

**Public comments received and department response to comments
Amendment to Hawaii Administrative Rules chapter 11-280.1 proposed November 29, 2019
Hawaii Department of Health**

Commenter: Par Hawaii

Comment: We respectfully disagree with the proposed changes to HAR 11-280.1-327(b). We request that the Department keep this statement in HAR 11-280.1-327:

“The director shall notify the applicant of the director’s decision within one hundred eighty days of receipt of a complete application, as defined in subsection (a).”

We feel that 180 days is ample time for the Department to complete their review of UST permit applications, including applications for installation, transfer, modification, and renewal. Without a firm deadline for the Department to provide a response to UST permit applications, this leaves the regulated community without assurance that we will be able to continue operating if the Department does not respond in a timely manner to permit applications.

We agree with the deletion of the statement automatically approving permits after 180 days, but we feel that the regulated community should be provided with a response, either approving, denying, or requesting more information on any UST permit application within 180 days.

It should also be noted that the regulation is contradictory on this matter. Applications for Transfer and Modification must be submitted to the Department within 30 and 60 days prior to the event, respectively. Therefore, we feel that the Department should similarly respond to those applications within a 30 or 60 day timeframe.

Response: Historically, the department has always issued permits for typical UST systems with factory-constructed tanks, such as those owned and/or operated by the commenter, within 180 days of the submission of a complete application. The commenter is correct that 180 days is typically sufficient time for the department to review the merits of a complete permit application. The change to the regulations will not impact the processing of routine UST system permit applications that are not the subject of dispute.

Note that if the department requests more information on a permit application, that application is not considered complete and will not be processed until the requested information is provided [see §§11-280.1-327(a)(1) and (3) and 11-280.1-324(c)(4)].

There are some unusual circumstances when a determination to approve, approve with conditions, or deny a complete permit application cannot be made within 180 days, such as when a contested case hearing is requested. The change to the regulations is being made specifically to accommodate these unusual situations by eliminating an automatic “deemed

approved” status. The department must always review an application’s merits and follow all relevant procedural rules before rendering a permit decision, even if completion of these processes requires more than 180 days. Therefore, the department intends to finalize the change as proposed.

Applications for permit transfer must be submitted 30 days prior to the proposed effective date of the transfer because the department expects to be able to process these applications within 30 days. Since the design and operational parameters of the permitted UST system remain unchanged when a permit is transferred, transfer applications do not require as much review as other permit applications. Similarly, the department expects to be able to determine whether or not to grant a modification request within 60 days, which is why the application must be submitted 60 days prior to the planned renovation or modification of the UST system.

Commenter: Honolulu Board of Water Supply

Comment: The Honolulu Board of Water Supply (BWS) supports the proposed amendment to remove the one hundred eighty (180) days automatic approval of a complete permit application if DOH is unable to act within that time that is currently stated in §11-280.1-327(b).

All permit applications should be reviewed and acted on by the DOH without any allowance for automatic approval if the department is unable to act. These permit applications should also have the opportunity for public review, comment, and hearing to solicit feedback and address any community concerns and interest on permits that allow the operations of underground storage tanks (USTs). Large USTs containing fuel such as Red Hill pose concerns that the permit process should address and mitigate to ensure drinking water quality, the environment and public health is protected now and into the future.

Thank you for the opportunity to comment.

Response: Thank you for your support.

Commenter: Nancy Shipley Rubin

Comment: I am opposed to leaving the response time open, We need this focus in order to take action on the problems of the Red hill tanks- I am not sure why they change has been proposed, but it does not feel like the right thing to do.

Please know that giving more time may be likened to leaving the door open to the fox in the chicken coop.

Our water purity should be the primary focus of the Dept of Health.

Thank you.

Response: As noted in the explanation of the proposed change that was posted online for public review, the change addresses current litigation in *Sierra Club v. Department of Health*; Civil No. 1CCV-19-0002098. The department has received a request for a contested case hearing on the Red Hill UST system draft permit. Since the permit decision can only be made after completion of the contested case hearing, the department was not able to render a permit decision within 180 days of receiving the complete application. The department does not intend and has never intended that new UST system permits—including the proposed draft permit for the Red Hill UST system—be “automatically” issued without appropriate opportunity for program review, deliberation, and due process.

The department is amending its administrative rules in order to support the UST Program’s ongoing efforts to protect human health and the environment, including the protection of the state’s drinking water resources at Red Hill.

Commenter: [No name given]

Comment: Section 91-13.5, HRS, requires a maximum period of time to grant or deny a permit. This amendment violates Section 91-13.5.

Response: The Department of Health respectfully disagrees with the commenter. Although the commenter correctly refers to an applicable statute, there are other considerations of law which render the provisions of that statute inapplicable under the circumstances, effectively overriding them. Chapter 91, Hawaii Revised Statutes (HRS), is a general chapter on administrative procedure. Section 91-13.5, HRS, states: “*Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval...*” (emphasis added). However, the statute providing for the regulation of underground storage tanks (USTs), chapter 342L, HRS, contains an affirmative requirement that a UST permit application be reviewed, which is one example of the “unless otherwise provided by law” scenarios allowed for in §91-13.5, HRS. Section 342L-4(c), HRS, states: “The director shall issue a permit for any term, not exceeding five years, *if the director determines this to be protective of human health and the environment*; provided that the permit may be subject to conditions as the director may prescribe” (emphasis added). Under §342L-4, HRS, the Director of Health may only issue a UST system permit after making a determination based on the permit application. Additionally, the Hawaii Constitution similarly imposes upon the Director an affirmative duty to protect the public trust (waters of the state, for example), something that cannot be done if a permit issues without review and deliberation. See Haw. Const. Art. XI, Sec. 1 and 7.