

JAN 26 2022

A BILL FOR AN ACT

RELATING TO WATER POLLUTION CONTROL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to: (1) include
2 wetlands in the definition of "state waters"; (2) clarify the
3 director of health's responsibility as a certifying agency as
4 authorized by section 342D-53, Hawaii Revised Statutes; (3)
5 increase the maximum statutory penalty amount contained in
6 section 342D-30, Hawaii Revised Statutes, to match the federal
7 penalty amount; and (4) increase the penalty for obstructing,
8 denying, or hampering the entry of authorized inspectors to
9 match the penalty enacted in section 342B-47, Hawaii Revised
10 Statutes. Wetlands are included in the definition of state
11 waters in section 342E-1, Hawaii Revised Statutes, and in
12 Hawaii's water quality standards in section 11-54-1, Hawaii
13 Administrative Rules, but are not currently included in the
14 definition of state waters in section 342D-1, Hawaii Revised
15 Statutes. Wetlands are considered Waters of the United States
16 in the Clean Water Act of 1972.

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SECTION 2. Section 342D-1, Hawaii Revised Statutes, is amended by adding five new definitions to be appropriately inserted and to read as follows:

"Act" means the Clean Water Act (formally referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972), P.L. 92-500, as amended by P.L. 95-217, P.L. 95-483, P.L. 97-117, and P.L. 114-115, (33 U.S.C. 1251 et seq.).

"Navigable waters" means the waters of the United States, including the territorial seas.

"Territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

"Water quality certification" or "certification" means a statement which asserts that a proposed discharge resulting from an activity will not violate applicable water quality standards, any other appropriate requirement of state law, or the applicable provisions of sections 301, 302, 303, 306 and 307 of the Act.

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1 "Water quality standards" means provisions of State law
2 which consist of a designated use or designated uses for State
3 waters and water quality criteria for such waters based upon
4 such uses."

5 SECTION 3. Section 342D-1, Hawaii Revised Statutes, is
6 amended by amending the definition of "state waters" to read as
7 follows:

8 ""State waters" means all waters, fresh, brackish, or salt,
9 around and within the State, including, but not limited to,
10 coastal waters, wetlands, streams, rivers, drainage ditches,
11 ponds, reservoirs, canals, ground waters, and lakes; provided
12 that drainage ditches, ponds, and reservoirs required as a part
13 of a water pollution control system are excluded."

14 SECTION 4. Section 342D-6, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "**§342D-6 Permits; procedures for.** (a) An application for
17 any permit required under this chapter shall be in a form
18 prescribed by the director.

19 (b) The department may require that applications for
20 permits shall be accompanied by plans, specifications, and any
21 other information that it deems necessary to determine whether

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1 the proposed installation, alteration, or use will be in accord
2 with applicable rules and standards.

3 (c) The director shall issue a permit for any term, not
4 exceeding five years, if the director determines that it will be
5 in the public interest; provided that the permit may be subject
6 to any reasonable conditions that the director may prescribe.
7 The director may include conditions in permits or may issue
8 separate permits for management practices for domestic sewage,
9 sewage sludge, and recycled water, regardless of whether the
10 practices cause water pollution. The director, on application,
11 shall renew a permit from time to time, for a term not exceeding
12 five years, if the director determines that it will be in the
13 public interest. The director shall not grant or deny an
14 application for the issuance or renewal of a permit without
15 affording the applicant and any person who commented on the
16 proposed permit during the public comment period an opportunity
17 for a hearing in accordance with chapter 91. A request for a
18 hearing and any judicial review of the hearing shall not stay
19 the effect of the issuance or renewal of a permit unless
20 specifically ordered by the director or an environmental court.

21 (d) The director, on the director's own motion or the
22 application of any person, may modify, suspend, revoke, or

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1 revoke and reissue any water pollution permit if, after
2 affording the permittee an opportunity for a hearing in
3 accordance with chapter 91, the director determines that:

4 (1) There is a violation of any condition of the permit;

5 (2) The permit was obtained by misrepresentation or there
6 was failure to disclose fully all relevant facts;

7 (3) There is a change in any condition that requires
8 either a temporary or permanent reduction or
9 elimination of the permitted discharge; or

10 (4) It is in the public interest.

11 The public interest excludes any reason less stringent than
12 the causes for permit modification, revocation, and termination,
13 or revocation and reissuance identified in title 40 Code of
14 Federal Regulations section 122.62 or 122.64.

15 (e) The director, on the director's own motion or the
16 application of any person, may modify, suspend, revoke, or
17 revoke and reissue any sludge permit after affording the
18 permittee an opportunity for a hearing in accordance with
19 chapter 91, and consistent with title 40 Code of Federal
20 Regulations section 501.15(c)(2) and (3) and (d)(2).

21 (f) The director shall ensure that the public receives
22 notice of each application for a permit to control water

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1 pollution. The director may hold a public hearing before ruling
2 on an application for a permit to control water pollution if the
3 director determines the public hearing to be in the public
4 interest. In determining whether a public hearing would be in
5 the public interest, the director shall be guided by title 40
6 Code of Federal Regulations section 124.12(a).

7 (g) In determining the public interest regarding permit
8 issuance or renewal, the director shall consider the
9 environmental impact of the proposed action, any adverse
10 environmental effects that cannot be avoided should the action
11 be implemented, the alternatives to the proposed action, the
12 relationship between local short-term uses of the environment
13 and the maintenance and enhancement of long-term productivity,
14 any irreversible and irretrievable commitments of resources that
15 would be involved in the proposed action should it be
16 implemented, and any other factors that the director, by rule,
17 may prescribe; provided that any determination of public
18 interest shall promote the optimum balance between economic
19 development and environmental quality.

20 (h) No applicant for a modification or renewal of a permit
21 shall be held in violation of this chapter during the pendency
22 of the applicant's application so long as the applicant acts

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1 consistently with the permit previously granted, the application
2 and all plans, specifications, and other information submitted
3 as part thereof.

4 ~~[(i) The department shall not require a water quality~~
5 ~~certification pursuant to section 401 of the federal Clean Water~~
6 ~~Act under this chapter for any applicant of the small scale~~
7 ~~beach restoration program that has received notice of~~
8 ~~authorization to proceed from the department of land and natural~~
9 ~~resources' office of conservation and coastal lands.]"~~

10 SECTION 5. Section 342D-6.5, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "§342D-6.5 Hawaiian loko i'a. ~~[(a)]~~ The department shall
13 process applications for permits and water quality
14 certifications for the reconstruction, restoration, repair, or
15 reuse of any loko i'a, or Hawaiian fishpond as defined in
16 section 183B-1, before all other permits and certifications.
17 The director shall render a decision on the completeness of any
18 application for that permit or water quality certification
19 within thirty days of receipt. Applications for loko i'a
20 reconstruction, restoration, or repair that are incomplete shall
21 be denied without prejudice. The director shall render a
22 decision on any complete application for a permit or water

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1 quality certification for any loko i'a within one hundred fifty
2 days.

3 ~~[(b) The department shall waive the requirement to obtain~~
4 ~~water quality certification under this chapter for any person~~
5 ~~that has received notice of authorization to proceed from the~~
6 ~~department of land and natural resources office of conservation~~
7 ~~and coastal lands under the statewide programmatic general~~
8 ~~permit for the restoration, repair, maintenance, and operation~~
9 ~~of loko i'a.~~

10 ~~(c) For purposes of this section:~~

11 ~~"Water quality certification" means state certification~~
12 ~~pursuant to section 401 of the federal Clean Water Act.] "~~

13 SECTION 6. Section 342D-9, Hawaii Revised Statutes, is
14 amended by amending subsection (a) to read as follows:

15 "(a) If the director determines that any person has
16 violated or is violating this chapter, any rule adopted pursuant
17 to this chapter, or any permit, water quality certification, or
18 variance issued pursuant to this chapter, the director:

19 (1) Shall cause written notice to be served upon the
20 alleged violator or violators. The notice shall
21 specify the alleged violation and may contain an order
22 specifying a reasonable time during which that person

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1 shall be required to take any measures that may be
2 necessary to correct the violation and to give
3 periodic progress reports; provided that if all
4 attempts of service of process upon the alleged
5 violator or violators are unsuccessful by personal
6 [~~delivery~~]service and by certified[, ~~registered~~, or
7 ~~express~~] mail, notice may be given via a posting on a
8 searchable government website and a sign conspicuously
9 posted on the property, if appropriate;

10 (2) May require that the alleged violator or violators
11 appear before the director for a hearing at a time and
12 place specified in the notice and answer the charges
13 complained of; and

14 (3) May impose penalties as provided in section 342D-31 by
15 sending written notice, either by certified mail or by
16 personal service, to the alleged violator or violators
17 describing the violation."

18 SECTION 7. Section 342D-30 Hawaii Revised Statutes, is
19 amended to read as follows:

20 "§342D-30 Civil penalties. (a) Any person who violates
21 this chapter, any rule, or any term or condition of a permit or
22 variance issued pursuant to this chapter shall be fined not more

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1 than [~~\$25,000~~]\$56,460 for each separate offense. Each day of
2 each violation shall constitute a separate offense. Any action
3 taken in environmental court to impose or collect the penalty
4 provided for in this section shall be considered a civil action.
5 In determining the amount of a civil penalty the environmental
6 court shall consider the seriousness of the violation or
7 violations, the economic benefit, if any, resulting from the
8 violation, any history of these violations, any good-faith
9 efforts to comply with the applicable requirements, the economic
10 impact of the penalty on the violator, and any other matters
11 that justice may require. It shall be presumed that the
12 violator's economic and financial conditions allow payment of
13 the penalty, and the burden of proof of the contrary is on the
14 violator.

15 (b) Any person who denies, obstructs, or hampers the
16 entrance or inspection by any duly authorized officer or
17 employee of the department of any building, place, or vehicle
18 that the officer or employee is authorized to enter and inspect
19 shall be fined not more than [~~\$10,000~~]\$25,000 for each day of
20 denial, obstruction, or hampering. Any action taken in
21 environmental court to impose or collect the penalty provided
22 for in this subsection shall be considered a civil action."

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SECTION 8. Section 342D-53, Hawaii Revised Statutes, is amended to read as follows:

"~~[+] §342D-53 [+] Certifying agency[-]~~ and water quality certification. (a) Water quality certification is required pursuant to section 401 of the Act for any applicant for a federal license or permit to conduct any activity, including the construction or operation of facilities which may result in any discharge into navigable waters.

(b) The director may act as a certifying agency, as defined in title 40 Code of Federal Regulations section 121.1(e) (1985). "Certifying agency" as used in this section has the same meaning as "certifying authority" as defined in title 40 Code of Federal Regulations section 121.1(e) which became effective on September 11, 2020.

(c) The director shall adopt and enforce rules to administer water quality certification consistent with section 401 of the Act, federal rules and regulations adopted pursuant to section 401 of the Act, and this chapter. Rules shall be adopted in conformity with chapter 91.

(d) The term of any water quality certification issued by the director shall not exceed five years.

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(e) The director shall not require a person to apply for a water quality certification for the following activities:

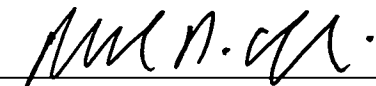
(1) If the person has received notice of authorization to proceed from the department of land and natural resources office of conservation and coastal lands under the statewide programmatic general permit for the restoration, repair, maintenance, and operation of loko i'a; or

(2) If a person has received notice of authorization to proceed from the department of land and natural resources office of conservation and coastal lands under the small-scale beach restoration program."

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 10. This Act shall take effect upon its approval.

INTRODUCED BY:



BY REQUEST

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Report Title: Water Pollution Control; Water Quality
Certification and Enforcement; Penalties; Department of Health

Description:

Adds, amends, and re-organizes sections in chapter 342D, Hawaii Revised Statutes, to include wetlands in the definition of State waters; clarifies the Director of Health's responsibility as a certifying agency; and increases maximum statutory civil penalties to match the amounts of federal penalties and the state penalty in section 342B-47(d), Hawaii Revised Statutes.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

SB. NO. 3116

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO WATER POLLUTION CONTROL.

PURPOSE: To clarify the Department of Health's authority to regulate water pollution and water quality by establishing and amending various definitions, clarifying that activities for which waivers based on notices to proceed from other state agencies were granted are activities which do not require water quality certifications and applications, and aligning statutory civil penalties to match corresponding federal or state amounts.

MEANS: Amend sections 342D-1, 342D-6, 342D-6.5, 342D-9, 342D-30 and 342D-53, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Amendments to Hawaii Revised Statutes and federal regulations over time, as well as practical experience gained from enforcement actions revealed opportunities to assure appropriate and effective clean water and water pollution enforcement.

The term "wetland" is added to the existing definition of "state waters" which, anomalously, does not include the term wetlands even though they are considered state waters in other water pollution control statutes and administrative rules.

The existing section 342D-6, HRS is for permit procedures. A water quality certification is not a permit. The existing section 342D-6(i), HRS, refers to a situation when a water quality certification

is not required. It was added in 2021 since there were no other sections referring to water quality certifications. The Department of Health is proposing to clarify that section 342D-53 applies to water quality certifications, and we are proposing to move the existing sections 342D-6(i) and 342D-6.5(b), HRS to the new 342D-53(e). This will clarify and enhance 342D, HRS by locating all water quality certification requirements in section 342D-53, HRS.

Impact on the public: Improve clean water enforcement, including stronger penalties for violators as a deterrent.

Impact on the department and other agencies:
None.

GENERAL FUND:	None.
OTHER FUNDS:	None.
PPBS PROGRAM DESIGNATION:	HTH 840.
OTHER AFFECTED AGENCIES:	None.
EFFECTIVE DATE:	Upon approval.