DAVID Y. IGE
GOVERNOR OF HAWAII

BRUCE S. ANDERSON, Ph.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

WRITTEN
TESTIMONY ONLY

Testimony in OPPOSITION to SB2501
RELATING TO WATER POLLUTION

SENATOR MIKE GABBARD, CHAIR
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

SENATOR KAIALI'I KAHELE, CHAIR
SENATE COMMITTEE ON WATER AND LAND

Hearing Date: 2/7/2020 Room Number: 224

Fiscal Implications: This measure may impact the priorities identified in the Governor's Executive Budget Request for the Department of Health's (Department) appropriations and personnel priorities.

Department Testimony: The Department respectfully opposes SB2501. The proposed amendments to HRS will require EPA approval and amendments to Hawaii Administrative Rules (HAR) Chapter 11-54. The concepts and terms used in this proposal may cause confusion if they are not consistent with EPA terminology or are otherwise further defined. Also, this proposed bill will have the apparently unintended consequence of requiring the Department to undertake the difficult and costly process of designating and approving existing uses for all waterbodies before an NPDES permit can be issued.

As discussed in greater detail below, the proposed amendment to HRS §342D-6 will, by implication, require the Department to determine and designate the "approved use in the class of waters" for individual waterbodies throughout the State – such determinations and designations do not currently exist for every waterbody. Additional funding and field staff positions will likely be required to make such determinations and designations. Further, this additional mandate is likely to cause major delays in processing and issuing federal National Pollutant

Discharge Elimination System (NPDES) permits for all projects or activities requiring such permits, including construction projects.

SB2501's proposed amendments to HRS §342D-6 and §342D-7 will require EPA approval.

HRS §342D-6 and §342D-7, which would be amended by this bill, relate to and appear to require amending the State's Water Quality Standards (WQS) in Hawaii Administrative Rules (HAR) Chapter 11-54. To preserve the State's delegated authority to issue NPDES permits, the State's WQS can only be revised and implemented if approved by the U.S. Environmental Protection Agency (EPA). EPA approval requires reviewing the proposed WQS revision, complying with federal regulations, and amending HAR Chapter 11-54 through the Hawaii administrative rule making process, including public participation. All NPDES permits are required by federal regulations to comply with the existing EPA approved WQS.

Concepts and terms newly proposed in SB 2501 may cause confusion.

This bill proposes to amend HRS §342D-6 to prohibit a permit contrary to a "use in a class of waters of which the use is not an approved use under standards established by regulation or rule." The term "use" does not appear to be defined and could refer to existing uses or designated uses.

Existing uses are defined in federal regulations at 40 CFR 131.3(e) as "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 or WQS." Existing uses are relevant to two provisions in the federal regulations – 1) 40 CFR 131.10(g) prohibiting removal of a designated use that would also remove an existing use, and 2) 40 CFR 131.12(a)(1) requiring maintenance and protection of existing uses and the level of water quality necessary to protect existing uses when implementing a state's antidegradation policy. If this bill refers to existing uses, the State will have to determine and approve all existing uses of all waterbodies in Hawaii that have been attained on or after November 28, 1975 before any NPDES permits can be issued.

Designated uses are defined in 40 CFR 131.3(f) as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." Designated

uses express the broad category of water uses, such as supporting aquatic life and human activities, recreation, and water supply. The WQS in HAR has specific designated use prohibitions to protect the broad designated uses. For example, because HAR §11-54-3 prohibits new sewage discharges within Class A embayments, the Department cannot issue an NPDES permit which would authorize that. Requiring by statute that all types of potential uses of each waterbody be specified is not necessary, especially since the highest level of protection is mostly provided by designating aquatic and wildlife use and recreation use. Most or all of Hawaii waters already have such designated use prohibitions.

The amendment to HRS §342D-6 prohibits a permit contrary to a "use in a class of waters of which the use is not an approved use under *standards established by regulation or rule*." The phrase "standards established by regulation or rule" is unclear. HRS §342D-1 refers to WQS, effluent standards, treatment and pretreatment standards, or standards of performance. It is not clear which of those standards is referenced by this phrase.

The proposed amendment prohibiting a permit ". . . for expansion of an existing use or addition of accessory use if the existing or accessory use is not an approved use in the class of waters" does not conform to the concept of a permit, appears to be unnecessary in light of EPA mandated protections, and introduces additional undefined terms.

The permit referenced in HRS §342D-6 is the NPDES permit. The scope of the NPDES permit requirement is defined in 40 CFR 122.1(b)(1) which states: "*The NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'. The terms 'pollutant', 'point source' and 'waters of the United States' are defined at §122.2."* NPDES permits are issued for discharges of pollutants. NPDES permits are ***NOT*** issued to expand, add, or remove uses associated with a waterbody. The proposal implies that NPDES permits can be issued for uses, which is outside the scope of the NPDES permit program.

Adding a designated use appears to require an addition to WQS in HAR Chapter 11-54. Such an addition to WQS must follow the administrative rule making process, and all WQS changes would need to be approved by EPA before the change is effective. 40 CFR 131.10(a) requires documentation similar to a Use Attainability Analysis (UAA) to adopt new or revised

designated uses other than those specified in CWA section 101(a)(2) or to remove designated uses. 40 CFR 131.10(g) requires a UAA to designate a use or remove a use that is not an existing use.

Further, this proposal does not appear to be necessary. The federal Clean Water Act (CWA), section 301(b)(1)(C) requires that NPDES permits include any numeric or narrative effluent limitation necessary to meet the existing EPA approved WQS. Until the WQS are revised and approved by EPA, NPDES permits must follow the existing EPA approved WQS and are, we believe, sufficiently protective of water quality.

In addition, the term "accessory use" does not appear to be defined in the HRS or in the WQS. The Department is unable to suggest a definition without a clearer understanding of what is intended by the proposed term.

This bill introduces concepts the Department currently contemplates addressing in Administrative Rules, and which, as presented in this bill, may conflict with applicable federal regulations.

SB2501 proposes to prohibit permits for ". . . an activity involving discharge of pollution including nonpoint source pollution . . . for water designated with the highest level of protection by regulation or rule without first obtaining a variance."

At the outset, although the term "highest level of protection" does not appear to be defined in the HRS or in the WQS, the Department infers that this concept refers to existing water classifications such as Class A or Class AA. The Department notes that, currently, the water quality criteria protected by NPDES permits are associated with a waterbody type (e.g. stream, open coastal, estuary, all waterbodies, etc.), not a water classification. The Department believes an NPDES permit which enforces Water Quality Based Effluent Limits (WQBELs) for all pollutant parameters that have a reasonable potential to cause or contribute to an excursion of any water quality criteria are an effective way to protect State waters. WQBELs are effluent limitations based on the WQS, and 40 CFR 122.44(d) requires all NPDES permits to contain WQBELs. An NPDES permit cannot be issued if this federal requirement is not incorporated.

The Department further notes that it is currently creating nonpoint source rules as mandated in HRS Chapter 342E. We recommend that any proposed reference to nonpoint source in HRS Chapter 342D be removed to avoid conflict with the nonpoint source rules which are being closely vetted by other State agencies which may be affected.

The Department notes that the proposed variance concept may conflict with applicable federal regulations. Any proposal on variances must meet the recently revised 40 CFR 131.14 variance requirements. Also, variance regulations require EPA approval before the Department may implement them. While variance provisions currently exist in HRS Chapter 342D, State WQS in HAR 11-54 do not have implementing regulations and, therefore, it is not clear how a variance to a WQS would be implemented. The Department's Clean Water Branch has drafted proposed amendments to HAR 11-54, but it has not yet gone through the rule making process or received EPA approval.

The Department further notes that the proposed variance concept implies that even if a discharger can and will comply with the applicable WQS for the associated waterbody, they would still need to obtain a variance. HRS §342D-1 defines a variance as a *"special written authorization from the director to cause or discharge waste or water pollution in a manner or in an amount in excess of applicable standards, or to do an act that deviates from the requirements or rules adopted under this chapter."* We believe this creates an undesirable situation where a discharger will be forced to seek a variance to comply with the proposed rule and applicable standards, when they already are complying with applicable standards and rules.

This bill proposed to shift the burden of proving entitlement to a variance on the applicant.

While the Department does not necessarily oppose the concept of shifting the burden of proof on the applicant, the term "entitlement to a variance" is unclear and should be defined.

Offered Amendments: None.

Thank you for the opportunity to testify on this measure.

The Kaneohe Bay Foundation
Post Office Box 6410
Kaneohe Hawaii 96744

In response to recent environmental challenges to Kaneohe Bay, the Kaneohe Bay Foundation (KBF) was formed to help protect the Bay.

Together with Senator Keohokalole we have proposed Senate Bill 2501 to provide process and structure to the existing Chapter 342D HRS and Department of Health Regulation 11-54 HAR. We want to emphasize that SB 2501 is intended to help the Department of Health Clean Water Branch to improve the all ready good job the department is doing.

Section 11-54-3 HAR establishes Classes of Waters and the levels of protection each class of waters is to be provided in order to protect the environment. Uses from which pollution discharges are permitted into each class of waters are also generally described in the section.

By way of example, Class AA of ocean waters described in Section 11-54-3(c)(1) HAR is to be maintained in "their natural pristine state" with:

> "...an absolute minimum of pollution or alteration of water quality from any human caused source..."

Whereas by contrast, Class A waters specifically allow discharges from toxic industrial uses including:

> "...drydock or marine railway discharges in the following water bodies...".

In fact NPDES permits are specifically permitted under Class A waters 11-54(c)(2)(C), but are not listed as permitted under the restrictive Class AA waters. Thus it would seem clear enough that the very toxic discharges from drydock operations would not therefore be permitted into Class AA waters. To be clear, by example: Kaneohe Bay is classified as Class AA waters, and Keehi Marina is identified as Class A water where discharges from "drydock" uses under NPDES permts, are specifically permitted.

Nevertheless, DOH has not adhered to this prohibition, and last year published an intention to issue an NPDES permit for discharges from a drydock use into Kaneohe Bay. While public outcry did result in a withdrawal of the specific intent to issue permit, without it, DOH would have proceeded to issue this inappropriate permit for discharges into Kaneohe Bay.

DOH has expressed the view that as long as DOH water quality standards are met, they would issue the permit without regard to class of waters. But DOH's water quality standards cover only some pollutants. For example, there is no standard for copper biocides poisonous to both sea life and humans, which is the primary pollutant arising from drydock operations. A, and the proposed permit was not even going to test discharges for this poison.

Hence THE PURPOSE OF SB 2501 IS TO PROHIBIT POLLUTION DISCHARGES FROM USES NOT PERMITTED UNDER THE EXISTING STANDARDS SET IN SECTION 11-54-3 HAR, AND ANY AMENDMENTS MADE TO THAT SECTION FROM TIME TO TIME BY THE DEPARTMENT OF HEALTH.

There are circumstances, such as long standing historic uses from which discharges have existed, or other circumstances which could require deviation from the prohibition. Section 342D-7 HRS already described situation under which a variance from the strict standards of the law could be allowed. To be granted a variance applicant must show that adherence to the law would cause "serious hardship". The law also requires that there must be a showing that the public benefit from allowing the variance would outweigh the potential harm to the environment. Procedure under the Variance law is adequately addressed in the Chapter 91 HRS (the Hawaii Administrative Procedures Act).

The present law described what a variance is, but does not specifically give the Director, the authority to grant a variance. So SB 2501 specifically gives that authority to the director. The law generally would require that an applicant has the burden of proof in a variance proceeding. SB 2501 does not leave that question to general law, but specifically places the burden of proof in variance proceedings on the applicant.

This changes present practice because at present, the Department (as in the cited case) de facto allows variances without requiring the proofs required in Section 342D-7 HRS.

Placing the Burden of Proof on an applicant, helps the department because the applicant claiming any historic use, or any lack of impact, would be required to show it, thereby relieving the department of the onorous job of separately documenting all past uses of the various bodies of waters of the State.

Furthermore, SB 2501 was specifically designed so that federal law and regulations are not impacted, because the bill utilizes the standards, classes of water, and uses from which discharges are permitted that are already contained in the law. Moreover, no DOH regulations will be impacted.

All that is changed, is that if a proposed discharge does not meet any of the requirements of Chapter 342D or 11-54 HAR, including specifically those of 11-54-3 HAR, no permit can be issued unless a variance is obtained. And no variance can be issued without the applicant meeting the aleady existing requirements of Section 342D-7 HRS.

SUBMITTED BY

_____

Howard Green,
Kaneohe Bay Foundation