

JAN 26 2009

A BILL FOR AN ACT

RELATING TO THE ENVIRONMENTAL RESPONSE LAW.

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. 9601)).

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:

1 (1) All disposal of hazardous substances at the facility
2 occurred before the person acquired the facility.

3 (2) In general, appropriate inquiries were made when:

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) shall be considered to satisfy the
12 requirements of this paragraph.

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

20 (3) The person provides all legally required notices with
21 respect to the discovery or release of any hazardous
22 substances at the facility.

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

1 (B) Does not impede the effectiveness or integrity of
2 any institutional control employed at the vessel
3 or facility in connection with a response action.

4 (7) The person complies with any request for information
5 or administrative subpoena issued by the President
6 under 42 United States Code chapter 103 or by the
7 director under chapter 128D or issued by any state or
8 federal court.

9 (8) The person is not:

10 (A) Potentially liable or affiliated with any other
11 person that is potentially liable, for response
12 costs at a facility through:

13 (i) Any direct or indirect familial
14 relationship; or

15 (ii) Any contractual, corporate, or financial
16 relationship (other than a contractual,
17 corporate, or financial relationship that is
18 created by the instruments by which title to
19 the facility is conveyed or financed or by a
20 contract for the sale of goods or services);
21 or

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

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

5 "(a) Notwithstanding any other provision or rule of law,
6 and subject only to the defenses set forth in subsection (c):

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

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

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

18 (4) Any person who accepts or accepted any hazardous
19 substances for transport to disposal or treatment
20 facilities or sites selected by such person, from
21 which there is a release, or a threatened release,

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

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

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

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

11 (2) An act of war;

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

1 against foreseeable acts or omissions of any such
2 third party and the consequences that could
3 foreseeably result from such acts or omissions; or

4 (4) Any combination of the foregoing paragraphs.

5 (d) A defendant may also avoid liability under subsection

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

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

20 (2) The defendant is a government entity which acquired
21 the facility by escheat, or through any other
22 involuntary transfer or acquisition, or through the

1 exercise of eminent domain authority by purchase or
2 condemnation; or

3 (3) The defendant acquired the facility by inheritance or
4 bequest[-]; or

5 (4) At the time the defendant acquired the facility the
6 defendant met the definition of "bona fide prospective
7 purchaser"; or

8 (5) The defendant was a contiguous property owner, as
9 described in subsection (k).

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

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

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

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

17 (e) No person shall be liable under this chapter or
18 otherwise under the laws of the State or any of the counties,
19 including the common law, to any government or private parties
20 for costs, damages, or penalties as a result of actions taken or
21 omitted in the course of rendering care, assistance, or advice
22 in compliance with this chapter, the National Contingency Plan,

1 or at the direction of a federal or state on-scene coordinator,
2 with respect to an incident creating a danger to public health
3 or welfare or the environment as a result of any release of a
4 hazardous substance or pollutant or contaminant or the threat
5 thereof. This subsection shall not preclude liability for
6 costs, damages, or penalties as the result of gross negligence
7 or intentional misconduct on the part of such person.

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

16 (g) No indemnification, hold harmless, or similar
17 agreement or conveyances shall be effective to transfer from the
18 owner or operator of any vessel or facility or from any person
19 who may be liable for a release or threat of release under this
20 section, to any other person, the liability imposed under this
21 section. Nothing in this subsection shall bar any agreement to
22 insure, hold harmless, or indemnify a party to such agreement

1 for any liability under this section. Nothing in this chapter
2 shall bar a cause of action that an owner or operator or any
3 person subject to liability under this section, or a guarantor,
4 has or would have, by reason of subrogation or otherwise against
5 any person.

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

19 (i) Provided that no liability shall be imposed under this
20 chapter, where the party sought to be charged has demonstrated
21 that the damages to natural resources complained of were
22 specifically identified as an irreversible and irretrievable

1 commitment of natural resources in an environmental impact
2 statement, or other comparable environment analysis, and the
3 decision to grant a permit or license authorizes such commitment
4 of natural resources, and the facility or project was otherwise
5 operating within the terms of its permit or license. There
6 shall be no double recovery under this chapter for natural
7 resource damages, including the costs of damage assessment or
8 restoration, rehabilitation, or acquisition for the same release
9 and natural resources. Notwithstanding any other provision of
10 this chapter, there shall be no recovery under this chapter for
11 natural resource damages where such damages have occurred wholly
12 before July 1, 1990.

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

16 (k) Contiguous Properties shall be treated as stated in
17 this subsection except as specifically noted.

18 (1) A person shall not be considered to be an owner or
19 operator under the following conditions.

20 (A) In general, a person that owns real property that
21 is contiguous to or otherwise similarly situated
22 with respect to, and that is or may be

1 contaminated by a release or threatened release
2 of a hazardous substance from, real property that
3 is not owned by that person shall not be
4 considered to be an owner or operator of a vessel
5 or facility under section 128D-6(a) solely by
6 reason of the contamination if:

7 (i) The person did not cause, contribute, or
8 consent to the release or threatened
9 release;

10 (ii) The person is not:

11 (I) Potentially liable, or affiliated with
12 any other person that is potentially
13 liable, for response costs at a
14 facility through any direct or indirect
15 familial relationship or any
16 contractual, corporate, or financial
17 relationship (other than a contractual,
18 corporate, or financial relationship
19 that is created by a contract for the
20 sale of goods or services); or

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1 (II) The result of a reorganization of a
2 business entity that was potentially
3 liable;

4 (iii) The person takes reasonable steps to:

5 (I) Stop any continuing release;

6 (II) Prevent any threatened future release;

7 and

8 (III) Prevent or limit human, environmental,

9 or natural resource exposure to any

10 hazardous substance released on or from

11 property owned by that person;

12 (iv) The person provides full cooperation,

13 assistance, and access to persons that are

14 authorized to conduct response actions or

15 natural resource restoration at the vessel

16 or facility from which there has been a

17 release or threatened release (including

18 the cooperation and access necessary for

19 the installation, integrity, operation, and

20 maintenance of any complete or partial

21 response action or natural resource

22 restoration at the vessel or facility);

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(v) The person:

(I) Is in compliance with any land use
restrictions established or relied on
in connection with the response action
at the facility; and

(II) Does not impede the effectiveness or
integrity of any institutional control
employed in connection with a response
action;

(vi) The person is in compliance with any request
for information or administrative subpoena
issued by the President or by the director
under chapter 128D or issued by any state or
federal court

(vii) The person provides all legally required
notices with respect to the discovery or
release of any hazardous substances at the
facility; and

(viii) At the time at which the person acquired the
property, the person:

(I) Conducted all appropriate inquiry with
respect to the property; and

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1 (II) Did not know or have reason to know that
2 the property was or could be
3 contaminated by a release or threatened
4 release of one or more hazardous
5 substances from other real property not
6 owned or operated by the person.

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

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

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

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

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

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

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

18 (3) The director may:

19 (A) Issue an assurance that no enforcement action
20 under Chapter 128D, Hawaii Revised Statutes will
21 be initiated against a person described in
22 paragraph (1); and

Report Title:

Environmental Response Law

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.

JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO THE ENVIRONMENTAL RESPONSE LAW.

PURPOSE: To promote the cleanup and reuse of contaminated properties by providing consistency between federal and state environmental liability laws for innocent parties, specifically bona fide prospective purchasers and innocent contiguous property owners.

MEANS: Amend Chapter 128D, Sections 1 and 6, Hawaii Revised Statutes, to include two provisions similar to those in 42 USC section 9601 added by the federal Small Business Liability Relief and Brownfields Revitalization Act in 2002 (P.L. 107-118(42 U.S.C. 9601)).

JUSTIFICATION: The current inconsistency of federal law with state environmental law in this area is unnecessary, confusing, and inhibits the purchase and redevelopment of contaminated property in Hawaii.

Impact on the public: The public will benefit from increased redevelopment of contaminated property with corresponding reduced health risks, additional jobs, increased tax revenues, and fewer unsightly contaminated properties. Consistency between state and federal laws makes it easier for mainland capital to evaluate Hawaii properties for loans.

Impact on the department and other agencies: Greater consistency with federal law will facilitate implementation of Chapter 128D, HRS. Protecting innocent purchasers of contaminated property should encourage additional voluntary cleanup of contaminated

property, thereby further promoting the goals of the Chapter 128D, HRS.

GENERAL FUND: The proposed bill requires no additional funding.

OTHER FUNDS: The proposed bill requires no additional funding.

PPBS PROGRAM
DESIGNATION: HTH-849.

OTHER AFFECTED
AGENCIES: None.

EFFECTIVE DATE: Upon approval.