



ENFORCEMENT POLICY INCLUDING INDUSTRIAL AND COMMERCIAL ACTIVITIES DISCHARGE MANAGEMENT

1.0 Re: NPDES Permit Requirements – Permit No. HI S000001

Under the requirements of the Oahu Municipal Separate Storm Sewer System (Oahu MS4) National Pollutant Discharge Elimination System (NPDES) permit issued to the State Department of Transportation, Highways Division (HDOT Highways) effective March 31, 2006, the HDOT Highways is required to develop and submit to the Department of Health (HDOH) an enforcement policy for Industrial Facilities and Activities. The Permit in Part D.1.g.(5) states that:

*“The Permittee shall develop and submit **an enforcement policy** that shall go into effect when it has been documented that an industrial or commercial facility has failed to comply with local ordinances and/or terms of this permit. This policy shall be submitted to DOH for review and acceptance within 180 days of the effective date of this permit. The policy shall be part of the **overall escalating enforcement policy** and must consist of the following:*

- *Issuance of written documentation to a facility representative within two (2) weeks of storm water deficiencies identified during inspection. Documentation must include copies of all field notes, correspondence, photographs, and sampling results if applicable.*
- *A timeline for correction of the deficiencies.*
- *Provisions for re-inspection and potential enforcement actions, if necessary.*

In the event the Permittee has exhausted all available sanctions and cannot bring a facility or activity into compliance with local ordinances and this permit, or otherwise deems the facility or activity an immediate and significant threat to water quality, the Permittee shall provide oral notification to DOH within one (1) week of such determination. Oral notification shall be followed by a copy of all inspection checklists, notes, photographs, and related correspondence within two (2) weeks of the determination. In instances where an inspector identifies a facility that has not applied for the General Industrial Storm Water permit coverage or any other applicable NPDES permit, the Permittee shall provide oral notification to DOH within one (1) week of such determination. Such oral notification shall be followed by written notification within two (2) weeks of the determination.” (See page 24 & 25 of the permit)

1.1 Background

Storm water flowing from industrial and commercial areas may be a significant source of pollutants that enter the Oahu MS4. Therefore, the Industrial and Commercial Discharge Management Program (Industrial Discharge Program) is designed to reduce, to the maximum extent practicable, the discharge of pollutants from all industrial and commercial facilities and activities that discharge into the Oahu MS4.

This program is related to another part of the Oahu Storm Water Management Program Plan (Oahu SWMP Plan) revised in 2006, the Illicit Discharge and Elimination Program, because industrial and commercial facilities activities are susceptible to causing illicit discharges. One element of the Industrial Discharge Program takes a proactive approach in reducing illicit discharges by identifying industrial and commercial areas that drain into the Oahu MS4 for priority inspections.

The Industrial Discharge Program consists of:

- Developing a comprehensive GIS database as part of the Asset Management System (AMS) to track industrial and commercial facilities and activities that discharge storm water runoff directly or indirectly into the Oahu MS4;
- Conducting inspections or investigations of industrial and commercial facilities and parcels; and
- Supporting a training program so that those involved in this program have the necessary knowledge and skills to conduct investigations.

1.1.1 Database Inventories

To better track, gauge, and reduce the amount of pollutants from industrial and commercial facilities that discharge into the Oahu MS4, HDOT Highways is developing a GIS database of inventories of industrial and commercial facilities that are discharging into the Oahu MS4 (see Section 3.1.6 of the Oahu SWMP Plan). As described in Chapter Three of the Oahu SWMP Plan, the AMS will contain this database and production tools to produce maps to support the program. The industrial and commercial databases were created from the following information:

- Findings from the 2000 Questionnaire Survey;
- Available information about parcel owners from the City and the State;
- Collection of new information obtained during field activities; and
- Readily available intra-agency informational databases.

The types of facilities and activities contained in the Industrial database include:

- Municipal landfills (open and closed);
- Hazardous waste recovery, treatment, storage and disposal facilities;
- Facilities subject to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11023;
- Facilities from follow-up investigations of the industrial facilities identified in the 2000 Questionnaire Survey;

- Facilities subject to General Industrial Storm Water permit coverage or any other applicable NPDES permit coverage which are adjacent to the HDOT Highways right-of-way or discharge to the Oahu MS4; and
- Any other industrial facility that either HDOT Highways or HDOH determines is contributing a substantial pollutant loading to the Oahu MS4.

The type of information collected for each industrial facility or activity in the database is provided in Section 3.1.6.1 of the Oahu SWMP Plan.

The types of facilities and activities contained in commercial database include:

- Retail gasoline outlets;
- Retail automotive services, including repair facilities;
- Restaurants; and
- Any other commercial facility that either HDOT Highways or HDOH determines is contributing pollutants to the Oahu MS4, which may cause or contribute to an exceedance of State water quality standards.

The type of information collected for each commercial facility or activity in the database is provided in Section 3.1.6.1 of the Oahu SWMP Plan.

1.1.2 Inspections of Industrial and Commercial Facilities

The major element of the Industrial Discharge Program is the inspection or investigation of industrial and commercial facilities to reduce the amount of illicit discharges coming from these sources to the maximum extent practicable. The inspections will be conducted on industrial and commercial facilities and parcels:

- Holding Connection Permits as described in Section 6.1 of the Oahu SWMP Plan; and
- Located in areas considered for priority inspections based on the potential for illicit discharges and impacts to water quality (e.g., location vis-à-vis 303(d) water bodies).

In general, investigations conducted as described in this section will be conducted in the same manner as the investigations under the Illicit Discharge Program (see Section 6.2 of the Oahu SWMP Plan).

All industrial and commercial facilities holding Connection or Discharge Permits are subject to inspections at least once every five (5) years to check whether their Oahu MS4 connections are consistent with the terms of their permits. Residential Connection Permit holders would not be subject to these inspections.

The AMS will be used to schedule inspections of permit holder properties or facilities. The owner of the property from which the connection originates is generally considered the owner of the connection, and would, therefore, be the responsible party for any illegal connection or connection beyond the terms of the permit.

During the inspection, the inspector will check that permitted dischargers are in compliance with local ordinances and the terms of the permit, and if not, follow-up action as described in Section 6.2 of the Oahu SWMP Plan will be taken.

The AMS will be used to identify and rank industrial and commercial facilities or dischargers according to the relative risk that the discharge may be contaminated with pollutants, and how this might affect the quality of storm water runoff entering the Oahu MS4. The methodology to rank facilities will take into account the number of industrial and commercial facilities within particular areas, and within those areas identified, the following factors will be considered:

- Density of facilities;
- Previous storm water violations;
- Water quality impairments; and
- Distance to 303(d) listed streams or waters.

Based on the information collected and analyzed using the AMS, priority areas will be identified, as well as identifying and prioritizing industrial and commercial facilities or parcels for inspections. This prioritized plan will be submitted to HDOH by March 2007, and once approved the AMS will be used to schedule inspections in accordance with quotas contained in the Oahu MS4 NPDES permit, as provided in Table 1. The inspections for Year 1 will be conducted prior to submitting the official prioritization plan to HDOH.

Table 1
Inspection Quota for the Industrial and Commercial
Discharge Management Program

Oahu MS4 NPDES permit Year	Minimum Number of Inspections
1	20
2	30
3	40
4	60
5	80

If an industrial or commercial facility or activity does not require NPDES permit coverage, this facility or activity would be subject to inspection at least twice every five years. If an industrial facility has NPDES permit coverage, this facility would be subject to inspection at least once every five years. However, inspections would not be conducted at those facilities or activities subject to HDOH inspections pursuant to its Notice of General Permit Coverage (NGPC) or any other applicable NPDES permit. If an inspector finds an industrial or commercial facility does not have NPDES permit coverage, but would be required to have coverage under State law, the facility would be reported to HDOH.

Inspectors will be trained to identify deficiencies, assess potential impacts to receiving waters, and evaluate the appropriateness and effectiveness of deployed Best Management Practices (BMPs) and Storm Water Pollution Control Plans (SWPCPs), if applicable. During an inspection of an industrial or commercial facility or activity, the inspector would record observations manually on paper inspection forms. The form will be developed, and when completed, it will be inserted in Appendix K of the Oahu SWMP Plan. The inspectors will also photograph site and BMP conditions. Similar to the inspections conducted under the Illicit Discharge Program, it is preferable that investigations under the Industrial Discharge Program be conducted during dry weather. However, useful site information can also be obtained during wet weather.

As noted above, investigations of industrial and commercial properties in high priority areas will be conducted in the same manner described in Section 6.2 of the Oahu SWMP Plan. However, because some of the inspected facilities or activities have an NPDES permit or require NPDES permitting, the inspectors will follow the applicable portions of the *NPDES Compliance Inspection Manual* (USEPA 300-B-94-014) dated September 1994 during the inspections. An important aspect of the investigations is to determine whether or not the facility or activity is in compliance with applicable State regulations, and if appropriate, the terms of the Oahu MS4 NPDES permit. The inspections will also assess whether or not the facility or activity contains potential sources of pollutants that threaten contamination of storm water and receiving waters. If such sources are identified, the inspector will check whether or not the facility or activity has implemented BMPs that are in compliance with State regulations, and if appropriate, the terms of the Oahu MS4 NPDES permit.

Inspection reports will be submitted to HDOH within two months of the inspection date, and records of all inspections will be maintained for a minimum of five years.

1.2 Enforcement

Industrial and commercial facilities subject to inspections under the Industrial Discharge Program will also be subject to the enforcement policy if storm water deficiencies are uncovered during inspections.

Adherence to the requirements of the Oahu SWMP involves many other groups and individuals besides HDOT Highways and master consultant personnel. Since the Oahu MS4 NPDES permit requires HDOT to “develop, implement and enforce a Storm Water Management Program Plan, compliance with the Oahu SWMP is also required of SWMP entities, such as contractors hired to work on HDOT Highways projects, utility companies conducting work within HDOT Highways rights-of-way, and landowners or businesses holding permits for connections or discharges into the Oahu MS4 or whose properties indirectly discharge storm water runoff into the Oahu MS4. Because the activities of these entities have the potential to cause storm water pollution to enter into the Oahu MS4 and/or surface waters, and since HDOT Highways has oversight over their activities that can cause storm water pollution through the programs described in Part II of the Oahu SWMP Plan, an enforcement policy has been developed for situations where such activities are in violation of the Clean Water Act, the promulgations of storm water regulations by the USEPA, and HRS Chapter 342D, Water

Pollution, and/or the Oahu MS4 NPDES permit or other NPDES general or individual permit.

The enforcement policy includes protocols and documentation standards and requirements. The protocols will be triggered by the identification of a violation that cannot immediately be addressed by the offending party or where the offending party refuses to address the violation. Once triggered, the enforcement policy is sequentially escalating and contains the following elements as described in the Oahu MS4 NPDES permit:

- Issuance of written documentation to the offending party within two weeks of identifying the storm water deficiency, including copies of all field notes, correspondence, photographs and sampling results, if applicable;
- A timeline for correcting deficiencies; and
- Provisions for re-inspection and potential punitive actions, if necessary.

As stated in the permit, in the event that the HDOT Highways has exhausted all available administrative sanctions and cannot bring the offending party into compliance with local ordinances and/or the Oahu MS4 NPDES permit, or otherwise deems the facility or actions of the offending party has an immediate and significant threat to water quality, HDOT Highways will provide oral notification to HDOH within one week of such determination to be followed by providing copies of all inspection checklists, notes, photographs and related correspondence within two weeks of the determination.

1.3 Enforcement Policy

In accordance with the provisions of the:

- Clean Water Act, as amended, (33 USC 1251);
- Hawaii Revised Statutes (HRS) Chapter 342D;
- Hawaii Administrative Rules, Chapters 11-54 and 11-55;
- Memorandum of Understanding (MOU) between HDOH and HDOT Highways dated July 13, 1999; and
- Current NPDES permit for HDOT Highways MS4, HDOT Highways establishes the following principals, actions, assistance and penalties for enforcement and to fulfill the requirement to effectively prohibit non-storm water discharges through its MS4.

1.3.1 Enforcement Principals

Enforcement is a tool that, when used with other strategies, helps to ensure that the effects of pollution in storm water discharge are minimized to the maximum extent practicable. Fair and equitable enforcement of environmental laws and rules requires matching carefully the significance of the violation to the effect of the enforcement action. Environmental rules are generally self-implementing. Public awareness and voluntary compliance with laws and rules is required and expected.

Although voluntary compliance is preferred, understanding the laws and rules can be complicated. HDOT Highways, as part of the Oahu SWMP, provides education and

technical assistance on permits and conducts inspections and other storm water related tasks.

When voluntary compliance with the laws and rules is unsuccessful, HDOT Highways may employ increasingly stringent administrative enforcement tools. During this process the role of HDOT Highways moves from educator to enforcer. Per the MOU between the HDOH and HDOT Highways, HDOH reserves to itself the adjudicatory functions in all administrative cases. (See MOU in Appendix A of the Oahu SWMP Plan).

The available steps to achieve the plan requirements can be summarized by the following tasks:

- Education
- Technical Assistance
- Compliance Inspection
- Warning
- Notice
- Order
- Penalty

Not all steps are used in all situations and multiple factors are considered in determining the appropriate response to a law or rule violation.

1.3.2 Enforcement Actions

Enforcing environmental laws and rules may be accomplished two ways: civil enforcement and criminal enforcement. Civil enforcement may be pursued through the courts (judicially) or directly through action by HDOT Highways (administratively). HDOT Highways will pursue, whenever possible, its enforcement action through civil administrative actions. However, if a HDOT Highways employee or its designated inspector notes possible criminal activity, a referral for investigation to the Attorney General may be made concurrent with ongoing inspections or other enforcement actions.

Administrative enforcement is the exercise of HDOT Highways authority to direct the owner or operator of a facility, site or property to comply with state law. An administrative enforcement action is based upon:

1. A violation, or potential to violate, a state law or rule, and
2. Authority to enforce that law or rule.

As stated, administrative enforcement tools consist of warning letters or letters of non-compliance, notices, orders and civil penalties. These categories are described below in more detail. Some enforcement authority is delegated to HDOT Highways with HDOH acting in an oversight capacity.

1. Warning Letters or Letters of Noncompliance

Warning letters typically cite minor or potential violations of environmental rules observed during a field visit or inspection. Warning letters describe measures the business or individual may take to remedy the situation.

2. Notices

A Notice of Violation or a Notice of Non-Compliance officially informs the recipient that they have violated or pose the potential to violate environmental laws. Notices may not be appealed. In some cases, a field citation may accompany a Notice of Non-Compliance.

3. Orders

An order is typically a unilateral directive requiring a person or business to take steps to correct violations of environmental laws. Administrative orders are authorized by statute, and most orders can be appealed.

4. Civil Penalties

In civil penalties, HDOT Highways' investigation must establish that a violation of law occurred. State laws authorizing civil penalties set maximum amounts, usually on a per-day and/or per-violation basis. Civil penalties are not "punitive." HDOT Highways uses them to secure correction of environmental regulatory violations and to deter future violations. Civil penalties can be appealed.

5. Criminal Enforcement

Unlike civil violations, investigation and prosecution of environmental crimes must not only establish a violation of law, but also that the person committed the violation knowingly or intentionally and/or willfully. In addition to specific environmental crimes, criminal prosecution may involve fraudulent reporting, testimony or recordkeeping. Criminal enforcement will be carried out by HDOH through the court system.

1.3.3 Compliance Assistance

The goal of compliance assistance is to help businesses voluntarily comply with laws and rules to protect public health and the environment. HDOT Highways/HDOH provides various resources and services to support voluntary compliance, including education, technical assistance and cooperation-based programs. Education and assistance programs are designed to help people and business conduct their activities in a manner that protects human health and the environment. Examples of technical assistance are brochures and site visits.

Inspectors provide compliance assistance during routine site inspections of facilities, sites or businesses in the form of regulatory information and technical assistance. In addition, the business or site owner and/or operator may be directed to useful sources of information relevant to problems observed at the facility or business.

The goal of compliance assistance is to ensure businesses and individuals understand what is necessary to comply with state laws to protect public health and the environment. Where instances of noncompliance are found, HDOT Highways works with the business owner or operator to achieve voluntary compliance. When voluntary compliance is not successful, administrative enforcement may be used.

A cooperation-based tool HDOT Highways may use in the future to improve voluntary environmental compliance is a negotiated agreement, called a memorandum of understanding. The typical nature of a memorandum of understanding addresses the effective management of wastes and/or the control of water pollution through identifying and using best management practices. Voluntary compliance is achieved through actions taken by the industries.

1.3.4 Assessment of Penalties

Civil penalties are not considered “punitive.” They are a monetary incentive to change behavior to ensure compliance with state law. Monetary penalties are aimed at correcting environmental violations and deterring future violations. HDOT Highways will consider several factors when determining the appropriate penalty amount to assess:

1. The nature of the violation, such as:
 - Severity of the violation (public health and/or environmental effect),
 - Magnitude of the violation (amount and type of pollution),
 - Whether the violation was due to negligence, recklessness or was intentional, and
 - Precautions taken to prevent the violation;
2. The prior behavior of the violator, such as:
 - Record of similar violations or a pattern of violations, and
 - Multiple notices of the violation and applicable corrective actions; and
3. Actions taken by the violator to correct the problem, such as:
 - Degree of cooperation in working toward compliance,
 - Timeliness and appropriateness of corrective actions taken, and
 - Compensation paid or agreed to for damages to public resources.

Penalties will be assessed based on the provisions of HRS 342D-30 to 36, Part II, Penalties. Penalties typically come due and payable to State Director of Finance in one of three ways:

- The violator does not initiate a formal appeal within the applicable time period;
- The violator appeals the penalty to the Department of Health hearing officer and the amount is reduced; or
- The violator and HDOT Highways negotiate a traditional or innovative settlement agreement.

Negotiated settlements can include:

- A reduction in the dollar amount of the penalty; and/or
- An Innovative Settlement in the form of a Supplemental Environmental Project.

HDOT Highways makes every effort to effectively and efficiently recover the final penalty assessment. Failing to pay a penalty will result in a referral to the state Attorney General's Office. The Attorney General's Office determines the appropriate action to be taken, such as seeking a judgment in court or the services of a collections agency.