



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

WRITTEN
TESTIMONY
ONLY

In reply, please refer to:
File:

**Testimony COMMENTING on SCR003
REQUESTING THE DEPARTMENT OF HEALTH TO ADOPT RULES FOR A
PERMIT TO DISCHARGE POLLUTANTS THAT INCLUDE THE MAJOR
FACTORS THAT ARE CONSIDERED IN IDENTIFYING THE FUNCTIONAL
EQUIVALENT OF A DIRECT DISCHARGE FOR POINT SOURCES OR NONPOINT
SOURCES**

SENATOR JOY A. SAN BUENAVENTURA, CHAIR
SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES
SENATOR MIKE GABBARD, CHAIR
SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

Hearing Date: 3/20/2023

Room Number: 224

1 **Fiscal Implications:** This measure may impact the priorities identified in the Governor's
2 Executive Budget Request for the Department of Health's (Department) appropriations and
3 personnel priorities.
4 **Department Testimony:** The Department respectfully offers the following comments regarding
5 SCR003.

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

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

15 First, the Supreme Court outlined seven factors that may be relevant in determining
16 whether a discharge from a point source to a jurisdictional water is the "functional equivalent"

1 of a discharge. The scope of the seven factors is not considered clear, comprehensive, or
2 exhaustive. Also, the Supreme Court struggled to define the seven factors and explained that the
3 “functional equivalent” analysis can be further refined through future court decisions in
4 individual cases and through U.S. Environmental Protection Agency (EPA) administrative
5 actions or guidance.

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

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

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

22 Thank you for the opportunity to testify.

23 **Offered Amendments:** None.

SCR-3

Submitted on: 3/19/2023 7:10:39 AM

Testimony for AEN on 3/20/2023 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Ted Bohlen	Testifying for Hawaii Reef and Ocean Coalition	Support	Written Testimony Only

Comments:

The Hawaii Reef and Ocean Coalition **SUPPORTS SCR3** asking the DOH to consider adopting rules regarding the "functional equivalent of direct discharge" factors for NPDES permits and nonpoint sources. Rules could help clarify the application in Hawaii of the Supreme Court decision in *County of Maui v. Hawaii Wildlife Fund* and EPA guidelines.

Hawaii Reef and Ocean Coalition (by Ted Bohlen)

SCR-3

Submitted on: 3/16/2023 9:17:25 PM

Testimony for AEN on 3/20/2023 1:30:00 PM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

You people do not know what the hell you are doing!!!