

ACT 148

S.B. NO. 3204

A Bill for an Act Relating to Environmental Emergency Response.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the capacity to respond to environ-

mental emergencies or accidents in a swift and timely manner is an important element in the effectiveness of any environmental protection program. It is the purpose of this Act to establish an environmental emergency response revolving fund within the department of health to provide the department with the resources and authority to: (1) perform emergency removal actions of hazardous substances; (2) require responsible parties to perform necessary removal or remedial actions; (3) recover costs incurred by the department in the course of performing any necessary actions; and (4) develop a contingency plan for the cleanup of hazardous sites in the State.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

“CHAPTER ENVIRONMENTAL EMERGENCY RESPONSE

§ -1 Definitions. As used in this chapter, unless the context otherwise requires:

“Department” means the department of health.

“Director” means the director of health.

“Fund” means the environmental emergency response revolving fund.

“Hazardous substance” means any substance or mixture of substances, including but not limited to feedstock materials, products, or wastes, which, because of their quantity, concentration, or physical, chemical, or infectious characteristics, may:

- (1) Cause or significantly contribute to an increase in serious irreversible or incapacitating reversible illness; or
- (2) Pose a substantial present or potential hazard to human health, to property, or to the environment when improperly stored, transported, released, or otherwise managed.

“Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance into the environment; but does not include any of the following:

- (1) Any release which results in exposure of persons solely within a workplace, with respect to a claim which such exposed persons may assert against their employer;
- (2) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel; or
- (3) Release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 (42 U.S.C. §2011), if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under 42 U.S.C. §2210.

“Remedy” means those actions consistent with permanent correction taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment.

- (1) The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of al-

ternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

- (2) The term includes the costs of permanent relocation of residents and businesses and community facilities where the director determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare.
- (3) The term does not include the offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the director determines that such actions are more cost-effective than other remedial actions; will create new capacity to manage hazardous substances in addition to those located at the affected facility; or are necessary to protect public health or welfare of the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials.

“Remove” means the cleanup of released hazardous substances from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, and any emergency assistance.

§ -2 Environmental emergency response revolving fund. (a) There is created an environmental emergency response revolving fund within the department which shall consist of moneys appropriated to the fund by the legislature, moneys paid to the fund as a result of departmental compliance proceedings, moneys paid to the fund pursuant to court-ordered awards or judgments, moneys paid to the fund in court-approved or out-of-court settlements, and moneys allotted to the fund from other sources.

(b) Moneys from the fund shall be expended by the department for emergency response actions consistent with this chapter.

§ -3 Reportable quantities, duty to report. (a) The director shall adopt rules pursuant to chapter 91 designating as hazardous substances such elements, compounds, mixtures, solutions, substances, and wastes which, when released into the environment, may present substantial danger to the public or the environment, and shall adopt rules establishing the quantities of such hazardous substances which, when released, shall be reported pursuant to this chapter. The director, as a minimum, shall adopt hazardous substances and reportable quantities as designated by the U.S. Environmental Protection Agency pursuant to parts 117 and 302 of Title 40 of the Code of Federal Regulations, and by the U.S. Department of Transportation pursuant to parts 171 and 172 of Title 49 of the Code of Federal Regulations. The designated quantity released of any hazardous substance shall be a reportable quantity, regardless of the medium into which the hazardous substance is released.

(b) Any person who fails to report a hazardous substance release to the

department within twenty-four hours of knowledge of the release shall be subject to a fine in an amount not to exceed \$10,000 for each day of failure to report.

§ -4 Response authorities; uses of fund. (a) Whenever the director determines that there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or a threatened release of a hazardous substance, the director may:

- (1) Issue an administrative order to any responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment;
- (2) Undertake those investigations, monitoring, surveys, testing, and other information gathering necessary to identify the existence, source, nature, and extent of the hazardous substances involved and the extent of danger to the public health or environment;
- (3) Perform any necessary removal actions so as to abate any immediate danger to the public and the environment; and
- (4) Contract the services of appropriate organizations to perform the actions set forth in paragraphs (2) and (3).

(b) Moneys in the fund may be expended by the director for any of the following purposes:

- (1) Payment of all costs of removal actions incurred by the State or the counties in response to a release or threatened release of a hazardous substance; or
- (2) Payment for the State's share of a removal or remedial action pursuant to section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9604(c)(3)).

(c) No response actions taken pursuant to this chapter by the department shall duplicate federal response actions.

§ -5 Recovery of costs. (a) Any costs incurred and payable from the fund shall be recovered by the attorney general, upon the request of the department, from the liable person or persons. The amount of any costs which may be recovered pursuant to this section for a remedial or removal action paid from the fund shall include the amount paid from the fund and legal interest.

(b) Moneys recovered by the attorney general pursuant to this section shall be deposited into the account of the fund.

§ -6 Liability. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b):

- (1) The owner or operator or both of a facility;
- (2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- (3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances; or
- (4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release, which causes the incurrence of response costs of a hazardous substance;

shall be liable for all costs of removal or remedial action incurred by the State, any

other necessary costs of response incurred by any other person consistent with this chapter, and damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release.

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

- (1) Any unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effect of which could not have been prevented or avoided by the exercise of due care or foresight;
- (2) An act of war;
- (3) An act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes by a preponderance of the evidence that due care was exercised with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and precautions were taken against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) Any combination of the foregoing paragraphs.

(c) No person shall be liable under this chapter for damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with this chapter or at the direction of an on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof. This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of such person.

(d) No indemnification, hold harmless, or similar agreement or conveyances shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person, the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section. Nothing in this chapter shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(e) Any person who is liable for a release, or threat of a release, of hazardous substances and who fails, without sufficient cause, as determined by the director, to properly provide removal or remedial action pursuant to an administrative order issued by the director, shall be liable to the department for punitive damage up to three times the amount of any costs incurred by the fund pursuant to this chapter as a result of the failure to perform the actions specified in the order.

§ -7 State contingency plan. (a) The department shall adopt, by rules, the criteria for the selection and for the priority ranking of sites pursuant to subsection (b) for removal and remedial action under this chapter, and shall adopt criteria for the ranking of sites in order of priority. The criteria shall take into account the pertinent factors relating to the public health and the environment, which shall include, but are not limited to, potential hazards to public health and the environment, the risk of fire or explosion, toxic hazards, the extent to which the deferral

of remedial action will result, or is likely to result, in a rapid increase in cost or in a hazard to human health and the environment. The criteria may include a minimum hazard threshold below which sites shall not be listed pursuant to this section.

(b) The department shall publish and revise, at least annually, a listing of the sites subject to this chapter. The sites shall be categorized and placed on one of the following lists:

- (1) A list of the hazardous substance release sites for which the department has identified a responsible party, and the responsible party is in compliance, as determined by the department, with an order issued, or an enforceable agreement entered into.
- (2) A list of the hazardous substance release sites for which all of the following apply:
 - (A) The department has not been able to identify a responsible party or the responsible party is not in compliance, as determined by the department, with an order issued or an enforceable agreement entered into;
 - (B) The nature and extent of the hazardous substance release at the site has not been adequately characterized by the responsible party or the department.

(c) Funds appropriated to the department for removal action shall be expended in conformance with the priority ranking of sites, as established on the list of sites specified in subsection (b), except that funds appropriated for removal action may be expended without conforming to the priority ranking if any of the following apply:

- (1) The funds are necessary to monitor removal actions conducted by private parties at sites listed pursuant to subsection (b)(1);
- (2) State funds are necessary for the State's share of a removal or remedial action pursuant to section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9604(c)(3));
- (3) The funds are used to assess, evaluate, and characterize the nature and extent of a hazardous substance release on sites listed pursuant to this section; or
- (4) The director determines that immediate removal action at a site is necessary because there may be an imminent and substantial endangerment to the public health or the environment."

SECTION 3. There is appropriated out of the general revenues of the State of Hawaii the sum of \$150,000, or so much thereof as may be necessary for fiscal year 1988-1989, to be paid into the environmental emergency response revolving fund created by this Act.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of \$50,000, or so much thereof as may be necessary for fiscal year 1988-1989, to enable the department of health to employ one full-time staff member to provide the planning, engineering, clerical, and field investigatory support necessary to implement the program established by this Act.

SECTION 5. All sums appropriated by this Act shall be expended by the department of health.

SECTION 6. This Act shall take effect on July 1, 1988.

(Approved June 1, 1988.)