

DEPARTMENT OF HEALTH

Adoption of Chapter 11-53
Hawaii Administrative Rules

October 22, 2021

SUMMARY

Chapter 11-53, Hawaii Administrative Rules,
entitled "Section 401 Water Quality Certifications",
is adopted.

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HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 11-53

SECTION 401 WATER QUALITY CERTIFICATIONS

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Historical Note: This chapter is based substantially on chapter 11-54, Water Quality Standards, Department of Health, State of Hawaii. [Eff 11/15/14]

§11-53-1 Definitions. As used in this chapter:

"33 CFR" means the Code of Federal Regulations, Title 33, Navigation and Navigable Waters, revised as of July 1, 2018, unless otherwise specified.

"40 CFR" means the Code of Federal Regulations, Title 40, Protection of the Environment, revised as of July 1, 2018, unless otherwise specified.

"Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 95-483 and Public Law 97-117, 33 U.S.C. section 1251 et. seq.

"Activity" means any activity or project that may result in a water pollutant discharge and that requires a certification.

"Applicant" means the owner or operator, as applicable, who requests a certification from the director by applying in accordance with this chapter.

"Application" means any forms provided by the department for use in obtaining the certification.

"Best management practices" or "BMPs" means schedules of activities, prohibitions or designations of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of state waters. Best management practices include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. Best management practices also include methods, measures, or practices to meet nonpoint source pollution control needs, and structural and nonstructural controls. BMPs can be applied before, during, and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving state waters.

"Blanket section 401 WQC" is a certification issued to the U.S. Army Corps of Engineers, Honolulu District, for the purpose of certifying regional or nationwide permits, in accordance with 33 CFR Parts 325 and 330.

"Certification" or "WQC" means a statement which asserts that a proposed discharge resulting from an

activity or facility will not violate applicable water quality standards and the applicable provisions of sections 301, 302, 303, 306 and 307 of the Act.

"Certifying person" is a person described in section 11-55-07(a).

"Department" means state department of health.

"Director" means the director of health or any person to whom the director has legally delegated such power and authority vested in the director in chapter 342D, HRS.

"Discharge" means the same thing as defined in section 502(16) of the Act.

"Discharge of a pollutant" means the same thing as defined in section 502(12) of the Act.

"Existing uses" means those uses actually attained in the water body on or after November 28, 1975 whether or not they are included in the water quality standards.

"Facility" means any facility that may result in a water pollutant discharge and that requires a certification.

"License or permit" means any permit, certificate, approval, registration, charter, membership, statutory exemption, or other form of permission granted by an agency of the federal government to conduct any activity which may result in any discharge.

"Licensing or permitting agency" means any agency of the federal government to which a federal application is made for a license or permit.

"Owner" or "operator" means the person who owns or operates any facility or activity that requires a certification.

"Pollutant" means the same thing as defined in section 502(6) of the Act.

"Pre-approved SOP" means standard operating procedures pre-approved by the department for use in activities.

"State waters" means the same thing as defined in section 342D-1, HRS.

"Water pollutant" means the same thing as defined in section 502(12) of the Act.

"Water quality standards" means state-adopted and U.S. Environmental Protection Agency-approved water quality standards in chapter 11-54.

[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-2 General policy of section 401 water quality certifications. (a) Section 401 of the Act provides that no license or permit can be issued to conduct any activity, including commencing construction or operation of a facility, that may result in a water pollutant discharge into state waters unless the State issues, waives, or does not require a section 401 water quality certification.

(b) The department is the state agency that may issue or waive a certification in accordance with this chapter. The director is authorized to act as a certifying agency, as defined in 40 CFR section 121.1(e).

(c) An owner or operator of an activity or facility may request a section 401 water quality certification from the director by applying for certification in accordance with this chapter.

(d) A certification issued pursuant to this chapter is not a permit, but becomes an enforceable condition when incorporated into a license or permit. The licensing or permitting agency is responsible for enforcing a certification issued by the director for the activity or facility.

(e) The issuance or waiver of a certification does not absolve any person from complying with the requirements of applicable water quality standards. The director may take any enforcement action authorized under the Act or chapter 342D, HRS, on water quality standards violations.

[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-3 Application. (a) Except as provided in subsection (c), the application shall include, at a minimum:

- (1) The certifying person's legal name, company or organization name, street or mailing address, telephone number, and email address;
- (2) The activity or facility name, location, island, and tax map key number(s);
- (3) The estimated beginning and ending dates of the activity or facility operations, as applicable;
- (4) Associated existing, pending, or denied federal and environmental permits and corresponding file numbers, and a statement of the approval or review status of each at the time of filing the application;
- (5) The scope of work or a description of the overall activity (e.g. upland and in-water) including: the construction or operation of facilities which may result in discharges into state waters; all water pollutant discharges that may result from the activity or facility; and specific biological, chemical, physical, thermal, and other pertinent characteristics of the discharge resulting from an activity or facility;
- (6) The name(s) of the state water where the discharge occurs, the latitude and longitude of the discharge location, the classification of the state water, and the associated existing uses;
- (7) A description of any BMPs that will be utilized to control the discharge of water pollutants and will assure compliance with section 11-53-7;
- (8) Certification that the BMPs utilized will comply with section 11-53-7;
- (9) A description of the methods and means to monitor: the quality of the discharge, the equipment used to treat and control the

- discharge, and measures planned to treat or control the discharge;
- (10) A filing fee of \$1000, submitted with the application;
 - (A) Fees shall be made payable to the "State of Hawaii" in the form of a check or other method specified by the department;
 - (B) Application(s) for blanket section 401 WQCs or with department pre-approved SOPs are exempt from the payment of filing fees;
 - (C) In the event application processing is withdrawn, either automatically pursuant to subsection (b)(2) or voluntarily by the applicant, or certification is finally denied, this filing fee shall not be refunded nor applied to any subsequent application;
 - (11) Any additional information requested by the director; and
 - (12) The certification paragraph below, signed by the certifying person electronically or by original wet signature at the director's discretion:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility

of fine and imprisonment for knowing violations."

(b) Within sixty calendar days of the application submission that includes the certified statement in subsection (a)(12) or the certifying person's response to a notice of deficiency under this subsection (b) that includes the certified statement in subsection (a)(12), the director shall notify the certifying person, in writing or by email, if the application is complete or deficient.

- (1) If the application is deficient, the notice shall include a description of any additional information necessary to correct the deficiency;
- (2) If the certifying person does not correct the deficiency within thirty days from the date of notice, application processing shall be automatically withdrawn without prejudice; and
- (3) The director shall not extend the thirty-day time frame for the certifying person to correct the application deficiency.

Nothing in this subsection (b) precludes the director from requesting additional information in accordance with subsection (a)(11).

(c) The application for certification for the reconstruction, restoration, repair, or reuse of any loko i'a, or Hawaiian fishpond as defined in section 183B-1, HRS, shall be processed in accordance with section 342D-6.5(b), HRS, and shall include:

- (1) The certifying person's legal name, company or organization name, street or mailing address, telephone number, and email address;
- (2) The activity or facility name, location, island, and tax map key number(s); and
- (3) A copy of the federal permit application.

(d) A filing fee shall not be required for an application submitted pursuant to subsection (c).

(e) Activities authorized pursuant to section 342D-6.5(b), HRS, do not require an application.

[Eff] (Auth: HRS §§342D-4, 342D-5,

342D-6.5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6, 342D-6.5)

§11-53-4 Determination. (a) The director shall act on an application within sixty days of acknowledging receipt of a complete application.

Acting on an application means:

- (1) Issuing, reissuing, revoking and reissuing, modifying, denying, or initiating public notice of the certification;
- (2) Notifying the certifying person and federal licensing or permitting agency that the director requires additional time to process the application; or
- (3) Waiving the State's authority to issue a certification by notifying the certifying person and the federal licensing or permitting agency.

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

(c) Notwithstanding subsection (a)(2), if the director fails or refuses to make a final determination on an application within one year of acknowledging receipt of a complete application, the director shall be considered to have waived the State's authority to issue a certification.

[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-5 Public notice and hearing. (a) The director may provide or require the applicant to provide opportunity for public comment or hearing(s), or both, to consider issuance of a certification.

Public notice procedures shall include at least the following:

- (1) Notice shall be circulated within the geographical areas covered by the proposed certification. Circulation includes any or all of the following:
 - (A) Posting in the post office and public places of the municipality nearest the location of the activity or facility;
 - (B) Posting near the activity or entrance to the facility, and in nearby places;
 - (C) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation; or
 - (D) Published on a publicly available department website.
- (2) Notice shall be mailed or sent electronically to any person or group upon request; and
- (3) The director shall add the name of any person or group upon request to a mailing or electronic notification list to receive copies of notices for all certifications within the State or within a certain geographical area.

(b) The public notice shall include at least the following:

- (1) Name and address of the agency issuing the certification;
- (2) Name and address of the applicant and the name and address of the activity or facility;
- (3) A brief description of the activities or facility operations which are requested to be certified;
- (4) Name of the state water affected by the certification, and whether the activity or facility is new or existing;
- (5) A statement of the tentative determination to issue or deny a certification for the

activity or facility described in the application;

- (6) A brief description of the procedures for formulating a final determination, including procedures for public comment, requesting a public hearing, and any other means of public participation offered; and
- (7) Name, address, and telephone number of a person at the State agency where interested persons may:
 - (A) Obtain further information;
 - (B) Request a copy of the draft certification; and
 - (C) Inspect and copy forms and related documents.

(c) The director shall provide a period of not less than thirty days following the date of the public notice during which time interested persons may submit their written views on the tentative determinations with respect to the certification. All written comments submitted during the thirty-day comment period shall be retained by the director and considered in the formulation of the director's final determination with respect to the certification application. The director shall respond to all written comments submitted during the thirty-day comment period. The comment period may be extended at the director's discretion.

(d) The director may hold a public hearing before ruling on an application for a certification if the director determines the public hearing to be in the public interest. In determining the public interest, the director shall consider the factors set forth in section 342D-6(g), HRS.

(e) All coordination, publication costs, and mailing costs associated with public notification with respect to the application shall be paid by the applicant to the appropriate publishing agency or agencies determined by the director. The applicant shall submit the original signed affidavit of publication to the department within four weeks of the publication date. Failure to provide and pay for

public notification, as deemed appropriate by the director, is a basis to delay issuance of a certification. At the director's sole discretion, the director may:

- (1) Coordinate and arrange for publication in lieu of the applicant; and
- (2) Require the applicant to bear all publication and mailing costs associated with the public notification, including those incurred by the department on behalf of the applicant.

(f) The director is not required to provide for public notice if the director finds that the federal licensing or permitting agency has or will provide for public notice concerning a certification.

[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-6 Certification. (a) A certification issued by the director shall include:

- (1) The certifying person's legal name and street address, and the owner's and operator's corresponding information if different from the certifying person;
- (2) A statement that asserts that when all requirements and conditions contained in the certification are fully complied with, there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards and applicable provisions of sections 301, 302, 303, 306, and 307 of the Act;
- (3) The term of the certification, which shall not exceed five years; provided, that the director may administratively extend the expiration date of the section 401 WQC upon written request from the certifying person;
- (4) Any condition which the director considers necessary or desirable with respect to the discharge resulting from an activity or

facility, including the general conditions set forth in section 11-53-7; and

- (5) Other information the director determines to be appropriate.

(b) Within thirty days from the final date of issuance of the certification, any interested party who submitted written comments during the public notice period or submitted written testimony in the public hearing may appeal the final certification decision issued under this chapter by filing a request for a contested case hearing, in accordance with chapter 91, HRS. "Interested" means any person with "standing" as defined by the Hawaii Constitution, statutes, rules, and court decisions. The appeal shall be limited to specific issues raised in writing during the public comment period or public hearing for the certification being appealed.

[Eff _____] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-7 General conditions. The owner and operator of an activity or facility for which a certification is issued shall comply with the following conditions:

- (1) Report to the federal licensing or permitting agency any non-compliance with the conditions of the issued certification;
- (2) Maintain records at the activity or facility site or in a nearby field office demonstrating that all certification requirements have been fully complied with;
- (3) Ensure that all activities are conducted or facilities operated in a manner that will comply with all applicable state water quality standards in chapter 11-54;
- (4) Ensure that all material(s) placed or to be placed in state waters are free of waste metal products, organic materials, debris, and any pollutants in concentrations toxic

- or potentially hazardous to aquatic life as specified in section 11-54-4;
- (5) Ensure that the activities will not permanently interfere with or adversely impact any designated uses or existing uses, or both, of the receiving state water. Any permanent interference with or adverse impacts to the designated uses or existing uses, or both, of the receiving state water is a violation of chapter 11-54;
 - (6) Ensure that pollution control measures and BMPs that prevent water pollutants from leaving the in-water work area authorized by the federal licensing or permitting agency are utilized. Any chemical or visual plume emanating from the authorized in-water work area is a violation of chapter 11-54;
 - (7) Ensure that:
 - (A) No construction material or construction-related materials shall be stockpiled in the aquatic environment or stored or placed in ways that will disturb the aquatic environment;
 - (B) All construction debris shall be contained and prevented from entering or reentering state waters;
 - (C) All construction debris from any portion of the activity that may generate debris that may float in the state water, create a plume, or travel with the current shall be collected, including debris caused by using hydraulic saws, water jets, or drilling equipment; and
 - (D) All construction debris shall be removed from the aquatic environment and disposed of at an upland site in accordance with state or county, or both, approvals;
 - (8) Collect and remove all sidecast material and dispose at an upland state or county, or both, approved site;

- (9) There shall be no discharge of any type of wash water or effluent, or both, into state waters without first obtaining a National Pollutant Discharge Elimination System permit authorizing such type of water pollutant discharge to state waters;
- (10) Runoff, return flow, or airborne particulate pollutants, if any, shall be contained on land and not allowed to enter state waters. Runoff or return flow, or both, authorized by the federal licensing or permitting agency may be discharged to state waters.
[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-8 Right to inspect. The department may enter and inspect any activity or facility in accordance with section 342D-8, HRS, before, during, or after, or any combination thereof, any activity, construction, or facility operation.
[Eff] (Auth: HRS §§342D-4, 342D-5, 342D-8, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-9 Modification. (a) At the request of the certifying person or at the director's initiative, the director may modify, revoke, or revoke and reissue an issued certification under the following circumstances:

- (1) Alterations or modifications to the activity or facility that will result in or have the potential to result in significant alteration in the nature or quantity of permitted materials to be stored, processed, discharged, emitted, or disposed of by the owner or operator;
- (2) The director receives information previously unavailable to the department that shows

that the terms and conditions of the certification do not accurately represent the actual circumstances relating to the activity or facility;

- (3) The State or federal government promulgates a new or amended pollution standard, limitation, or effluent guideline that is applicable to the activity or facility;
- (4) A court of competent jurisdiction invalidates or modifies a State or federal statute or rule or federal guideline upon which a condition of the certification is based;
- (5) The director finds that the activity or facility endangers human health or the environment and that a change in the conduct of the activity or operation of the facility would remove the danger to human health or the environment; or
- (6) The director finds that the applicant falsified information on the application or did not disclose relevant information in the application.

(b) The director shall require public notice in a manner consistent with the requirements of section 11-53-5 for any modification, revocation, or revocation and reissuance of an issued certification.

(c) A filing fee in accordance with section 11-53-3(a)(10) is required for all modifications requested by the certifying person.

(d) In certification modification proceedings, only those portions of the certification that are proposed to be modified are subject to comment. For the avoidance of doubt, public comments on modifications shall not be construed as and shall not require a reconsideration of the entire certification.

(e) At the certifying person's request or at the director's initiative, the director may modify the certification without public notice:

- (1) To recognize a change in ownership or control of the activity or facility if the director finds that no other change in the

certification is necessary and the owner or operator consents;

- (2) To correct typographical errors; or
- (3) To change a provision in the certification that will not result in allowing an actual or potential increase in the emission or discharge of a pollutant into the environment, or that will not result in a reduction of the department's ability to monitor the owner's or operator's compliance with applicable statutes and rules.
[Eff _____] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-10 Revocation. (a) Under the following circumstances, the director can revoke an issued certification without reissuance after holding a public hearing and notifying the federal licensing or permitting agency:

- (1) The federal license or permit or the federal licensing or permitting agency authorizes the activity in a manner inconsistent with the actual operation or construction of the activity or facility;
- (2) Since the certification was issued, changes in conditions regarding the activity or facility or affected state waters affect or might affect compliance with water quality standards and requirements;
- (3) Unresolved noncompliance with applicable State and federal pollution statutes and rules or a condition of the certification at the activity or facility exists, where the owner or operator refuses to resolve the noncompliance;
- (4) Certification conditions are violated;
- (5) Water quality standards, applicable federal law, or other appropriate requirements of

State law have changed since the certification was issued;

- (6) The applicant failed to fully disclose any facts relevant to issuing the certification or submitted false or misleading information to the department or the director;
- (7) The director finds that the activity or facility endangers human health or the environment and that the danger cannot be removed by modifying the certification conditions certification; or
- (8) The permittee has failed to comply with certain requirements or has failed to pay a penalty owed under certain statutes.

(b) An issued certification is automatically revoked without the need for a public hearing when the federal license or permit for the activity or facility is revoked or terminated. [Eff]

(Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-11 Review and advice. The director may, and upon request shall, provide federal licensing and permitting agencies with determinations, definitions, and interpretations of the meaning and content of state water quality standards. [Eff]

(Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-12 Activities that do not require certification. (a) The director may determine activities that qualify for a certification waiver or that do not require a certification. Activities with a certification waiver or that do not require a certification must still comply with water quality standards.

(b) Certification for an activity shall be waived if the director fails to notify the certifying

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person of a deficient application per section 11-53-3(b); or

(c) Reconstruction, restoration, repair, or reuse of any Hawaiian fishpond by any person who has received notice of authorization to proceed as set forth in section 342D-6.5(b), HRS shall not require a certification. [Eff _____] (Auth: HRS §§342D-4, 342D-5, 342D-6.5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6, 342D-6.5)

§11-53-13 After-the-fact activities. (a) If an activity is initiated without a certification, the director may issue or waive the certification for portions of the activity that were not initiated. No certification or waiver shall retroactively apply to any portion of an activity that has already occurred.

(b) If an activity is completed the director may not issue or waive a certification. No certification or waiver shall retroactively cover an activity that has already occurred.

(c) The department may notify the federal licensing or permitting agency enforcing the after-the-fact activity that certification is not required so that enforcement actions may proceed.

[Eff _____] (Auth: HRS §§342D-4, 342D-5, 342D-53) (Imp: HRS §§342D-4, 342D-5, 342D-6)

§11-53-14 Severability. If any provisions of this chapter, or the application thereof to any person or circumstances, is held invalid, the invalidity does not affect other provisions or application of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

[Eff _____] (Auth: HRS §§342D-1, 342D-4, 342D-5, Ch. 342E) (Imp: HRS §§342D-4, 342D-5, Ch. 342E)

DEPARTMENT OF HEALTH

Chapter 11-53, Hawaii Administrative Rules, was adopted on _____, following a public hearing held on February 1, 2021, after public notice was given in the Honolulu Star-Advertiser, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, The Garden Island, and Midweek on December 16, 2020.

The adoption of chapter 11-53 shall take effect ten days after filing with the Office of the Lieutenant Governor.

ELIZABETH A. CHAR, M.D.
Director
Department of Health

APPROVED:

DAVID Y. IGE
Governor
State of Hawaii

Dated: _____

APPROVED AS TO FORM:

Deputy Attorney General

Filed