
A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL RESPONSE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to promote the
2 cleanup and reuse of contaminated properties by providing relief
3 for bona fide prospective purchasers and innocent contiguous
4 property owners from liability under chapter 128D, Hawaii
5 Revised Statutes. This Act amends chapter 128D, Hawaii Revised
6 Statutes, to establish consistency between state and federal
7 laws after the passage of the federal Small Business Liability
8 Relief and Brownfields Revitalization Act, P.L. 107-118 (42
9 U.S.C. sections 9601-9628).

10 SECTION 2. Section 128D-1, Hawaii Revised Statutes, is
11 amended by adding a new definition to be appropriately inserted
12 and to read as follows:

13 "Bona fide prospective purchaser" means a person (or a
14 tenant of a person) that acquires ownership of a facility after
15 October 1, 2009 and establishes each of the following by a
16 preponderance of the evidence:

17 (1) All disposal of hazardous substances at the facility
18 occurred before the person acquired the facility;

1 (2) The person carried out all appropriate inquiries when,
2 on or before the date on which the person acquired the
3 facility:

4 (A) The person made all appropriate inquiries into
5 the previous ownership and uses of the facility
6 in accordance with generally accepted good
7 commercial and customary standards and practices
8 in accordance with subparagraph (B) and (C).

9 (B) The standards and practices referred to in 42
10 United States Code section 9601(35)(B)(ii) and
11 (iv) and 40 Code of Federal Regulation part 312
12 are used unless the director requires by rules
13 adopted pursuant to chapter 91.

14 (C) In the case of property in residential use or
15 other similar use at the time of purchase by a
16 nongovernmental or noncommercial entity, a
17 facility inspection and title search that reveal
18 no basis for further investigation shall be
19 considered to satisfy the requirements of this
20 paragraph;

- 1 (3) The person provides all legally required notices with
2 respect to the discovery or release of any hazardous
3 substances at the facility;
- 4 (4) The person exercises appropriate care with respect to
5 hazardous substances found at the facility by taking
6 reasonable steps to:
- 7 (A) Stop any continuing release;
8 (B) Prevent any threatened future release; and
9 (C) Prevent or limit human, environmental, or natural
10 resource exposure to any previously released
11 hazardous substance;
- 12 (5) The person provides full cooperation, assistance, and
13 access to persons that are authorized to conduct
14 response actions or natural resource restoration at a
15 vessel or facility (including the cooperation and
16 access necessary for the installation, integrity,
17 operation, and maintenance of any complete or partial
18 response actions or natural resource restoration at
19 the vessel or facility);
- 20 (6) The person:

- 1 (A) Is in compliance with any land use restrictions
2 established or relied on in connection with the
3 response action at a vessel or facility; and
- 4 (B) Does not impede the effectiveness or integrity of
5 any institutional control employed at the vessel
6 or facility in connection with a response action;
- 7 (7) The person complies with any request for information
8 or administrative subpoena issued by the President
9 under 42 United States Code chapter 103 or by the
10 director under chapter 128D or issued by any state or
11 federal court; and
- 12 (8) The person is not:
- 13 (A) Potentially liable or affiliated with any other
14 person that is potentially liable, for response
15 costs at a facility through:
- 16 (i) Any direct or indirect familial
17 relationship; or
- 18 (ii) Any contractual, corporate, or financial
19 relationship (other than a contractual,
20 corporate, or financial relationship that is
21 created by the instruments by which title to
22 the facility is conveyed or financed or by a

1 contract for the sale of goods or services);

2 or

3 (B) The result of a reorganization of a business
4 entity that was potentially liable."

5 SECTION 3. Section 128d-6, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§128D-6 Liability.** (a) Notwithstanding any other
8 provision or rule of law, and subject only to the defenses set
9 forth in subsection (c):

10 (1) The owner or operator or both of a facility or vessel;

11 (2) Any person who at the time of disposal of any
12 hazardous substance owned or operated any facility at
13 which such hazardous substances were disposed of;

14 (3) Any person who by contract, agreement, or otherwise
15 arranged for disposal or treatment, or arranged with a
16 transporter for transport for disposal or treatment,
17 of hazardous substances owned or possessed by such
18 person, by any other party or entity, at any facility
19 or on any vessel owned or operated by another party or
20 entity and containing such hazardous substances; and

21 (4) Any person who accepts or accepted any hazardous
22 substances for transport to disposal or treatment

1 facilities or sites selected by such person, from
2 which there is a release, or a threatened release,
3 which causes the incurrence of response costs of a
4 hazardous substance;
5 shall be strictly liable for (A) all costs of removal or
6 remedial actions incurred by the State or any other person; to
7 the extent such costs and actions are consistent with this
8 chapter, the state contingency plan, and any other state rules;
9 (B) damages for injury to, destruction of, or loss of natural
10 resources, including the reasonable costs of assessing such
11 injury, destruction, or loss resulting from such release; and
12 (C) the costs of any health assessment or health effects study
13 carried out consistent with this chapter, the state contingency
14 plan, or any other state rules.

15 (b) The amounts recoverable in an action under this
16 section shall include interest on the amounts recoverable under
17 subparagraphs (A) through (C). Such interest shall accrue from
18 the later of (1) the date payment of a specified amount is
19 demanded in writing, or (2) the date of the expenditure
20 concerned. The rate of interest on the outstanding unpaid
21 balance of the amounts recoverable under this section shall be

1 the same rate as is specified for interest on investments of the
2 State's fund.

3 (c) There shall be no liability under subsection (a) for a
4 defendant otherwise liable who can establish by a preponderance
5 of the evidence that the release or threat of release of a
6 hazardous substance and the damages resulting therefrom were
7 caused solely by:

8 (1) Any unanticipated grave natural disaster or other
9 natural phenomenon of an exceptional, inevitable, and
10 irresistible character, the effect of which could not
11 have been prevented or avoided by the exercise of due
12 care or foresight;

13 (2) An act of war;

14 (3) An act or omission of a third party other than an
15 employee or agent of the defendant, or than one whose
16 act or omission occurs in connection with a
17 contractual relationship, existing directly or
18 indirectly, with the defendant, if the defendant
19 establishes by a preponderance of the evidence that
20 the defendant exercised due care with respect to the
21 hazardous substance concerned, taking into
22 consideration the characteristics of such hazardous

1 substance, in light of all relevant facts and
2 circumstances; and the defendant took precautions
3 against foreseeable acts or omissions of any such
4 third party and the consequences that could
5 foreseeably result from such acts or omissions; or

6 (4) Any combination of the foregoing paragraphs.

7 (d) A defendant may also avoid liability under subsection
8 (a) where the defendant is able to establish that the real
9 property on which the facility concerned is located was acquired
10 by the defendant after the disposal or placement of the
11 hazardous substance on, in, or at the facility. In addition to
12 establishing the foregoing, the defendant must establish that
13 the defendant has satisfied the requirements of section 128D-
14 6(c)(3) and one or more of the following circumstances described
15 in paragraphs (1), (2), ~~(3)~~, (4), or (5) is also
16 established by the defendant by a preponderance of the evidence:

17 (1) At the time the defendant acquired the facility the
18 defendant did not know and had no reason to know that
19 any hazardous substance which is the subject of the
20 release or threatened release was disposed on, in, or
21 at the facility;

- 1 (2) The defendant is a government entity which acquired
2 the facility by escheat, or through any other
3 involuntary transfer or acquisition, or through the
4 exercise of eminent domain authority by purchase or
5 condemnation; [~~or~~]
- 6 (3) The defendant acquired the facility by inheritance or
7 bequest[~~or~~];
- 8 (4) At the time the defendant acquired the facility, the
9 defendant met the definition of "bona fide prospective
10 purchaser"; or
- 11 (5) The defendant was a contiguous property owner, as
12 described in subsection (k).

13 To establish that the defendant had no reason to know, as
14 provided in paragraph (1), the defendant must have undertaken,
15 at the time of acquisition, all appropriate inquiry into the
16 previous ownership and uses of the property consistent with good
17 commercial or customary practice in an effort to minimize
18 liability. For purposes of the preceding sentence the court
19 shall take into account any specialized knowledge or experience
20 on the part of the defendant, the relationship of the purchase
21 price to the value of the property if uncontaminated, commonly
22 known or reasonably ascertainable information about the

1 property, the obviousness of the presence or likely presence of
2 contamination at the property, and the ability to detect such
3 contamination by appropriate inspection.

4 Nothing in this subsection or in section 128D-6(c)(3) shall
5 diminish the liability of any previous owner or operator of such
6 facility who would otherwise be liable under this chapter.

7 Notwithstanding this definition, if the defendant obtained
8 actual knowledge of the release or threatened release of a
9 hazardous substance at such facility when the defendant owned
10 the real property and then subsequently transferred ownership of
11 the property to another person without disclosing such
12 knowledge, the defendant shall be treated as liable under
13 section 128D-6(a)(1) and no defense under section 128D-6(c)(3)
14 shall be available to the defendant.

15 Nothing in this subsection shall affect the liability under
16 this chapter of a defendant who, by any act or omission, caused
17 or contributed to the release or threatened release of a
18 hazardous substance which is the subject of the action relating
19 to the facility.

20 (e) No person shall be liable under this chapter or
21 otherwise under the laws of the State or any of the counties,
22 including the common law, to any government or private parties

1 for costs, damages, or penalties as a result of actions taken or
2 omitted in the course of rendering care, assistance, or advice
3 in compliance with this chapter, the National Contingency Plan,
4 or at the direction of a federal or state on-scene coordinator,
5 with respect to an incident creating a danger to public health
6 or welfare or the environment as a result of any release of a
7 hazardous substance or pollutant or contaminant or the threat
8 thereof. This subsection shall not preclude liability for
9 costs, damages, or penalties as the result of gross negligence
10 or intentional misconduct on the part of such person.

11 (f) No county or local government shall be liable under
12 this chapter for costs or damages as a result of actions taken
13 in response to an emergency created by the release or threatened
14 release of a hazardous substance or pollutant or contaminant
15 generated by or from a facility owned by another person. This
16 subsection shall not preclude liability for costs or damages as
17 a result of gross negligence or intentional misconduct by the
18 county or local government.

19 (g) No indemnification, hold harmless, or similar
20 agreement or conveyances shall be effective to transfer from the
21 owner or operator of any vessel or facility or from any person
22 who may be liable for a release or threat of release under this

1 section, to any other person, the liability imposed under this
2 section. Nothing in this subsection shall bar any agreement to
3 insure, hold harmless, or indemnify a party to such agreement
4 for any liability under this section. Nothing in this chapter
5 shall bar a cause of action that an owner or operator or any
6 person subject to liability under this section, or a guarantor,
7 has or would have, by reason of subrogation or otherwise against
8 any person.

9 (h) In the case of an injury to, destruction of, or loss
10 of natural resources under section 128D-6(a)(4)(B), liability
11 shall be solely to the State for natural resources within the
12 State or belonging to, managed by, controlled by, or
13 appertaining to the State. The natural resource trustee for the
14 State shall act on behalf of the public as trustee of such
15 natural resources to recover for such damages. Sums recovered
16 by the natural resource trustee under section 128D-6(a)(4)(B)
17 shall not be limited by the sums which can be used to restore or
18 replace such resources. Any damages recovered by the state
19 attorney general for damages to natural resources shall be
20 deposited in the fund and credited to a special account for the
21 purposes provided above.

1 (i) Provided that no liability shall be imposed under this
2 chapter, where the party sought to be charged has demonstrated
3 that the damages to natural resources complained of were
4 specifically identified as an irreversible and irretrievable
5 commitment of natural resources in an environmental impact
6 statement, or other comparable environment analysis, and the
7 decision to grant a permit or license authorizes such commitment
8 of natural resources, and the facility or project was otherwise
9 operating within the terms of its permit or license. There
10 shall be no double recovery under this chapter for natural
11 resource damages, including the costs of damage assessment or
12 restoration, rehabilitation, or acquisition for the same release
13 and natural resources. Notwithstanding any other provision of
14 this chapter, there shall be no recovery under this chapter for
15 natural resource damages where such damages have occurred wholly
16 before July 1, 1990.

17 (j) No person other than a government entity may recover
18 costs or damages under this chapter arising from a release which
19 occurred before July 1, 1990.

20 (k) Contiguous properties shall be treated as stated in
21 this subsection, except as specifically noted:

- 1 (1) A person shall not be considered to be an owner or
2 operator under the following conditions:
- 3 (A) In general, a person who owns real property that
4 is contiguous to or otherwise similarly situated
5 with respect to, and that is or may be
6 contaminated by a release or threatened release
7 of a hazardous substance from, real property that
8 is not owned by that person shall not be
9 considered to be an owner or operator of a vessel
10 or facility under section 128D-6(a) solely by
11 reason of the contamination if:
- 12 (i) The person did not cause, contribute, or
13 consent to the release or threatened
14 release;
- 15 (ii) The person is not potentially liable, or
16 affiliated with any other person that is
17 potentially liable, for response costs at a
18 facility through any direct or indirect
19 familial relationship or any contractual,
20 corporate, or financial relationship (other
21 than a contractual, corporate, or financial
22 relationship that is created by a contract

1 for the sale of goods or services); or the
2 result of a reorganization of a business
3 entity that was potentially liable;
4 (iii) The person takes reasonable steps to stop
5 any continuing release; prevent any
6 threatened future release; and prevent or
7 limit human, environmental, or natural
8 resource exposure to any hazardous substance
9 released on or from property owned by that
10 person;
11 (iv) The person provides full cooperation,
12 assistance, and access to persons that are
13 authorized to conduct response actions or
14 natural resource restoration at the vessel
15 or facility from which there has been a
16 release or threatened release (including the
17 cooperation and access necessary for the
18 installation, integrity, operation, and
19 maintenance of any complete or partial
20 response action or natural resource
21 restoration at the vessel or facility);

- 1 (v) The person is in compliance with any land
2 use restrictions established or relied on in
3 connection with the response action at the
4 facility; and does not impede the
5 effectiveness or integrity of any
6 institutional control employed in connection
7 with a response action;
- 8 (vi) The person is in compliance with any request
9 for information or administrative subpoena
10 issued by the president of the United States
11 or by the director under chapter 128D or
12 issued by any state or federal court;
- 13 (vii) The person provides all legally required
14 notices with respect to the discovery or
15 release of any hazardous substances at the
16 facility; and
- 17 (viii) At the time at which the person acquired the
18 property, the person conducted all
19 appropriate inquiry within the meaning of
20 the United States Code section 9601(35)(b)
21 with respect to the property; and did not
22 know or have reason to know that the

1 property was or could be contaminated by a
2 release or threatened release of one or more
3 hazardous substances from other real
4 property not owned or operated by the
5 person;

6 (B) To qualify as a person described in subparagraph
7 (A), a person must establish by a preponderance
8 of the evidence that the conditions in clauses
9 (i) through (viii) of subparagraph (A) have been
10 met;

11 (C) Any person that does not qualify as a person
12 described in this paragraph because the person
13 had, or had reason to have, knowledge specified
14 in subparagraph (A)(viii) at the time of
15 acquisition of the real property may qualify as a
16 bona fide prospective purchaser as defined under
17 section 128D-1, if the person is otherwise
18 described in that section;

19 (D) With respect to a hazardous substance from one or
20 more sources that are not on the property of a
21 person that is a contiguous property owner that
22 enters ground water beneath the property of the

1 person solely as a result of subsurface migration
2 in an aquifer, subparagraph (A)(iii) shall not
3 require the person to conduct ground water
4 investigations or to install ground water
5 remediation systems, except as the director may
6 deem necessary or in accordance with the policy
7 of the Environmental Protection Agency concerning
8 owners of property containing contaminated
9 aquifers, dated May 24, 1995;

10 (2) With respect to a person described in this subsection,
11 nothing in this subsection:

12 (A) Limits any defense to liability that may be
13 available to the person under any other provision
14 of law; or

15 (B) Imposes liability on the person that is not
16 otherwise imposed by section 128D-6(a);

17 (3) The director may:

18 (A) Issue an assurance that no enforcement action
19 under chapter 128D shall be initiated against a
20 person described in paragraph (1); and

1 (B) Grant a person described in paragraph (1)
2 protection against a cost recovery or
3 contribution action under section 128D-5."

4 SECTION 4. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 5. This Act shall take effect upon its approval.

Report Title:

Environmental Response; Liability

Description:

Amends chapter 128D, Hawaii Revised Statutes, to be consistent with federal law, which protects innocent purchasers of, and property owners who are contiguous to, contaminated property from liability for addressing contamination they did not cause. (SD1)