

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HI 96801-3378

In reply, please refer to:
DOH/CWB

08005CEC.08

August 7, 2008

Mr. Wayne Nastri
Regional Administrator, Region 9
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Dear Mr. Nastri:

**Subject: Section 401 Water Quality Certification (WQC) Application for U.S. Environmental Protection Agency (EPA), Region 9 Draft General Permit (GP) for Discharges Incidental to the Normal Operation of Commercial and Large Recreational Vessels (VGP) and Draft General Permit for Discharges Associated with Recreational Vessels (RGP) into Waters of the State of Hawaii
File No. WQC 0000742**

The Hawaii State Department of Health (HDOH), Clean Water Branch (CWB), acknowledges receipt of a letter (dated June 27, 2008) which includes copies of the draft general permits, draft fact sheets and a *Federal Register* notice from Mr. Douglas E. Eberhardt, Chief of your NPDES Permits Office, requesting that the HDOH make a "written determination" regarding certification under Clean Water Act (CWA), Section 401 for the subject National Pollutant Discharge Elimination System (NPDES) GPs to be issued under the authorization of CWA, Section 402. Mr. Eberhardt also indicated in his letter that "[E]PA may not issue a permit authorizing discharges into the waters of Hawaii until the State has granted certification under CWA Section 401, or has waived its right to certify." Mr. Eberhardt's letter was received by the CWB on July 7, 2008.

The HDOH reviews and processes an Application for a Section 401 WQC in accordance with CWA, Section 401; Hawaii Revised Statutes (HRS), Chapters 91, 92 and 342D; Title 40, Code of Federal Regulations (CFR), Part 121; and Hawaii Administrative Rules (HAR), Chapter 11-54.

Please be informed that the HDOH has reviewed information submitted with Mr. Eberhardt's letter of July 7, 2008 for a Section 401 WQC and is providing comments and rendering its initial written determination on a request for a Section 401 WQC submitted by the EPA, Region 9.

This letter is served to inform you that HDOH has determined that:

1. HDOH does not waive, nor should HDOH be deemed by EPA to have waived, HDOH's jurisdiction in processing EPA's request for a Section 401 WQC for the subject VGP and RGP in the State of Hawaii in accordance with CWA, Subsection 401(a), 40 CFR §121.16, and HAR, 11-54-9.1.04(b). EPA has also indicated in the *Federal Register* notice (E8-13615, 73 FR 34296) that "EPA expects significant public interest and comments on today's proposed permits, . . ."
2. The Application is insufficient for HDOH to issue a certification now. Therefore, under HAR, 11-54-9.1.02(b), processing of the water quality certification application shall not be completed until EPA or its duly authorized representative has supplied the information or other items needed to complete the Application.

To be sufficient and complete the Application, the HDOH requires EPA to:

- a. Include appropriate conditions to require compliance with:
 - (1) HAR, 11-54-3(b)(2) which states "[N]o new treated sewage discharges shall be permitted within estuaries;" and
 - (2) HAR, 11-54-3(c)(2) which states "[N]o new sewage discharges will be permitted within embayments."

We acknowledge that CWA, Section 312, may have an effect on the enforcement of these Water Quality Standards (WQS).

- b. Include appropriate conditions to require compliance with HAR, 11-54-5.2(a) which states "[N]atural freshwater lakes, saline lakes, and anchialine pools will be maintained in the natural state through Hawai'i's "no discharge" policy for these waters. Waste discharge into these waters is prohibited."

As defined in HRS, Section 342-1, "Waste" means sewage, industrial and agricultural matter, and all other liquid, gaseous, or solid substance, including radioactive substance, whether treated or not, which may pollute or tend to pollute the waters of this State.

- c. Include appropriate monitoring and reporting requirements which will ensure the compliance of HRS, Section 342D-51 requirements:

“§342D-51 Affirmative duty to report discharges. Any person who has caused an unlawful discharge under section 342D-50(a) has an affirmative duty to report the incident to the director within twenty-four hours of the discharge, unless a valid permit issued under section 342D-6 specifies another reporting period for the specific discharge.”

- d. Require vessels to monitor “enterococcus,” instead of “Fecal Coliform,” in order to comply with HAR, 11-54-8 and 40 CFR §131(c)(2) requirements, respectively.
- e. Provide appropriate methods:

- (1) To determine that vessels’ discharges will comply with CWA, Section 101(a)(3) and HAR, 11-54-4(a)(4) and 11-54-4(b) requirements.

CWA, Section 101(a)(3) states that “(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.”

HAR, 11-54-4(a)(4) requires that all waters shall be free of substances attributable to domestic, industrial, or other controllable sources of pollutants, including “[H]igh or low temperatures; biocides; pathogenic organisms; toxic, radioactive, corrosive, or other deleterious substances at levels or in combinations sufficient to be toxic or harmful to human, animal, plant, or aquatic life, or in amounts sufficient to interfere with any beneficial use of the water;” (Emphasis added)

HAR, 11-54-4(b) requires that “[T]o ensure compliance with paragraph (a)(4), all state waters are subject to monitoring and to the following standards for acute and chronic toxicity and the protection of human health.” (Emphasis added)

- (2) To be used to determine that discharge of oil and grease from any vessels will:

- (a) Meet HAR, Subsection 11-54-4(a)(2) requirements which requires that “[A]ll waters shall be free of substances attributable to domestic, industrial, or other controllable sources of pollutants, including: (2) Floating debris, oil, grease, scum, or other floating materials;” (Emphasis added) and

- (b) Meet the draft VGP effluent limits established at 15.0 mg/l.

- (3) On how EPA will inform all boat owners that their discharges incidental to their normal boat operating activities are now automatically covered under an

NPDES VGP or RGP and subject to compliance with the applicable VGP/RGP requirements and that only a vessel that “is greater or equal to 300 gross registered tons or the vessel has the capacity to hold or discharge more than 8 cubic meters (2113 gallons) of ballast water” will be required to “submit a complete and accurate NOI in accordance with the requirements of Part 10 of this permit.”

3. Pursuant to HAR, 11-54-9.1.03, the director of health (director) may provide “the opportunity for public comment or hearing(s) or both to consider the issuance of a water quality certification.”

We note that there is no assurance that there will be any public meeting or public hearing held in the State of Hawaii for the proposed “draft” VGP and “draft” RGP. Nor did the *Federal Register* notice (E8-13615, 73 FR 34296) discuss in detail how EPA or the State would complete the Clean Water Act section 401 certification process for the draft VGP and draft RGP. The need for a Section 401 WQC was discussed in the Fact Sheet which was located at EPA’s website. As such, “a notice shall be published in accordance with chapters 91 and 92, HRS. The director shall inform the owner or its duly authorized representative in writing that the action has been taken. All publication and mailing costs associated with the public notification of the director's tentative determinations with respect to the water quality certification application shall be paid by the owner to the appropriate newspaper agency or agencies determined by the director. Failure to provide and pay for public notification, as considered appropriate by the director, may result in a delay in the certification process.” (Emphasis added) Therefore, in accordance with HAR, 11-54-9.1.02(a)(10), we request that you submit a “statement of choice for publication” of EPA’s intent to publish a “Public Notice of Proposed Action or a Public Notice of Public Hearing.” We recommend that you designate a person to work closely with the CWB in this regard.

4. According to 40 CFR 121.2(a)(4), any issued Section 401 WQC shall contain conditions which the HDOH “deems necessary or desirable with respect to the discharge of the activity.”
5. According to 40 CFR 121.2(a)(5), any issued Section 401 WQC shall contain such other information as the HDOH “may determine to be appropriate.”
6. EPA shall be the Agency responsible to inform all boat owners of which water bodies have or do not have an EPA approved Total Maximum Daily Load (TMDL) implementation plan prepared under CWA, Subsection 303(d).

As stated in page 36 of the VGP fact sheet, “[E]PA has access to other sources of data available for identifying discharges from vessels covered by the proposed permit, including state registration information, MARAD vessel calls, U.S. Coast Guard registration and customs records, and data from the Ballast Water Clearinghouse. From these sources, EPA can obtain information from which we can deduce the nature of ship and boat discharges from these smaller vessels.”

The HDOH has neither access to these information sources nor resources to provide adequate and timely notification to the affected boaters.

7. Any signatures required for the water quality certification application shall be provided as described in 40 CFR §122.22(a)(3).” (Emphasis added)
8. Filing fee as required pursuant to HAR, 11-54-9.1.02(e) was not submitted with Mr. Eberhardt’s letter of June 27, 2008. A filing fee of \$1000, made payable to the "State of Hawaii" in the form of a cashier's check or money order, shall be submitted with the water quality certification application. The processing of your Application for a Section 401 WQC cannot be completed until the filing fee is received. The HDOH is expecting to receive the filing fee no later than August 25, 2008.
9. Clarification is needed in different effluent numerical limitation established for total residual chlorine used in VGP Item Nos. 5.1.1.1.2(3) [for Gray waters] and 5.8.1.1 [for Ballast Waters]. Item No. 5.1.1.1.2(3) states that “(3) Concentrations of total residual chlorine may not exceed 10.0 micrograms per liter (µg/l).” Item No. 5.8.1.1 states that “[T]he discharge of Total Residual Chlorine (TRC) as a biocide or derivative may not exceed 100 micrograms per liter (µg/l). Any other biocides or derivatives may not exceed acute water quality criteria listed in EPA’s 1986 Quality Criteria for Water [the Gold Book], and any subsequent revision, at the point of ballast water discharge. Discharges of biocide residuals or derivatives must also meet monitoring requirements under Part 5.8.2.1, and reporting and recordkeeping requirements in Part 5.8.3.” (Emphasis added.) Are there any monitoring requirements established for other potential toxic pollutant that may be contained in the vessels’ effluent discharges other than from ballast waters and gray waters?

For future submittals, please include the File No. WOC 0000742 and the following certification statement in your cover letter:

“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


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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."

If you have any questions, please contact Mr. Alec Wong, Chief of CWB or have your staff contact Mr. Edward Chen of the Engineering Section, CWB, at (808) 586-4309.

Sincerely,



Laurence K. Lau
Deputy Director for
Environmental Health

c: Mr. Douglas E. Eberhardt, Chief of NPDES Permits Office, EPA, Region 9 [via email]
Mr. Eugene Bromley, EPA Region 9 [via email]
PICO, EPA Region 9
DOBOR, State DLNR
DAR, State DLNR
Harbors Division, State DOT
CZM Program, Office of Planning, State DBEDT