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# A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL RESPONSE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

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

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

13           "Bona fide prospective purchaser" means a person (or a  
14 tenant of a person) who acquires ownership of a facility after  
15 October 1, 2009."

16           SECTION 3. Section 128D-6, Hawaii Revised Statutes, is  
17 amended to read as follows:



1           "§128D-6 Liability. (a) Notwithstanding any other  
2 provision or rule of law, and subject only to the defenses set  
3 forth in subsection (c):

4           (1) The owner or operator or both of a facility or vessel;

5           (2) Any person who at the time of disposal of any  
6 hazardous substance owned or operated any facility at  
7 which such hazardous substances were disposed of;

8           (3) Any person who by contract, agreement, or otherwise  
9 arranged for disposal or treatment, or arranged with a  
10 transporter for transport for disposal or treatment,  
11 of hazardous substances owned or possessed by such  
12 person, by any other party or entity, at any facility  
13 or on any vessel owned or operated by another party or  
14 entity and containing such hazardous substances; and

15           (4) Any person who accepts or accepted any hazardous  
16 substances for transport to disposal or treatment  
17 facilities or sites selected by such person, from  
18 which there is a release, or a threatened release,  
19 which causes the incurrence of response costs of a  
20 hazardous substance;

21 shall be strictly liable for (A) all costs of removal or  
22 remedial actions incurred by the State or any other person; to



1 the extent such costs and actions are consistent with this  
2 chapter, the state contingency plan, and any other state rules;  
3 (B) damages for injury to, destruction of, or loss of natural  
4 resources, including the reasonable costs of assessing such  
5 injury, destruction, or loss resulting from such release; and  
6 (C) the costs of any health assessment or health effects study  
7 carried out consistent with this chapter, the state contingency  
8 plan, or any other state rules.

9 (b) The amounts recoverable in an action under this  
10 section shall include interest on the amounts recoverable under  
11 subparagraphs (A) through (C). Such interest shall accrue from  
12 the later of:

13 (1) [~~the~~] The date payment of a specified amount is  
14 demanded in writing[~~]~~; or

15 (2) [~~the~~] The date of the expenditure concerned.

16 The rate of interest on the outstanding unpaid balance of the  
17 amounts recoverable under this section shall be the same rate as  
18 is specified for interest on investments of the State's fund.

19 (c) There shall be no liability under subsection (a) for a  
20 defendant otherwise liable who can establish by a preponderance  
21 of the evidence that the release or threat of release of a



1 hazardous substance and the damages resulting therefrom were  
2 caused solely by:

3 (1) Any unanticipated grave natural disaster or other  
4 natural phenomenon of an exceptional, inevitable, and  
5 irresistible character, the effect of which could not  
6 have been prevented or avoided by the exercise of due  
7 care or foresight;

8 (2) An act of war;

9 (3) An act or omission of a third party other than an  
10 employee or agent of the defendant, or than one whose  
11 act or omission occurs in connection with a  
12 contractual relationship, existing directly or  
13 indirectly, with the defendant, if the defendant  
14 establishes by a preponderance of the evidence that  
15 the defendant exercised due care with respect to the  
16 hazardous substance concerned, taking into  
17 consideration the characteristics of such hazardous  
18 substance, in light of all relevant facts and  
19 circumstances; and the defendant took precautions  
20 against foreseeable acts or omissions of any such  
21 third party and the consequences that could  
22 foreseeably result from such acts or omissions; or





1 (4) Any combination of the foregoing paragraphs.

2 (d) A defendant may also avoid liability under subsection  
3 (a) where the defendant is able to establish that the real  
4 property on which the facility concerned is located was acquired  
5 by the defendant after the disposal or placement of the  
6 hazardous substance on, in, or at the facility. In addition to  
7 establishing the foregoing, the defendant must establish that  
8 the defendant has satisfied the requirements of section 128D-  
9 6(c)(3) and one or more of the following circumstances described  
10 in ~~[paragraphs]~~ paragraph (1), (2), (3), (4), or (5) is also  
11 established by the defendant by a preponderance of the evidence:

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

17 (2) The defendant is a government entity which acquired  
18 the facility by escheat, or through any other  
19 involuntary transfer or acquisition, or through the  
20 exercise of eminent domain authority by purchase or  
21 condemnation; ~~[or]~~



1 (3) The defendant acquired the facility by inheritance or  
2 bequest [-];

3 (4) At the time the defendant acquired the facility the  
4 defendant was a bona fide prospective purchaser and  
5 met the requirements set forth in subsection (k); or

6 (5) The defendant was a contiguous property owner and met  
7 the requirements set forth in subsection (l).

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

21 Nothing in this subsection or in section 128D-6(c)(3) shall  
22 diminish the liability of any previous owner or operator of such



1 facility who would otherwise be liable under this chapter.  
2 Notwithstanding this definition, if the defendant obtained  
3 actual knowledge of the release or threatened release of a  
4 hazardous substance at such facility when the defendant owned  
5 the real property and then subsequently transferred ownership of  
6 the property to another person without disclosing such  
7 knowledge, the defendant shall be treated as liable under  
8 section 128D-6(a)(1) and no defense under section 128D-6(c)(3)  
9 shall be available to the defendant.

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

15 (e) No person shall be liable under this chapter or  
16 otherwise under the laws of the State or any of the counties,  
17 including the common law, to any government or private parties  
18 for costs, damages, or penalties as a result of actions taken or  
19 omitted in the course of rendering care, assistance, or advice  
20 in compliance with this chapter, the National Contingency Plan,  
21 or at the direction of a federal or state on-scene coordinator,  
22 with respect to an incident creating a danger to public health



1 or welfare or the environment as a result of any release of a  
2 hazardous substance or pollutant or contaminant or the threat  
3 thereof. This subsection shall not preclude liability for  
4 costs, damages, or penalties as the result of gross negligence  
5 or intentional misconduct on the part of such person.

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

14 (g) No indemnification, hold harmless, or similar  
15 agreement or conveyances shall be effective to transfer from the  
16 owner or operator of any vessel or facility or from any person  
17 who may be liable for a release or threat of release under this  
18 section, to any other person, the liability imposed under this  
19 section. Nothing in this subsection shall bar any agreement to  
20 insure, hold harmless, or indemnify a party to such agreement  
21 for any liability under this section. Nothing in this chapter  
22 shall bar a cause of action that an owner or operator or any



1 person subject to liability under this section, or a guarantor,  
2 has or would have, by reason of subrogation or otherwise against  
3 any person.

4 (h) In the case of an injury to, destruction of, or loss  
5 of natural resources under section 128D-6(a)(4)(B), liability  
6 shall be solely to the State for natural resources within the  
7 State or belonging to, managed by, controlled by, or  
8 appertaining to the State. The natural resource trustee for the  
9 State shall act on behalf of the public as trustee of such  
10 natural resources to recover for such damages. Sums recovered  
11 by the natural resource trustee under section 128D-6(a)(4)(B)  
12 shall not be limited by the sums which can be used to restore or  
13 replace such resources. Any damages recovered by the state  
14 attorney general for damages to natural resources shall be  
15 deposited in the fund and credited to a special account for the  
16 purposes provided above.

17 (i) Provided that no liability shall be imposed under this  
18 chapter, where the party sought to be charged has demonstrated  
19 that the damages to natural resources complained of were  
20 specifically identified as an irreversible and irretrievable  
21 commitment of natural resources in an environmental impact  
22 statement, or other comparable environment analysis, and the



1 decision to grant a permit or license authorizes such commitment  
2 of natural resources, and the facility or project was otherwise  
3 operating within the terms of its permit or license. There  
4 shall be no double recovery under this chapter for natural  
5 resource damages, including the costs of damage assessment or  
6 restoration, rehabilitation, or acquisition for the same release  
7 and natural resources. Notwithstanding any other provision of  
8 this chapter, there shall be no recovery under this chapter for  
9 natural resource damages where such damages have occurred wholly  
10 before July 1, 1990.

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

14 (k) For purposes of this section, a bona fide prospective  
15 purchaser shall establish each of the following by a  
16 preponderance of the evidence:

17 (1) All disposal of hazardous substances at the facility  
18 occurred before the bona fide prospective purchaser  
19 acquired the facility;

20 (2) On or before the date on which the bona fide  
21 prospective purchaser acquired the facility:



- 1           (A) The bona fide prospective purchaser carried out  
2           all appropriate inquiries into the previous  
3           ownership and uses of the facility in accordance  
4           with generally accepted good commercial and  
5           customary standards and practices as set forth in  
6           42 United States Code Section 9601(35)(B)(ii) and  
7           (iv), and in 40 Code of Federal Regulations Part  
8           312, unless the director requires otherwise by  
9           rule adopted under chapter 91; or
- 10          (B) In the case of property in residential or other  
11          similar use at the time of purchase by a  
12          nongovernmental or noncommercial entity, a  
13          facility inspection and title search revealed no  
14          basis for further investigation;
- 15          (3) The bona fide prospective purchaser provides all  
16          legally required notices with respect to the discovery  
17          or release of any hazardous substances at the  
18          facility;
- 19          (4) The bona fide prospective purchaser exercises  
20          appropriate care with respect to hazardous substances  
21          found at the facility by taking reasonable steps to:
- 22          (A) Stop any continuing release;



- 1           (B) Prevent any threatened future release; and
- 2           (C) Prevent or limit human, environmental, or natural
- 3           resource exposure to any previously released
- 4           hazardous substance;
- 5       (5) The bona fide prospective purchaser provides full
- 6       cooperation, assistance, and access to persons who are
- 7       authorized to conduct response actions or natural
- 8       resource restoration at a vessel or facility
- 9       (including the cooperation and access necessary for
- 10       the installation, integrity, operation, and
- 11       maintenance of any complete or partial response
- 12       actions or natural resource restoration at the vessel
- 13       or facility);
- 14       (6) The bona fide prospective purchaser:
- 15       (A) Is in compliance with any land use restrictions
- 16       established or relied on in connection with the
- 17       response action at a vessel or facility; and
- 18       (B) Does not impede the effectiveness or integrity of
- 19       any institutional control employed at the vessel
- 20       or facility in connection with a response action;
- 21       (7) The bona fide prospective purchaser complies with any
- 22       request for information or administrative subpoena





1 issued by the President under 42 United States Code  
2 Chapter 103 or by the director under chapter 128D or  
3 issued by any state or federal court; and

4 (8) The bona fide prospective purchaser is not:

5 (A) Potentially liable or affiliated with any other  
6 person that is potentially liable, for response  
7 costs at a facility through:

8 (i) Any direct or indirect familial  
9 relationship; or

10 (ii) Any contractual, corporate, or financial  
11 relationship (other than a contractual,  
12 corporate, or financial relationship that is  
13 created by the instruments by which title to  
14 the facility is conveyed or financed or by a  
15 contract for the sale of goods or services);

16 or

17 (B) The result of a reorganization of a business  
18 entity that was potentially liable.

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

21 (1) In general, a person that owns real property that is  
22 contiguous to or otherwise similarly situated with



1 respect to, and that is or may be contaminated by a  
2 release or threatened release of a hazardous substance  
3 from, real property that is not owned by that person  
4 shall not be considered to be an owner or operator of  
5 a vessel or facility under section 128D-6(a) solely by  
6 reason of the contamination if:

7 (A) The person did not cause, contribute, or consent  
8 to the release or threatened release;

9 (B) The person is not:

10 (i) Potentially liable, or affiliated with any  
11 other person who is potentially liable, for  
12 response costs at a facility through any  
13 direct or indirect familial relationship or  
14 any contractual, corporate, or financial  
15 relationship (other than a contractual,  
16 corporate, or financial relationship that is  
17 created by a contract for the sale of goods  
18 or services); or

19 (ii) The result of a reorganization of a business  
20 entity that was potentially liable;

21 (C) The person takes reasonable steps to:

22 (i) Stop any continuing release;



1           (ii) Prevent any threatened future release; and  
2           (iii) Prevent or limit human, environmental, or  
3                   natural resource exposure to any hazardous  
4                   substance released on or from property owned  
5                   by that person;

6           (D) The person provides full cooperation, assistance,  
7                   and access to persons who are authorized to  
8                   conduct response actions or natural resource  
9                   restoration at the vessel or facility from which  
10                  there has been a release or threatened release  
11                  (including the cooperation and access necessary  
12                  for the installation, integrity, operation, and  
13                  maintenance of any complete or partial response  
14                  action or natural resource restoration at the  
15                  vessel or facility);

16           (E) The person:  
17                   (i) Is in compliance with any land use  
18                           restrictions established or relied on in  
19                           connection with the response action at the  
20                           facility; and

21                   (ii) Does not impede the effectiveness or  
22                           integrity of any institutional control



1                   employed in connection with a response  
2                   action;

3       (F)   The person is in compliance with any request for  
4           information or administrative subpoena issued by  
5           the President under 42 United States Code Chapter  
6           103 or by the director under chapter 128D or  
7           issued by any state or federal court;

8       (G)   The person provides all legally required notices  
9           with respect to the discovery or release of any  
10          hazardous substances at the facility; and

11       (H)   At the time at which the person acquired the  
12          property, the person:

13           (i)   Carried out all appropriate inquiries within  
14               the meaning of 42 United States Code section  
15               9601(35)(B) with respect to the property;  
16               and

17           (ii) Did not know or have reason to know that the  
18               property was or could be contaminated by a  
19               release or threatened release of one or more  
20               hazardous substances from other real  
21               property not owned or operated by the  
22               person.



- 1       (2) To qualify as a person described in paragraph (1), a  
2       person must establish by a preponderance of the  
3       evidence that the conditions in subparagraphs (A)  
4       through (H) of paragraph (1) have been met;
- 5       (3) Any person who does not qualify as a person described  
6       in paragraph (1) because the person had, or had reason  
7       to have, knowledge specified in paragraph (1) (H) at  
8       the time of acquisition of the real property may  
9       qualify as a bona fide prospective purchaser as  
10       defined under section 128D-1, if the person otherwise  
11       meets the requirements of subsection (k); and
- 12       (4) With respect to a hazardous substance from one or more  
13       sources that are not on the property of a person who  
14       is a contiguous property owner that enters ground  
15       water beneath the property of the person solely as a  
16       result of subsurface migration in an aquifer,  
17       paragraph (1) (C) shall not require the person to  
18       conduct ground water investigations or to install  
19       ground water remediation systems, except as the  
20       director may deem necessary or in accordance with the  
21       policy of the Environmental Protection Agency



1 concerning owners of property containing contaminated  
2 aquifers, dated May 24, 1995.

3 (m) With respect to a person described in subsection (l),  
4 nothing in subsection (l):

5 (1) Limits any defense to liability that may be available  
6 to the person under any other provision of law; or

7 (2) Imposes liability on the person that is not otherwise  
8 imposed by section 128D-6(a).

9 (n) The director may:

10 (1) Issue an assurance that no enforcement action under  
11 chapter 128D will be initiated against a person  
12 described in subsection (l); and

13 (2) Grant a person described in subsection (l) protection  
14 against a cost recovery or contribution action under  
15 section 128D-5."

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

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



**Report Title:**

Environmental Response; Liability

**Description:**

Excludes bona fide prospective purchasers and owners of contiguous properties who meet certain conditions from liability under the environmental response law. (HB428 HD1)

