

ACT 298

S.B. NO. 3109

A Bill for an Act Relating to Environmental Statutes.

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

SECTION 1. Section 342B-7, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that [the] any person has violated an accepted schedule[,] or an order issued under this section, [any rule adopted pursuant to this chapter, any condition of a permit or variance issued pursuant to this chapter, or has continued to violate this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 2. Section 342D-1, Hawaii Revised Statutes, is amended by deleting the definition “individual wastewater system”.

[“Individual wastewater system” means a facility which disposes of treated or untreated domestic wastewater generated from dwelling units or other sources generating domestic wastewater of similar volume and strength such as: (1) developments of a density not greater than one dwelling unit per 5,000 square feet of ultimate development; (2) developments with buildings other than dwellings but involving the generation of domestic wastewater at a rate of less than

400 gallons per day per 5,000 square feet of ultimate development; or (3) multifamily dwelling units developed and constructed pursuant to section 46-15.1 and chapters 356, 359 and 201E, subject to the approval of the director. Individual wastewater systems include, but are not limited to, cesspools, septic tanks, and household aerobic units.”]

SECTION 3. Section 342D-9, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that [the] any person has violated an accepted schedule[,] or an order issued under this section, [any rule adopted pursuant to this chapter, or any permit or variance issued pursuant to this chapter, or has continued to violate this chapter.] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 4. Section 342F-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) The director shall issue a permit for any term, not exceeding five years, if the director determines that such will be in the public interest; provided that the permit may be subject to such reasonable conditions as the director may prescribe. The director, on application, shall renew a permit from time to time for a term not exceeding five years if the director determines that such is in the public interest. The director shall not deny an application for the issuance or renewal of a permit without affording the applicant an opportunity for a hearing in accordance with chapter 91.

The director, on the director’s own motion or the application of any person, may modify, suspend, or revoke any permit if, after affording the permittee an opportunity for a hearing in accordance with chapter 91, the director determines that:

- (1) There is a violation of any condition of the permit[; or]
- (2) The permit was obtained by misrepresentation, or failure to disclose fully all relevant facts[; or]
- (3) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted emission; or
- (4) Such is in the public interest.

[The director shall ensure that the public receive notice of each application for a permit to control water or hazardous waste pollution. The director may hold a public hearing before ruling on an application for a permit to control water or hazardous waste pollution if the director determines such public hearing to be in the public interest.]

In determining the public interest, the director shall consider the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the action be implemented, the alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented, and any other factors which the director may by rule prescribe; provided that any determination of public interest shall promote the optimum balance between economic development and environmental quality.”

SECTION 5. Section 342F-7, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that [the] any person has violated the provisions of an accepted schedule[,] or has violated an order issued under this section, [or has continued to violate this chapter, any rule adopted pursuant to this chapter, or any condition of a permit or variance issued pursuant to this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 6. Section 342H-1, Hawaii Revised Statutes, is amended by amending the definition of “person” to read:

““Person” means any individual, partnership, firm, association, public or private corporation, federal agency, the State or any of its political subdivisions, trust, estate, or any other legal entity.”

SECTION 7. Section 342H-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) The director shall issue a permit for any term, not exceeding five years, if the director determines that such will be in the public interest; provided that the permit may be subject to such reasonable conditions as the director may prescribe. The director, on application, shall renew a permit from time to time for a term not exceeding five years if the director determines that such is in the public interest. The director shall not deny an application for the issuance or renewal of a permit without affording the applicant an opportunity for a hearing in accordance with chapter 91.

The director, on the director’s own motion or the application of any person, may modify, suspend, or revoke any permit if, after affording the permittee an opportunity for a hearing in accordance with chapter 91, the director determines that:

- (1) There is a violation of any condition of the permit[; or]
- (2) The permit was obtained by misrepresentation, or failure to disclose fully all relevant facts[; or]
- (3) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted disposal; or
- (4) Such is in the public interest.

[The director shall ensure that the public receive notice of each application for a permit to control water or hazardous waste pollution. The director may hold a public hearing before ruling on an application for a permit to control water or hazardous waste pollution if the director determines such public hearing to be in the public interest.]

In determining the public interest, the director shall consider the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the action be implemented, the alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented, and any other factors which the director may by rule prescribe; provided that any determination of public interest shall promote the optimum balance between economic development and environmental quality.”

SECTION 8. Section 342H-7, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that [the] any person has violated an accepted schedule[,] or an order issued pursuant to this section, [any rule adopted

pursuant to this chapter, any condition of a permit or variance issued pursuant to this chapter, or has continued to violate this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 9. Section 342J-2, Hawaii Revised Statutes, is amended by amending the definition of “solid waste” to read:

““Solid waste” means garbage, refuse, and other discarded materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations, sludge from waste treatment plants and water supply treatment plants, and residues from air pollution control facilities and community activities, but does not include solid or dissolved material in domestic sewage, irrigation return flows, or industrial discharges which are subject to permit under chapter[.] 342D.”

SECTION 10. Section 342J-7, Hawaii Revised Statutes, is amended by amending subsections (a), (b), and (c) to read as follows:

“(a) If the director determines that any person is violating this chapter, any rule adopted pursuant to this chapter, or violating any condition of a permit [or variance] issued pursuant to this chapter, the director:

- (1) Shall cause written notice to be served upon the alleged violator or violators. The notice shall specify the alleged violation and may contain an order specifying a reasonable time during which that person shall be required to take such measures as may be necessary to correct the violation and to give periodic progress reports.
- (2) May require that the alleged violator or violators appear before the director for a hearing at a time and place specified in the notice and answer the charges complained of.
- (3) May impose penalties as provided in section [342J-10] 342J-9 by sending a notice in writing, either by certified mail or by personal service, to the alleged violator or violators describing such violation.

(b) If the director determines that any person is continuing to violate this chapter, any rule adopted pursuant to this chapter, or any condition of a permit [or variance] issued pursuant to this chapter after having been served notice of violation, the director:

- (1) Shall cause written notice to be served upon the alleged violator or violators. The notice shall specify the alleged violation and shall contain an order requiring that person to submit a written schedule within thirty days specifying the measures to be taken and the time within which such measures shall be taken to bring that person into compliance with the provisions of this chapter, the provisions of any rule adopted pursuant to this chapter, or the conditions of any permit [or variance] issued pursuant to this chapter.
- (2) Shall accept or modify the submitted schedule within thirty days of receipt of such schedule. Any schedule not acted upon after thirty days of receipt by the director shall be deemed accepted by the director.
- (3) Shall issue to the alleged violator or violators a cease and desist order against the activities that violate this chapter, any rule adopted pursuant to this chapter, or any condition of a permit [or variance] issued pursuant to this chapter if that person does not submit a written schedule to the director within thirty days. This

order shall remain in effect until such time that the director accepts the written schedule.

- (4) May impose penalties as provided in section [342J-10] 342J-9 by sending a notice in writing, either by certified mail or by personal service, to the alleged violator or violators describing such violation.

(c) If the director determines that [the] any person has violated an accepted schedule[,] or an order issued [under] pursuant to this section, [any rule adopted pursuant to this chapter, any condition of a permit or variance issued pursuant to this chapter, or has continued to violate this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 11. Section 342J-9, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Any person who violates this chapter, any rule adopted pursuant to this chapter, or any condition of a permit [or variance] issued pursuant to this chapter shall be fined not more than \$10,000 for each separate offense. Each day of violation shall constitute a separate offense. Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action.”

SECTION 12. Section 342J-13, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§342J-13~~]]~~ **Fees.** The director may establish reasonable fees for the issuance of permits [and variances] to cover the cost of issuance thereof and for the implementation and enforcement of the terms and conditions of permits [and variances] (not including court costs or other costs associated with any formal enforcement action). The fees shall be deposited to the credit of the general fund.”

SECTION 13. Section 342J-36, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that the owner or operator is not able to conduct monitoring, testing, and analysis in a satisfactory manner, the director may dictate the conduct of such activity, the cost of which shall remain the responsibility of the owner or operator.”

SECTION 14. Section 342L-8, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that any person has violated an accepted schedule[,] or an order issued [under] pursuant to this section, [any rule adopted pursuant to this chapter, any condition of a permit or variance issued pursuant to this chapter, or has continued to violate this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 15. Section 342N-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) The director shall issue a permit for any term, not exceeding five years, if the director determines that such will be in the public interest; provided that the permit may be subject to such reasonable conditions as the director may

prescribe. The director, on application, shall renew a permit from time to time for a term not exceeding five years if the director determines that such is in the public interest. The director shall not deny an application for the issuance or renewal of a permit without affording the applicant an opportunity for a hearing in accordance with chapter 91.

The director, on the director's own motion or the application of any person, may modify, suspend, or revoke any permit if, after affording the permittee an opportunity for a hearing in accordance with chapter 91, the director determines that:

- (1) There is a violation of any condition of the permit[; or]
- (2) The permit was obtained by misrepresentation, or failure to disclose fully all relevant facts[; or]
- (3) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted emission[; or]
- (4) Such is in the public interest.

[The director shall ensure that the public receive notice of each application for a permit to control water or hazardous waste pollution. The director may hold a public hearing before ruling on an application for a permit to control water or hazardous waste pollution if the director determines such public hearing to be in the public interest.]

In determining the public interest, the director shall consider the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the action be implemented, the alternatives to the proposed action, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented and any other factors which the director may by rule prescribe; provided that any determination of public interest shall promote the optimum balance between economic development and environmental quality.”

SECTION 16. Section 342N-6, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) If the director determines that any person has violated an accepted schedule[, or] an order issued under this section, [any rule adopted pursuant to this chapter, any conditions of a permit issued pursuant to this chapter, or has continued to violate this chapter,] the director shall impose penalties by sending a notice in writing, either by certified mail or by personal service, to that person, describing such nonadherence or violation with reasonable particularity.”

SECTION 17. Chapter 128D, Hawaii Revised Statutes, is amended by adding ten new sections to be appropriately designated and to read as follows:

“§128D- Civil penalties. (a) Any person who is liable for a release, or threat of a release, of hazardous substances, or pollutants or contaminants and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an administrative order issued by the director, may be liable to the department for punitive damages 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. The director is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 128D-5.

(b) In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release or a threat of a release of hazardous substances or pollutants or contaminants, any person who wilfully violates or fails or refuses to comply with any provision of this chapter, or any order issued, or rule adopted under this chapter, shall be subject to a civil penalty not to exceed \$25,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The director is authorized to commence a civil action in the appropriate circuit court to recover such damages.

(c) Any rule issued pursuant to this chapter shall be adopted in accordance with chapter 91.

(d) Civil penalties collected under this chapter shall be paid to the department for deposit into the revolving fund and may be recovered in a civil action in a court of competent jurisdiction where the violation is alleged to have occurred.

(e) In determining the amount of any civil penalty assessed pursuant to this section, the court shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit of savings (if any) resulting from the violation, and such other matters as justice may require. The director may compromise and settle any claim for a penalty pursuant to this chapter.

**§128D- Injunctive relief.** The director may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent any violation of this chapter, of any rule adopted pursuant to this chapter, or of any order issued pursuant to this chapter. The court shall grant relief in accordance with the Hawaii rules of civil procedure.

**§128D- Knowing releases.** Any person who knowingly releases a hazardous substance into the environment shall be punished by a fine of not less than \$5,000 but not more than \$50,000 per day of violation, or by imprisonment for not more than three years, or both. If a conviction of a person is for a violation committed after a first conviction of the person under this section, the punishment shall be a fine not less than \$10,000 but not more than \$100,000 per day of violation, or imprisonment of not more than six years or both.

**§128D- Record keeping requirements.** No person shall, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any investigative action or request made under this chapter, or any enforcement action taken under this chapter, remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any record, report, or information that is relevant to any investigative action or request under section 128D-4(a) and (b).

**§128D- Confidentiality of information.** (a) Any record, report, or information obtained from any persons under section 128D-4(a) and (b) shall be available to the public, except as provided in subsection (b).

(b) Upon a showing satisfactory to the department that public disclosure of records, reports, or information, or a particular part thereof, obtained by the department, its personnel or contractors pursuant to this chapter, would divulge commercial or financial information entitled to protection under state or federal law, the department shall consider such information to be confidential and not a public record open to disclosure.

(c) No confidential information, obtained pursuant to this chapter by any official or employee of the department within the scope and cause of this official's or employee's employment in the prevention, control, or cleanup of releases of hazardous substances or pollutants or contaminants into the environment, shall be disclosed by the official or employee with the following exception: the document or information may be disclosed to officers, employees, or authorized representatives of the State or of the United States, including local government entities, who have been charged with carrying out this chapter, including a cost recovery or an enforcement action, or to comply with any state law, CERCLA, or the Clean Water Act, or when relevant in any proceeding under this chapter. Persons receiving information pursuant to this paragraph shall maintain the confidentiality of the information which is provided in this section to the maximum extent allowed by law.

**§128D- Reporting requirements.** The department shall submit to the legislature an annual report, including a comprehensive budget to implement remedial action plans requiring funding by the environmental response revolving fund. This report shall identify those sites eligible for remedial action under CERCLA, including a statement as to any appropriation that may be necessary to pay the State's share of the plan.

**§128D- Public participation.** Public participation activities may be implemented by the department and required of responsible parties, in accordance with the state contingency plan, or any other state rule.

**§128D- Employee protection.** No person shall terminate from employment or in any other way discriminate against, or cause to be eliminated from employment or discriminated against, any person on the grounds that the person has provided information to the State, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

**§128D- Removal and remedial orders.** (a) In addition to any other orders the director may issue, the director, upon determining that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance, pollutant, or contaminant, may issue without a hearing, such orders as may be necessary to protect the public health and welfare and the environment.

(b) Any person who, without sufficient cause, knowingly or recklessly violates, or fails or refuses to comply with any order of the director under this section, in any action brought in circuit court to enforce the order, may be fined not more than \$25,000 for each day in which the violation occurs or such failure to comply continues.

(c) Any person who receives and complies with the terms of any order issued under this section, within sixty days after completion of the required order, may petition the director for reimbursement from the fund for the reasonable costs of the action, including interest.

(d) Within sixty days of receipt of the petition, the director shall schedule a contested case hearing in compliance with chapter 91, and, within thirty days of the completion of the hearing, grant in whole or in part, or deny the petition. The petitioner, pursuant to section 91-14, may seek judicial review of any partial or complete denial of the petition.



(e) In the contested case hearing, in order to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that the petitioner is not liable for response costs under this chapter and that the costs for which it seeks reimbursement are reasonable in light of the action required by the order.

(f) A petitioner who is liable for response costs under this chapter may recover the petitioner's reasonable costs of response from the fund to the extent that it can demonstrate, on the administrative record, that the director's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with the law. Reimbursement awarded under this paragraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or not otherwise in accordance with the law.

(g) Reimbursement awarded by a court under subsections (e) and (f) may include appropriate costs, fees, and other expenses.

**§128D- Judicial review.** (a) No court shall have jurisdiction to review any challenges to removal or remedial actions selected, or to renew any order issued under this chapter, except as follows:

- (1) Any action under section 128D-5 to recover response costs or damages or for contribution;
- (2) Any action to enforce an order issued under section 128D-4(a)(1);
- (3) Any action for reimbursement under section 128D- (d); and
- (4) Any action under section 128D- , in which the State has moved to complete a remedial action.

(b) In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the director shall be limited to the administrative record. In those cases arising under subsection (a)(1), (a)(2), and (a)(4), the director shall establish an administrative record, as the director deems appropriate. In those cases arising under subsection (a)(1), (a)(2), and (a)(4), otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court. In cases arising under subsection (a)(3), chapter 91 shall govern.

(c) In considering objections raised in judicial action under this chapter, the court shall uphold the director's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law.

(d) If the court finds that the selection of the response actions was arbitrary and capricious or otherwise not in accordance with the law, the court shall award:

- (1) Only the response cost or damages that are not inconsistent with the state contingency plan; and
- (2) Such other relief as is consistent with the state contingency plan.

(e) In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had the errors not been committed."

SECTION 18. Chapter 128D, Hawaii Revised Statutes, is amended to read as follows:

**“[[[CHAPTER 128D]]]  
ENVIRONMENTAL [EMERGENCY] RESPONSE LAW**

**[[§128D-1]] Definitions.** As used in this chapter, unless the context otherwise requires:

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510 (42 U.S.C. §§9601-9675), as amended.

“Clean Water Act” means the Federal Water Pollution Control Act of 1972, P.L. 92-500 (33 U.S.C. §§1251-1387), as amended.

“Department” means the department of health.

“Director” means the director of health.

“Environment” means any waters, including surface water, ground water, or drinking water supply, any land surface or any subsurface strata, or any ambient air within the State of Hawaii or under the jurisdiction of the State.

“Facility” means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance or pollutant or contaminant has been deposited, stored, disposed of, or placed, or otherwise comes to be located; but does not include any consumer product in consumer use.

“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.

Hazardous substance as defined in this section means: any substance designated pursuant to section 311(b)(2)(A) of the Clean Water Act; any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA; any hazardous waste having the characteristics identified under or listed pursuant to §3001 of the Resource Conservation and Recovery Act; any toxic pollutant listed under section 307(a) of the Clean Water Act; any hazardous air pollutant listed under section 112 of the Clean Air Act, as amended (42 U.S.C. §§7401-7626); any imminently hazardous chemical substance or mixture regulated under section 7 of the Toxic Substances Control Act, as amended (15 U.S.C. §§2601-2671), and any other substance or pollutant or contaminant designated by rules adopted pursuant to this chapter.

“National contingency plan” means the national contingency plan published under section 311(c) of the Clean Water Act or revised pursuant to section 105 of CERCLA.

“Natural resources” means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. §§1801-1882), the State of Hawaii or any county.

“Owner” or “operator” means (1) in the case of a vessel, any person owning, operating, or chartering by demise the vessel, (2) in the case of an onshore facility or an offshore facility, any person owning or operating the facility, and (3) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of a state or local government, any person who owned, operated, or otherwise controlled activities at the facility immediately beforehand. “Owner” or “operator” does not include a person or financial institution who holds or held a lien, encumbrance, security interest, or loan agreement that attaches or is attached to the facility, vessel, or real property; provided that the person or financial institution makes or made no decision or takes or took no action that causes or caused or contributes or contributed to a release or threatened release of a hazardous substance from or at a facility, vessel, or real property.

“Pollutant or contaminant” means any element, substance, compound, or mixture, including disease-causing agents, which, after release into the environment which is:

- (1) Designated under any list promulgated under the Federal Insecticide, Fungicide, and Rodenticide Act, the Comprehensive Environmental Response Compensation and Liability Act, Safe Drinking Water Act, Energy Research and Development Act, the Atomic Energy Act, the Occupational Safety and Health Act, the Toxic Substances Control Act, the Clean Water Act, federal Water Pollution Control Act, the Resource Conservation and Recovery Act, or the Clear Air Act; or
- (2) Listed by the National Toxicology Program, the International Agency for Research on Cancer, or the Chemical Abstracts Service Registry; or
- (3) Any substance that the director determines, based upon empirical evidence or existing scientific or documented toxicological studies to cause an imminent and substantial endangerment.

Any substance not classifiable under paragraphs (1) and (2) may be designated a pollutant or contaminant by the director under rules adopted pursuant to chapter 91. The term does not include any pollutants or contaminants for which there are environmental permits or enforcement actions issued by the department under chapter 342D.

“Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance or pollutant or contaminant into the environment[.]; including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant; 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, or pipeline pumping station engine;
- (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[.];
- (4) Any release resulting from the normal application of fertilizer;

- (5) Any release resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act; or
- (6) Releases from sewerage systems collecting and conducting primarily domestic wastewater.

“Remedy” or “remedial action” 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 or pollutant or contaminant 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] or 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 pollutants or contaminants or associated 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 alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health [and] or welfare [and] or 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 pollutants or contaminants, or may otherwise be necessary to protect the public health or welfare[,] or the environment.
- (3) The term does not include the offsite transport of hazardous substances[,] or pollutants or contaminants, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or pollutants or contaminants 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] or the environment from a present or potential risk which may be created by further exposure to the continued presence of such hazardous substances [or materials.] or pollutants or contaminants.

“Remove” or “removal action” means the cleanup of released hazardous substances or pollutants or contaminants from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances or pollutants or contaminants into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances[,] or pollutants or contaminants, 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.

“Respond” or “response” means remove, removal, remedy, or remedial action; and all such terms include government enforcement activities related thereto.

“SARA” means the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

“Vessel” means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

**[[§128D-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, all interest attributable to investment of money deposited in the fund, and moneys allotted to the fund from other sources.

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

**[[§128D-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] at a minimum, shall adopt hazardous substances and reportable quantities as designated by the United States Environmental Protection Agency pursuant to parts 117 and 302 of Title 40 of the Code of Federal Regulations, and by the United States 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 in charge of a vessel or an offshore or onshore facility shall immediately notify the department as soon as the person has any knowledge of any release of a hazardous substance from the vessel or facility in quantities equal to or greater than those determined pursuant to section 102 of CERCLA or rules adopted pursuant to this chapter. Federal or state permitted releases or releases which occurred prior to July 1, 1990, are excluded from this requirement. Unless the director requires otherwise by rule, the regulations adopted under section 103(b) of CERCLA shall apply to the implementation of this section.

~~[(b)]~~ (c) Any person who fails to report a hazardous substance release to the department [within twenty-four hours of] immediately upon 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[.] or imprisoned for not more than three years or for not more than five years in the case of second or subsequent convictions, or both. Notification received pursuant to this section or information obtained by the exploitation of this notification shall not be used against any person in any criminal case, except a prosecution for perjury or for giving a false statement.

**[[§128D-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] any hazardous substance is released or there is a substantial threat of a release into the environment or there is a release of any pollutant or contaminant that may present an imminent and substantial danger to the public health, welfare, or the environment the director is authorized to act, consistent with the state contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time, including its removal from any contaminated natural resources, or take any other response measure consistent with the state contingency plan which the director deems necessary to protect the public health or welfare or the environment. The director may:

- (1) Issue an administrative order [to any] or conduct any other enforcement or compliance activities necessary to compel any known responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment;
- (2) Solicit the cooperation of responsible parties prior to issuing an order to encourage voluntary cleanup efforts; and, if necessary, negotiate enforcement agreements with responsible parties to conduct needed response actions according to deadlines established in compliance orders or settlement agreements;
- [(2)] (3) Undertake those investigations, monitoring, surveys, testing, sampling, and other information gathering necessary to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved and the extent of danger to the public health or welfare or to the environment;
- [(3)] (4) Perform any necessary removal or remedial actions so as to abate any immediate danger to the public [and] health or welfare or to the environment; and
- [(4)] (5) Contract the services of appropriate organizations to perform the actions set forth in paragraphs (1), (2) [and], (3)[.], and (4).

(b) For the purposes of determining or investigating an actual release or a suspected release, or choosing or taking any response action, or conducting any study, or enforcing this chapter, any person who has or may have information relevant to any of the following, upon the request of any duly authorized representative of the department shall furnish information or documents in the person's possession relating to such matter:

- (1) The identification, nature, and quantity of hazardous substances or pollutants or contaminants which have been or are generated, treated, or store<sup>1</sup> or disposed of at a facility or vessel or transported to a facility or vessel.
- (2) The nature and extent of a release or threatened release of a hazardous substance or pollutant or contaminant from a facility or vessel.
- (3) Information relating to the ability of a person to pay for or perform the cleanup.

In addition, upon reasonable notice, such person shall grant any such authorized representative of the department access at all reasonable times to any facility, vessel, establishment, site, place, property, or location to inspect same and to review and copy all documents or records relating to such matters or shall copy and furnish the officer, employee, or representative of the department all such documents or records, at the option and expense of such person.

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

- (1) Payment of all costs of removal or remedial 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)).] CERCLA.

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

**[[§128D-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.

(c) Any action for recovery of response costs referred to in section 128D-6(a)(4)(A) and (C) must be commenced within six years after the date of completion of all response actions.

(d) Any action for recovery of natural resource damages referred to in section 128D-6(a)(4)(B) must be commenced within three years after the later of the following: (1) the date of the discovery of the loss and its connection with the release in question; or (2) the date on which the final regulations are promulgated under section 301(c) of CERCLA.

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

- (1) The owner or operator or both of a facility;
- (2) Any person who at the time of disposal of any hazardous substance or pollutants or contaminants owned or operated any facility at which such hazardous substances or pollutants or contaminants 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 or pollutants or contaminants owned or possessed by such person, by any other party or entity, at any facility or on any vessel owned or operated by another party or entity and containing such hazardous substances[;] or pollutants or contaminants; and
- (4) Any person who accepts or accepted any hazardous substances or pollutants or contaminants 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] to a hazardous substance[;] or pollutant or contaminant;

shall be strictly liable for (A) all costs of removal or remedial [action] actions incurred by the State[.]; any other necessary costs of response incurred by any other person consistent with this chapter, [and] the state contingency plan, or any other state rules; (B) 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[.]; and (C) the costs of any health assessment or health effects study carried out consistent with this chapter, the state contingency plan, or any other state rules.

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

[(b)] (c) 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 a hazardous substance or pollutant or contaminant 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 or pollutant or contaminant concerned, taking into consideration the characteristics of such hazardous substance[, ] or pollutant or contaminant, 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)] (d) No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law to any government or private parties for costs, damages, or penalties 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 pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person.

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

[(d)] (f) 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 damages<sup>1</sup> 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.]

(g) In the case of an injury to, destruction of, or loss of natural resources under section 128D-6(a)(4)(B), liability shall be solely to the State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to the State. The natural resource trustee for the State shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the natural resource trustee under section 128D-6(a)(4)(B) shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under section 128D-6(a)(4)(B) shall not be limited by the sums which can be used to restore or replace such resources. Any damages recovered by the state attorney general for damages to natural resources shall be deposited in the fund and credited to a special account for the purposes provided above.

(h) Provided that no liability shall be imposed under this chapter, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resources. Notwithstanding any other provision of this chapter, there shall be no recovery under this chapter for natural resource damages where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before July 1, 1990.

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

**[[§128D-7]] State contingency plan[.]; rules.** (a) The department shall adopt, by rules, and from time to time update a Hawaii state contingency plan which, as nearly as the department deems appropriate and practicable, shall comport with and complement the National Contingency Plan prepared under the authority of the Clean Water Act and CERCLA. The state contingency plan shall include methods and criteria for evaluating the degree of hazard present at a site with releases of hazardous substances or pollutants or contaminants, including whether the site poses an imminent or substantial hazard, whether it is a priority site, and whether response actions are feasible and effective. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans.

(a) (b) The department shall adopt, by rules, the criteria for the selection and for the priority ranking of sites pursuant to subsection [(b)] (c) 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)] (c) 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 with releases of hazardous substances or pollutants or contaminants 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 with releases of hazardous substances or pollutants or contaminants 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 of hazardous substances or pollutants or contaminants at the site [has] have not been adequately characterized by the responsible party or the department.

[(c)] (d) Funds appropriated to the department for [removal action] response actions shall be expended in conformance with the priority ranking of sites, as established on the list of sites specified in subsection [(b),] (c), 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),] (c)(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));] CERCLA;
- (3) The funds are used to assess, evaluate, and characterize the nature and extent of a [hazardous substance release on] release of hazardous substances or pollutants or contaminants at sites listed pursuant to this section; or
- (4) The director determines that immediate removal action at a facility or site is necessary because there may be an imminent and substantial endangerment to the public health or welfare or the environment.

(e) The department may adopt such rules, as it deems necessary for the implementation, administration, and enforcement of this chapter, CERCLA, the Clean Water Act, and other pertinent laws."

SECTION 19. Statutory material to be repealed is bracketed. New statutory material is underscored.<sup>2</sup>

## **ACT 298**

**SECTION 20.** This Act shall take effect upon its approval.

(Approved June 26, 1990.)

### **Notes**

1. So in original.
2. Edited pursuant to HRS 23G-16.5.