

ACT 377

S.B. NO. 1581

A Bill for an Act Relating to the Environment.

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

SECTION 1. The legislature finds that developers, lenders, potential property buyers, and other potential responsible parties are reluctant to purchase, lend money for, or develop properties that may be contaminated by hazardous substances, pollutants, or contaminants.

The legislature further finds that many developers, lenders, and prospective purchasers are frequently willing to clean up properties voluntarily, if they are not considered an “owner or operator” under chapter 128D.

The purpose of this Act is to:

- (1) Establish a program within the department to facilitate voluntary and timely responses to hazardous substance releases and threats of releases; and
- (2) Provide relief from liability for eligible persons who conduct adequate voluntary response action pursuant to this Act.

SECTION 2. Chapter 128D, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

“PART . VOLUNTARY RESPONSE PROGRAM

§128D-A General. (a) Except as otherwise provided in this part, all requirements of rules adopted pursuant to part I shall apply to voluntary response actions conducted pursuant to this part. All voluntary response actions, where an exemption from liability may be granted by the department, shall follow the public participation requirements of the remedial process as described in rules adopted pursuant to part I. Additionally, the requesting party shall post a sign at the site notifying the public of

participation in the voluntary response program and the public's opportunity to comment.

(b) This part shall apply to any person who chooses to conduct a voluntary response action. However, the exemption from liability in section 128D-J shall only apply to prospective purchasers.

§128D-B Definitions. As used in this part, unless the context otherwise requires:

“Prospective purchaser” means a prospective owner, operator, tenant, developer, lender, or any other party who would not otherwise be liable under section 128D-6, prior to conducting a voluntary response action.

“Requesting party” means the person or persons submitting an application to conduct a voluntary response action.

“Voluntary response action” means a response conducted voluntarily by a requesting party.

§128D-C Eligibility. (a) This part shall apply to all releases or threats of releases to which the director is authorized to respond under section 128D-4, except:

- (1) A site listed or proposed to be listed on the National Priorities List (NPL) pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA);
- (2) Those sites with respect to which an order or other enforcement actions has been issued or entered under CERCLA and is still in effect;
- (3) A site where the United States Coast Guard has issued a federal Letter of Interest;
- (4) A site that is the subject of corrective action under the Resource Conservation and Recovery Act (RCRA) or chapter 342J;
- (5) At the discretion of the director, a site where the director has issued an order or is conducting a response pursuant to an enforceable agreement under this chapter 128D and chapter 342L;
- (6) A site which poses an imminent and substantial threat to human health, the environment, or natural resources as determined by the director; and
- (7) A site where the director has determined that there is a significant public interest.

(b) The requesting party shall provide the department with written consent from the property owner to conduct the voluntary response action including any restrictions of property rights.

(c) The requesting party shall pay a nonrefundable processing fee of \$1,000 with each application to be eligible for a voluntary response action.

§128D-D Application. (a) For each site at which a requesting party chooses to conduct a voluntary response action, an application and \$1,000 nonrefundable processing fee shall be submitted.

(b) The department shall review each application in a timely manner and approve or deny the application based upon the requirements in this section and sections 128D-B and 128D-C.

(c) Each application shall include but not be limited to the following information:

- (1) The requesting party's name, mailing address, telephone number, facsimile number, if applicable, or electronic mail address;
- (2) The property owners' names, mailing addresses, telephone numbers, facsimile numbers, if applicable, or electronic mail addresses;

- (3) The property location, mailing address, street or physical location address, latitude and longitude, tax map key numbers, and telephone number for the requesting party;
- (4) A brief description of the site, its operational history, and any known or suspected contamination;
- (5) A listing of any permits obtained by any facility on the property;
- (6) A description of the intended scope of work;
- (7) A description of any civil, criminal, or administrative actions relative to the environmental matters of the subject property;
- (8) A written consent by the property owner supporting the proposed voluntary response action including any restrictions of property rights; and
- (9) The signature of the requesting party.

(d) The requesting party shall provide the department with any and all reports and data pertaining to environmental investigations or response actions on the subject property.

(e) Within sixty days after initial approval of the application, the requesting party and the department shall negotiate an agreement for conducting the voluntary response action. The agreement shall contain guarantees of completion, such as letters of credit, personal guarantees, insurance, or similar measures of guarantee. If, after sixty days, an agreement cannot be negotiated in good faith, the department may deny the application.

(f) The department's decision on an application shall be final, with no right of appeal.

§128D-E Denial of application. (a) The director may deny an application submitted under section 128D-D. In denying an application, the director may consider the following:

- (1) An administrative enforcement action has been initiated that concerns the remediation of the hazardous substance, pollutant, or contaminant;
- (2) Site eligibility based on the criteria in section 128D-C;
- (3) Completeness and accurateness of the application:
 - (A) If an application is denied because it is incomplete or inaccurate, the director, not later than forty-five days after receipt of the application, shall identify the omission or inaccuracy for the requesting party. A requesting party whose application has been denied because it is incomplete or inaccurate, may resubmit an application for the same response action without submitting an additional application fee; and
 - (B) If a requesting party's application is denied a second time, the director may require an additional \$1,000 processing fee for any subsequent submittal;
- (4) Inappropriate or inadequate scope of work;
- (5) Pending litigation;
- (6) The capacity of the requesting party or the requesting party's agent to carry out the response action properly;
- (7) Whether the department will receive a substantial benefit for cleanup or an indirect public benefit in combination with a reduced direct benefit to the department;
- (8) Whether the continued operation of the site or new site development, with the exercise of due care, will aggravate or contribute to the existing contamination or interfere with the department's response action;

- (9) Whether the continued operation or new development of the property will pose health risks to the community and those persons likely to be present at the site; or
 - (10) The financial viability of the prospective purchaser.
- (b) If the director finally denies the application, the director shall:
- (1) Notify the requesting party that the application has been denied; and
 - (2) Explain the reasons for denial of the application.

§128D-F Funding. (a) The department shall establish an account, to be called the voluntary response action account, within the environmental response revolving fund pursuant to section 128D-2, for the purpose of administration and oversight of this part.

(b) The \$1,000 nonrefundable application fee shall be deposited into the voluntary response action account.

(c) Upon initial approval of an application, the department may require a deposit of up to \$5,000 to initiate a site-specific account. The department may require an additional deposit of up to \$5,000, whenever the balance of the site-specific account falls below \$1,000.

(d) If a site-specific account balance is inadequate to support oversight, the department may discontinue oversight on the voluntary response action. The department may pursue enforcement action against the requesting party and any other person liable under section 128D-6, pursuant to part I of this chapter, when an account balance is inadequate to support further oversight by the department.

(e) At the completion of the voluntary response action, or at the termination of the agreement, the department shall provide a final accounting of the site-specific account and return the balance to the requesting party.

§128D-G Oversight costs. (a) The department's oversight costs shall be calculated at \$100 for each hour of staff time plus actual expenses or one hundred twenty-five per cent of actual cost when contracting for oversight services.

(b) The department shall provide each requesting party or parties a summary of the oversight costs for the party's specific site on an annual basis.

§128D-H Exempt positions. There is established such positions as necessary to support the voluntary response program. These positions shall be appointed by the director without regard to chapters 76 and 77. These positions shall be included in any benefit program generally applicable to the officers and employees of the State.

§128D-I Letter of completion. (a) Within thirty days of satisfactory completion of the voluntary response action, the director shall issue a letter of completion for the response action completed by the requesting party.

(b) The letter of completion shall identify the specific hazardous substances, pollutants, contaminants, media, and land area addressed in the response action.

(c) If contamination is left on the site, the letter of completion shall identify land use restrictions and any required management plan.

(d) The letter of completion shall be noted on the property deed and shall be sent to the county agency that issues building permits. The benefits and restrictions identified in the letter of completion shall run with the land and apply to all future owners of the property. The exemption from liability noted in section 128D-J does not apply to those persons who were liable pursuant to section 128D-6 prior to conducting the voluntary response action.

§128D-J Exemption from liability. (a) To qualify for an exemption from liability, a requesting party that is also a prospective purchaser must have obtained final approval to conduct a voluntary response action from the department prior to becoming the owner or operator of the property.

(b) Prospective purchasers who complete a voluntary response action and receive a letter of completion from the department shall be exempt from future liability to the department for those specific hazardous substances, pollutants, contaminants, media, and land area addressed in the voluntary response action.

(c) The exemption from future liability to the department referenced in subsection (b) shall apply only to those specific hazardous substances, pollutants, and contaminants cleaned up to a risk-based standard of not more than one total lifetime cancer risk per one million and only to the specific media and land area addressed in the voluntary response action; provided that the exemption only applies to the contamination which occurred prior to conducting the voluntary response action.

(d) A party who is exempt from future liability to the department under subsections (b) and (c) shall not be liable for claims for contribution or indemnity regarding matters addressed in the voluntary response action.

(e) The department reserves the right to take action consistent with this chapter against responsible parties.

(f) The exemption from liability shall not be effective:

- (1) If a letter of completion is acquired by fraud, misrepresentation, or failure to disclose material information; or
- (2) Where transactions were made for the purpose of avoiding liability under part I.

(g) There shall be no exemption from liability for other laws or requirements.

§128D-K Termination of voluntary response action. (a) An agreement under this part may be terminated by the requesting party at any time.

(b) The director may terminate an agreement pursuant to this section when:

- (1) There is an imminent and substantial threat to public health, the environment, or natural resources;
- (2) The requesting party is not acting in good faith;
- (3) Inadequate funds remain in the site-specific account;
- (4) An applicant becomes ineligible after initiating the action pursuant to sections 128D-D and 128D-F;
- (5) An applicant fails to comply with the terms of the agreement noted in section 128D-E(e); or
- (6) The draft remedial action is inadequate.

(c) Termination of the agreement pursuant to this section does not affect any right the director may have under any law to recover costs or to take enforcement action.

(d) Nothing in this part prohibits the department from taking enforcement action prior to completion of the voluntary response action. Furthermore, the director may, at any time, use the director's authority under section 128D-4 when it is deemed necessary."

SECTION 3. Chapter 128D, Hawaii Revised Statutes, is amended by designating sections 128D-1 to 128D-23 as part I and inserting a title before section 128D-1 to read as follows:

“PART I. HAWAII ENVIRONMENTAL RESPONSE LAW”

SECTION 4. Section 128D-1, Hawaii Revised Statutes, is amended by amending the definition of “owner” or “operator” to read as follows:

““Owner” or “operator” means:

- (1) [in] In the case of a vessel, any person owning, operating, or chartering by demise the vessel[,];
- (2) [in] In the case of an onshore facility or an offshore facility, any person owning or operating the facility[,]; and
- (3) [in] In the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of a state or local government, any person who owned, operated, or otherwise controlled activities at the facility immediately beforehand.

“Owner” or “operator” does not include a person [or financial institution who holds or held a lien, encumbrance, security interest, or loan agreement that attaches or is attached to a facility, vessel, or real property; provided that the person or financial institution makes or made no decision or takes or took no action that causes or caused or contributes or contributed to a release or threatened release of a hazardous substance from or at a facility, vessel, or real property.] who, without participating in the management of the vessel or facility, holds indicia of ownership primarily to protect its security interest in the vessel or facility. Until such time as the department adopts rules pertaining to lenders, the provisions of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 shall apply to the actions of lenders after July 1, 1997.”

SECTION 5. There is appropriated out of the environmental response revolving fund established in section 128D-2, Hawaii Revised Statutes, the sum of \$100,000 or so much thereof as may be necessary for fiscal year 1997-1998 for the voluntary response program.

The sum appropriated shall be expended by the department of health for the purposes of this Act.

SECTION 6. In codifying the new part added to chapter 128D, Hawaii Revised Statutes, by section 2 of this Act, the Revisor of Statutes shall substitute appropriate section numbers for the letters used in the new sections’ designations in this Act.

SECTION 7. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 8. This Act shall take effect ninety days after its approval; except that section 5 shall take effect on July 1, 1997.

(Approved July 7, 1997.)