

**ACT 240**

**H.B. NO. 3838**

A Bill for an Act Relating to the Environment.

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

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER  
AIR POLLUTION CONTROL**

## PART I. DEFINITIONS AND GENERAL PROVISIONS

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

“Administrator” means the Administrator of the United States Environmental Protection Agency.

“Air pollutant” has the same meaning as in the Clean Air Act, 42 United States Code section 7602 (g), and any substance designated as such by rules adopted under chapter 91.

“Air pollution” means the presence in the outdoor air of substances in quantities and for durations which may endanger human health or welfare, plant or animal life, or property or which may unreasonably interfere with the comfortable enjoyment of life and property throughout the State and in such areas of the State as are affected thereby, but excludes all aspects of employer-employee relationships as to health and safety hazards.

“Ambient air” means the general outdoor atmosphere.

“Clean Air Act” means the federal Clean Air Act of 1963 as amended (42 United States Code section 7401 et seq.).

“Compliance plan” means a plan which includes a description of how a source proposes to comply with all applicable requirements pursuant to this chapter and includes a schedule of compliance and a schedule under which the permittee will submit progress reports to the department no less frequently than every six months.

“Council” means the compliance advisory council.

“Covered source” means:

- (1) Any major source;
- (2) Any source subject to a standard of performance for new stationary sources as established in this chapter;
- (3) Any source subject to an emissions standard for hazardous air pollutants as established in this chapter;
- (4) Any source subject to the rules for the prevention of significant deterioration of air quality as established in this chapter; and
- (5) Any source in a source category designated by the director.

“Department” means the department of health.

“Director” means the director of health.

“Draft proposed permit” means the version of a permit for which the department offers public notice and an opportunity for public comment and hearing.

“Emission” means the act of releasing or discharging air pollutants into the ambient air from any source.

“EPA” means the United States Environmental Protection Agency.

“Fugitive dust” means uncontrolled emission of solid airborne particulate matter from any source other than combustion.

“Fugitive emissions” means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

“Hazardous air pollutant” means those hazardous air pollutants listed in section 112 (b) of the Clean Air Act, as amended, 42 United States Code section 7412 (b), and any other hazardous air pollutant designated by rules.

“Major source” means any stationary source, or any group of stationary sources that are located on one or more contiguous properties, and are under common control, belonging to a single major industrial grouping and that emits or has the potential to emit, considering controls:

- (1) Any hazardous air pollutant, except radionuclides, in the aggregate of ten tons per year or more, twenty-five tons per year or more of any combination, or such lesser quantity as the director may establish by rule;
- (2) One hundred tons per year or more of any regulated air pollutant, including fugitive emissions of any such regulated air pollutant as the director may establish by rule; and
- (3) For radionuclides, "major source" shall have the meaning specified by the director by rule.

"Modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any air pollutant or hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any air pollutant or hazardous air pollutant not previously emitted by more than a de minimis amount.

"Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

"Party" means each person named as party or properly entitled to be a party in any court or agency proceeding.

"Permit" means written authorization from the director to construct, modify, relocate, or operate any regulated air pollutant source. A permit authorizes the permittee to cause or allow the emission of a regulated air pollutant in a specified manner or amount, or to do any act, not forbidden by this chapter or by rules adopted pursuant to this chapter, but requiring review by the department.

"Permit program" means the program established pursuant to part III of this chapter.

"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.

"Proposed permit" means the version of a permit that the department forwards to the Administrator for review.

"Regulated air pollutant" means:

- (1) A volatile organic compound;
- (2) Any air pollutant for which a national or state ambient air quality standard has been adopted; and
- (3) Any air pollutant that is established by rule pursuant to this chapter pertaining to standards of performance for new stationary sources and emissions standards for hazardous air pollutants.

"SBAP" means the small business assistance program established by section -61.

"Small business ombudsman" means the small business ombudsman for air pollution control established pursuant to section -63.

"Small business stationary source" means a stationary source that:

- (1) Is owned or operated by a person that employs one hundred or fewer individuals;
- (2) Is independently owned and operated and not dominant in its field or as otherwise defined by the federal Small Business Act (42 United States Code section 631 et seq.);
- (3) Is not a major stationary source;
- (4) Does not emit fifty tons or more per year of any regulated air pollutant; and
- (5) Emits less than seventy-five tons per year of all regulated air pollutants.

“Source” means any property, real or personal, which emits or may emit any air pollutant.

“Stationary source” means any piece of equipment or any activity at a building, structure, facility, or installation that emits or may emit any air pollutant.

“Variance” means special written authorization from the director to cause or emit any regulated air pollutant in a manner or in an amount in excess of applicable standards, or to do an act that deviates from the requirements of rules or standards adopted pursuant to this chapter.

§ **-2 Administration.** The department shall administer this chapter through the director. The director may delegate to any person the power and authority vested in the director by this chapter as the director deems reasonable and proper for the effective administration of this chapter, except the power to make rules.

§ **-3 General functions, duties, and powers of the director.** (a) In addition to any other power or duty prescribed by law and in this chapter, the director shall prevent, control, and abate air pollution and the emission of air pollutants in the State.

(b) In the discharge of the duty described in subsection (a) the director may adopt, amend, and repeal state rules controlling and prohibiting air pollution and the release of air pollutants or as otherwise necessary for the purposes of this chapter.

(c) In addition to other specific powers provided in this chapter, the director may appoint, without regard to chapters 76 and 77, hearings officers to conduct contested case hearings and public participation activities, including public hearings and public informational meetings.

§ **-4 Other powers of department and director not affected.** The powers, duties, and functions vested in the department and director under this chapter shall not be construed to affect in any manner the powers, duties, and functions vested in the department and director under any other law. Rules shall be adopted pursuant to chapter 91.

§ **-5 Effect of laws, ordinances, and rules.** (a) All laws, ordinances, and rules inconsistent with this chapter shall be void and of no effect.

(b) Any county may adopt ordinances and rules governing any matter relating to air pollutant and air pollution control which is not governed by a rule of the department adopted pursuant to this chapter; provided that any county ordinance or rule relating to air pollution control shall be void and of no effect as to any matter regulated by a rule of the department upon the adoption thereof.

§ **-6 Short title.** This chapter may be cited as the “Hawaii Air Pollution Control Act.”

§ **-7 Annual reports.** The department shall compile an annual report summarizing:

- (1) Air quality data from all air quality monitoring stations;
- (2) Annual criteria pollutant emissions;
- (3) Annual air toxic emissions; and
- (4) All enforcement actions.

## PART II. AIR POLLUTION

§ -11 **Prohibition.** No person, including any public body, shall engage in any activity which causes air pollution or causes or allows the emission of any regulated air pollutant without first securing approval in writing from the director.

§ -12 **Specific powers of the director.** The director may:

- (1) Establish ambient air quality standards for the State as a whole or for any part thereof;
- (2) Establish and administer any permit program;
- (3) Establish by rule the control of open burning, fugitive dust, and visible emissions;
- (4) Establish by rule the control of vehicular smoke emission and require the installation, use, and proper operation and maintenance of air pollution control equipment for motor vehicles;
- (5) Establish and administer a program of inspection and testing of all modes of transportation except aircraft, to enforce compliance with applicable emission limitations when necessary and practicable, and to control or limit the operation of motor vehicular and other modes of transportation when the director finds pursuant to standards established by rules such modes of transportation are producing or pose an immediate danger of producing unacceptable levels of air pollution or when such control is necessary to meet applicable ambient air quality standards;
- (6) Establish by rule other specific areas for control of air pollution, thereby allowing for varying conditions;
- (7) Establish standards of performance or rules for existing, new, or modified stationary sources or adopt standards of performance for existing, new, or modified stationary sources as promulgated by the Administrator;
- (8) Establish maximum achievable control technology standards or rules for the control of hazardous air pollutants from existing, new, or modified sources or adopt maximum achievable control technology as promulgated by the Administrator; and
- (9) Establish rules for the prevention of significant deterioration of air quality or adopt prevention of significant deterioration regulations as promulgated by the Administrator.

§ -13 **Public participation.** (a) Except as provided in subsections (b) and (c), where public participation is deemed appropriate by the director or is required, the director shall provide for notice and opportunity for public comment as follows:

- (1) The director shall make available for public inspection in at least one location in the county affected by the proposed action, or in which the source is or would be located:
  - (A) Information on the subject matter;
  - (B) All information submitted by the applicant, except for that deemed confidential;
  - (C) The department's analysis and proposed action; and
  - (D) Other information and documents deemed appropriate by the department;
- (2) The director shall notify the public of the availability of information listed in paragraph (1). Notification shall be published in a newspa-

per which is printed and issued at least twice weekly in the county affected by the proposed action, or in which the source is or would be located;

- (3) Public notice shall be mailed to any person, group, or agency upon request;
- (4) The director shall provide a period of not less than sixty days following the date of the public notice during which time interested persons may submit written comments on the subject matter, application, department's analysis and proposed actions, and other appropriate considerations. The period for comment may be extended at the discretion of the director; and
- (5) The director, at the director's sole discretion, may hold a public hearing if the public hearing would aid in the director's decision. Any person may request a public hearing. The request shall be in writing and shall be filed within the sixty-day comment period prescribed in paragraph (4) and shall indicate the interest of the party filing the request and the reasons why a hearing is warranted. The director shall publish the public notice for a hearing in accordance with paragraph (2) at least thirty days in advance of the hearing date and shall conduct the hearing in the county which would be affected by the proposed action, or in which the source is or would be located.

(b) All rules shall be adopted, amended, and repealed pursuant to chapter 91. The director shall provide written notice to any person, who submitted comments during the comment period or presented testimony during the public hearing, of the final action taken by the department with respect to the rules.

(c) The director shall hold a public hearing when revising the state implementation plan required by the Clean Air Act, and the amendments thereto, and the regulations promulgated thereunder.

**§ -14 Variances.** (a) Every application for a variance shall be made on forms furnished by the department and shall be accompanied by a complete and detailed description of present conditions, how present conditions do not conform to applicable standards, and such other information as the department may by rule prescribe.

(b) Each application for a variance shall be reviewed in light of the descriptions, statements, plans, histories, and other supporting information submitted with the application, such additional information as may be submitted upon the request of the department, and the effect or probable effect upon the air quality standards established pursuant to this chapter.

(c) Whenever an application for a variance is approved, the department shall issue a variance authorizing the emission or discharge of an air pollutant in excess of applicable standards. No variance shall be granted by the department unless the application and the supporting information clearly show that:

- (1) The continuation of the function or operation involved in the discharge of air pollution occurring or proposed to occur by the granting of the variance is in the public interest as determined in section -27;
- (2) The emission or discharge occurring or proposed to occur does not substantially endanger human health or safety; and
- (3) Compliance with the applicable standards or rules from which a variance is sought would produce serious hardship without equal or greater benefits to the public.

(d) Any variance or renewal thereof shall be granted within the requirements of this section and for time periods and under conditions consistent with the reasons therefor, and within the following limitations:

- (1) If the variance is granted on the ground that there is no practicable means known or available for the adequate prevention, control, or abatement of the air pollution involved, it shall be only until the necessary means for prevention, control, or abatement becomes practicable and subject to the taking of any substitute or alternate measures that the department may prescribe. No renewal of a variance granted under this subsection shall be allowed without a thorough review of known and available means of preventing, controlling, or abating the air pollution involved;
- (2) The director may issue a variance for a period not exceeding five years; and
- (3) Every variance granted under this section shall include conditions requiring the grantee to perform air or discharge sampling and report the results of such sampling to the department.

(e) Any variance granted pursuant to this section may be renewed from time to time on terms and conditions and for periods not exceeding five years which would be appropriate on initial granting of a variance; provided that the applicant for renewal has met all of the conditions specified in the immediately preceding variance; and provided further that the renewal, and the variance issued in pursuance thereof, shall provide for emission or discharge not greater than that attained pursuant to the terms of the immediately preceding variance at its expiration. No renewal shall be granted except on application therefor. Any such application shall be made at least one hundred eighty days prior to the expiration of the variance. The director shall act on an application for renewal within one hundred eighty days of the receipt of such application.

(f) The director may afford a hearing in accordance with chapter 91 in relation to an application for the issuance, renewal, or modification of a variance.

(g) No variance shall be construed to prevent or limit the application of any emergency provisions and procedures provided by law.

(h) Any application for a variance shall be subject to the public participation requirements of section -13. The contents of the public notice on the variance application for a variance shall include at least:

- (1) The name and address of the applicant;
- (2) A brief description of the applicant's activities or operations which result in the emission, or other activity described in the variance application;
- (3) A short description of the location of each emission or discharge indicating whether such emission or discharge is new or existing;
- (4) A brief description of the public participation procedures, including the comment period and other means by which interested persons may comment on the variance application and the department's proposed action; and
- (5) The address and phone number of the state agency at which interested persons may obtain further information and may inspect a copy of the variance application and supporting and related documents.

§ -15 **Complaints; hearings; appointment of masters.** The director may:

- (1) Receive or initiate complaints on air pollution, hold hearings in connection with air pollution, and institute legal proceedings in the

name of the State for the prevention, control, or abatement of air pollution; and

- (2) Appoint a master or masters to conduct investigations and hearings.

§ -16 **Research, educational, and training programs.** The director may:

- (1) Conduct and supervise research programs for the purpose of determining the causes, effects, hazards, or means to monitor or abate sources of air pollution;
- (2) With the approval of the governor, cooperate with, and receive money from, the federal government, or any political subdivision of the State or from private sources for the study and control of air pollution; and
- (3) Conduct and supervise statewide educational and training programs on air pollution prevention, control, and abatement, including the preparation and distribution of information relating to air pollution.

### PART III. PERMIT PROGRAM

§ -21 **Specific functions, duties, and powers of the director.** The director shall have the functions, duties, and power to:

- (1) Issue permits for a fixed term not to exceed five years;
- (2) Assure compliance by all sources required to have a permit with each applicable standard, regulation, or requirement provided by federal or state statutes or rules;
- (3) Assure that, upon issuance or renewal, permits incorporate emission limitations and other requirements in an applicable state implementation plan;
- (4) Terminate, modify, or revoke and reissue permits for cause;
- (5) Enforce permits, permit fee requirements, and the requirement to obtain a permit including the recovery of civil penalties; and
- (6) Assure that permits in effect during the establishment and implementation of this new permit program will continue in effect until the permittee has applied for and obtained a permit under the new program.

§ -22 **Permit and permit renewal; requirements.** (a) The owner or operator of a covered source shall obtain a permit from the department. The director may exempt any nonmajor category of covered sources from the permit obligation for a period of five years after the effective date of the rules establishing the permit program.

(b) Within twelve months after the effective date of the rules establishing the permit program, the owner or operator of a covered source shall submit to the department an application for a permit and a compliance plan.

(c) No person shall begin construction, modification, or relocation of any covered source without first obtaining a permit from the director.

(d) The director may require any person who owns, operates, or desires to construct, modify, or relocate a source other than a covered source to obtain a permit prior to the construction, modification, relocation, operation, or continued operation.

(e) Permits being renewed shall be subject to the same procedural requirements that apply to initial permit issuance, including the procedure of federal oversight and public participation.



(f) Permit expiration terminates the source's right to operate unless a timely and complete renewal application is submitted to the department and provided the owner or operator acts consistently with the permit previously granted, the application on which it was granted, and all plans, specifications, and other information submitted as a part thereof.

§ -23 **Application for permit.** (a) An application for a permit required pursuant to this chapter shall be in the form prescribed by the director and for existing sources shall also be accompanied by a compliance plan.

(b) The department may require that permit applications be accompanied by other plans, specifications, meteorological monitoring data, ambient air quality monitoring data, and best available control technology analysis, and any other information necessary to identify the source, the air emissions, and the air quality impacts and to determine whether the proposed installation, modification, or operation will be in accord with applicable rules and standards.

§ -24 **Action on a permit application.** (a) Within sixty days of receipt of an application the department shall give the applicant written notice that the application is complete, or give the applicant written notice of incompleteness outlining additional information requirements.

(b) The department shall take final action on each permit application within eighteen months after the application is determined or deemed to be complete, except that in each of the first three years of the permit program the department need only act on one third of the permit applications submitted during the first year of the permit program. The department may prioritize final action on applications for construction or modification.

(c) Each application for a covered source shall be subject to federal oversight.

(d) For each application for a covered source the director shall provide for public notice, an opportunity for public comments, and an opportunity for public hearing in accordance with section -13.

§ -25 **Approval of permit.** (a) The director shall issue a permit for any term not exceeding five years if it is determined that the source will comply with all requirements of this chapter and the rules and standards adopted pursuant to this chapter.

(b) The permit may be subject to such reasonable conditions as the director may prescribe, including emission limitations or other conditions to assure compliance with all hazardous air pollutant maximum achievable control technology standards or rules adopted pursuant to this chapter.

(c) The director, on application, shall renew a permit for a term not exceeding five years, if it is determined that the source complies with all requirements of this chapter and the rules and standards adopted pursuant to this chapter.

(d) 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.

(e) The director shall not issue a permit for a covered source if the Administrator timely objects to its issuance.

§ -26 **General and temporary permits; single permit.** (a) The director, after notice and opportunity for public hearing pursuant to section -13, may issue a general permit covering numerous similar sources. The owner of any source covered by a general permit must apply to the department for use of the

general permit.

(b) The director may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. No permit shall be issued unless it is assured that the source at all authorized locations will be or is in compliance with all requirements pursuant to this chapter and the rules and standards adopted pursuant to this chapter.

**§ -27 Other permit action.** (a) The director, on the director's own motion or the application of any person, may terminate, modify, suspend, or revoke and reissue any permit if, after affording the permittee an opportunity for a hearing in accordance with chapter 91, the director determines that:

- (1) The permit contains a material mistake made in establishing the emissions limitations or other requirements of the permit;
- (2) Permit action is required to assure compliance with the applicable requirements of the Clean Air Act, this chapter, and the applicable standards and rules adopted pursuant to this chapter;
- (3) Permit action is required to address additional applicable requirements of the Clean Air Act, this chapter, and the applicable standards and rules adopted pursuant to this chapter;
- (4) There is a violation of any condition of the permit;
- (5) The permit was obtained by misrepresentation or failure to disclose fully all relevant facts;
- (6) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
- (7) More frequent monitoring or reporting by the permittee is required;
- (8) It is necessary to incorporate into the permit the requirements from pre-construction review permits or exemptions authorized under an approved new source review program in the applicable implementation plan; or
- (9) Such is 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.

(b) The director may revise a permit administratively if the revision:

- (1) Corrects typographical errors;
- (2) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;
- (3) Allows for a change in ownership or operational control of a source where the department determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the department; or
- (4) Makes any other change that the department determines to be similar to those in paragraphs (1) to (3).

§ -28 **Recordkeeping and monitoring requirements.** The director may require an owner or operator of any source on a continuous, periodic, or one-time basis to:

- (1) Establish, maintain, and submit records;
- (2) Draft reports;
- (3) Install, use, and maintain monitoring equipment, and use audit procedures or methods;
- (4) Sample emissions in accordance with such procedures or methods, at such locations, at such intervals, during periods, and in the manner prescribed by the director;
- (5) Keep records on the source and the control equipment parameters, production variables, or other indirect data when direct monitoring is impractical;
- (6) Sample and analyze the composition of the fuel, waste, or other products being burned or incinerated;
- (7) Submit compliance certifications; and
- (8) Provide other information as the department may require.

§ -29 **Fees.** (a) The director shall establish fees for permits issued pursuant to this chapter to be paid by the applicant prior to the issuance of the permit and thereafter on a schedule established by the department.

(b) Fees for covered sources shall adequately cover the direct and indirect costs required to develop, support, and administer the permit program, including the reasonable costs of:

- (1) Reviewing and acting upon any application for or renewal of a permit;
- (2) Implementing and enforcing the terms and conditions of any permit, including legal support;
- (3) Monitoring emissions and ambient air quality, including resources to audit and inspect source-operated monitoring programs at least once a year;
- (4) Preparing generally applicable rules or guidance;
- (5) Performing or reviewing modeling, analyses, and demonstrations;
- (6) Preparing inventories and tracking emissions;
- (7) Providing support to the small business assistance program; and
- (8) Administering the fund.

(c) Fees for covered sources shall be based on the number of tons of regulated air pollutant, excluding carbon monoxide, allowed or emitted by the permitted source and shall not be less than \$25 per ton per year. A covered source shall not be assessed for emissions of a regulated air pollutant in excess of four thousand tons per year.

(d) Unless changed by rules, fees for covered sources shall be changed in December of each year only by the percentage, if any, by which the consumer price index for that calendar year exceeds the consumer price index for the prior calendar year. The consumer price index for any calendar year is the average of the consumer price index for all urban consumers published by the United States Department of Labor, as of the close of the twelve-month period ending on August 31 of each calendar year.

(e) Nothing in the cost-per-ton fee provisions of subsections (c) and (d) shall restrict the director from assessing more or less than the amount determined under subsections (c) and (d) from any one covered source or any class or category of covered sources, as designated by the director; provided the department collects a total amount of fees sufficient to cover the costs of the permit program.

§ -30 **Judicial review.** The applicant and any person who participated in the public comment process may obtain judicial review in state court of the final action on a permit issuance or renewal. This is in addition to judicial review otherwise available.

§ -31 **Government records; confidential information.** (a) The department shall make all government records maintained pursuant to this chapter open to public inspection in accordance with chapter 92F unless access is restricted or closed by law.

(b) Except as provided in subsection (c), the following permit program documents are deemed to be government records:

- (1) Permit applications and all supporting information;
- (2) Compliance plans (including schedules of compliance);
- (3) Emissions or compliance monitoring reports;
- (4) Certifications;
- (5) Permits; and
- (6) Any other information submitted to the department pursuant to the permit program.

(c) Upon a showing satisfactory to the director by any person that records, reports, or information, or particular part thereof (other than emission data), to which the director has access pursuant to this chapter, contain information of a confidential nature concerning secret processes or methods of manufacture, these records, reports, or information shall be kept confidential except that such record, report, or information may be disclosed to other officers or employees of the department and EPA concerned with carrying out this chapter or when relevant in any proceeding pursuant to this chapter. The contents of the permit itself shall not be entitled to confidentiality protection.

(d) 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 proceedings, 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 pursuant to chapter 91.

(e) Any officer, employee, or agent of the department acquiring confidential information from any inspection authorized by section -41 who divulges the information except as authorized in this chapter or except as ordered by a court or at an administrative hearing regarding an alleged violation of this chapter or of any rule or standard adopted pursuant to this chapter shall be fined not more than \$1,000.

(f) The provisions of sections 92F-16 and 92F-17 shall apply to any officer, employee, or agent of the department acquiring any confidential information as defined in this section.

§ -32 **Clean air special fund.** (a) There is created in the state treasury a special fund to be designated as the clean air special fund. The proceeds in the fund shall be used solely to pay for all reasonable direct and indirect costs required to develop, support, and administer the permit program requirements of this chapter including reasonable costs of:

- (1) Reviewing and acting upon any application for or renewal of a permit;

- (2) Implementing and enforcing the terms and conditions of any permit, including legal support as defined by rules;
  - (3) Monitoring emissions and ambient air quality including resources to audit and inspect source-operated monitoring requirements at least once a year;
  - (4) Preparing generally applicable rules or guidelines;
  - (5) Performing or reviewing modeling, analyses, and demonstrations;
  - (6) Preparing emissions inventories and tracking systems;
  - (7) Providing support to the small business assistance program; and
  - (8) Administering the fund.
- (b) All moneys collected as fees pursuant to section -29 shall be deposited into the clean air special fund. All interest earned or accrued on moneys deposited in the fund shall become a part of the fund.

§ -33 **Minimum permit conditions.** At a minimum, each permit shall require the permittee to:

- (1) Submit to the director, no less than every six months, the results of any required monitoring and a compliance certification; and
- (2) Disclose the annual emissions of hazardous air pollutants.

§ -34 **Exceptions.** This part does not apply to open burning and fugitive dust which shall be regulated by rules adopted by the department.

#### PART IV. ENFORCEMENT AND PENALTIES

§ -41 **Inspection of premises.** The director, in accordance with the law, may enter and inspect any building or place to investigate an actual or suspected source of air pollution, to ascertain compliance or noncompliance with this chapter or any rule or standard adopted by the department pursuant to this chapter, or any permit or other approval granted by the department pursuant to this chapter, and to make reasonable tests in connection therewith. No confidential information secured pursuant to this section by any official or employee of the department within the scope and course of the official's or employee's employment in the prevention, control, or abatement of air pollution shall be disclosed by the official or employee except as it relates directly to air pollution and then only in connection with the official's or employee's official duties and within the scope and course of the official's or employee's employment.

§ -42 **Enforcement.** (a) If the director determines that any person has violated or is violating this chapter, any rule adopted pursuant to this chapter, or any permit issued or variance granted pursuant to this chapter, the director shall serve written notice by certified mail or personal service upon the alleged violator or violators specifying the alleged violation and may include with the notice:

- (1) 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) An order imposing penalties provided in section -48; and
- (3) An order that the alleged violator or violators appear before the director for a hearing at a time and place specified in the notice or to be set later and answer the charges complained of.

(b) If the director determines that any person is continuing to violate this chapter, any rule adopted, permit issued, or variance granted pursuant to this

chapter after having been served notice of violation, the director shall serve written notice by certified mail or personal delivery upon the alleged violator or violators specifying the alleged violation. With the notice the director:

- (1) Shall order the alleged violator or violators 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 this chapter, any rule adopted, permit issued, or variance granted pursuant to this chapter. The director 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;
- (2) Shall order the alleged violator or violators to cease and desist from the activities that violate this chapter, any rule adopted, permit issued, or variance granted 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; and
- (3) May impose penalties as provided in section -48 by ordering the alleged violator or violators to appear before the director for a hearing at a time and place specified in the notice or to be set later and answer the charges complained of.

(c) If the director determines that any person has violated an accepted schedule or an order issued pursuant to this section, 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.

(d) Any order issued pursuant to this chapter shall become final, unless not later than twenty days after the notice of violation and order is served, the person or persons named therein request in writing a hearing before the director. Any penalty imposed pursuant to this chapter shall become due and payable twenty days after the notice of penalty is served, unless the person or persons named therein request in writing a hearing before the director. Whenever a hearing is requested on any penalty imposed pursuant to this chapter, the penalty shall become due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. Upon request for a hearing, the director shall require that the alleged violator or violators appear before the director for a hearing at the time and place specified in the notice and answer the charges complained of.

(e) Any hearing conducted pursuant to this section shall be conducted as a contested case under chapter 91. If, after a hearing held pursuant to this section, the director finds that a violation or violations have occurred, the director shall affirm or modify any penalties imposed or shall modify or affirm the order previously issued or issue an appropriate order or orders for the prevention, abatement, or control of the violation or emission of air pollutants involved, or for the taking of such other corrective action as may be appropriate. If, after a hearing on an order or penalty contained in a notice, the director finds that no violation has occurred or is occurring, the director shall rescind the order or penalty. Any order issued after a hearing may prescribe timetables for necessary action in preventing, abating, or controlling the violation.

(f) If the amount of any penalty is not paid to the department within thirty days after it becomes due and payable, the director may institute a civil action in

the name of the State to recover the administrative penalty which shall be a government realization. In any proceeding to recover the administrative penalty imposed, the director need only show that:

- (1) Notice was given;
- (2) A hearing was held or the time granted for requesting a hearing has run without such a request;
- (3) The administrative penalty was imposed; and
- (4) The penalty remains unpaid.

(g) In connection with any hearing held pursuant to this section, the director shall have the power to subpoena the attendance of witnesses and the production of evidence on behalf of all parties.

**§ -43 Emergency powers; procedures.** (a) Notwithstanding any other law to the contrary, if the director determines that an imminent peril to the public health and safety is or will be caused by the release of any air pollutant or combination of air pollutants which requires immediate action, the director, with the approval of the governor and without public hearing, may order any person causing or contributing to the release of the air pollutant to immediately reduce or stop the release and the director may take any and all other actions as may be necessary. Any such order shall fix a place and time, not later than twenty-four hours thereafter, for a hearing to be held before the director.

(b) Nothing in this section shall be construed to limit any power which the governor or any other officer may have to declare an emergency and act on the basis of such a declaration, if such power is conferred by statute or constitutional provision, or inheres in the office.

**§ -44 Injunctive and other relief.** The director may institute a civil action in any court of competent jurisdiction for injunctive and other relief to prevent any violation of this chapter, any rule adopted, condition of a permit, or variance issued pursuant to this chapter, without the necessity of prior revocation of the permit or variance, to collect civil penalties, or obtain other relief. The court shall have the power to grant relief in accordance with the Hawaii Rules of Civil Procedure.

**§ -45 Citation.** (a) Any person who violates the vehicular smoke emission rules and open burning control rules adopted by the department pursuant to this chapter may be issued a summons or citation for such violation. Violations of vehicular smoke emission rules and open burning control rules shall be enforced by police officers. The summons or citation shall be printed in the form hereinafter described, warning the person to appear and answer the charge against the person at a certain place and at a time within seven days of the issuance of the summons or citation.

(b) The summons or citation shall be designed to provide for all necessary information. The form and content of such summons or citation shall be adopted or prescribed by the district courts.

(c) The original of a summons or citation shall be given to the purported violator and the other copy or copies distributed in the manner prescribed by the district courts; provided that the district courts may prescribe alternative methods of distribution of the original and any other copies.

(d) Summonses and citations shall be consecutively numbered and the carbon copy or copies of each shall bear the same number.

(e) If any person fails to comply with a summons or citation, the person who issued the summons or citation shall cause a complaint to be entered against

the person and secure the issuance of a warrant for the person's arrest. Failure to comply with a summons or citation is a misdemeanor.

§ -46 **Appeal.** If any party is aggrieved by a decision of the director, the party may appeal in the manner provided in chapter 91 to the circuit court of the circuit in which the party resides or has the party's principal place of business or in which the action in question occurred; provided that the operation of a cease and desist order will not be stayed on appeal unless specifically ordered by a court of competent jurisdiction.

§ -47 **Civil penalties.** (a) Any person who violates the vehicular smoke emission rules adopted by the department pursuant to this chapter shall be fined not less than \$25 nor more than \$2,500 for each separate offense. Each day of each violation constitutes a separate offense.

(b) Any person who violates the open burning control rules adopted by the department pursuant to this chapter shall be fined not more than \$10,000 for each separate offense. Each day of each violation constitutes a separate offense.

(c) Any person who violates this chapter, any rule adopted pursuant to this chapter, other than vehicular smoke emission control and open burning control rules, any condition of a permit issued or variance granted pursuant to this chapter, or any fee or filing requirement shall be fined not more than \$25,000 for each separate offense. Each day of each violation constitutes a separate offense.

(d) Any person who denies, obstructs, or hampers the entrance, inspection, or monitoring by any duly authorized officer or employee of the department of any building, place, or vehicle that the officer or employee is authorized to enter and inspect shall be fined not more than \$25,000 for each violation. Each day of each violation constitutes a separate offense.

§ -48 **Administrative penalties.** (a) In addition to any other administrative or judicial remedy provided by this chapter, or by rules adopted pursuant to this chapter, the director is authorized to impose by order the penalties specified in section -47.

(b) Factors to be considered in imposing an administrative penalty include the nature and history of the violation and of any prior violations, and the opportunity, difficulty, and history of corrective action.

(c) It is presumed that the violator's economic and financial conditions allow payment of the penalty, and the burden of proof to the contrary is on the violator.

(d) In any proceeding to recover the penalty imposed, the director need only show that:

- (1) Notice was given;
- (2) A hearing was held or the time granted for requesting a hearing has run without such a request;
- (3) The penalty was imposed; and
- (4) The penalty remains unpaid.

§ -49 **Criminal penalties.** (a) Any person who knowingly violates any applicable standards or limitations, any condition in a permit issued pursuant to this chapter, any order, any rule, or any fee or filing requirement shall be punished by a fine of not more than \$25,000 for each day of violation or by imprisonment not to exceed five years, or both.

(b) Any person who knowingly makes any false statement, representation, or certification in any form, in any notice or report required by a permit, or who



knowingly renders inaccurate any monitoring device or method required by the department to be maintained by the person pursuant to this chapter, or who fails to report as required by this chapter, shall be punished by a fine of not more than \$25,000 or by imprisonment for not more than two years or both for each instance of violation.

(c) Any person who negligently releases into the ambient air any hazardous air pollutant or extremely hazardous substance and who at the time negligently places another person in imminent danger of death or serious bodily injury upon conviction, shall be punished by a fine of not more than \$25,000 or imprisonment for not more than one year, or both. If a conviction of any person under this subsection is for a violation committed after a first conviction of such person under this subsection, the maximum punishment shall be doubled with respect to both the fine and the imprisonment.

(d) Any person who knowingly releases into the ambient air any hazardous air pollutant or extremely hazardous substance and who knows at the time that another person is thereby placed in imminent danger of death or serious bodily injury, upon conviction, shall be punished by a fine of not more than \$25,000, or imprisonment of not more than fifteen years, or both. Any organization which violates this subsection shall be subject to a fine of not more than \$1,000,000. If a conviction of any person under this subsection is for a violation committed after a first conviction of such person under this subsection, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

§ -50 **Disposition of collected fines and penalties.** Fines and penalties collected under sections -47, -48, and -49 shall be deposited into the environmental response revolving fund established by section 128D-2.

§ -51 **Enforcement by state and county authorities.** All state and county health authorities and police officers shall enforce this chapter and the rules, orders, and permits of the department.

§ -52 **Nonliability of department personnel.** Notwithstanding any other law to the contrary, no member, officer, or employee of the department shall be criminally liable or responsible under this chapter for any acts done by the member, officer, or employee in the performance of the member's, officer's, or employee's duties; provided that this section shall not apply to violations of section -31.

§ -53 **Other action not barred.** No existing civil or criminal remedy for any wrongful action which is a violation of any statute or any rule of the department or the ordinance of any county shall be excluded or impaired by this chapter.

§ -54 **Priority in courts.** All actions brought pursuant to this chapter or pursuant to the rules adopted under this chapter or pursuant to the conditions of a permit issued under this chapter shall in the discretion of the court receive priority in the courts of the State.

§ -55 **Consent orders; settlement agreements.** At least thirty days before a consent order or settlement agreement of any kind under this chapter to which the director or the State is a party is final or filed with a court, the director shall provide public notice and a reasonable opportunity for the public to comment. The director shall promptly consider any such written comments and may

withdraw or withhold consent to the proposed order agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this section shall apply to civil or criminal penalties under this chapter.

§ -56 **Citizen suits.** (a) After June 30, 1995, any person may commence a civil action on that person's own behalf against:

- (1) Any person (including the State and the director) who is alleged to be in violation of this chapter, including any emission standard or limitation or any order issued by the director;
- (2) The director where there is alleged a failure to perform any act or duty under this chapter which is not discretionary; or
- (3) Any person who proposes to construct or constructs any new or modified major emitting facility without a required permit or who is alleged to be in violation of any condition of such permit.

(b) The circuit court shall have jurisdiction to:

- (1) Enforce such an emission standard or limitation, or an order;
- (2) Order the director to perform such act or duty; and
- (3) Apply any appropriate civil penalties.

(c) No action may be commenced:

- (1) Under subsection (a)(1):
  - (A) Prior to sixty days after the plaintiff has given notice of the violation to (i) the director, (ii) the department, and (iii) any alleged violator of the standard, limitation, or order; or
  - (B) If the director or the department has commenced and is diligently prosecuting a civil action to require compliance with the standard, limitation, or order, but in any such action any person may intervene as a matter of right; or
- (2) Under subsection (a)(2) prior to sixty days after the plaintiff has given notice of such action to the director. Notice under this subsection shall be given in such matter as the director shall prescribe by rule.

(d) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitations may be brought only in the judicial circuit in which such source is located.

(e) In any action under this section, the director, if not a party, may intervene as a matter of right at any time in the proceeding.

(f) 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 any party, whenever the court determines such award is appropriate. The court, if a temporary restraining order or preliminary injunction is sought, may require the filing of a bond or equivalent security in accordance with the Hawaii Rules of Civil Procedure.

(g) Nothing in this section shall restrict any right which any person may have under any constitutional provision, statute, or common law to seek enforcement of any emission standard or limitation or to seek any other relief.

(h) Penalties received under subsection (b) shall be deposited into the clean air special fund established by section -32. These amounts shall remain available to finance air compliance and enforcement activities. The court shall have discretion to order that such civil penalties, in lieu of being deposited in the fund, be used in beneficial mitigation, education, or protection projects which enhance public health or the environment.

## PART V. SMALL BUSINESS ASSISTANCE PROGRAM

§ -61 **Small business assistance program.** (a) The director shall establish within the department a SBAP to provide technical support and environmental compliance information to those small business stationary sources subject to the provisions of this chapter. The SBAP shall:

- (1) Develop, collect, and coordinate information concerning compliance methods and technologies for small business stationary sources;
- (2) Assist small business stationary sources with air pollution prevention and accidental release detection and prevention, including providing information concerning alternative technologies, process changes, products, and methods of operation that help reduce air pollution;
- (3) Assist small business stationary sources in determining applicable requirements and in obtaining permits pursuant to this chapter in a timely and efficient manner;
- (4) Assure that small business stationary sources receive in a timely manner notice of their rights and of any applicable rules or standards proposed or adopted pursuant to this chapter;
- (5) Inform small business stationary sources of their obligations pursuant to this chapter;
- (6) Develop procedures for referring small business stationary sources to qualified consultants in evaluating the operations of such sources and in determining compliance with this chapter; and
- (7) Develop procedures to consider requests from small business stationary sources for modification of:
  - (A) Any work practice or technological compliance methods; or
  - (B) The milestones for implementing such work practice or compliance method;
 based on the technological and financial capability of any such small business stationary source. No modification may be granted unless it is in compliance with the applicable requirements of this chapter and the Clean Air Act.

(b) The director, upon petition by a small business stationary source, after notice and opportunity for public comment, may include as a small business stationary source for purposes of this chapter any stationary source which does not meet the criteria for items (3), (4), or (5) of the definition of "small business stationary source" provided the stationary source does not emit more than one hundred tons per year of all regulated air pollutants.

(c) The director, in consultation with the Administrator and the Administrator of the federal Small Business Administration and after providing notice and opportunity for public comment, may exclude from the definition of "small business stationary source" any category or subcategory of sources that the Administrator or the director determines to have sufficient technical and financial capabilities to meet the requirements of this chapter without the application of this part.

§ -62 **Compliance advisory council; establishment; appointment, number, and term of members; duties.** (a) There is established within the department, for administrative purposes, an advisory council to be known as the compliance advisory council which shall:

- (1) Render advisory opinions concerning the effectiveness of the SBAP, difficulties encountered, and the degree and severity of enforcement;

- (2) Make periodic reports to the Administrator concerning the compliance of the SBAP with the requirements of the federal Paperwork Reduction Act (44 United States Code subsection 3501 et seq.), the Regulatory Flexibility Act (5 United States Code subsection 601 et seq.), and the Equal Access to Justice Act (Public Law 96-354);
  - (3) Review information for small business stationary sources to assure such information is understandable by the layperson;
  - (4) Have the SBAP serve as the secretariat for the development and dissemination of such reports and advisory opinions; and
  - (5) Perform other duties as required by the director.
- (b) The council shall be composed of seven voting members. The members shall be appointed in the manner provided in section 26-34, except as provided otherwise in this section.
- (c) The members of the council shall be selected as follows:
- (1) Two persons who are not owners, or representative of owners, of small business stationary sources selected by the governor to represent the general public;
  - (2) Two persons who are owners or represent owners of small business stationary sources, with one member selected by the majority leadership of the house of representatives, and one member selected by the minority leadership of the house of representatives;
  - (3) Two persons who are owners or represent owners of small business stationary sources, with one member selected by the majority leadership of the senate and one member selected by the minority leadership of the senate; and
  - (4) One member selected by the director to represent the department.
- (d) The members shall serve for two-year terms. The council shall elect its officers, and four members shall constitute a quorum. The members shall serve without compensation but shall be reimbursed for expenses, including travel expenses, necessary for the performance of their duties.

**§ -63 Small business ombudsman for air pollution control; qualifications; duties.** (a) There is created an office of the small business ombudsman for air pollution control in the department which shall be headed by a single executive to be known as the small business ombudsman for air pollution control who shall be appointed by the director for a term of four years. The position of small business ombudsman shall be exempt from the civil service laws pursuant to paragraph (17) of section 76-16. The director may remove or suspend for cause the small business ombudsman after due notice and public hearing.

(b) The person appointed as the small business ombudsman shall be experienced in dealing with both private enterprise and government entities; arbitration and negotiation; interpretation of laws and rules; investigation; record-keeping; report writing; public speaking; and management. All employees of the office shall be hired by the small business ombudsman and shall serve at the small business ombudsman's pleasure. In determining the salary of each employee, the small business ombudsman shall consult with the department of personnel services and shall follow as closely as possible the recommendations of the department of personnel services. The small business ombudsman and the small business ombudsman's full-time staff shall be entitled to participate in all state employee benefit plans.

(c) The small business ombudsman shall:

- (1) Assist small businesses which may be affected by air pollution control rules by providing services as necessary such as:

- (A) Assistance in the dissemination of information to small businesses and interested parties;
  - (B) Referral of small businesses to specialists for financial, technological, and operational information and assistance to reduce air pollution and prevent accidental releases;
  - (C) Encouragement of small businesses to participate in the development of air pollution control rules;
  - (D) Assistance in investigations and resolutions of complaints and disputes between small businesses and the department of health concerning air pollution control; and
  - (E) Presentations to trade associations and small businesses to inform them of the air pollution control rules and compliance requirements; and
- (2) Assist in the development and continued operation of the SBAP by participating in meetings and conferences and preparing and providing information as necessary such as:
- (A) Evaluation of the air pollution control rules and their effect on the economy and small businesses;
  - (B) Assistance in preparation of guideline documents;
  - (C) Evaluation of the SBAP and the assistance provided to small businesses;
  - (D) Reports, recommendations, and testimony to various governmental agencies and the legislature if so requested; and
  - (E) Comments and recommendations to EPA and the department of health on proposed air pollution control rules that impact small businesses.

(d) The small business ombudsman shall submit to the director an annual report discussing the small business ombudsman's activities under this chapter."

SECTION 2. Chapter 342B, Hawaii Revised Statutes, is repealed.

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date. Chapters 11-59 and 11-60, Hawaii Administrative Rules (Department of Health), shall remain in effect until they are replaced by rules adopted under the authority of the chapter being enacted by this Act. References in the new chapter to rules shall include rules currently in effect until they are replaced by rules adopted pursuant to the new chapter.

SECTION 4. It is not intended, nor should it be inferred, that these changes to the Hawaii clean air provisions have any effect on the interpretation of any other state environmental laws. This Act addresses only the state law providing for controls on air pollution.

SECTION 5. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. This Act shall take effect on July 1, 1992.

(Approved June 17, 1992.)