the second part of Comment No. 1, while parameters for how the Director will make determinations of whether a nonpoint source of pollution requires registration would be useful, given the case-by-case nature of this determination, specific parameters cannot be set forth at this time. Any final decision made by the Director may be appealed per HAR section 11-56-13. As such, no additional language will be added per the second part of Comment No. 1.

DOH’s proposed action: The DOH will clarify the intent of the proposed rule made in response to the first part of the comment above.

Comment No. 2. Proposed HAR, Title 11, Chapter 56, Section 6

On page 1-2 of the written testimony provided by J. Marsters, commented that, “Item (2) Requires a monitoring strategy to be included in the Water Pollution Control Plan (WPCP). However, (2)(D) requires “Water quality monitoring of State water affected by the nonpoint source pollution from the facility.” Due to mixing that may occur from a variety of discharges, only the discharges from the facility can be used to judge whether the facility is meeting its WPCP requirements. We recommend deleting Item (2)(D). Item (2)(E) provides for “other monitoring methods and activities” that could cover monitoring of State waters if it is scientifically justifiable. However, the “as deemed necessary” in (2)(E) should be clarified. Does it mean as deemed necessary by the Director?

DOH Response to Comment No. 2.

The DOH expects that effectively implemented Water Pollution Prevention Plans (WPPPs) will result in minimal impacts to receiving or adjacent State waters. To verify that WPPPs are effective, monitoring of the most effected receiving waters need to be

conducted. Monitoring of the receiving waters may be conducted in many ways including through visual or other means. Depending on the nature of the pollutants that the Director identifies as present, either through registration disclosures or through inspection, additional monitoring methods such as water quality sampling and chemical analyses may be warranted. When the Director determines that specific types of monitoring, in excess of what is proposed in the WPPPs are deemed necessary, the registrant may appeal the decision per HAR section 11-56-13. The DOH anticipates that the primary modes of monitoring will be visual inspections of both the management measures included in the WPPPs and visual monitoring of receiving waters.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.

Randall Wakumoto on Behalf of the City and County of Honolulu, Department of Facilities Maintenance, February 1, 2021

Summary: The Director of Facilities Maintenance of the City and County of Honolulu provided support for HAR 11-56.

In reviewing the City and County of Honolulu's written testimony, the DOH identified one (1) comment which requires a response.

Comment No. 1. Proposed HAR, Title 11, Chapter 56

On page 1 of the written testimony, R. Wakumoto commented that, "The DFM further encourages the State of Hawaii's DOH to consider adopting and creating a formal regulatory process, as well as, facilitating and providing technical guidance that would allow for coordinated efforts to develop market-based programs, including water quality trading. Water quality trading can provide flexibility for permitted entities in meeting its regulatory obligations along with substantial cost savings by promoting increased investment in other nonpoint source pollutant reductions while still attaining its water quality goals."

DOH Response to Comment No. 1.

The DOH concurs with the comments from DFM. Should the DOH successfully adopt the proposed rules HAR Chapter 11-56, and be provided adequate resources to develop a nonpoint source pollution control program, the DOH could begin to explore the development of a water quality trading program that allows for flexibility for permitted entities in meeting regulatory obligations.

DOH's proposed action: The DOH does not plan to make changes to the proposed rule based on the comment and response above.