

ALAN M. ARAKAWA
Mayor

DAVID C. GOODE
Director

ROWENA M. DAGDAG-ANDAYA
Deputy Director

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GLEN A. UENO, P.E., P.L.S.
Development Services Administration

CARY YAMASHITA, P.E.
Engineering Division

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COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS - MAYOR
ENGINEERING DIVISION

200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793

Highways Division

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2016 JUL 11 AM 11:05

Honorable Alan M. Arakawa
Mayor, County of Maui
200 South High Street
Wailuku, Hawaii 96793

July 5, 2016

For Transmittal to:

Honorable Mike White, Council Chair
Maui County Council
200 South High Street
Wailuku, Hawaii 96793

Dear Chair White:

SUBJECT: Notice of Public Hearing on Changes to Hawaii Administrative Rules
Title 11, Chapter 55, Entitled "Water Pollution Control"

The attached letter is to inform you of the DPW's request for additional time to respond to the Department of Health's proposed rule changes to the subject administrative rules. We are concerned that the proposed changes as written will have a very significant impact on the County's resources.

Should you have any further questions, please call John Smith of our Engineering Division at Ext. 7745.

Sincerely,

DAVID C. GOODE
Director of Public Works

DCG/JS:(ED16-588)

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COUNTY COMMUNICATION NO. 16-171

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**DEPARTMENT OF PUBLIC WORKS
ENGINEERING DIVISION**

200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793

June 29, 2016

Virginia Pressler, M.D., Director
State of Hawai'i
Department of Health
1250 Punchbowl Street
Honolulu, HI 96813

**Re: NOTICE OF PUBLIC HEARING ON CHANGES TO HAWAII ADMINISTRATIVE RULES
TITLE 11, CHAPTER 55, ENTITLED "WATER POLLUTION CONTROL"
Docket No. CWB-1-16**

Dear Dr. Pressler:

On Friday, June 24, 2016 the County of Maui became aware of the Department of Health (Department), Clean Water Branch's proposed amendments to the National Pollutant Discharge Elimination System (NPDES) General Permit applicable to the County of Maui and contained in Hawai'i Administrative Rules (HAR), Title 11 Chapter 55. We only became aware of these changes through our consultant who found them on the Department's website. We have preliminarily reviewed the proposed changes and find that they will have an immense impact on the County of Maui in terms of the resources required to implement them. The Department is proposing to add multiple conditions to the permit, including conditions to expand the geographic reach of the County's Small MS4 General Permit, as well as to significantly increase the requirements for compliance under the permit.

The Department of Health was required to notify the County of Maui by mail of the draft NPDES General Permit, but has failed to do so. The Code of Federal Regulations, 40 CFR 124.10(c), list the notice requirements for a variety of actions, including draft general permits, and states in pertinent part:

"(c) Methods . . . Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons

(i) The applicant (except for NPDES and 404 general permits when there is no applicant);

Virginia Pressler, M.D., Director
State of Hawai‘i
Department of Health
June 29, 2016
Page 2 of 3

(x)(A) To Any unit of local government having jurisdiction over the area where the facility is proposed to be located;

(4) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it....”

These regulations are applicable to permits issued by the State (see 40 CFR 123.25(a)(28)).”

In this case, the County of Maui was required to submit an application in the form of a Notice of Intent to be covered under the subject NPDES General Permit and will be responsible for compliance with all of the proposed new conditions in the permit. As such, it should be treated as an “applicant” for notification purposes, as failure to do so would violate the County’s procedural and substantive due process rights. Additionally, the County is clearly the “unit of local government” with jurisdiction over the area being regulated yet was not given the required notification by mail. This failure requires at the very least an extension of the deadline for the County to provide a response to the proposed conditions.

We have cooperated with the Department in the past in developing our new permit program, and question why the Department did not provide the required notification to the current MS4 permittees that would be drastically affected. The Code of Federal Regulations (CFR) clearly states that “The Director is encouraged to provide as much notice as possible of the NPDES or Section 404 draft general permit to the facilities or activities to be covered by the general permit” (40 CFR 124.10 (c)(2)). In this case, NO notice was provided, clearly in violation of Federal and Hawaii laws.

It is clear that the EPA’s requirements and policies are to provide the affected parties with as much notice as possible to participate in the permitting process. Given the significance of the proposed changes to this General Permit, and the great potential impact to small MS4 permit holders, it was incumbent upon the Department to follow the EPA’s regulations and guidance in ensuring that affected parties were aware of the proposed changes. The County of Maui did not receive such notice, although we understand, from our conversations with other permittees, that some permittees were notified by the Department by email. The Department has failed in its responsibility and did not follow the legal requirement to notify the County directly.

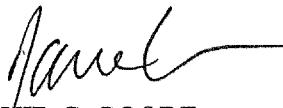
If the public comment period is closed on Friday, July 1, 2016 the County will have had less than a week to provide all of its comments and objections to the massive number of new conditions on its permit. Federal law requires at least 30 days for this period, but also provides that the comment period may be reopened and that longer periods are often necessary and should be granted. 40 CFR 124.14 states, in pertinent part:

“(a)(1)(4) A comment period of longer than 60 days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they shall be granted under § 124.10 to the extent they appear necessary.”

Virginia Pressler, M.D., Director
State of Hawai'i
Department of Health
June 29, 2016
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Based on the reasons stated herein, the Department is required to grant, and the County hereby requests an extension of the comment period for 60 days so that we may adequately assess the implications to the County and provide an informed response. We request a response on this matter prior to the hearing date of July 1, 2016, which we will attend via video conference line should the meeting not be postponed as would be the responsible action to take given the Department's clear failure to properly notify the required permittees and applicants.

Sincerely,



DAVID C. GOODE
Director of Public Works

DCG/JS (ED16-577)

cc: Shan Tsutsui, Lt. Governor
Alan Arakawa, Mayor
Mike White, Council Chair ✓
Michael Hopper, Deputy Corporation Counsel
Edward Bohlen, Deputy Attorney General
Eugene Bromley, U.S. EPA Region 9
Alec Wong, Chief, Clean Water Branch
Darryl Lum, Engineering Section Supervisor, Clean Water Branch

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