

ACT 280

S.B. NO. 1756

A Bill for an Act Relating to the Environmental Response Law.

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

SECTION 1. Chapter 128D, Hawaii Revised Statutes, is amended by adding six new sections to be appropriately designated and to read as follows:

“§128D- Apportionment and contribution. (a) Liability to the State for any costs or expenditures under this chapter shall be joint and several. Wholly apart from such liability to the State, as between parties who are liable under this chapter, there shall be the rights of apportionment and contribution as provided in this section.

(b) Any party found liable for any costs or expenditures may institute an action for apportionment under this section at any time after receiving an order or after costs or expenditures are incurred by the liable party. Any party found liable for any costs or expenditures may join any other parties that may be liable under section 128D-6 in an action for apportionment.

(c) Any action for apportionment under this section shall be without prejudice to any other action that may be brought by an objecting party under this chapter.

(d) Any party who has incurred removal or remedial action costs in accordance with this chapter may seek contribution or indemnity from any person who is liable pursuant to this chapter. An action to enforce a claim for indemnity or contribution may be brought by any defendant in an action brought pursuant to this chapter or in a separate action after the party seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter. In resolving claims for indemnity or contribution, the court may allocate costs among liable parties using those equitable principles which are appropriate.

(e) Any party who receives compensation for response costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same response costs or damages or claims pursuant to any other state or federal law. Any party who receives compensation for response costs or damages or claims pursuant to any other state or federal law shall be precluded from receiving compensation for the same response costs of damages or claims as provided in this chapter.

(f) Any party found liable for any costs or expenditures under this chapter except under section 128D-5, who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion. All recoverable costs or expenditures shall be allocated by the court. If any share of the response costs is

not paid by a liable party because of insolvency or otherwise, that share shall be assigned to an orphan share. If there is an orphan share, the court shall adjust the allocations of the remaining liable parties so that in addition to paying their allocated shares, they proportionately pay the entire orphan share.

(g) In the process of apportionment of costs among the parties found liable and the establishment of the orphan share, the court shall consider the following criteria:

- (1) The volume of hazardous substances transported to the site by each party. For purposes of determining volume, the volume of each transport of a hazardous substance shall be allocated between the arranger for the transport and the transporter of a hazardous substance in apportioning a percentage share of response costs;
- (2) The anticipated impact of the hazardous substance and control of the hazardous substance on the cost of response activity at the site;
- (3) The degree of care exercised in the disposal or treatment, or both of the hazardous substance by each party that may be liable under section 128D-6;
- (4) The manner in which the site was operated and the degree of care exercised by the owner or operator;
- (5) The degree of a party's involvement in site operations;
- (6) Whether all applicable permits and licenses required by law were obtained and complied with;
- (7) The degree to which the party cooperated with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release; and
- (8) Any other aggravating or mitigating factor that the court determines to be relevant.

(h) If the court finds the evidence insufficient to establish each party's portion of the costs or expenditures under subsection (f), the court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the parties.

(i) Any costs or expenditures required by this chapter made by a liable party shall be credited toward the party's apportioned share. Costs shall include reasonable attorney's fees.

§128D- Administrative review of orders. (a) Any person who receives and complies with the terms of any order issued under this chapter, within sixty days after completion of the required order, may petition the director to appoint a hearings officer for review of the order and for reimbursement from the fund or the State for the reasonable costs of complying with the order, including interest.

(b) Within thirty days of receipt of the petition, the hearings officer shall commence 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.

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

(d) A petitioner who is liable under this chapter may recover the petitioner's reasonable costs of compliance with the order from the fund, or, if there are not sufficient moneys in the fund to satisfy the claims, then from the State, to the extent that the petitioner can demonstrate, on the administrative record, that the director's decision in selecting the action ordered was arbitrary and capricious or

was otherwise not in accordance with the law. Reimbursement awarded under this subsection shall include all costs incurred by the petitioner pursuant to the order. If only a portion of the order is found to be arbitrary and capricious or otherwise not in accordance with law, reimbursement awarded under this paragraph shall include all costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with the law.

(e) Reimbursement awarded under subsections (c) and (d) may include appropriate costs, fees, and other expenses, including reasonable attorney's fees.

§128D- De minimis settlements. (a) Whenever practicable and in the public interest, the director, in consultation with the attorney general, as promptly as possible, shall reach a final settlement with a potentially responsible party in any administrative or civil action brought under this chapter, provided that the settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the director, the conditions in either paragraph (1) or (2) are met:

- (1) Both the amount of the hazardous substances contributed by that party to the facility and the toxic or other hazardous effects of the substances contributed by that party to the facility are minimal in comparison to other hazardous substances at the facility; or
- (2) The potentially responsible party is the owner of the real property on or in which the facility is located, and did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subsection shall not apply if the potentially responsible party purchases the real property with actual or constructive knowledge that the property was used for the generation, storage, treatment, or disposal of any hazardous substance.

(b) The director may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this section unless such a covenant would be inconsistent with the public interest.

(c) The director shall reach any such settlement or grant such covenant not to sue as soon as possible after the director has available the information necessary to reach such a settlement or grant such a covenant.

(d) A settlement under this section shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. Any state court with jurisdiction may enforce any such consent decree or administrative order.

(e) A party who has resolved its liability to the State under this section shall not be liable for claims for contribution or indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(f) Nothing in this section shall be construed to affect the authority of the director to reach settlements with other potentially responsible parties.

§128D- Citizen's suits. (a) Except as provided in subsections (c) and (d) and in section 128D-17, any person may commence a civil action in the circuit court on the person's own behalf against:

- (1) Any person, including the State and any other governmental instrumentality or agency, who is alleged to be in violation of any rule,

requirement, or order that has become effective pursuant to this chapter; or

- (2) The director, where there is alleged a failure of the director to perform any act or duty under this chapter, that is not discretionary with the director.

(b) The circuit court shall have jurisdiction in actions brought under subsection (a)(1) to enforce the rule, requirement, or order concerned, to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The circuit court shall have jurisdiction in actions brought under subsection (a)(2) to order the director to perform the act or duty concerned.

(c) The following shall apply to actions brought pursuant to subsection (a)(1):

- (1) No action may be commenced before sixty days after the plaintiff has given notice in accordance with rules adopted under chapter 91 of the violation to:
 - (A) The director; and
 - (B) Any alleged violator of the rule, requirement, or order concerned; and
- (2) No action may be commenced if the director has issued a notice letter to the violator concerning the violation or has undertaken a response action, including investigation, with respect to the violation.

(d) No action may be commenced under subsection (a)(2) before the sixtieth day following the date on which the plaintiff gives notice to the director that the plaintiff will commence the action. Notice under this subsection shall be given in such manner as the director shall adopt by rule.

(e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

(f) The State, if not a party to any action under this section, may intervene as a matter of right.

(g) This chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in section 128D-17.

(h) No action shall be brought under this section for two years following the effective date of this Act.

§128D- Exemption from duplicative regulation. When there has been a response to a release pursuant to an order issued under federal law, the director may use this chapter to address the same release provided that:

- (1) The release creates an imminent and substantial harm to the public health or welfare; and
- (2) The federal law has not provided a remedy consistent with the state contingency plan.

In those circumstances, the director shall avoid actions in conflict with federal law. A single release may be addressed either by CERCLA or by this chapter, but not both, except in the case of a joint enforcement. Nothing in this chapter shall prevent the director from taking action pursuant to the common law or other statutory provisions necessary to protect the public health and welfare, safety, or the environment.

§128D- Exemption from state and county permits. No state or county permit shall be required for the portion of any removal or remedial action conducted entirely on site where such response action is carried out in compliance with this chapter.”

SECTION 2. Section 128D-1, Hawaii Revised Statutes, is amended as follows:

1. By adding three new definitions to be appropriately inserted and to read as follows:

“Contractual relationship” means relationships involving land contracts, deeds or other instruments transferring title or possession.

“Oil” means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes, crude oil or any fraction or residue.

“Person” means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, county, commission, political subdivision of the State, or, to the extent they are subject to this chapter, the United States or any interstate body.”

2. By amending the definition of “hazardous substance” to read as follows:

“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:] includes 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;] Solid Waste Disposal 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), oil, trichloropropane, and any other substance or pollutant or contaminant designated by rules adopted pursuant to this chapter.

In adopting rules, the director shall consider 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.”

3. By amending the definition of “natural resources” to read as follows:

““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[.], or by the United States to the extent that the latter are subject to state law.”

4. By amending the definition of “pollutant or contaminant” to read as follows:

““Pollutant or contaminant” means any element, substance, compound, or mixture, [including disease-causing agents,] which[,] after release into the environment [is:] and upon exposure, ingestion, inhalation, or assimilation into any organism either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

- (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 [Clean] 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.]”

5. By amending the definition of “release” to read as follows:

““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:] excludes:

- (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, vessel, 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 legal 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[.]; or
 - (7) Any release permitted by any federal, state, or county permit or other legal authority.

6. By amending the definition of “remedy” or “remedial action” to read as follows:

““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 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 or welfare 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 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 pollutants or contaminants.”

7. By amending the definition of “remove” or “removal action” to read as follows:

““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.”

SECTION 3. Section 128D-2, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

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

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

“§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.] establishing the quantities of designated hazardous substances, and specifying the periods of time within which such quantities, when released, are reportable pursuant to this chapter. The director, 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 (other than a federal or state permitted 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] 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 CER-CLA shall apply to the implementation of this section.

(c) Any person who fails to report a hazardous substance release to the department immediately upon knowledge of the release shall be subject to a [fine] civil penalty 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.] subject to prosecution for a criminal misdemeanor. Notification received by the department pursuant to this section or information obtained by the exploitation of [this] such notification shall not be used against any such person in any criminal case, except for a prosecution for perjury or for giving a false statement[.]; or a violation of section 128D-10.”

SECTION 5. Section 128D-4, Hawaii Revised Statutes, is amended to read as follows:

“§128D-4 [Response] State response authorities; uses of fund. (a) Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of such release into the environment of any pollutant or contaminant that may present [an imminent and] a 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 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) 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, issue without a hearing, such orders as may be necessary to protect the public health, welfare, and the environment;
- [(2)] (3) 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;
- [(3)] (4) 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;
- [(4)] (5) Perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment; and
- [(5)] (6) Contract the services of appropriate organizations to perform the actions set forth in paragraphs (1), (2), (3), [and] (4)[.], and (5).

(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 reasonable and necessary 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 ~~[[]stored[]]~~ 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.

(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]¹ pollutant or contaminant; or
- (2) Payment for the State's share of a removal or remedial action pursuant to section 104(c)(3) of CERCLA[.];
- (3) Payment of all costs incurred by the State in the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance or pollutant or contaminant;
- (4) Payment of all costs of response action for a release due to the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act; or
- (5) Payment of all costs or remedial action for any release permitted by any federal, state or local permit or other legal authority.

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

SECTION 6. Section 128D-5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) [Any costs] Except for costs incurred in responding to a release or threatened release of any pollutant or contaminant and except for costs incurred in accordance with section 128D-4(c)(4), and (5), and except for costs incurred in accordance with section 128D-4(c)(3) for natural resources damage occurring wholly prior to July 1990, 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."

SECTION 7. Section 128D-6, Hawaii Revised Statutes, is amended to read as follows:

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

- (1) The owner or operator or both of a facility[;] or vessel;
- (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 [to] of a hazardous substance [or pollutant or contaminant];

shall be strictly liable for (A) all costs of removal or remedial actions [incurred by the State; any other necessary costs of response incurred by any other person] incurred by the State or any other person; to the extent such costs and actions are consistent with this chapter, the state contingency plan, [or] and 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.

(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] the defendant

exercised due care 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] the defendant took precautions 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.

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

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

(2) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or

(3) The defendant acquired the facility by inheritance or bequest.

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

Nothing in this subsection or in section 128D-6(c)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this definition, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, the defendant shall be treated as liable under section 128D-6(a)(1) and no defense under section 128D-6(c)(3) shall be available to the defendant.

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

[(d)] (e) 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 releases 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)] (f) 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.

[(f)] (g) 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 person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

[(g)] (h) In the case of any 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 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)] (i) 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)] (j) 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."

SECTION 8. Section 128D-7, Hawaii Revised Statutes, is amended to read as follows:

"§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, and 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.

(b) The department shall adopt, by rules, the criteria for the selection and for the priority ranking of sites pursuant to subsection (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.

(c) The department shall publish and revise, at least annually, a listing of the sites subject to this chapter[.] and any de minimis settlements made under this chapter. The sites shall be categorized and placed on one of the following lists:

- (1) A list of the 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 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 release of hazardous substances [or pollutants or contaminants] at the site have not been adequately characterized by the responsible party or the department.

(d) Funds appropriated to the department for response actions shall be expended in conformance with the priority ranking of sites, as established on the list of sites specified in subsection (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 (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 CERCLA;
- (3) The funds are used to assess, evaluate, and characterize the nature and extent of a 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 criminal penalties set forth in sections 128D-3 and 128D-10 shall not take effect until the state contingency plan has been adopted. Until the state contingency plan is adopted, the national contingency plan, as it exists on the effective date of this chapter, will be considered to be the state contingency plan for purposes of enforcing the remaining sections of this chapter.

[(e)] (f) 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 9. Section 128D-8, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

“(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, knowingly, or recklessly 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] \$50,000 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.] penalties.”

SECTION 10. Section 128D-8, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

“(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.”

SECTION 11. Section 128D-10, Hawaii Revised Statutes, is amended by amending the section to read as follows:

“~~[[~~§128D-10~~]]~~ **Knowing releases.** Any person who knowingly releases a hazardous substance into the environment in an amount above the reportable quantity established in the rules (other than a permitted release pursuant to and in accord with a federal, state, or county permit), shall be subject to prosecution for a class C felony or shall be punished by a [fine] civil penalty of [not less than \$5,000 but] not more than [\$50,000] \$100,000 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

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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].”

SECTION 12. Section 128D-11, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§128D-11~~]]~~ **Recordkeeping 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, shall remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any record, report, or information that is [relevant to] the subject of or who has reason to believe that they may be the subject of any investigative action or request under section 128D-4(a) and (b).”

SECTION 13. Section 128D-12, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§128D-12~~]]~~ **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 records, reports, or information for which confidentiality is claimed by the person from whom they are obtained shall be disclosed until such person has received reasonable notice under the procedures set forth in 40 C.F.R. Part 2, Section 2.201 et seq. and has had the opportunity to demonstrate why these should not be disclosed, including a reasonable opportunity to obtain judicial relief. In any such proceeding, confidentiality shall be accorded to any documents which satisfy the criteria set forth in 40 C.F.R. Part 2 or any rules adopted by the department.

~~[[~~(c)~~]]~~ (d) 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] subsection shall maintain the confidentiality of the information which is provided in this section to the maximum extent allowed by law.”

SECTION 14. Section 128D-15, Hawaii Revised Statutes, is amended to read as follows:

“[§128D-15] 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, or has refused to act because of the good faith belief that one would be acting in violation of this chapter. No criminal penalty shall be imposed under this chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority.”

SECTION 15. Section 128D-17, Hawaii Revised Statutes, is amended to read as follows:

“[§128D-17] 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-8(d); and
- (4) Any action under section 128D-16, 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.]

(a) Any person who receives and complies with the terms of any order issued under this chapter may bring and maintain an action in the circuit court to review the order as provided for in this section, prior to the completion of all action required in this order, provided that the person shall not seek any form of injunctive relief and at all times is in compliance with the order.

(b) The director’s order may be issued without a hearing and shall be supported by an administrative record consisting of the documents and other papers and materials considered by the director in issuing the order. The order shall be effective immediately unless it provides otherwise. The person receiving the order may supplement the administrative record with other documents, writings,

or material within thirty days after receipt of the order. In the sole discretion of the director, the administrative record may be supplemented further by a proceeding in which testimony and other evidence may be received. A person aggrieved by the order who is and continues to be in compliance with the order may petition the circuit court for an expedited review of the order after service of a certified copy of the order. The review by the court shall be confined to the administrative record. The court shall, upon request by any party, hear oral arguments and receive written briefs. Discovery shall not be permitted. The court shall affirm the order or, if it finds that the order is arbitrary and capricious, it shall reverse or modify the order. The court's order in any expedited review shall be without prejudice to any party in any other proceeding.

(c) In an expedited review of the director's order concerning the determination that the aggrieved party is subject to liability under this chapter, the court shall affirm the order unless it is clearly shown to be arbitrary and capricious.

(d) If the court reverses the director's determination that the objecting party is subject to liability under this chapter, the court shall vacate the order of the director in its entirety and award the objecting party reimbursement from the fund, or if sufficient funds are not available, then from the State, of all costs incurred in complying with the order, which may include the party's reasonable attorney's fees.

(e) In reviewing a director's order under this section, the court shall uphold the director's decision on technical issues, including the nature and scope of the action ordered, unless the objecting party demonstrates, based on the administrative record, that the decision is arbitrary and capricious.

(f) If the court finds that the director's order is arbitrary and capricious under subsection (e), the court shall issue findings of fact and conclusions of law sufficient to advise the parties of the deficiencies in the order. The court shall thereafter allow the contesting parties a thirty-day period following the entry of its findings of fact and conclusions of law to agree to mutually acceptable technical modifications to the challenged order. However, if the contesting parties are unable to reach agreement within the thirty-day period, then the parties shall notify the court and each party shall select a technical panel member in accordance with subsection (g) at the conclusion of the thirty-day period. The court shall order that the outstanding issues be submitted to a technical panel for binding resolution of the issues identified by the court in a manner consistent with the court's findings and conclusions, and the state contingency plan.

(g) The technical panel shall consist of three members, each of whom shall have expertise in engineering, or expertise in the physical, chemical, biological, or health sciences.

(h) A majority of the technical panel members shall determine an appropriate resolution to the technical issues identified by the court in the period of time the court orders. The technical panel members shall be selected as follows:

- (1) One member shall be selected by the director;
- (2) One member shall be selected by the objecting party, or a majority of the objecting parties challenging the order; and
- (3) The foregoing two members shall select the third member of the panel within thirty days of their selection.

(i) After making a decision that resolves the technical issues, the technical panel shall submit its final decision to the court. The court shall vacate the order found arbitrary and capricious and enter an order adopting the decision submitted by the technical panel unless the court finds that:

- (1) The decision is not consistent with the court's findings of fact and conclusions of law and the state contingency plan;
- (2) The decision was procured by corruption, fraud, or undue means;
- (3) There was evident partiality or corruption in the panel, or any of the members;
- (4) The panel was guilty of misconduct by which the rights of any party have been prejudiced; or
- (5) The panel exceeded its powers or so imperfectly executed them that a mutual, final, and definite decision upon the subject matter submitted was not made.

(j) Any action for concurrent review under this section shall have priority on the civil trial calendar of the circuit court.

(k) The petitioner, in any action pursuant to section 128D-____, may seek judicial review of any partial or complete denial of the petition. The review shall be conducted pursuant to section 91-14. In addition to any other relief that may be awarded, the court may award to the petitioner reimbursement from the fund, or if there are insufficient funds then from the State, which may include appropriate costs, fees, and other expenses, including reasonable attorney's fees.

[(e)] (l) 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 16. Section 128D-16, Hawaii Revised Statutes, is repealed.

SECTION 17. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 18. This Act shall take effect upon its approval.

(Approved June 17, 1991.)

Notes

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