COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

August 26, 2016

Clean Water Branch
Environmental Management Division
State Department of Health
919 Ala Moana Boulevard, Room 301
Honolulu, Hawaii 96814-4920

Dear Clean Water Branch:

SUBJECT: **DOCKET NO. CWB-1-16; PUBLIC HEARING ON PROPOSED "WATER POLLUTION CONTROL" RULE CHANGES, AUGUST 31, 2016** (IEM-73)

At its meeting of August 23, 2016, the Maui County Council's Infrastructure and Environmental Management Committee discussed the potential fiscal and operational impacts and liabilities for Maui County should proposed changes to Hawaii Administrative Rules, Title 11, Chapter 55, entitled "Water Pollution Control," be implemented.

The Committee is strongly opposed to any rule changes for the County and other small MS4 permittees at this time. Instead, the Committee supports the views contained in the attached correspondence dated August 16, 2016, "COUNTY OF MAUI OBJECTIONS REGARDING PROPOSED CHANGES TO HAWAII ADMINISTRATIVE RULES TITLE 11, CHAPTER 55, ENTITLED 'WATER POLLUTION CONTROL,' Docket No. CWB-1-16."

Furthermore, because the County failed to receive adequate notice of the proposed changes in accordance with the apparent requirements of the Code of Federal Regulations, the prudent thing would be to extend the current rules for two additional years, as the County is requesting. The Committee agrees this extra time period will grant the County and other small MS4 permittees an opportunity to work through what is being proposed and address new requirements by the Environmental Protection Agency, while allowing for meaningful input.

Thank you for the opportunity to provide comments on this important matter. Should you have any questions, please contact me or the Committee staff (Shelly Espeleta at 270-7134, or Rayna Yap at 270-8007).

Sincerely,

Elle Cochran

ELLE COCHRAN, Chair
Infrastructure and Environmental Management Committee

iem:ltr:073adoh01:ske

Attachment

cc: Hon. David Ige, Governor, State of Hawaii
Hon. Shan Tsutsui, Lieutenant Governor, State of Hawaii
Hon. Tulsi Gabbard, Member of Congress
Eugene Bromley, Water Division, Region 9, United States Environmental Protection Agency
Virginia Pressler, M.D., Director, State Department of Health
Keith Kawaoka, Deputy Director, State Department of Health, Environmental Health Administration
Alec Wong, Chief, State Department of Health, Clean Water Branch
Darryl Lum, Engineering Section Supervisor, State Department of Health, Clean Water Branch
Edward Bohlen, Deputy Attorney General, State Department of the Attorney General
Anthony Borge, Chair, State Department of Business, Economic Development & Tourism, Small Business Regulatory Review Board
Hon. Alan M. Arakawa, Mayor, Maui County
Pat Wong, Corporation Counsel, County of Maui
Michael Hopper, Deputy Corporation Counsel, County of Maui
David Goode, Director of Public Works, County of Maui

ALAN M ARAKAWA
Mayor

DAVID C GOODE
Director

ROWENA M DAGDAG-ANDAYA
Deputy Director

Telephone (808) 270-7745
Fax (808) 270-7975

COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS
ENGINEERING DIVISION
200 SOUTH HIGH STREET
WAILUKU MAUI HAWAII 96793

GLEN A UENO P E
Development Services Administration

CARY YAMASHITA P E
Engineering Division

LESLI L OTANI P E L S
Highways Division

August 16, 2016

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

Re: COUNTY OF MAUI OBJECTIONS REGARDING PROPOSED CHANGES TO HAWAII ADMINISTRATIVE RULES TITLE 11, CHAPTER 55, ENTITLED "WATER POLLUTION CONTROL"
Docket No. CWB-1-16

Dear Dr. Pressler:

The County of Maui submits the attached objections relative to Docket No. CWB-1-16 and related documents. In providing these objections, the County wants to stress that we are committed to sensible protection of Maui's precious water resources. The County has been an active sponsor of many successful environmental, watershed and water protection programs, is actively engaged with the environmental community on Maui, and has committed to and made good progress with their recently imposed Small MS4 permit.

However, the County believes that the onerous revisions proposed by the Department of Health are the wrong approach and far exceed the EPA requirements for Small MS4 permits, even under anticipated new federal rules, and deprive the County of the discretion to make the best use of our limited resources to protect Maui's environment. The County believes the majority of the new permit requirements should be removed, and requests a complete re-draft:

one that begins with collaborative stakeholder engagement and includes a transparent public review process. The County reserves its right to raise additional objections to the proposed amendments.

Sincerely,

DAVID C. GOODE
Director of Public Works

DCG/JRS (ED16-751)

cc: (via email): David Ige, Governor, State of Hawaii
Shan Tsutsui, Lt. Governor, State of Hawaii
Tulsi Gabbard, Congresswoman, 2nd Congressional District of Maui
Mike White, Maui County Council Chair
Michael Hopper, Deputy Corporation Counsel, County of Maui
Keith Kawaoka, Deputy Director of Environmental Health
Edward Bohlen, Deputy Attorney General of CWB
Eugene Bromley, U.S. EPA Region 9
Alec Wong, Chief, Clean Water Branch
Darryl Lum, Engineering Section Supervisor, Clean Water Branch
Anthony Borge, Chair, Small Business Regulatory Review Board

Attachment 1: County of Maui's Objections regarding Proposed Changes to Hawaii Administrative Rules, Title 11, Chapter 55, Entitled "Water Pollution Control," Docket No. CWB-1-16
Attachment 2: County of Maui's Objections and Comments regarding the Administrative Directive No. 09-01
Attachment 3: County of Maui's Objections and Comments regarding the Small Business Impact Statement

County of Maui's Objections regarding Proposed Changes to
Hawaii Administrative Rules, Title 11, Chapter 55, Entitled "Water Pollution Control,"
Docket No. CWB-1-16

1. **General Objection – Applicable to All Proposed Amendments - Inadequate Notice:**
The County of Maui (County) learned of the proposed rule changes and the July 1, 2016 public hearing and deadline for comments on Friday, June 24th, 2016 by an inadvertent find on the Clean Water Branch's website. The County believes that the Department of Health (DOH) failed to notify the County of these proposed rule changes in accordance with the requirements of 40 CFR 124.10. The County submitted separate letters on June 29 and July 12, 2016 providing the County's justification for requesting a 60-day extension of the comment period. Over the past month, the County has had to divert significant resources from their MS4 program, as well as significant staff resources, to respond to the proposed rule changes. Given the significance of the proposed changes and the inadequate time to fully evaluate the proposed rule changes, the County objects to each and every proposed condition and reserves the right to challenge all conditions during any future contested case or court proceeding.

2. **General Objection – Applicable to All Proposed Amendments - Lack of Stakeholder Engagement:**
The County objects to the process the DOH followed in its development of the proposed General Permit revisions. The DOH made no effort to include the stakeholders in the proposed rule change process. The DOH cites within the Fact Sheet for Appendix K that some new requirements are modeled after the State of California's, Phase II Small MS4 General Permit. The DOH should have also pursued the collaborative process that the California State Water Resources Control Board (SWRCB) and other jurisdictions, including the Washington Department of Ecology, and Oregon Department of Environmental Quality (DEQ), conducted over several years to adopt their Small MS4 General Permit. The SWRCB conducted several stakeholder meetings and public workshops to answer questions and discuss the proposed rule development process. The SWRCB published three draft permits prior to the Final Order and addressed the concerns of the Small MS4s and significantly revised the permits with each draft to remove objectionable prescriptive requirements. For example, the California permit revisions included deletion of the initially proposed industrial and commercial program, trash reduction program, and mandatory construction inspection frequencies.

Washington Department of Ecology (Ecology) is preparing for renewal of their General Permits in 2018 (Western Washington) and 2019 (Eastern Washington). They are requesting early input to help develop the proposed draft permits, with ideas to help inform draft permit writing to be received through late 2016. Oregon DEQ engaged interested stakeholders through their MS4 Advisory Committee for Phase II General Permit development from June through November 2015. The MS4 Advisory Committee, consisting of representatives from regulated entities, environmental interests, and technical experts, conducted seven meetings with a goal of developing the general permit through a transparent, collaborative process and a smooth transition from individual permits to the general permit.

Since the inception of the County's Small MS4 Permit, the DOH has emphasized that they wanted to work with and help the County to meet its permit requirements, for the benefit of Maui's water resources. That collaboration, not the one-sided, one-size-fits-all approach now taken by the DOH, was needed in the preparation of the draft proposed revised rules. Rather than working with the

County in developing and reviewing the proposed permit conditions, the DOH unilaterally and without required notice developed the new permit conditions.

One reason the DOH failed to involve the Permittees in any stakeholder meetings may be the impending expiration of the general permit later this year. To the extent this is the case, the proper approach would be to administratively extend the permits with the current conditions rather than rush through a multitude of new illegal and burdensome conditions without any stakeholder involvement or a meaningful comment period.

3. **General Objection – Applicable to All Proposed Amendments - Prescriptive Approach:** The County objects to the DOH's prescriptive approach. Based on conversations with the DOH and its representatives since becoming a Small MS4 Permittee in 2014, the County has been operating under the understanding that this is the County's program and that the County would be afforded the time to develop it in a way that best focuses its limited resources to provide the best protection of storm water. Because of that line of thinking, they have to date taken a more holistic approach, working with local environmental advocacy groups and local storm water experts familiar with Maui County to understand how the County can use public/private partnerships to have the largest practicable positive impact on storm water quality.

   Additionally, 40 C.F.R §122.34(b)(6)(e)(2) states that, "*EPA strongly recommends that until the evaluation of the storm water program in §122.37, **no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4**, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality.*" The DOH has not provided adequate information or analysis regarding why or how the specific measures proposed within the revised rules would protect water quality.

   Burdening the County with these prescriptive measures proposed will only cripple many of our efforts to date because we will be forced to focus all our resources on trying to meet many tracking and paperwork requirements of the new permit that may or may not affect water quality. In essence we see these proposed changes as systematically dismantling our sense of ownership, forcing us to take a defensive rather than a collaborative approach to working with the DOH for the benefit of water quality in Maui County.

   Any conditions imposed on the County may seek to reduce the discharge of pollutants, but only to the "maximum extent practicable". The County contends that the proposed conditions represent requirements that are not practicable for the County to achieve for the reasons set forth herein.

   The DOH has indicated that they believe their proposed rule changes respond to the EPA's MS4 General Permit partial remand. However, many of the requirements go too far and do not provide permittees the options intended by the Small MS4 program. In laying out their proposed rule changes to respond to the remand, EPA states that their proposed new rule (40 CFR Part 122 [EPA-HQ-OW-2015-0671; FRL-9939-88-OW]: NPDES NS4 General Permit Remand) "would not establish any new substantive requirements for Small MS4s." This statement indicates EPA's intent that the proposed general permit would not dramatically increase the requirements for compliance with the MEP

standard. Clearly, the DOH has gone too far in identifying measures they feel will define the MEP; they seem to have incorporated many of the requirements of the O'ahu Phase I permits. It is also clear that EPA meant for the two programs to remain separate, and that the Phase II permittees should not be required to meet all the same requirements as the Phase I permittees.

4. **General Objection– Applicable to All Proposed Amendments - Unachievable Timelines:**
The County objects to being held to the same or more severe program development timelines as Hawai'i's Large Phase I MS4 Permit holders. In many cases, the DOH requires new actions to be taken, new programs to be established and deliverables to be submitted within 18 months from the "effective date of this Permit." The majority of these actions, programs and deliverables are copied from the Individual Permit language that the DOH has recently proposed on Phase I permit holders. These Phase I programs have been developed and negotiated over 20 years of program implementation. To require the County and other Small MS4 Permittees with very limited resources to accomplish these actions, programs and deliverables within 18 months is patently ridiculous, and sets up the County for failure. We note that in the currently proposed Oregon DEQ General Permit, DEQ has provided a targeted timeline of the end of the 5-year permit period for many of its required measures. The County questions whether the proposed changes are designed to garner fines and fees rather than to develop meaningful and useful storm water programs.

   The proposed timelines are arbitrary and not realistically applicable to all requirements and to all Permittees. For the County, many of these additional requirements are unfunded mandates and, if our request to stay the majority of these requirements is not granted, the County will have to request the necessary funds from the County Council. With limited resources, the Council has to weigh these budget requests against other critical needs for core County functions. For these reasons, the County requests the DOH to remove the references to any timelines to allow the County and other Small MS4 permittees to propose timelines for the various actions, programs, and deliverables as part of their Storm Water Management Program (SWMP) Plan.

   In addition, any timelines in the final General Permits should start from the Notice of General Permit Coverage (NGPC) date, and not the effective date of the Permit (EDOP). The NGPC is the authorization that the Permittee is covered under the General Permit, and is the appropriate regulatory reference for action timelines.

5. **General Objection – Applicable to All Proposed Amendments - Inconsistency with the EPA's Small MS4 Program:**
The County objects to the DOH's utter disregard of the EPA's establishment of the Small MS4 program for dischargers that are unlikely to have significant discharges of pollutants from their Small MS4 systems. The County understands that the DOH is proposing to allow dischargers to Class 1 inland waters and Class AA marine waters to be covered by the State's General Permit, to reduce the workload and resource requirements of the DOH. However, to remain protective of the more sensitive water bodies, the DOH proposes to drastically increase the requirements for all MS4 General Permit holders, making them subject to permit program conditions formerly applied to Phase I large MS4/individual permit holders. The proposed revisions will drastically and unfairly increase the permit program management expenses of the County and other Small MS4 permittees that have been

able to obtain coverage under the General Permit because they do not discharge to these sensitive waters.

In 1999, EPA issued its Phase II regulations, generally contained in 40 CFR §122.30 et seq. The full Phase II regulations, with an important Preamble, are contained in 64 FR 68722. The Phase II regulations establish six minimum control measures that must be implemented through NPDES permits. These six minimum control measures are (l) public education and outreach; (2) public involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction storm water management in new development and redevelopment; and (6) pollution prevention and good housekeeping of municipal operations. In the Phase II regulations, EPA was very clear that implementation of these six minimum measures through an NPDES permit would achieve the maximum extent practicable (MEP) standard and, absent evidence to the contrary, would also be sufficient to achieve state water quality standards. In fact, EPA stated in guidance to the Phase II regulations that it "strongly recommends that until the evaluation of the storm water program in § 122.37, **no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4**," except in limited cases. (40 C.F.R §122.34(b)(6)(e)(2).)

In separate correspondence, the DOH has indicated that they are seeking to have the new General Permit comply with the anticipated new EPA rules for Small MS4 general permits. The EPA has proposed revised rules in response to a partial remand of the Small MS4 permit rules by the US Court of Appeals. The rules were released for public comment in January 2016 but are not yet finalized, thus are not currently applicable. However, we note that, even if the proposed rules are adopted, EPA's opening summary states that "[t]he proposal would not establish any new substantive requirements for MS4s." The County believes the DOH has gone too far in the proposed measures contained in Appendix K; they seem to have incorporated many of the requirements of the O'ahu Phase I permits. The DOH's proposed General Permit (Appendix K) fails to provide evidentiary support for their consistency with the MEP standard.

To address the DOH's goal of protecting sensitive state waters while expanding the purview of the General Permit program, the **County recommends the adoption of two separate General Permits for regulated MS4 permittees: a "major permit" for dischargers to Class 1 inland waters and Class AA marine waters, and a "minor permit" for entities that do not discharge to these sensitive water bodies.** This would allow the DOH to set more appropriate, equitable and realistic permit requirements for each class of discharger. The additional proposed requirements consistent with those typically found in an Individual Permit could be assigned to the "major permit," thereby allowing the minor permittees to develop their programs at a practical pace in keeping with EPA's Phase II permit program. An example of such a program currently exists in the Special Management Area permit program.

6. **General Objection – Applicable to All Proposed Amendments – Disregard for Economic Considerations:**
The County objects to the DOH's disregard for the economic considerations of the proposed General Permit revisions. The proposed revisions would likely increase the County's permit program budget by at least an order of magnitude (State DOT has indicated they may incur annual costs of $11 million, the County's cost could be even higher). Given the County's small tax base compared to the

Phase I large permit holders', requiring the County to unnecessarily meet the same permit requirements as large permit holders is unjust.

In the Phase II regulations under the NPDES Permitting Authority's Role for the NPDES Storm Water Small MS4 Program, EPA states that "*To the extent possible, NPDES permitting authorities should provide financial assistance to MS4s, which often have limited resources, for the development and implementation of local programs. EPA recognizes that funding for programs at the State and Tribal levels may also be limited, but strongly encourages States and Tribes to provide whatever assistance is possible. In lieu of actual dollars, NPDES permitting authorities can provide cost-cutting assistance in a number of ways. For example, NPDES permitting authorities can develop outreach materials for MS4s to distribute or the NPDES permitting authority can actually distribute the materials. Another option is to implement an erosion and sediment control program across an entire State (or Tribal land), thus alleviating the need for the MS4 to implement its own program.*" This approach to cost-sharing is also supported in 40 CFR 123.35(h).

Inherent in the unique MEP standard Congress established in CWA section 402(p)(3)(B)(iii) is an assessment of whether the controls imposed to reduce the discharge of pollutants to the MEP bear a reasonable relationship to the pollution control benefits to be achieved. Other jurisdictions have acknowledged that the cost of compliance is a relevant factor in determining MEP. For example, the California Office of Chief Counsel stated that whether a particular BMP will achieve the MEP standard depends on, in part, whether the BMP will "have a cost that bears a reasonable relationship to the pollution control benefits to be achieved."

In their Fact Sheets, Administrative Directive 09-01 and Small Business Impact Statement accompanying the proposed Permit revisions, the DOH provides no analysis of the actual costs of their proposed changes to the Permittees including Small MS4s, contractors, small business and general public. Without identifying the relationship between the cost of any particular control and the pollution control benefits to be achieved by implementing that control, the DOH has failed to evaluate the cost-benefit analysis applicable to establishing the MEP. Under this "generalized" and inadequately evaluated approach, extremely costly requirements that could bear little or even no relationship (or may even have a negative relationship) to the pollution control benefits to be achieved will be forced upon the Permittees. This is not a proper way to determine whether a control reduces the discharge of pollutants to the MEP. The County strongly objects to the DOH's prescriptive requirement for BMPs without identifying the relationship between the BMP's costs and the pollution control benefits to be achieved by implementing that BMP.

In addition, although the County may already practice some of the proposed measures, or be planning to implement them, once they become conditions of the MS4 Permit, they no longer are discretionary decisions of the County. Prescriptive permit obligations become mandatory costs that cannot be deferred or eliminated, even when budgetary realities require the deferral of pavement preservation or other maintenance activities (which also have significant storm water quality impacts), life safety staff reductions, park closures and cuts to other basic services. The County must be given the discretion to meet its Small MS4 permit obligations in a less prescriptive manner, within the framework of the MEP, to allow the County to manage its limited resources in the manner it deems

most appropriate. If DOH proposes to add more specific requirements to satisfy EPA's new proposed rule, those requirements should not add onerous programs that greatly exceed the Small MS4 program intent. For example, DOH is proposing in Appendix K to require Small MS4 permittees to "implement BMPs" to reduce pesticides from residential, commercial, and industrial areas. This requirement falls under the minimum control measure, "Pollution Prevention/Good Housekeeping" (page 55-K-26). However, the EPA's current and proposed rules call this section "Pollution Prevention/ Good Housekeeping for Municipal Operations." EPA clearly intends this section to apply to municipal operations only for Small MS4 permits, not third parties, and the attempt by DOH to expand the County's responsibilities and programs throughout their proposed section 6, as documented under individual sections below, is counter to the EPA's intent.

7. **General Objection – Applicable to All Proposed Amendments - Unfunded State Mandate:** The County objects to the DOH's imposition of an unfunded mandate. The Constitution of the State of Hawai'i, Article VIII *Local Government, Creation; Powers of Political Subdivision*, provides for the creation of counties by the legislature. Taxation authority is reserved to the State, except for that delegated by the legislature to the political subdivisions, relating to the taxation of real property. The legislature has the power to apportion state revenues among the counties. Article VIII, Section 5, entitled *Transfer of Mandated Programs*, states that "(i)f any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide the State share in the cost." The County contends that the DOH's proposed changes to the General Permit constitute both a new program and a higher level of service that are mandated by the State to the County and, therefore, require State funding.

   To determine if a program is new or imposes a higher level of service, it is appropriate to compare the challenged program with the legal requirements in effect immediately before the enactment of the challenged program. If the program did not exist under previous law, it is a new program. A "higher level of service" occurs when the new requirements are intended to provide an enhanced level of service to the public that is more specific than the prior law. In the case of Appendix K, for example, an assessment of whether the proposed General Permit ("Proposed Permit") imposes new programs or higher levels of service requires a comparison of the DOH's proposed revisions to the existing Small MS4 Permit ("Existing Permit").

   The Existing Permit, set to expire in December 2016, is 16 pages long and tracks precisely the six minimum measures that EPA determined in the Phase II regulations to be sufficient to reduce the discharge of pollutants from Small MS4s to the MEP. In contrast, the Proposed Permit is 53 pages long and includes multiple programs and requirements that either are not addressed in the EPA's Phase II regulations at all or greatly increase the requirements under the six minimum measures, in a manner that goes far beyond the intention of MEP.

   A comparison of the Proposed Permit and the Existing Permit reveal that the Proposed Permit contain many new programs. For example, the following program elements required under *(a) Minimum Control Measures* (MCMs) in the Proposed Permit are not required by the Existing Permit and represent new programs under the state mandates law:

- Under MCM (4) Construction Site Runoff Control:
  - Prescriptive specifications for tracking, inventorying and inspecting construction sites, and the requirement to develop a comprehensive program within 18 months; and
  - Requirement for the County to confirm construction project compliance with the State's NPDES permits;
- Under MCM (5) Post-Construction Storm Water Management in New Development and Redevelopment:
  - Prescriptive specifications for tracking, inventorying and inspecting post-construction BMPs, and the requirement to develop a comprehensive program within 18 months;
- Under MCM (6) Pollution Prevention/Good Housekeeping:
  - Requirement to develop a Debris Control Program, containing five separate and onerous sub-programs, within 18 months;
  - Requirement to develop a Chemical Applications BMP Program within 18 months;
  - Requirement to develop an Erosion Control BMP Program within 18 months; and
  - Requirement to develop a Maintenance Activities BMP Program within 18 months.
- Under MCM (7) Industrial and Commercial Activities Discharge Management Program:
  - Requirement to develop a comprehensive program within 18 months that is completely outside the current General Permit requirements to meet the MEP;
  - Requirement for the County to "verify and accept" Industrial facility Storm Water Pollution Control Plans for facilities regulated under Appendix B of the State's NPDES rules, a role that is clearly not the County's responsibility.
- Under MCM (8) TMDL Implementation and Monitoring:
  - Onerous requirements for monitoring every discharge from an MS4 subject to Waste Load Allocations.

A comparison between the Proposed Permit and the Existing Permit also reveals that the Proposed Permit contains significantly higher levels of service in many of the Existing Permit elements. The County contends that, by imposing Permit requirements that greatly exceed the current Federal (EPA) requirements for Small MS4 Permittees, the DOH cannot claim that they are simply imposing a Federal permit and that their actions do not constitute a State mandate. DOH also cannot claim that the new measures they are proposing are intended to meet the requirements of the yet-to-be-finalized Small MS4 remand rule and, therefore, are not a State mandate. EPA clearly states that the proposed rule does not "alter the existing, substantive requirements of the six minimum control measures in 40CFR 122.34(b)..." The County believes DOH has gone too far, and the proposed rules exceed the Federal requirements.

To determine what elements of the State's NPDES program are required by the federal regulations, it is necessary to look to the express requirements of the Clean Water Act and the federal regulations. As explained below, the Draft Permit exceeds the requirements of the CWA and Phase II Regulations. Section 402(p)(3)(B) of the CWA requires that an NPDES permit be obtained for discharges from municipal storm sewers, and further requires that those permits meet the requirements of Section 402(p)(3)(B)(i) to (iii). Section 402(p)(3)(B)(4) and (6) required U.S. EPA to adopt regulations for such permits in two phases - Phase I, applicable to larger MS4s and Phase II, applicable to small MS4s. Specific to small MS4s such as the County, Section 402(p)(3)(B)(6) required EPA to adopt

regulations which, among other things, establish a "comprehensive program" for small MS4s and create, at a minimum, requirements for state storm water management programs.

The six minimum control measures contained in the Phase II regulations therefore represent the federal mandates under the CWA. To the extent the requirements of the Draft Permit exceed the six minimum control measures, they represent state mandates, not federal mandates. As noted above, the Existing Permit incorporates the six minimum measures from the Phase II regulations. Therefore, the analysis above regarding the comparison between the Existing Permit and the Draft Permit also serves to illustrate the components of the Draft Permit that exceed the federal mandates. In other words, the new programs identified above exceed the federal mandates because they are not one of the six minimum control measures. The higher levels of service identified above exceed the federal mandates because they go beyond the requirements of the six minimum measures as set forth in the Phase II regulations. Together the new programs and higher levels of service exceed the federal requirements.

Program requirements that are not mandated by the federal regulations do not become a federal mandate simply because the DOH says the requirements are necessary to achieve the MEP standard found in Section 402(p)(3)(B)(iii) of the CWA. There are at least two reasons why this is true.

First, in the Phase II regulations, U.S. EPA made clear that the six minimum measures, when properly implemented, "will reduce pollutants to the maximum extent practicable." DOH cannot claim that their more onerous State mandates are federal mandates by reference to MEP. As an example, the EPA limits their "Pollution Prevention/Good Housekeeping" requirements, in both the currently valid rules and the proposed remand rules, to "municipal operations." The DOH has removed the term "municipal operations" and has proposed a host of requirements that that County believes greatly exceed the MEP and seeks to require the County to monitor third parties beyond the scope of even the EPA's new proposed rule.

Second, for the reasons set forth in this document, the DOH has not established a factual basis to demonstrate that controls not called for in the Phase II regulations are necessary to achieve the reduction of pollutant discharges to the MEP. Absent such evidence, the DOH has not established that the additional controls they propose are required to achieve MEP. Relative to a pesticide program, for example, DOH is proposing to require the permittee to:

> *(b) Implement appropriate requirements for pesticide, herbicide, and fertilizer applications - The Permittee shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers from residential, commercial, and industrial areas and activities to its Small MS4.",*

Appendix K then goes on to describe the minimum BMPs that must be followed. However, because the requirements are not limited to municipal operations, DOH greatly exceeds both the MEP standard and the County's authority to regulate pesticide use. For example, requiring the County to institute certifications for commercial applicators goes far beyond the MEP relative to pesticide use at the County's own facilities, or use of these chemicals by the County itself, and enters the County into the realm of regulating federal and state pesticide rules. The State Department of Agriculture currently regulates such operations, thus the County lacks the authority to do so. The County maintains that these types of requirements go far beyond the County's authority or obligation to achieve the MEP. Appropriate measures to address pesticides as a pollutant within the realm of "MEP" would be to require the County to utilize certain BMPs relative to their own pesticide use, or

to require the County to distribute educational material on the safe use of pesticides at a public event. The specificity required under the EPA's proposed remand rule has been accommodated by other jurisdictions, for example, by requiring a certain number of such educational campaigns within the permit period. That is, by not adding multiple onerous requirements and instead providing more specificity for options to meet the MEP, the proposed General Permit would meet the remand rule while still reflecting the EPA's intent that the proposed rules do not establish any new substantive requirements for Small MS4s.

Other jurisdictions have determined that, in most cases, dischargers lack adequate fee authority to fund the types of new programs and higher levels of services called for in the Draft Permit. The ability of the County to enact fees to pay for the new programs or higher levels of service in the Draft Permit is highly constrained by constitutional limits. The County cannot enact such fees unilaterally; voter approval is required, and is far from certain. Additionally, the State is in no way sharing in the cost of these new programs as required by the Constitution. The State may need to consider a General Excise Tax increase to assist in paying for these increasing permit requirements.

The unfunded state mandates law is a constitutional requirement imposed upon the State to fund programs that it requires local agencies to implement. It is well recognized that the current storm water programs are not fully funded at the Federal, State and local levels. In its report on Urban Stormwater Management in the United States, the National Research Council concluded that State and local governments do not have adequate financial support to implement storm water programs in a rigorous way. The DOH should not impose new programs or higher levels of service on dischargers without providing the funding to implement such programs. Throughout this document, the County has requested deletion of DOH's proposed Permit measures that pose unacceptable costs with no demonstrated link to water quality improvement; if DOH does not grant the County's requests to stay these proposed permit terms, they must be prepared to pay for these unfunded mandates.

8. **General Objection – Applicable to All Proposed Amendments - Requiring the County to Assume Responsibility for the Actions and Duties of Others:**
In multiple areas of the proposed changes to Chapter 11-55, Appendix K, the DOH proposes to require the County to monitor, track, and in many cases control the activities of parties other than the County, its facilities and employees. To the extent anything in the general permit requires the County to monitor, track or control the activities of third parties that are not subject to a County permit, the County objects to such requirements. The County cannot be held responsible or liable for the activities of third parties other than the County, its facilities and employees. In addition, the County lacks the legal authority to impose many of the proposed requirements on other parties, including but not limited to regulating NPDES permitting for other parties and regulating the use of pesticides, both of which fall under the jurisdiction of the State DOH and Department of Agriculture.

9. **General Objection – Applicable to All Proposed Amendments - Rigid Requirement to use GIS:**
In multiple areas of the proposed changes to Chapter 11-55, Appendix K, the DOH proposes to require the County to monitor and track using geographic information system (GIS). The County would prefer to use their existing management systems for tracking and compliance and would like flexibility to use a variety of systems including non-GIS systems. The SWRCB under the California's, Phase II Small MS4 General Permit made including spatial data in a GIS optional. Therefore, the County requests to delete all references to GIS from the proposed rules or make it optional similar to California's General Permit for Small MS4s.

10. Proposed Hawai'i Administrative Rules (HAR), Title 11, Chapter 55, page 55-18, Definition of "Small MS4"
Proposed HAR, Title 11, Chapter 55, page 55-80 and 55-81, Parag. 34.08 (m)(2) and (3)
Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-3, Parag. 1 (c)
Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-4, Parag. 2 (b)
DOH has added a discretionary designation of small municipal separate storm sewer systems, stating that "(i)f required by the director, small municipal separate storm sewer systems located outside urbanized areas, that meet any of the designation criteria in §11-55-34.08(m)(3)(A)-(C) shall submit a notice of intent." The proposed designated criteria includes:

"(A) The director determines that the storm water discharge from the unregulated small municipal separate storm sewer system results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts; or
(B) The director determines that the small municipal separate storm sewer system has high population and high population density as determined by the latest Decennial Census by the Bureau of Census. High population means a population of 10,000 or more. High population density means a density of 1,000 residents per square mile or greater. Also to be considered in this definition is a high density created by a non-residential population, such as tourists or commuters; or
(C) The small municipal separate storm sewer system discharges to a Class 1 or Class AA water or to a State water for which a Total Maximum Daily Load (TMDL) has been adopted by DOH and approved by the EPA and the small municipal separate storm sewer system has been assigned a Wasteload Allocation (WLA).

In the FACT SHEET FOR APPENDIX K revisions, the DOH states:

"Based on the proposed Small MS4 designation criteria, the DOH is proposing to designate Kihei and Lahaina on the Island of Maui. As determined by the latest Decennial Census by the Bureau of the Census, Kihei has a population of 20,881 and population density of 2,250 and Lahaina has a population of 11,704 and population density of 1,503. Kapaa on the Island of Kauai with population of 15,313 and population density of 2,880 meet the designation criteria however, at this time, DOH has not identified any significant water quality impacts from Kapaa's MS4 discharges and therefore is not currently proposing to require coverage for Kapaa."

The County objects to the "discretionary designation" approach to Small MS4 designation criteria. Firstly, the December 8, 1999 Phase II final rule gives the permitting authority the ability to set additional criteria to designate small MS4s located outside urbanized areas. In making designations of small MS4s, permitting authorities must (40 CFR 123.35(b)(1-3):

"(1)(i) Develop criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

(2) Apply these criteria, at a minimum, to any small MS4 located outside of an urbanized area serving a jurisdiction with a population density of at least 1,000 people per square mile and a population of at least 10,000;
(3) Designate any small MS4 that meets your criteria by December 9, 2002. You may wait until December 8, 2004 to apply the designation criteria on a watershed basis if you have developed a comprehensive watershed plan. You may apply these criteria to make additional designations at any time, as appropriate;"

The County asserts that the DOH had the responsibility to apply their designation criteria to any Small MS4 meeting the population and population density requirements by 2002. Since no Maui MS4s were designated at that time, they must be assumed to have not met the designation criteria. Additional designations may be made at any time; however, such additional designation for MS4s that met the population criteria must be based on the MS4 newly meeting the designation criteria. In making additional designations based on the established designation criteria, the DOH must show evidence that the MS4 now meets the designation criteria where they did not in the past.

The County disagrees with the Fact Sheet statement implying that the DOH has identified significant water quality impacts from MS4 discharges from Lahaina and Kihei, as an attempted justification for Lahaina and Kihei being required to obtain coverage under the General Permit while Kapaa is not. The DOH should provide documented evidence that discharges from the Lahaina and Kihei MS4s have violated water quality criteria to justify the inclusion of Lahaina and Kihei, if such criteria is to be applied. The DOH has also failed to specifically define the geographic boundaries of Kihei and Lahaina.

The County also opposes the DOH's designation of Lahaina and Kihei when other CDPs with much greater population apparently will not be required to obtain coverage under the General Permit. For example, Hilo, with a CDP population of 43,263 and an annual tourist count of 473,141 and an MS4 that likely includes significant discharge to a Class 1 water body (Wailoa River), may have a much greater impact on storm water quality than Lahaina.

11. **Proposed HAR, Title 11, Chapter 55, Appendix F, page 55-F-11, Parag. 7(b)**
The DOH proposes to require hydrotesting dischargers (for example, contractors hydrotesting new water lines) to conduct inspections of receiving waters immediately before, during and after discharges, stating that the permittee shall "*look at effluent and receiving state waters for turbidity, color, floating oil and grease, floating debris and scum, materials that will settle, substances that will produce taste in the water or detectable off-flavor in fish, and inspect for items that may be toxic or harmful to human or other life.*" Paragraph 7(a) requires the same inspection be conducted of the discharge. The County believes that the additional inspection of the receiving waters is impractical. Firstly, receiving waters may be a substantial distance from the hydrotesting discharge, and the permittee may not have access to the outfall location. Secondly, the water quality at the outfall may be affected by many other sources and it would be difficult to ascertain what conditions were attributable to the hydrotesting activities. The inspection of the discharge at the source is the appropriate approach, and the County requests deletion of paragraph 7(b).

12. **Proposed HAR, Title 11, Chapter 55, Appendix F, page 55-F-11, Parag. 7(c)**
The DOH proposes to require hydrotesting permittees to "*conduct daily inspections of any directly associated ground disturbing or industrial activities associated with the hydrotesting water discharge whether or not discharges occur. The inspections shall document whether adequate Best Management Practices are implemented to prevent the discharge of pollutants other than hydrotesting waters to state waters.*" This requirement appears to be circumventing the permit threshold for construction sites (one acre) and industrial facilities. Construction and industrial facility best management practices (BMPs) should be regulated under those permits, if applicable. The County requests deletion of paragraph 7(c). If the DOH maintains this section, it must provide more guidance regarding the requirement to conducting these inspections "whether or not discharges occur". For example, for a one-day hydrotesting discharge on a water line installation for a project that does not trigger the 1-acre construction area threshold (so no construction NPDES permit), when does the obligation for inspections begin and end?

13. **Proposed HAR, Title 11, Chapter 55, Appendix G, page 55-G-14 and G-15, Parag. (e)(1)-(4)**
The DOH proposes to require dewatering permittees to implement a range of BMPs to prevent the discharges of pollutants from storm water discharges other than the dewatering effluent authorized by the general permit. The County maintains that storm water discharges other than dewatering effluent should be managed through other relevant permits, and requests deletion of this section.

14. **Proposed HAR, Title 11, Chapter 55, Appendix G, page 55-G-28, Table 34.5**
The DOH proposes to require dewatering permittees to sample dewatering effluent on a daily basis, rather than the currently required weekly basis. The County notes that, for long-term construction projects that require dewatering, the increase to daily monitoring would greatly increase the cost of construction. The County believes the permittee should be given more discretion to select the appropriate monitoring interval. It may be appropriate to conduct daily sampling for the first few weeks of dewatering, or when the dewatering system is changes, until it is shown that the effluent meets the effluent limitations. Dewatering discharge typically reaches a "steady state" after initial pumping, and ongoing daily sampling is unnecessary. The County requests that the DOH maintain the current requirement for weekly sampling, but would support daily sampling for the first week of dewatering activities.

15. **Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-1, Parag. 1(a)**
The permit lists certain non-storm water discharges that are authorized by this general permit, provided that they do not cause or contribute to any violation of water quality standards. The DOH has not provided any revisions to this list from the current permit. The County requests that "charity car washing" be added to those non-storm water discharges authorized by the permit:

    The County believes discharges from charity car washes are minimal and highly intermittent and do not cause or contribute to any violation of water quality standards. The County will work with charities to educate them on BMP options, such as controlling the runoff and using commercial car washes. Nonetheless, charity car washes may be a significant community "feel good" practice that the County does not want to curtail within the MS4. Other jurisdictions, such as Oregon, have included charity car washes in their list of allowable non-storm water discharges under their MS4 General

Permit, and we note that charity car washing is included as an allowable non-storm water discharge in the City and County of Honolulu's Individual Permit.

16. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-2, Parag. 1(b)

The DOH proposes to modify the areas that are able to receive coverage under the general permit to include "class 1, inland waters," and "class AA, marine waters." Previously, a discharger to Class 1 and AA waters was required to apply for an Individual Permit. In the FACT SHEET FOR APPENDIX K revisions, the DOH states (page 4):

> *"With the introduction of the Small MS4 designation criteria in HAR, Chapter 11-55-34.08(m)(3) and knowing that a portion of those discharge to* Class *1 and* Class *AA waters, the DOH expects the universe of Small MS4 Permittees to increase. If not eligible to obtain coverage under a General Permit, the DOH* ***would have difficulty issuing Individual Permits in a timely matter with the limited DOH resources*** *(emphasis added). As a result of the proposed revision, additional requirements were added to make the permit consistent with those requirements typically found in an Individual NPDES Permit."*

It appears that the purpose of these revisions is to reduce the workload and the resource needs of the DOH, at the great expense of the County and other Small MS4 permittees who have been able to obtain coverage under the General Permit. By adding the requirements typically found in an Individual NPDES Permit to the General Permit, the DOH has unduly burdened the County and other Small MS4s previously covered under the General Permit with program elements that are far out of proportion to their likely impact to water quality. We emphasize that none of these requirements are required by the applicable EPA Phase II permit regulations.

For Maui County, the proposed inclusion of Individual Permit requirements on the Small MS4 General Permittees that do not discharge to Class AA/Class 1 waters imposes a program level that cannot be achieved with the County's limited resources. The EPA has been clear on the delineation and requirements for Phase I and Phase II permit holders, stating that Phase I permit holders generally have individual permits, and Phase II permit holders are generally covered under a general permit. By attempting to pull most of the Phase I Individual Permit requirements into the State's General Permit, the DOH has unreasonably burdened Small MS4 permittees covered under the General Permit. The County contends that these drastically increased requirements for their MS4 will result in greater harm to water quality, as other potentially more beneficial programs such as working with agricultural users and community watershed groups upland of the MS4, will have to be curtailed.

The County also objects to HAR 11-55 Appendix K (1)(c) and (2)(b) to the extent it purports to authorize the Director in his/her "discretion" to designate discharges outside of an urbanized area as requiring coverage under a permit.

17. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-5 and -6, Parag. 4(b)(4)

The DOH proposes to add a requirement for a separate "Permit boundary map" and "Guidance Document" that seems to duplicate information that would be included in the County's Storm Water Management Program (SWMP) Plan or the required Annual Report. The County questions the purpose of these additional documents. In the Fact Sheet for Appendix K, the DOH justifies inclusion

of the proposed permit boundary map and guidance document based on the documents required in California's Phase II Small MS4 General Permit which became effective on July 1, 2013. However, the DOH failed to note that SWMPs are no longer required under California's, Phase II Small MS4 General Permit.

The information requested is already required to be contained in the required SWMP Plan, with updates reported in the required Annual Report. Tracking two documents with the same information is burdensome and counterproductive with respect to good program management. Therefore, the County opposes the addition of the separate "Permit boundary map" and "Guidance Document."

18. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-11, Parag. 6(a)(4)

The DOH currently requires Small MS4 entities covered by the General Permit to "(d)evelop, implement, and enforce a program to reduce pollutants in storm water runoff entering the permittee's small municipal separate storm sewer system from construction activities disturbing one acre or more, including construction activities less than one acre that are part of a larger common plan of development or sale that would disturb one acre or more." The DOH proposes to add "smaller projects that have the potential to discharge pollutants to the Permittee's Small MS4." The County needs a clear criteria for what activities to track, and the words "have the potential to discharge pollutants to the permittee's Small MS4" do not provide that criteria. This should be stricken throughout the permit conditions as it is ambiguous.

19. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-12, Parag. 6(a)(4)(D)

The DOH proposes to require that Small MS4 entities covered by the General Permit to

*"develop and implement a system to track **all** construction projects occurring within **its jurisdiction**"* (emphasis added).

The term "construction projects" is undefined and unclear. "Construction projects" should be defined throughout the permit to be limited to projects that are over one acre and require a grading permit from the County. To the extent this is defined more broadly, the County objects and believes that it is inappropriate for Small MS4s authorized under the General Permit to expend resources to track, to the detail specified, ALL construction projects, including those that do not include grading or the reasonable potential to discharge pollutants to the County's regulated MS4. While the County requires projects smaller than one acre to establish BMPs for the protection of storm water, the proposed language would place an undue burden on the County to track projects that are likely to have little impact on water quality. In addition, the County believes that the paragraph should not cite "within its jurisdiction", since many areas that may be within a permittees jurisdiction are not covered by the General Permit. The County requests the following revision to this paragraph:

The Permittee shall develop and implement a system to track construction projects for which a grading permit is required that are within the area of the County's regulated MS4 and are greater than one acre or, due to the nature of their construction activity, the County judges to be a potential source of pollutants to the County's regulated MS4."

20. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-12 and -13, Parag. 6(a)(4)(D)(4)

The DOH requests that the County identify whether construction projects have

"*applied for coverage under HAR, Chapter 11-55, Appendix C, NPDES General Permit Authorizing the Discharge of Storm Water Associated with Construction Activity... and satisfied any other applicable requirements of the NPDES permit program (i.e., an individual NPDES permit*;"

The County cannot be held responsible for the enforcement or monitoring of the NPDES permits regulated by the DOH, and is not responsible for determining whether the construction activity has satisfied NPDES requirements. The County lacks the legal authority to take action against facilities, as the Federal and State governments are given that authority by law, not the County. The DOH may not delegate its duties to the County. The County requests that this language be removed.

21. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-13, Parag. 6(a)(4)(D) (6)

The DOH requests that the County assess the construction project's "*project threat to water quality.*" The County requests that the DOH provide the metrics or evaluation factors they want the Small MS4 permittees to use for this factor. Although suggested prioritization criteria are provided in Parag. 6(a)(4)(H)(4), we know of no guidance for determining how these factors should be weighted.

22. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-13, Parag. 6(a)(4)(D)

The DOH requests that:

"*The system used to track/inventory construction sites shall be completed, up-to-date, and in use within 18 months of the effective date of this permit.*"

Please see item 4, above for our general objection regarding the imposed timelines. In addition, such a system will be continually updated as construction sites are added. The term, "completed" should be removed. The County requests the following revision to the last sentence of paragraph 6(a)(4)(D):

"*A schedule to develop the system used to track/ inventory construction sites shall be included in the SWMP.*"

23. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-16, Parag. 6(a)(4)(H)(3)

The DOH requests that:

"*Construction projects shall be inspected at least quarterly by a qualified construction inspector who is independent (i.e., not involved in the day-to-day planning, design, or implementation) of the construction projects to be inspected.*"

The County Development Services Administration inspectors currently inspect construction projects that trigger permits (grading or building permits) on a frequency that exceeds quarterly. Please confirm that the Development Services Administration (DSA) qualified construction inspectors, none of whom are involved in the day-to-day planning, design, or implementation of the construction projects, meet this inspection requirement.

24. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-16, Parag. 6(a)(4)(H)(4)

The DOH states that:

"*Within 18 months of the effective date of this Permit, the Permittee shall develop written procedures for evaluating prioritization of construction sites. Prioritization criteria shall be*

based on project threat to water quality. Project threat to water quality includes soil erosion potential, site slope, projects size and type, sensitivity of receiving water bodies, proximity to receiving water bodies, and non-storm water discharges."

The DOH provides no rationale for these new requirements. The County refers to its Comment 3 and 8, above. The DOH has failed to provide any justification for such a requirement, and the addition of these prescriptive requirements exceeds the MEP. The County requests this proposed requirement be removed; if the DOH does not remove this requirement, the County requests more guidance from the DOH as to how these factors should be weighted to prioritize construction sites. Are there studies that show that this type of prioritization results in increased protection of water quality? Are there data documenting which of these factors should be weighted higher? In addition, if this requirement stands, the County requests the following revision to the first sentence of paragraph 6(a)(4)(H)(4):

"*Within 36 months of the NGPC date, the Permittee shall develop written procedures for evaluating prioritization of construction sites.*"

25. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-18, Parag. 6(a)(4)(J)(2)

The DOH requests that Permittees:

"*Develop and implement an Enforcement Response Plan to include written procedures for appropriate corrective and enforcement actions, and follow-up inspections when an inspected project is not in full compliance with its requirements, other permits, and any other applicable requirements under the NPDES permit program.*"

The County already has an enforcement program that includes follow-up inspections when an inspected project is not in full compliance with certain requirements. However, the County can only enforce their own codes and rules. Per our Comment 8, above, enforcement of NPDES permits is the DOH's responsibility. Additionally, the DOH should specify which "requirements" are the subject of this permit, as not all County requirements will affect water quality. The County requests the following revision:

"*...when an inspected project <u>that involves grading of an area over one acre</u> is not in full compliance with <u>any issued grading</u> permit, ~~and any other applicable requirements under the NPDES permit program~~.*"

26. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-18 and K-19, Parag. 6(a)(4)(H)
[Note: the numbering of these sections appears off]

The DOH requests that Permittees:

"*...verify that the project has... satisfied any other applicable requirements of the NPDES permit program...*"

The County can only enforce their own codes and rules, and lacks the legal authority to enforce NPDES requirements and conditions. Per our Objection 8, above, enforcement of NPDES permits is the DOH's responsibility. Additionally, not all "relevant permits" involve water quality and thus not every County permit or approval should be the subject of this General Permit. The County requests the following revision:

"The Permittee shall not allow construction to commence on any project until it has verified that the project has been issued all relevant ~~City (i.e., City Building and Site Development and Subdivision permits) and/or County~~ permits that may affect water quality and are administered by the Permittee ~~and received from DOH a Notice of General Permit Coverage for the discharge of storm water associated with construction activities (unless the project will disturb less than one (1) acre of land), hydrotesting and/or dewatering effluent and satisfied any other applicable requirements of the NPDES permit program (i.e., an individual NPDES permit).~~"

27. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-20, Parag. 6(a)(5)

The DOH states:

"The permittee shall develop, implement, and enforce a program to reduce pollutants in storm water runoff entering the permittee's small municipal separate storm sewer system from new development and redevelopment projects that disturb greater than or equal to one acre, including construction sites less than one acre that are part of a larger common plan of development or sale that would disturb one acre or more and smaller projects that have the potential to discharge pollutants to the Permittee's Small MS4." (underlined text constitutes a new requirement.)

The County already requires developments/projects with a disturbed area of over 1 acre to meet specific design criteria and to be designed by a licensed engineer. Projects under 1 acre must still implement BMPs, but they do not need to be prepared by an engineer. The difficulty with the proposed language (smaller projects that have the potential to discharge pollutants to the Permittee's Small MS4) is that just about any project could fall into that category, including projects that do not trigger permits (grading or building). The proposed language would place an undue burden on the County to track small projects that are likely to have little impact on water quality. The County requests the added language be removed; if the DOH does not remove this proposed revision, they must provide guidance on how "potential to discharge pollutants" should be judged.

"The permittee shall develop, implement, and enforce a program to reduce pollutants in storm water runoff entering the permittee's small municipal separate storm sewer system from new development and redevelopment projects that disturb greater than or equal to one acre, including construction sites less than one acre that are part of a larger common plan of development or sale that would disturb one acre or more ~~and smaller projects that have the potential to discharge pollutants to the Permittee's Small MS4~~."

28. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-20, Parag. 6(a)(5)

The DOH states:

"The Permittee's program must ensure that permanent controls are in place to reduce the discharge of pollutants to the MEP. The Permittee shall also..."

The County reiterates its Objections 3 and 5 regarding the overly prescriptive requirements and the imposition of permit terms that greatly exceed the Phase II rule MEP standard. Under the existing Phase II rules, County should have the ability to establish the programs that best use their resources to meet the MEP standard. The County requests this paragraph be revised as follows:

"The Permittee's program must ensure that permanent controls are in place to reduce the discharge of pollutants to the MEP. ~~The Permittee shall also develop criteria defining when types of permanent post-construction BMPs (i.e., LID techniques), must be included in a project design to address storm water impacts and pollutants of concern. For State waters on the State CWA Section 303(d) list or State established and EPA approved TMDLs, the pollutants of concern to be targeted shall include the parameters causing impairment.~~ The program shall include, at a minimum, the following elements:"

29. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-21 and -22, Parag. 6(a)(5)(B)

The DOH states:

"Standards - Within 18 months after the effective date of this Permit, the Permittee shall develop standards for addressing post-construction BMPs, including Low Impact Development (LID) requirements... The plan for the implementation of LID provisions in the Permittee's standards shall include at a minimum the following:

- *Criteria for requiring implementation.*
- *Investigation into the development of quantitative criteria for a specific design storm to be managed by LID techniques. Examples of design storm requirements include: 24-hour, 85% storm through infiltration; on-site management of the first inch of rainfall within a 24-hour period; retention of the 100-year, 2-hour storm; or onsite management of the 24-hour, 95% storm.*
- *Requiring management practices to be prioritized to favor infiltration, evapotranspiration, or harvesting/reuse of stormwater followed by other practices that treat release stormwater. This shall also apply to alternative offsite locations.*
- *Requiring 1.5 times the water quality volume for any treat and release practices."*

The DOH provides no rationale for these prescriptive requirements, such as investigation into the development of quantitative criteria for a specific design storm and requiring 1.5 times the water quality volume for treat and release practices. The County already has ordinances requiring post-construction BMPs and uses 1-inch design storm to calculate the Water Quality Volume. Preliminary investigation of other jurisdictions, including City and County of Honolulu, State of Maryland DOH of Environment, Water Management Administration, and State of Hawai'i DOT (various divisions), indicate that these entities all use a 1-inch design storm to calculate the Water Quality Volume, and this is the volume used in the design of treat and release situations. Such prescriptive practices are not appropriate for a General Permit, and the County requests that Paragraph 6(a)(5)(B) be deleted in its entirety.

The SWRCB rejected the comment made to include a 1.5 multiplier requirement for offsite projects under the California's, Phase II Small MS4 General Permit and stated the following in their fact sheet:

"Staff does not agree that a 1.5 multiplier must be required for any off-site project. Due to the complex and diverse conditions of California's geography, the requirement of a one-size-fits all multiplier may not be feasible."

The County considers requiring each MS4 to conduct an investigation into the development of quantitative criteria for a specific design storm is unnecessary, excessive and a waste of their limited resources.

30. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-23, Parag. 6(a)(5)(D)

The DOH includes the following in this paragraph:

"At a minimum, this will include the review of all plans disturbing at least one (1) acre, including smaller projects (e.g., retail gas stations, restaurants, auto repair shops, parking lots) that have the potential to discharge pollutants to the Permittee's MS4 for post-construction BMPs and LID requirements."

The addition of the requirement to review all plans for smaller projects such as gas stations, restaurants, etc. is too prescriptive and excessive relative to the MEP for Small MS4s. Industrial facilities that are likely to discharge pollutants should be regulated under HAR 11-55, Appendix B, with enforcement conducted by the DOH. The County requests revision of this paragraph as shown:

Review of Plans for Post-Construction BMPs. The Permittee shall ensure that plan reviews for new developments and redevelopments include a review for post-construction BMPs and LID requirements to ensure compliance with this part of the permit. The plans shall clearly identify if the BMPs are intended to be permanent post-construction stormwater management structures. At a minimum, this will include the review of all plans disturbing at least one (1) acre~~, including smaller projects (e.g., retail gas stations, restaurants, auto repair shops, parking lots) that have the potential to discharge pollutants to the Permittee's MS4~~ for post-construction BMPs and LID requirements. Project documents for projects that will include installation of permanent post-construction BMPs and LID practices shall also include appropriate requirements for their future continued maintenance.

31. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-24, Parag. 6(a)(5)(E)

The DOH states:

"The database shall include activities or projects which initially discharge into the Permittee's MS4 and shall begin in the plan review stage with a database or geographic information system (GIS). The Permittee shall also map post-construction BMPs on the GIS."

Please see our Objection 9, above, for our objection regarding the prescriptive inclusion of GIS.

32. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-26, Parag. 6(a)(6)

Relative to Pollution Prevention/Good Housekeeping, the DOH states:

"For Small MS4s designated in accordance with §11-55-34.0S(m) (3), to comply with this minimum control measure, the Permittee is only required to include good housekeeping and other control measures, and employee and contractor training on good housekeeping practices to ensure that good housekeeping measures and best management practices are properly implemented. All other Small MS4s, at a minimum, shall include the following: i) Debris Control BMPs Program Plan - Within 18 months of the effective date of this Permit, the Permittee shall develop a Debris Control BMPs Program Plan. The Debris Control BMPs Program Plan shall be implemented as part of the System Maintenance Program, and at a minimum include:..."

Please confirm that, since Lahaina and Kihei are designated in accordance with §11-55-34.0S(m) (3), they would not be subject to the various activities (Debris Control BMPs Program Plan, Chemical Applications BMPs Program Plan, Erosion Control BMPs Program Plan, Maintenance Activities BMPs Program Plan, Trash Reduction Plan) detailed in this section. However, the County notes that, even if only the Kahului-Paia Urbanized Area (UA) regulated MS4 is subject to these requirements, the requirements are too prescriptive and onerous for a Small MS4 Permittee with limited resources, and greatly exceed the MEP standard. The proposed permit requirements are simply unrealistic for Small MS4 permittees to be able to fund. In addition, the requirement to put many of these measures into place within 18 months is unachievable. Any timelines for programs should be described in the SWMP Plan provided by the County, per our Objection 4, above.

The County also notes an attempt to make the Permittees responsible for third parties such as commercial applicators, and for third party activities such as maintenance of vehicles. The County has no authority to enforce against private parties, especially pesticide application that is regulated by State and Federal laws. Please see our Objection 8, above regarding inappropriate delegation of authority. The County requests removal of the entire new proposed permit terms following "All other Small MS4s, at a minimum, shall include the following:"

33. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-27, Parag. 6(a)(6)(i)

The DOH States:

"Debris Control BMPs Program Plan - Within 18 months of the effective date of this Permit, the Permittee shall develop a Debris Control BMPs Program Plan. The Debris Control BMPs Program Plan shall be implemented as part of the System Maintenance Program, and at a minimum include:

(a) Asset Management System and Mapping
(b) Inspection/Maintenance Schedule
(c) Storm Drain Marking
(d) Maintenance of Structural Controls
(e) Trash Reduction Plan"

Please see our Objection 4, above for our general objection regarding this imposed timeline. Additionally, please see our Objection 3, above, for the inappropriate burden of the proposed new requirements. These proposed permit requirements greatly exceed the MEP standard, and would be among the most onerous and unrealistic for Small MS4 permittees to be able to fund. The County requests that the requirement for a Debris Control Program Plan be deleted in its entirety.

34. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-27, Parag. 6(a)(6)(i)(a)

The DOH states:

"The asset management system shall, at a minimum, assign an identification number for each drain inlet, outfall, and BMPs, and map their location on the Geographic Information System (GIS)."

Please see our Objection 9, above, for our general objection regarding the inclusion of GIS.

35. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-28, Parag. 6(a)(6)(i)(a)

The DOH states:

"The Permittee shall use this asset management system to establish priorities and to schedule and track efforts of appropriate system maintenance and debris removal program activities such as street sweeping, catch basin cleaning, and green waste and accumulated soil removal. The asset management system shall include justification of its priorities on the basis of potential impacts to water quality."

This requirement is in direct conflict with the Section 6(A)(6)(i)(b), creating confusion on where and how to track the street sweeping and drain cleaning activities. The County would like flexibility to establish priorities, schedule inspections using their existing business processes and document in the SWMP Plan and the Annual Reports. Such prescriptive practices are not appropriate for a General Permit, and the County requests deletion of this proposed requirement.

36. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-28, Parag. 6(a)(6)(i)(a)

The DOH states:

"The Asset Management System and Mapping shall be completed, up-to-date and implemented within 18 months of the effective date of this Permit."

Please see our Comment 4, above for our general objection regarding this imposed timeline. In addition, such a system will be continually updated as infrastructure projects are implemented. The term, "completed" should be removed. In Comment 32, the County requested deletion of the entire Debris Control Program Plan; however, if the DOH does not delete this requirement in the General Permit, the County requests the following revision to the last sentence of paragraph 6(a)(6)(i)(a):

"The Asset Management System and Mapping shall be implemented within 24 months of the NGPC date."

37. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-29, Parag. 6(a)(6)(i)(b)

The DOH states:

"The schedule shall provide that each major street mile, storm drainage feature, and BMP is inspected at least once during the term of this permit (maintenance/cleaning may be conducted in lieu of inspections to satisfy this requirement). Structural controls that were not previously inspected shall be inspected/cleaned within one (1) year after the effective date of this permit and placed on the priority based schedule. At a minimum all structural controls shall be inspected/cleaned once per permit term."

The DOH provides no rationale for the mandated frequency of inspection and maintenance. Additionally, this requirement is in direct conflict with the Section 6(a)(6)(i)(b), and exceeds the MEP standard. These contradictory requirements further support the County's stand that the proposed revisions are too prescriptive to be included in a Small MS4 General Permit and do not meet the intention of the EPA for Small MS4s. The County requests deletion of this sentence in its entirety. We note that SWRCB similarly deleted mandatory inspection frequencies from the California's Phase II Small MS4 General Permit during their public comment proceedings.

38. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-29, Parag. 6(a)(6)(i)(b)

The DOH states:

"Within 18 months of the effective date of this Permit the Permittee shall have developed procedures for prioritizing inspections and maintenance and developed an initial schedule for inspections and maintenance."

Please see our Objection 4, above, regarding this imposed timeline. In Comment 32, the County requested deletion of the entire Debris Control Program Plan; however, if the DOH does not delete this requirement in the General Permit, the County requests the following revision to the above sentence:

"Within 36 months of the NGPC date, the Permittee shall have developed procedures for prioritizing inspections and maintenance and developed an initial schedule for inspections and maintenance."

The justification for this request is that this a new requirement within the General Permit and this would require MS4 inventory to be established in order to develop an inspection schedule for both street sweeping and drain cleaning. Additionally, this process will involve coordination between various Departments within the County.

39. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-30, Parag. 6(a)(6)(i)(c)

The DOH states:

"Within 5 years of the effective date of this permit, all storm water drains receiving runoff from industrial or commercial activities shall be marked (stenciling or placards), where feasible."

The DOH provides no evidence of a link to improved water quality through the use of the proposed measure. The County contends that the measure greatly exceeds the MEP standard for Small MS4s, and requests deletion of this proposed requirement.

40. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-30, Parag. 6(a)(6)(i)(c)

The DOH states:

"Maintenance of Structural Controls - The Permittee shall develop and implement an Action Plan to maintain, and improve, as necessary, structural BMPs. The Action Plan shall cover a 5 year period and be updated annually to include additional retrofit projects with water quality protection measures. At a minimum, annual updates to the Action Plan shall consider system inspection results, storm water monitoring data, recent construction, and required operations and maintenance. The annual updates to the Action Plan shall be included in the Annual Report with a description of the projects status. The Action Plan shall include, but not be limited to projects in compliance with any TMDL implementation and monitoring plan."

The DOH provides no rationale for these prescriptive requirements, which greatly exceed the MEP standard for Small MS4s. The County considers this an unfunded mandate and undue burden on Small MS4s with limited funding and resources. The County of Maui is in its first iteration of the MS4 permit and considers it an unreasonable expectation on Small MS4s to meet this requirement imposed on the Large and Medium MS4s in their latest iteration of the Permits. At this time, the

County's storm water program is not mature enough to look into storm water retrofits. For these reasons, the County of Maui requests to delete this Section 6(A)(6)(i)(d) in its entirety.

41. **Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-31 and -32, Parag. 6(a)(6)(i)(e)**
The DOH states:

"Trash Reduction Plan – The Permittee shall develop and implement, a trash reduction plan which assesses the issue, and identifies and implements control measures, and monitors these activities to reduce trash loads from the Small MS4. The plan shall specify the rationale for specific BMPs considered and implemented by the Permittee, and the method to access the effectiveness of the implemented BMPs..."

The DOH provides no rationale for these prescriptive requirements. The County objects to inclusion of the Trash Reduction Plan within the General Permit as detailed in previous comments. O'ahu's Large MS4 permittees have been subject to a trash reduction plan, but it is too onerous for Small MS4s, and exceeds EPA's MEP intent for Small MS4s. As discussed in Comment 3, above, the SWRCB addressed the concerns of the Small MS4s and significantly revised the draft permits to address the prescriptive and onerous requirements and deleted their proposed trash reduction program. The County requests that Paragraph 6(a)(6)(i)(e) be deleted in its entirety.

Moreover, the County maintains developing a baseline load for trash by each MS4 permittee is not a BMP or pollution control technology. Section 303(d) of the CWA, requires states to identify waters within their state where current pollution control technologies alone cannot meet the water quality standards set for that waterbody. Therefore, developing a baseline load for trash should be the DOH's duty. In fact, in the Phase II rule, EPA encourages States to develop such programs themselves, rather than imposing them on Small MS4 permittees. 40 CFR 123.35(h) encourages permitting authorities to provide cost-cutting assistance, and provides examples such as providing technical and programmatic assistance, conducting research projects, performing watershed monitoring, developing outreach materials or implementing measures across an entire State so that Small MS4s do not have to implement their own programs.

42. **Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-32, Parag. 6(a)(6)(ii)**
The DOH states:

"Chemical Applications BMPs Program Plan – Within 18 months of the effective date of this Permit, the Permittee shall develop a Chemical Applications BMPs Program Plan. The Chemical Applications BMPs Program Plan shall be implemented as part of the System Maintenance Program, and at a minimum include:"

Please see our Objections 3 and 4, above, regarding the proposed prescriptive measures and timelines, and Objection 8 for earlier discussions of this proposed pesticide program. In addition to this requirement clearly exceeding the MEP Standard for Small MS4s, the County objects to the Chemical Application Plan on the basis that County has no authority to enforce against private parties, especially pesticide application that is regulated by the State and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This measure is a clear attempt to delegate the related duties of DOH

and the Department of Agriculture. The County requests deletion of the Chemical Applications BMPs Program Plan.

43. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-32, Parag. 6(a)(6)(ii)(a)

The DOH states:

"Training - The Permittee shall develop an Authorized Use List of the chemicals the Facility uses and implement training for Facility personnel and commercial applicators, as necessary, to ensure compliance with federal and State laws and regulations, including certification and training requirements, to minimize or eliminate runoff of potential pollutants to the receiving waters."

The County with their limited resources cannot be responsible for certifying and training commercial applicators. In addition, there is no proven link between establishment of this measure and the minimization or elimination of runoff of potential pollutants, and the proposed measure exceeds the MEP standard. The County requests deletion of the Chemical Applications BMPs Program Training requirement in this section; however, if the DOH does not delete this requirement in the General Permit, the County requests the following revision to 6(a)(6)(ii)(a):

"Training - The Permittee shall develop an Authorized Use List of the chemicals the Facility uses and implement training for Facility personnel ~~and commercial applicators, as necessary,~~ to ensure compliance with federal and State laws and regulations, including certification and training requirements~~, to minimize or eliminate runoff of potential pollutants to the receiving waters~~."

44. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-33, Parag. 6(a)(6)(ii)(b)

The DOH proposes the following:

"Implement appropriate requirements for pesticide, herbicide, and fertilizer applications – The Permittee shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers from residential, commercial, and industrial areas and activities to its Small MS4. BMPs shall include, at a minimum:"

The County objects to the proposed requirements, particularly as they relate to any activity beyond the County's own personnel. The County has no authority to certify or institute training for private parties for pesticide use, protected by FIFRA, at residential, commercial and industrial facilities. Furthermore, the County maintains that it is DOH's responsibility to track the contribution of pollutants associated with pesticides, herbicides, and fertilizers from various sources under the HAR 11-55 Appendix M. The requirement for a pesticide management plan for MS4s is spelled out under the requirements for Phase I permits; there is no such requirement in EPAs rules for Small MS4s. The County requests deletion of this entire section; however, if the DOH does not delete this requirement in the General Permit, the County requests the following revision to 6(a)(6)(ii)(b):

"Implement appropriate requirements for pesticide, herbicide, and fertilizer applications – The Permittee shall implement BMPs to reduce the contribution of pollutants associated with the application, storage, and disposal of pesticides, herbicides, and fertilizers ~~from residential,~~

~~*commercial, and industrial areas and activities to its Small MS4*~~ *by their Facility personnel. BMPs shall include, at a minimum:*

(1) training, educational activities, applicable certifications and other measures for ~~*commercial applicators*~~ *permittee personnel involved in chemical application activities;*

(2) integrated pest management measures at permittee Facilities that rely on non-chemical solutions;

(3) the use of native vegetation, where suitable for the environment;

(4) chemical application, as needed; and

(5) the collection and proper disposal of unused pesticides, herbicides, and fertilizers at permittee Facilities."

The Permittee shall ensure that Permittee personnel applying registered pesticides, herbicides, and fertilizers shall work under the direction of a certified applicator, follow the pesticide label, and comply with any other State or government regulations for pesticides, herbicides, and fertilizers. All Facility personnel applying pesticides, herbicides or fertilizers shall receive training on the BMPs annually."

45. Proposed HAR, Title 11, Chapter 55, Appendix K, pages 55-K-34 through -36, Parag. 6(a)(6)(iii)

The DOH proposes the following:

"Erosion Control BMPs Program Plan - Within 18 months of the effective date of this Permit, the Permittee shall develop an Erosion Control BMPs Program Plan. The Erosion Control BMPs Program Plan shall be implemented as part of the System Maintenance Program, and at a minimum include:"

The Erosion Control BMPs Program Plan is to include implementing permanent erosion control improvements, identification of erosional areas with the potential for significant water quality impact, and requiring the implementation of temporary and permanent erosion control measures. DOH provides no rationale for these prescriptive requirements.

Please see our Comments 3 and 4, above, for our general objections regarding the proposed prescriptive measures and timelines. The County considers the proposed Erosion Control BMPs Program Plan to be an unfunded mandate and undue burden, in excess of the MEP standard, on Small MS4s with limited funding and resources. The County of Maui is in its first iteration of its MS4 permit program and considers it an unreasonable expectation to meet this requirement imposed on the Large and Medium MS4s in their latest iteration of their Permits. The County requests that Paragraph 6(a)(6)(iii) be deleted in its entirety.

46. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-36 through -38, Parag. 6(a)(6)(iv)

The DOH proposes the following:

"Maintenance Activities BMPs Program Plan - Within 18 months of the effective date of this Permit, the Permittee shall develop a Maintenance Activities BMPs Program Plan. The Maintenance Activities BMPs Program Plan shall be implemented as part of the System Maintenance Program, and at a minimum include:

(a) Facility-Wide Maintenance Activities – Within 18 months of the effective date of this Permit, the Permittee shall develop a written procedure to implement minimum BMPs for routine infrastructure maintenance activities that have the potential to impact the quality of receiving waters, and ensure the implementation of the applicable BMPs. Routine maintenance activities include, but are not limited to: vehicle and equipment maintenance, vehicle or equipment fueling, chemical storage, recycling, paving and road repairs, street cleaning, concrete work, curb and gutter replacement, buried utility repairs and installation, vegetation removal, painting and paving, debris and trash removal, and spill cleanup. The procedures shall ensure that appropriate BMPs are verifiable through field inspections (i.e., field inspectors can quickly determine if the appropriate BMPs have been implemented).

(b) Training - The Permittee shall develop and provide annual training for storm water pollution prevention to Facility maintenance personnel and contractors with the potential to impact storm water runoff. The training shall identifying potential sources of pollution specific to Facility-wide maintenance activities, general BMPs that can be used to reduce and/or eliminate potential sources of pollutants, and procedures for establishing and implementing site-specific BMPs. The training shall educate Facility maintenance personnel that they serve a role in protecting water quality. Facility Maintenance personnel shall be made aware of the NPDES permit, the overall SWMP, and the applicable BMPs Program(s)."

While the County believes these activities are achievable, they oppose the 18-month timelines proposed. Please see our Comment 4, above, for our position on these requirements. There is no reason for the DOH to impose such a short timeline on this task. The County is in its first iteration of its MS4 permit program and considers it an unreasonable expectation that they could meet this requirement in 18 months, with the minimal resources in its current program. The County requests revising "18 months" to "36 months" wherever it is noted in this section.

47. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-38 through -45, Parag. 6(a)(7)
The DOH proposes the following:

"Industrial and Commercial Activities Discharge Management Program – *Within 18 months of the effective date of this Permit, the Permittee shall develop an Industrial and Commercial Activities Discharge Management Program to reduce to the MEP the discharge of pollutants from all industrial and commercial facilities and activities which discharge into the Permittee's Small MS4.*"

The DOH goes on to list several prescriptive requirements, including: Inventory and Map of Industrial and Commercial Facilities and Activities; Requirement to Implement BMPs; Inspection of Industrial and Commercial Facilities and Activities; Reporting; Enforcement Policy; and Training (Sections i through vi).

The proposed 6(a)(7) imposes an entirely new program that is well outside the EPA's intent for Small MS4s, even under the proposed remand rule. The new program triggers the issue of an unfunded mandate. The proposed requirements are those that were developed for Phase I Large MS4 permittees on O'ahu and are too onerous/prescriptive for Small Permittees with no discharge to Class AA marine or Class 1 waters. In addition, the rules would require many of these measures to be in place within 18 months of the effective date of this Permit (should be the NGPC), which is simply unachievable for a Small MS4 Permittee with limited financial resources. These proposed revisions also appear to require

the County to regulate and monitor third parties. As such, they seek to delegate the basic duties of the DOH to catalog and monitor other parties that require an NPDES permit to the County to insure they meet the requirements of the State. The County would also be required to inspect all commercial and industrial facilities, which is something the DOH should be performing for facilities under the NPDES program (HAR 11-55, Appendix B). The DOH also attempts to require the County to enforce against facilities which "fail to comply" with NDPES rules, again something the DOH is required to do by statute. The County neither possesses the personnel nor the legal authority for this undertaking, and requests the Section 7 be deleted in its entirety from the proposed General Permit.

48. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-45, Parag. 6(a)(7)(vii)

Relative to Storm Water Pollution Control Plans, the DOH proposes:

"(a) *Verify the facility owner has received NPDES permit coverage for the discharge of storm water associated with industrial activity or provided proof of filing an NOI, or NPDES application; and (b) Review and accept a Site-Specific [SWPCP] or other plans relating to pollution prevention or similar document(s).*"

The regulation of NPDES permits for industrial facilities (Appendix B) is the DOH's responsibility. The County cannot be responsible for checking on facility coverage or accepting SWPCPs. The County requests this section be deleted in its entirety from the proposed rules.

49. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-47, Parag. 6(a)(8)

Relative to TMDL Implementation and Monitoring, the DOH states:

"For TMDLs approved and adopted prior to 2015, the permittee must comply with any assigned WLA(s) within one (1) year of the effective date of this general permit."

It is unreasonable to expect compliance with any assigned WLA(s) with one year. It would take a Permittee more than one year to understand and identify the measures needed to comply with WLA reductions and then several years of programming and budgeting to implement these reduction measures. The County requests the above paragraph to be deleted in its entirety.

50. Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-47, Parag. 6(a)(8)

Relative to TMDL Implementation and Monitoring, the DOH states:

"For TMDLs approved by the EPA and adopted by the DOH after 2015, the permittee must comply with any assigned WLAs [waste load allocations] within 5 (five) years of the TMDL approval. The Permittee shall comply with the WLAs, consistent with the assumptions of the associated TMDL document. Compliance shall be evaluated on an annual basis after the applicable deadline with monitoring beginning the year following the deadline. To determine compliance with WLAs, the permittee must monitor every storm event and discharge point from its Small MS4 into the receiving water.....

In lieu of monitoring every discharge point, representative monitoring may be conducted for similar discharges. Justification of using representative monitoring must be provided to the DOH and accepted prior to implementation of a monitoring plan and shall not cause delay in beginning monitoring. As applicable, if monitoring results have already been recorded for an interval during the monitoring year, the permittee may choose not to have those samples evaluated. If the samples are evaluated, it must be recorded and the highest loading must be used for comparison with the applicable WLA."

The DOH and EPA have the authority and means to establish a schedule for compliance within each approved TMDL as part of the Implementation Plan prepared with the TMDL. These schedules should reflect proposed activities by all stakeholders and have timelines established to achieve consistency with the WLA reductions as soon as possible, but with realistic assumptions of the activities required by each stakeholder, and the duration required for each activity.

To require a permittee comply with assigned WLAs within five (5) years of the TMDL approval for some unknown future TMDLs is completely unreasonable and arbitrary. DOH in the first paragraph acknowledges that "due to high variance in the level of detail and specificity of TMDLs..." Therefore, it would seem to indicate that compliance of the various WLA reductions should be variable due to the level of detail and complexity of the TMDL.

TMDL requirements should not be added to the Small MS4 General Permits. Particularly, the requirement to monitor for every storm event is not achievable by a Small MS4 and, as a new program, amounts to an unfunded mandate. We note that not even the City's and HDOT O'ahu's Large MS4 Permits include requirements to monitor every storm event. It is inequitable and unreasonable to require Small MS4 Permittees to monitor every storm event and discharge point from its Small MS4 into the receiving water, and is beyond the MEP standard and, quite frankly, impossible.

There should also be flexibility provided within the rules to allow permittees to comply with its WLAs in the absence of actual water quality monitoring data. Alternative measures such as using literature documentation, independent research studies done in other parts of the country that identify the effectiveness, pollutant removal rates for a specific BMP from verification programs such as NJCAT, NPDEP etc. should be allowed to comply with WLA reductions in lieu of water quality monitoring.

This furthers the County's argument that the requirements added would make this general permit consistent with those requirements typically found in an Individual NPDES Permit (or, in this case exceed the requirements of the current Hawai'i Phase I permit holders) and constitute a blatant disregard to the limited resources and appropriate program level of a Small MS4s Permittees. The County requests deletion of this section in its entirety from the proposed rules; however, if the DOH does not delete this requirement in the General Permit, the County requests the 6(a)(8) to be rewritten as follows:

> *"The requirements of this section apply to MS4 discharges to receiving waters with established Total Maximum Daily Loads approved by EPA where urban storm water is identified as a source of TMDL pollutant loading and the permittee has assigned Wasteload Allocations (WLA)s. For TMDLs approved by the EPA and adopted by the DOH, the Permittee for any assigned WLAs will, within two (2) years of the TMDL approval, prepare a Draft WLA Implementation and Management (I&M) plan, for a minimum of one TMDL per year, that will describe the Permittee's approach to proposed activities for WLA reduction(s) including a schedule for the proposed activities with milestone commitments. The Draft WLA I&M Plan would be consistent with the Permittee's WLA and the implementation framework within the approved TMDL."*

51. **Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-49, Parag. 8**
Proposed HAR, Title 11, Chapter 55, Appendix K, page 55-K-51, Parag. 10(c)
EPA's Handbook for Developing Watershed TMDLs state that both the TMDL process and document itself need to be structured in such a way that they facilitate implementation. Additionally, this Handbook emphasizes the early stakeholder involvement efforts of the TMDL process to facilitate implementation activities. The DOH spells out requirements for implementation for each TMDL. Based on the justification for the revision to the TMDL language above in Comment 48, the County requests the following changes to these sections:

"*The Permittee shall submit their progress for the proposed activities in the I&M Plan annually including any milestone commitments*"