

ACT 125

S.B. NO. 1259

A Bill for an Act Relating to Environmental Response.

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

SECTION 1. The purpose of this Act is to promote the cleanup and reuse of contaminated properties by providing relief for bona fide prospective purchasers and innocent contiguous property owners from liability under chapter 128D, Hawaii Revised Statutes. This Act amends chapter 128D, Hawaii Revised Statutes, to establish consistency between state and federal laws after the passage of the federal Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118 (42 U.S.C. Sections 9601-9628).

SECTION 2. Section 128D-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Bona fide prospective purchaser” means a person (or a tenant of a person) who acquires ownership of a facility after October 1, 2009, and establishes each of the following by a preponderance of the evidence:

- (1) All disposal of hazardous substances at the facility occurred before the person acquired the facility;
- (2) The person carried out all appropriate inquiries when, on or before the date on which the person acquired the facility;
 - (A) The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with subparagraphs (B) and (C);
 - (B) The standards and practices referred to in 42 United States Code Section 9601(35)(B)(ii) and (iv) and 40 Code of Federal Regulations part 312 are used unless the director requires otherwise by rules adopted pursuant to chapter 91; and
 - (C) In the case of property in residential use or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this paragraph;
- (3) The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility;

- (4) The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to:
 - (A) Stop any continuing release;
 - (B) Prevent any threatened future release; and
 - (C) Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;
- (5) The person provides full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility);
- (6) The person:
 - (A) Is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and
 - (B) Does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action;
- (7) The person complies with any request for information or administrative subpoena issued by the President of the United States under 42 United States Code chapter 103, by the director under chapter 128D, or issued by any state or federal court; and
- (8) The person is not:
 - (A) Potentially liable, or affiliated with any other person who is potentially liable, for response costs at a facility through:
 - (i) Any direct or indirect familial relationship; or
 - (ii) Any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or
 - (B) The result of a reorganization of a business entity that was potentially liable.”

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

shall be strictly liable for (A) all costs of removal or remedial actions incurred by the State or any other person; to the extent such costs and actions are consistent with this chapter, the state contingency plan, 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)]~~ section 128D-6(a)(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 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 the defendant exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and 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]~~ shall 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), (4), or (5) 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]~~ that 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~~[-]~~;

- (4) At the time the defendant acquired the facility, the defendant met the definition of “bona fide prospective purchaser”; or
- (5) The defendant was a contiguous property owner, as described in subsection (k).

To establish that the defendant had no reason to know, as provided in paragraph (1), the defendant ~~must~~ shall 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.

(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 compliance with this chapter, the National Contingency Plan, or at the direction of a federal or state on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person.

(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.

(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.

(h) In the case of an injury to, destruction of, or loss of natural resources under section 128D-6(a)(4)(B), liability shall be solely to the State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to the State. The natural resource trustee for the State shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the natural resource trustee under section 128D-6(a)(4) (B) shall 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.

(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~~ environmental 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 have occurred wholly before July 1, 1990.

(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.

(k) Contiguous properties shall be treated as stated in this subsection, except as specifically noted:

(1) A person shall not be considered to be an owner or operator under the following conditions:

(A) In general, a person who owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under section 128D-6(a) solely by reason of the contamination if:

- (i) The person did not cause, contribute to, or consent to the release or threatened release;
- (ii) The person is not potentially liable, or affiliated with any other person who is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or the result of a reorganization of a business entity that was potentially liable;
- (iii) The person takes reasonable steps to stop any continuing release; prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;
- (iv) The person provides full cooperation, assistance, and access to persons who are authorized to conduct response

- actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);
- (v) The person is in compliance with any land use restrictions established or relied on in connection with the response action at the facility, and the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;
 - (vi) The person complies with any request for information or administrative subpoena issued by the President of the United States under 42 United States Code chapter 103, by the director under chapter 128D, or issued by any state or federal court;
 - (vii) The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and
 - (viii) At the time at which the person acquired the property, the person conducted all appropriate inquiry within the meaning of 42 United States Code Section 9601(35)(B) with respect to the property, and the person did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person;
- (B) To qualify as a person described in subparagraph (A), a person shall establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met;
 - (C) Any person who does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser as defined under section 128D-1, if the person is otherwise described in that section;
 - (D) With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except as the director may deem necessary or in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995;
- (2) With respect to a person described in this subsection, nothing in this subsection:
 - (A) Limits any defense to liability that may be available to the person under any other provision of law; or
 - (B) Imposes liability on the person that is not otherwise imposed by section 128D-6(a);
 - (3) The director may:

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- (A) Issue an assurance that no enforcement action under chapter 128D shall be initiated against a person described in paragraph (1); and
- (B) Grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 128D-5.”

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 16, 2009.)