



STATE OF HAWAII  
DEPARTMENT OF HEALTH  
KA 'OIHANA OLAKINO  
P. O. BOX 3378  
HONOLULU, HI 96801-3378  
[doh.testimony@doh.hawaii.gov](mailto:doh.testimony@doh.hawaii.gov)

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**Testimony COMMENTING on HCR003  
REQUESTING THE DEPARTMENT OF HEALTH TO ADOPT RULES FOR A  
PERMIT TO DISCHARGE POLLUTANTS THAT INCLUDE THE MAJOR  
FACTORS THAT ARE CONSIDERED IN IDENTIFYING THE FUNCTIONAL  
EQUIVALENT OF A DIRECT DISCHARGE FOR POINT SOURCES OR NONPOINT  
SOURCES**

REPRESENTATIVE NICOLE E. LOWEN, CHAIR  
HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

Hearing Date: 3/23/2023

Room Number: 325

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

4 **Department Testimony:** The Department respectfully offers the following comments regarding  
5 HCR003.

6 On July 26, 2021, the Hawaii District Court concluded that the County of Maui was  
7 required to obtain a National Pollutant Discharge Elimination System (NPDES) permit for the  
8 Lahaina Wastewater Reclamation Facility's discharge into the Pacific Ocean through its  
9 injection wells and groundwater based on the Supreme Court's April 23, 2020 decision.  
10 Accordingly, the Department is processing an NPDES permit for the Lahaina Wastewater  
11 Reclamation Facility based on the courts' rulings.

12 Establishing rules for a permit to discharge that includes the functional equivalent factors  
13 of consideration for a direct discharge for point sources or non-point sources is inadvisable for  
14 the reasons described below:

15 First, the Supreme Court outlined seven factors that may be relevant in determining  
16 whether a discharge from a point source to a jurisdictional water is the "functional equivalent"  
17 of a discharge. The scope of the seven factors is not considered clear, comprehensive, or

1 exhaustive. Also, the Supreme Court struggled to define the seven factors and explained that the  
2 “functional equivalent” analysis can be further refined through future court decisions in  
3 individual cases and through U.S. Environmental Protection Agency (EPA) administrative  
4 actions or guidance.

5 Second, the EPA did not propose or issue any regulations since the Supreme Court’s  
6 decision for a permit to discharge that includes the factors for consideration in identifying the  
7 functional equivalent of a direct discharge for point sources or non-point sources. The EPA did  
8 issue guidance on applying the Supreme Court’s decision in January 2021, however, the EPA  
9 rescinded the guidance in September 2021.

10 Finally, the Supreme Court decision for the Lahaina Wastewater Reclamation Facility  
11 involved only point source discharges. Nonpoint source discharges are not subject to point  
12 source regulations (e.g., NPDES) and the Department does not have statutory authority (Hawaii  
13 Revised Statutes, Chapter 342E) to issue permits for nonpoint sources. Rules controlling point  
14 source discharges are adopted under Hawaii Administrative Rules (HAR), Chapter 11-55. Rules  
15 controlling nonpoint source water pollution are adopted under HAR, Chapter 11-56.

16 Therefore based on the complexity in determining a functional equivalent of a direct  
17 discharge; the absence of any regulations and guidance from the EPA; and the lack of statutory  
18 authority to issue permits for nonpoint sources, the Department believes that adopting rules that  
19 identifies the functional equivalent of a direct discharge is not prudent at this time. The  
20 Department also believes that setting a deadline to establish such rules is not practical.

21 Thank you for the opportunity to testify.

22 **Offered Amendments:** None.



Testimony of the  
**Hawai'i State Association of Counties**  
on

H.C.R. No. 3

REQUESTING THE DEPARTMENT OF HEALTH TO ADOPT RULES FOR A PERMIT TO DISCHARGE POLLUTANTS THAT INCLUDE THE MAJOR FACTORS THAT ARE CONSIDERED IN IDENTIFYING THE FUNCTIONAL EQUIVALENT OF A DIRECT DISCHARGE FOR POINT SOURCES OR NONPOINT SOURCES.

Committee on Energy & Environmental Protection  
Thursday, March 23, 2023, 9:30 a.m..

The Hawai'i State Association of Counties (HSAC) supports H.C.R. 3, which requests the Department of Health to adopt rules for a permit to discharge pollutants

In *County of Maui v. Hawaii Wildlife Fund*, the U.S. Supreme Court, after environmental assessments suggested that pollution from the Lahaina Wastewater Reclamation Facility was reaching the nearby Pacific Ocean, ruled that the Clean Water Act requires a permit when the “addition of pollutants into navigable waters is the “functional equivalent” of direct discharges from any point source.”

The Court further determined that functional equivalent determinations should be within the states' authority to regulate groundwater and other non-point sources of pollution.

The Department of Health is responsible for administering the Clean Water Act, and therefore, should collaborate and work with the Environmental Protection Agency (EPA) to develop and adopt the “functional equivalent of a direct discharge” based on the ruling of the Supreme Court and EPA guidelines.

This is an important issue for the protection of our near-shore waters and its associated resources.

For these reasons, we strongly support H.C.R. 3, and request your favorable consideration of this measure.

**HCR-3**

Submitted on: 3/21/2023 10:40:53 AM

Testimony for EEP on 3/23/2023 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Douglas Perrine	Individual	Support	Written Testimony Only

Comments:

HCR3 is a common sense measure requesting the DOH to follow the rulings of the US Supreme Court. Please pass HC3 to help Hawaii abide by the law and avoid futher fines from the EPA for violating the Clean Water Act.