

**Public Comment (October 17, 2022 through November 18, 2022)
Response to Comments on Proposed Draft Hawaii Administrative Rules (HAR),
Chapter 11-55 and National Pollutant Discharge Elimination System (NPDES)
General Permits in HAR, Chapter 11-55, Appendices A, D, H, I, and M**

Between October 17, 2022 through November 18, 2022, the Department of Health (DOH), Clean Water Branch (CWB) sought written input on proposed draft HAR 11-55 revisions and revisions to general permit standard conditions (in HAR 11-55 Appendix A) and NPDES General Permits in HAR 11-55 Appendix D (leaking underground storage tank remedial activities), Appendix H (petroleum bulk stations and terminals), Appendix I (well drilling), and Appendix M (pesticide). Below are the DOH-CWB responses to the early stakeholder outreach comments received.

State of Hawaii, Department of Land and Natural Resources, Commission on Water Resource Management

Comment 1: §11-55-02(a)(2)

As the lead water agency in the State, CWRM has broad authorities to protect and regulate both water quantity and quality. While DOH has primary jurisdiction and responsibility for the State’s water quality and pollution control programs, as co-trustees of water there is an increasing need for CWRM and DOH to work in partnership rather than operating in silos. We can no longer afford to think of water quantity and water quality as separate issues. They are intrinsically linked and connected. This fact should be reflected in the amendments to the HAR so there is consistency within all State agencies that manage, protect and regulate water. As such, CWRM suggests incorporating the following amendment to §11-55-02 General policy of water pollution control. (a) It is the public policy of this State: (2) To protect, maintain, and improve the quality of State waters: (F) For public trust uses of water, including traditional and customary practices.

Comment 2: §11-55-04(a) and §11-55-39

Activities that require an NPDES permit may affect Native Hawaiian traditional and customary practices and ground water dependent ecosystems (GDEs). CWRM recommends consultation with the region’s ‘Aha Moku Advisory Council, Department of Hawaiian Home Lands (DHHL), and/or the Office of Hawaiian Affairs (OHA) as part of the NPDES permit application process. Furthermore, the Hawai’i Supreme Court recognized that the State has an obligation to protect traditional and customary practices to the extent feasible, and that the proponent of an action must show sufficient evidence that these types of practices are protected, if they exist in the location in question. This “Ka Pa‘akai framework” was created by the Court “to help ensure the enforcement of traditional and customary native Hawaiian rights while reasonably accommodating competing private development interests.”

CWRM is obligated to conduct a “Ka Pa‘akai analysis” of a proposed action requiring CWRM approval independent of the entity proposing the action. CWRM recommends that this analysis also be done for NPDES permits to inform any decision on the impact of the proposed action on traditional and customary practices and suggests incorporating the following amendment to §11-55-39 Public interest. (a) A person submitting an NPDES permit application shall explain in writing why the proposed action meets the public interest as defined in section 342D-6(g), HRS. The explanation shall address: (7) the impact to traditional and customary practices.

Comment 3: §11-55-04(j)

Water is required for certain traditional and customary uses including kalo cultivation. CWRM suggests the following addition to §11-55-02(j) Exclusions: (3) Discharges which may not require an NPDES permit include, but are not limited to, the following: (S) instream use of water for traditional and customary kalo cultivation practices.

Comment 4: §11-55-40(b)(1)(E)

The Commission strongly encourages the implementation of water conservation measures, best management practices to mitigate storm water runoff, and the reuse of storm water and the use of other alternative non-potable sources where practicable. The Commission has published a Water Conservation Manual for State of Hawai‘i Facilities (2007) that lists conservation measures for restrooms and shower facilities; kitchens, cafeterias, and staff rooms; and landscaping. The Commission has also published a Handbook for Stormwater Reclamation and Reuse Best Management Practices in Hawai‘i (2008).

Response: As noted by CWRM, the DOH is the lead agency for water quality within the State. As such, the DOH is only responsible for protection of water quality. The DOH protects all water (in terms of quality) within the State equally in accordance with the water quality standards set by the DOH and as approved by the United States Environmental Protection Agency (USEPA). Following the objective of the Federal Clean Water Act (CWA) and State law/policy, the DOH works to restore and protect water within the State for use by the public where appropriate. As the DOH does not make any determinations on the quantity or access to water resources within the State, by protecting the quality of water within the State equally in line with the CWA and State law/policy, traditional and customary practices should be protected to the extent of DOH’s jurisdiction over water quality.

The Clean Water Branch agrees that protection of traditional and customary practices is a concern of the State. As such, as noted in the comment, there are several agencies within the State that are

important stakeholders and partners in protecting traditional and customary practices such as the Department of Land and Natural Resources, Department of Hawaiian Home Lands, and Office of Hawaiian Affairs. To ensure that the State protects traditional and customary practices, a holistic framework of law, policy, and implementation should be utilized by all affected State agencies. Such a framework should be implemented with coordination between the multiple affected agencies. Changing the rules or policy of one agency in a vacuum is not the most effective way to address these issues. This approach leads to a patchwork of inconsistent and potentially contradictory law and policy with no underlying process for implementation or enforcement. Rather, the State and its affected regulatory agencies should conduct interdepartmental consultations, discussions, and agreements to create a framework to effectively address this issue consistently across each agency's jurisdiction. If the framework developed as a result of such coordination determines that rule or policy changes/development are necessary, then the affected agencies should jointly conduct rulemaking to ensure consistency across each agency.

Therefore, the suggested revisions have not been made. The DOH may make changes to address this concern in a future rulemaking following interdepartmental consultation and coordination as noted above.

State of Hawaii, Department of Land and Natural Resources, Land Division

Comment 1: *The proposed amendments include defining the role and responsibilities of the "Certifying Person." According to the proposed definition as found in §11-55-01, a "Certifying Person" means an individual who meets the signatory requirements in section 11-55-07(a). Under §11-55-07(a), the individual who meets the signatory requirements as it relates to State agencies is "either a principal executive officer or a ranking elected official." Further, proposed amendments to §11-55-07(e) defines the responsibilities of the "Certifying Person" which states that the "Certifying Person" is required to make the following certification:*

"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."

In addition, the proposed amendments, pursuant to §11-55-07(c), would require that if “the certifying person changes, the new certifying person shall notify the department and provide their contact information on a form as specified by the director.” The proposed amendments to §11-55-07(d) would further require that “if an authorization under subsection (b) is no longer accurate because the certifying person changed or a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of subsection (b) must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.” Moreso, the proposed amendment to §11-55-40(b)(H) states that “Any person who submits a document without the appropriate signature or certification statement” is considered to be in non-compliance and could be subject to a “Field citation” that could result in a \$1,000 fine pursuant to the proposed amendment to §11-55-40(b)(2)(c).

Based on our overall understanding of the roles and responsibilities of the “Certifying Person” we kindly suggest the following:

1. Clarify the definition of “Certifying Person” to include the responsibilities, either in whole or in part, as found in §11-55-07(e); and

2. Clarify the appropriate person for State agencies under §11-55-07(a)(3) as either the Chair or the Director of the Agency in their ex-officio capacity and that they be exempt from compliance with §11-55-07(c) and (d). As you are aware, a Cabinet member’s term is four to eight years, depending on the Administration. Given such turnover, allowing the Chair or Director to sign in an ex-officio capacity will not only simplify things for State Departments, but will also allow Departments to avoid repeated fines due to non-compliance through inadvertent mistake or oversight.

Response: The current language regarding the requirements for the Certifying Person (excluding the field citation condition) is based on federal regulations contained in Title 40 of the Code of Regulations. The Clean Water Branch’s implementation is based on our current interpretation on how to implement the requirements in practice. The Clean Water Branch is not opposed to making changes in line with the comments and suggestions raised here, however, as the current language is based on federal regulations and current Clean Water Branch practices, these changes will need to be discussed/reviewed internally prior to coming to a decision. It may also be possible that a rule change is not necessary to implement such changes if after internal review it is determined that such changes can be implemented through changes to Clean Water Branch practices rather than State rule.

Therefore, the suggested revisions have not been made.

City and County of Honolulu, Department of Department of Design and Construction

Comment 1: Thank you for the opportunity to review and comment. The Department of Design and Construction has no comments to offer at this time.

Response: Thank you for your attention in this matter.

Par Hawaii Refining

Comment 1: As a supplement to Mr. Rosen comments, please let me add that we are generally opposed to the concept of unifying the discharge limits for Appendix H under the most stringent water quality for Bulk Terminals not only because such an approach will most certainly make meeting the new limits more difficult, the limits being proposed are not representative of the conditions and the locations in which all bulk terminals discharge. Currently Appendix H provides different limits based on saline and fresh water discharges. The key portions of the Appendix H comparison, is provided for 1. Current Par West Saline, and Fresh WQS for theoretical Bulk Terminals that discharge to fresh water and to Most-stringent limits (Proposed).

	Current Appendix H	Current Appendix H		Proposed Appendix H	Current Par West (Saline) to Most Stringent (Proposed) App H Ratio Current / Proposed
	Par West Saline ug/l	Fresh ug/l		Most Stringent ug/l	
Benzene	1,700	1,800		1,700	1.00
Toulene	1,700	5,800		1,700	1.00
Ethyl Benzene	140	11,000		140	1.00
Xylene	NS	NS		2,100	NA
Ammonia - Nitrogen	15(a)	5(b)		5(a)	3.00
Lead, Total Recoverable	140	29		29	4.83
Dissolved Oxygen	>75	>75		>80	1.07
pH	7 - 8.6			6.0 - 8.0	NA
(a)	Based on criteria of not to exceed more than 2% of the time and based on "wet" flow conditions/siting of > 3 million gallons of freshwater				
(b)	Based on criteria of not to exceed more than 10% of the time and based on "dry" flow conditions/siting of > 3 million gallons of freshwater				

As shown in the comparison above the proposed (most stringent) Appendix H limits for Ammonia Nitrogen and Total Recoverable Lead are about 3 times and 5 times more stringent than currently listed on the NGPC Appendix H Permit (21HG295.FNL.21) for the Par West/IES Terminal that was issued on February 21, 2021. If adopted there is much greater risk that select terminals will be immediately out of compliance .

The Total Recoverable Lead limit is proposed to be reduced by nearly a factor of 5, for consistency and to have the most stringent standard everywhere, but the terminals all discharge (principally stormwater) to the ocean (in saline waters). So to be consistent with the general goal of meeting applicable water quality standards, more consistency could be achieved by basing the Appendix H limits on saline waters because there are no terminals in Hawaii (that discharge to freshwater) and that is unlikely to change because most petroleum fuels are delivered first by ship or barge. For bulk petroleum terminals if consistency and accuracy are both important then the limits should be based on the saline WQS.

The Appendix H limit for ammonia is proposed to be reduced by 2/3rds and essentially get 3 times more stringent but seemingly for a somewhat different reason. For decades the WQS in ammonia and other nutrients have been established on a two tier criteria "wet" and "dry" criteria and that two tier scheme has been preserved in the latest (2021) version of HAR 54. For the Par West terminal and others that are located in areas where there is significant fresh water inflow, the difference between the "wet" criteria and the "dry" criteria is 15 vs 9 ug/l for the not to exceed more than 2% of the time basis. For decades NGPC permits haven't been issued around the two tiered criteria but the proposed amendment would dismiss that long held distinction from the NGPC permit. Particularly because the State has continued to recognize a distinction in WQS based on the amount of freshwater inflows, the Appendix H permits should reflect that as well (and I believe there is guidance from the EPA to give consideration to the surroundings and siting) which is consistent with the "dry" and "wet" criteria that Hawaii has historically embraced.

The second factor contributing to tightening of the ammonia limit, is because the DOH is proposing to base the Appendix H criteria on the statistical criteria of not to exceed more than 10 percent of the time rather than not to exceed more than 2% of the time. That variance accounts for another nearly 50% reduction drop from 9 to 5 ug/l. And it is not clear how the permit limit would be stated to reflect and parallel the 10% of the time WQS specified in the HAR.

The Appendix H NGPC permit has no provisions for averaging or comparing to the 10% of the time WQS. If the terminals routinely discharged and sampling and testing then the 10% of the time could be made over some period of sampling events. But most discharges are in association with stormwater events, rather than the treated process stream itself. Discharges from some terminals are so infrequent the 10% criteria is not really applicable because there is no statistical basis to give them just consideration. Would the DOH be open to including some numeric limit as to the minimum number of samples that would have to be collected before the 10% of the time exceedance would be recognized. As it stands now the Appendix H appear to be proposing to

use a time-based WQS to set an immediate permit limit. If every exceedance is going to be considered a violation then, it would seem that the permit should be set based on the not-to-exceed criteria of 2% of the time (assuming of course that the WQS is deemed to be sufficiently protective of the environment).

The ammonia NPDES limit has been historically difficult to meet at the Chevron and IES/Par refineries when they were in operation. Because the limits were so stringent a Zone of Mixing permit were necessary when outflows were continuous. Lowering the limit from 15 to 5 ug/l would be very difficult to meet (while operating as a terminal) even if the discharge consists mostly of storm water, (assuming that most treated terminal water could be retained in tanks. Terminals that have a common permitted outlet for stormwater and treated process water, may be at risk, absent the clarification request by Mr. Rosen.

The DOH seeming just relaxed/eliminated that need to conduct ammonia testing on stormwater under Appendix B, in part because of the challenges meeting the State nutrient limits, so this proposal for Appendix H appears a little inconsistent with

Also as shown in the table above Appendix H should retain the allow for a pH of 8.6. A number of federal NPDES limit industries to a pH range of 6 -9. Although there are some exceptions, because most water from terminal operations is neutral to begin with, most terminals do not have treatment trains design to adjust the pH of the process water, which is typically being treated to remove the organics. Moreover, much of the pH is influenced by the native soil and stormwater and run-on. Given the State's long acceptance of 8.6 pH it is unclear why there is additional need for further pH control (tightening) of process water from bulk petroleum terminals. If sampling just on the treated process water the more stringent pH limit may not pose much of a challenge.

Response: The following revisions were made to the effluent limitations from the proposed:

1. Instead of one effluent limitation for all receiving water types, there are now two sets of limits: one for saline waters and one for fresh waters.
2. For total recoverable lead, benzene, toluene, and ethyl benzene, the effluent limitations were reverted to those in the currently effective general permit (issued July 13, 2018) for saline and fresh waters.
3. The ammonia nitrogen, pH, and dissolved oxygen limits have been revised.

For ammonia nitrogen, the revised saline water effluent limitation is based on the 2% not to exceed criteria for wet open coastal waters. The general permit currently covers two facilities, both of which discharge to wet open coastal waters and have an effluent limit based on the 2% not to exceed criteria for open coastal waters. As the CWB does not expect there to be new facilities to be covered under this general permit, the effluent limitations were revised to establish the saline water ammonia nitrogen effluent limitation to be what is established for current facilities. The revised fresh water effluent limitation is based on the 2% not to exceed criteria for estuaries. For fresh waters, only estuary and Pearl Harbor estuary have water quality criteria for ammonia nitrogen. The estuary criteria was selected for the revised effluent limitation over the Pearl Harbor estuary criteria as it was the more stringent of the two.

For pH, the revised saline water effluent limitation is based on the criteria for open coastal waters. The general permit currently covers two facilities, both of which discharge to wet open coastal waters and have effluent limitations based on the criteria for open coastal waters. As the CWB does not expect there to be new facilities to be covered under this general permit, the effluent limitations were revised to establish the saline water pH effluent limitation to be what is established for current facilities. The revised fresh water effluent limitation is based on the most stringent pH range among the fresh water types.

Comment 2: Lastly, we oppose the addition of TPH-diesel and TPH-gasoline sampling and testing because those parameters are not needed to determine if the process water is being properly treated before being released. There are already widely-recognized organic parameters, specifically, COD, O&G and BTEX level that serve as a good means of verifying performance of the water treating facility associated with the bulk terminal before discharge. Though no limits are being proposed at this time because there are no WQS for TPH-diesel and TPH-gasoline, however there are Environmental Action Limits (2.5 ppm and 5 ppm) which might find their way on to the permit and create challenges in the future.

Making the Appendix H NGPC conditions unduly restrictive may force us to apply for individual NPDES permits and these facilities are not complex.

Response: As discussed in the fact sheet, total petroleum hydrocarbons (TPH) are a potential pollutant that may be discharged from this class of facility. The CWB has determined that monitoring is required to assess whether this class of facility is effectively removing these pollutants prior to discharge. While there are no WQS currently for TPH-diesel or TPH-gasoline, the CWB is currently assessing whether to adopt such

standards. As evidenced by the Environmental Action Limits established by the Department's Hazard Evaluation and Emergency Response Office, elevated discharges of TPH-diesel and TPH-gasoline may be harmful to the environment. As such, monitoring is required to characterize the amount of TPH that may be leaving these types of facilities and entering the environment. It should also be noted that the HAR 11-55 Appendix D NPDES general permit authorizing discharges from leaking underground storage tank remedial activities already require monitoring for (and for certain pollutants, limits) BTEX, TPH-diesel, and TPH-gasoline. The currently proposed revision only includes monitoring requirements for these pollutants.

Therefore, based on the reasons discussed above, the general permit has not been revised.