

JAN 28 2009

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

4           "§128D- Contiguous properties. (a) A person that owns  
5 real property that is contiguous to or otherwise similarly  
6 situated with respect to, and that is or may be contaminated by  
7 a release or threatened release of a hazardous substance from,  
8 real property that is not owned by that person shall not be  
9 considered liable under section 128D-6 solely by reason of the  
10 contamination if:

11           (1) The person did not cause, contribute, or consent to  
12           the release or threatened release;

13           (2) The person is not:

14           (A) Potentially liable, or affiliated with any other  
15           person that is potentially liable, for response  
16           costs at a facility through any direct or  
17           indirect familial relationship or any  
18           contractual, corporate, or financial relationship



- 1           other than a contractual, corporate, or financial  
2           relationship that is created by a contract for  
3           the sale of goods or services; or  
4        (B) The result of a reorganization of a business  
5           entity that was potentially liable;  
6        (3) The person takes reasonable steps to:  
7           (A) Stop any continuing release;  
8           (B) Prevent any threatened future release; and  
9           (C) Prevent or limit human, environmental, or natural  
10          resource exposure to any hazardous substance  
11          released on or from property owned by that  
12          person;  
13        (4) The person provides full cooperation, assistance, and  
14          access to persons that are authorized to conduct  
15          response actions or natural resource restoration at  
16          the facility from which there has been a release or  
17          threatened release, including the cooperation and  
18          access necessary for the installation, integrity,  
19          operation, and maintenance of any complete or partial  
20          response action or natural resource restoration at the  
21          facility;  
22        (5) The person:



- 1           (A) Is in compliance with any land use restrictions
- 2                           established or relied on in connection with the
- 3                           response action at the facility; and
- 4           (B) Does not impede the effectiveness or integrity of
- 5                           any institutional control employed in connection
- 6                           with a response action;
- 7           (6) The person is in compliance with any request for
- 8                           information or administrative subpoena issued by the
- 9                           director under this chapter;
- 10          (7) The person provides all legally required notices with
- 11                           respect to the discovery or release of any hazardous
- 12                           substances at the facility; and
- 13          (8) At the time the person acquired the property, the
- 14                           person:
- 15                        (A) Conducted all appropriate inquiry within the
- 16                           meaning of section 128D-6(e) (2) with respect to
- 17                           the property; and
- 18                        (B) Did not know or have reason to know that the
- 19                           property was or could be contaminated by a
- 20                           release or threatened release of one or more
- 21                           hazardous substances from other real property not
- 22                           owned or operated by the person.



1        To qualify for non-liability under in this subsection, a  
2 person must establish by a preponderance of the evidence that  
3 the conditions herein have been met.

4        (b) Any person that does not qualify for non-liability  
5 under subsection (a) because the person had, or had reason to  
6 have, knowledge specified in subsection (a)(8) at the time of  
7 acquisition of the real property, may qualify as a bona fide  
8 prospective purchaser under section 128D-6 if the person is  
9 otherwise described in that section.

10       (c) With respect to a hazardous substance from one or more  
11 sources that are not on the property of a person that is a  
12 contiguous property owner that enters ground water beneath the  
13 property of the person solely as a result of subsurface  
14 migration in an aquifer, subsection (a)(3) shall not require the  
15 person to conduct ground water investigations or to install  
16 ground water remediation systems, except when required by  
17 federal law.

18       (d) Nothing in this section shall:

19       (1) Limit any defense to liability that may be available  
20       to the person under any other provision of law; or

21       (2) Impose liability on the person that is not otherwise  
22       imposed by section 128D-6.



- 1        (e) The director may:
- 2        (1) Issue an assurance that no enforcement action under
- 3        this chapter will be initiated against a person
- 4        described in subsection (a); and
- 5        (2) Grant a person described in subsection (a) protection
- 6        against a cost recovery action under section 128D-5."

7        SECTION 2. Section 128D-6, Hawaii Revised Statutes, is  
8 amended to read as follows:

9        "**§128D-6 Liability.** (a) Notwithstanding any other  
10 provision or rule of law, and subject only to the defenses set  
11 forth in subsection (c):

- 12        (1) The owner or operator or both of a facility or vessel;
- 13        (2) Any person who at the time of disposal of any
- 14        hazardous substance owned or operated any facility at
- 15        which such hazardous substances were disposed of;
- 16        (3) Any person who by contract, agreement, or otherwise
- 17        arranged for disposal or treatment, or arranged with a
- 18        transporter for transport for disposal or treatment,
- 19        of hazardous substances owned or possessed by such
- 20        person, by any other party or entity, at any facility
- 21        or on any vessel owned or operated by another party or
- 22        entity and containing such hazardous substances; and

1           (4) Any person who accepts or accepted any hazardous  
2           substances for transport to disposal or treatment  
3           facilities or sites selected by such person, from  
4           which there is a release, or a threatened release,  
5           which causes the incurrence of response costs of a  
6           hazardous substance;

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

11 (B) damages for injury to, destruction of, or loss of natural  
12 resources, including the reasonable costs of assessing such  
13 injury, destruction, or loss resulting from such release; and

14 (C) the costs of any health assessment or health effects study  
15 carried out consistent with this chapter, the state contingency  
16 plan, or any other state rules.

17           (b) The amounts recoverable in an action under this  
18 section shall include interest on the amounts recoverable under  
19 [~~subparagraphs (A) through (C).~~ Such] subsection (a). The  
20 interest shall accrue from the later of:

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



1           (2)   ~~[the]~~ The date of the expenditure concerned.  
2   The rate of interest on the outstanding unpaid balance of the  
3   amounts recoverable under this section shall be the same rate as  
4   is specified for interest on investments of the ~~[State's]~~  
5   environmental response revolving fund.

6           (c)   There shall be no liability under subsection (a) for a  
7   defendant otherwise liable who can establish by a preponderance  
8   of the evidence that the release or threat of release of a  
9   hazardous substance and the damages resulting therefrom were  
10   caused solely by:

11           (1)   Any unanticipated grave natural disaster or other  
12                natural phenomenon of an exceptional, inevitable, and  
13                irresistible character, the effect of which could not  
14                have been prevented or avoided by the exercise of due  
15                care or foresight;

16           (2)   An act of war;

17           (3)   An act or omission of a third party other than an  
18                employee or agent of the defendant ~~[, or than one]~~ or a  
19                person whose act or omission occurs in connection with  
20                a contractual relationship, existing directly or  
21                indirectly, with the defendant ~~[, if the]~~. The  
22                defendant ~~[establishes]~~ shall establish by a

1           preponderance of the evidence that the defendant  
2           exercised due care with respect to the hazardous  
3           substance concerned, taking into consideration the  
4           characteristics of [~~such~~] that hazardous substance, in  
5           light of all relevant facts and circumstances; and  
6           that the defendant took precautions against  
7           foreseeable acts or omissions of any such third party  
8           and the consequences that could foreseeably result  
9           from such acts or omissions; or

10         (4) Any combination of the foregoing paragraphs.

11         To qualify for non-liability under paragraph (3), the  
12         defendant shall establish that the defendant has provided full  
13         cooperation, assistance, and facility access to the persons that  
14         are authorized to conduct response actions at the facility  
15         (including the cooperation and access necessary for the  
16         installation, integrity, operation, and maintenance of any  
17         complete or partial response action at the facility), is in  
18         compliance with any land use restrictions established or relied  
19         on in connection with the response action at a facility, and  
20         does not impede the effectiveness or integrity of any  
21         institutional control employed at the facility in connection  
22         with the response action.





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

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

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

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



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

15 The defendant must also establish that the defendant took  
16 reasonable steps to stop any continuing release, prevent any  
17 threatened future release, and prevent or limit any human,  
18 environmental, or natural resource exposure to any previously  
19 released hazardous substance.

20 Nothing in this subsection or in [~~section 128D-6(e)(3)~~]  
21 subsection (c)(3) shall diminish the liability of any previous  
22 owner or operator of [~~such~~] a facility who would otherwise be



1 liable under this chapter. [~~Notwithstanding this definition, if~~  
2 ~~the~~] If a defendant obtained actual knowledge of the release or  
3 threatened release of a hazardous substance at [such] a facility  
4 when the defendant owned the real property, and then  
5 subsequently transferred ownership of the property to another  
6 person without disclosing such knowledge, the defendant shall be  
7 treated as liable under [section 128D-6(a)(1)] subsection (a)(1)  
8 and no defense under [section 128D-6(c)(3)] subsection (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~~] that is the subject of the action  
14 relating to the facility.

15 (e) A defendant who is determined to be a bona fide  
16 prospective purchaser may also avoid liability under subsection  
17 (a) if the person (or a tenant of a person) acquires ownership  
18 of a facility and establishes each of the following by a  
19 preponderance of the evidence:

20 (1) All disposal of hazardous substances at the facility  
21 occurred before the person acquired the facility;



1       (2) The person made all appropriate inquiries into the  
2       previous ownership and uses of the facility in  
3       accordance with generally accepted good commercial and  
4       customary standards and practices in an effort to  
5       minimize liability; provided that in the case of  
6       property in residential or other similar use at the  
7       time of purchase by a nongovernmental or noncommercial  
8       entity, a facility inspection and title search that  
9       reveal no basis for further investigation shall be  
10       considered to satisfy the requirements of this  
11       subparagraph. For purposes of the preceding sentence  
12       the court shall take into account any specialized  
13       knowledge or experience on the part of the defendant,  
14       the relationship of the purchase price to the value of  
15       the property if uncontaminated, commonly known or  
16       reasonably ascertainable information about the  
17       property, the obviousness of the presence or likely  
18       presence of contamination at the property, and the  
19       ability to detect such contamination by appropriate  
20       inspection;



- 1        (3) The person provides all legally required notices with  
2        respect to the discovery or release of any hazardous  
3        substances at the facility;
- 4        (4) The person exercises appropriate care with respect to  
5        hazardous substances found at the facility by taking  
6        reasonable steps to:
- 7            (A) Stop any continuing release;  
8            (B) Prevent any threatened future release; and  
9            (C) Prevent or limit human, environmental, or natural  
10        resource exposure to any previously released  
11        hazardous substance;
- 12        (5) The person provides full cooperation, assistance, and  
13        access to persons that are authorized to conduct  
14        response actions or natural resource restoration at a  
15        facility, including the cooperation and access  
16        necessary for the installation, integrity, operation,  
17        and maintenance of any complete or partial response  
18        actions or natural resource restoration at the  
19        facility;
- 20        (6) The person:



- 1           (A) Is in compliance with any land use restrictions
- 2                           established or relied on in connection with the
- 3                           response action at a facility; and
- 4           (B) Does not impede the effectiveness or integrity of
- 5                           any institutional control employed at the
- 6                           facility in connection with a response action;
- 7           (7) The person complies with any request for information
- 8                           or administrative subpoena issued by the director
- 9                           under this chapter; and
- 10          (8) The person is not:
- 11                   (A) Potentially liable, or affiliated with any other
- 12                           person that is potentially liable, for response
- 13                           costs at a facility through:
- 14                           (i) Any direct or indirect familial
- 15                                   relationship; or
- 16                           (ii) Any contractual, corporate, or financial
- 17                                   relationship, other than a contractual,
- 18                                   corporate, or financial relationship that is
- 19                                   created by the instruments by which title to
- 20                                   the facility is conveyed or financed or by a
- 21                                   contract for the sale of goods or services;
- 22                                   or



1            (B) The result of a reorganization of a business  
2            entity that was potentially liable.

3            [~~(e)~~] (f) No person shall be liable under this chapter or  
4 otherwise under the laws of the State or any of the counties,  
5 including the common law, to any government or private parties  
6 for costs, damages, or penalties as a result of actions taken or  
7 omitted in the course of rendering care, assistance, or advice  
8 in compliance with this chapter, the National Contingency Plan,  
9 or at the direction of a federal or state on-scene coordinator,  
10 with respect to an incident creating a danger to public health  
11 or welfare or the environment as a result of any release of a  
12 hazardous substance or pollutant or contaminant or the threat  
13 thereof. This subsection shall not preclude liability for  
14 costs, damages, or penalties as the result of gross negligence  
15 or intentional misconduct on the part of such person.

16            [~~(f)~~] (g) No county or local government shall be liable  
17 under this chapter for costs or damages as a result of actions  
18 taken in response to an emergency created by the release or  
19 threatened release of a hazardous substance or pollutant or  
20 contaminant generated by or from a facility owned by another  
21 person. This subsection shall not preclude liability for costs



1 or damages as a result of gross negligence or intentional  
2 misconduct by the county or local government.

3       ~~[(g)]~~ (h) No indemnification, hold harmless, or similar  
4 agreement or conveyances shall be effective to transfer from the  
5 owner or operator of any vessel or facility or from any person  
6 who may be liable for a release or threat of release under this  
7 section, to any other person, the liability imposed under this  
8 section. Nothing in this subsection shall bar any agreement to  
9 insure, hold harmless, or indemnify a party to such agreement  
10 for any liability under this section. Nothing in this chapter  
11 shall bar a cause of action that an owner or operator or any  
12 person subject to liability under this section, or a guarantor,  
13 has or would have, by reason of subrogation or otherwise against  
14 any person.

15       ~~[(h)]~~ (i) In the case of an injury to, destruction of, or  
16 loss of natural resources under ~~[section 128D-6(a)(4)(B),~~  
17 ~~liability]~~ subsection (a)(4)(B), damages shall be solely awarded  
18 to the State for natural resources within the State or belonging  
19 to, managed by, controlled by, or appertaining to the State.  
20 The ~~[natural resource trustee for the]~~ State shall act on behalf  
21 of the public as trustee of such natural resources to recover  
22 for such damages. Sums recovered by the ~~[natural resource~~





1 trustee] under [~~section 128D-6(a)(4)(B)~~] subsection (a)(4)(B),  
2 shall not be limited by the sums which can be used to restore or  
3 replace such resources. Any damages recovered by the state  
4 attorney general for damages to natural resources shall be  
5 deposited in the fund and credited to a special account for the  
6 purposes provided above.

7        [~~(i)~~] (j) [~~Provided that no~~] No liability shall be imposed  
8 under this chapter[~~7~~] where the party sought to be charged has  
9 demonstrated that the damages to natural resources complained of  
10 were specifically identified as an irreversible and  
11 irretrievable commitment of natural resources in an  
12 environmental impact statement, or other comparable environment  
13 analysis, and the decision to grant a permit or license  
14 authorizes such commitment of natural resources, and the  
15 facility or project was otherwise operating within the terms of  
16 its permit or license. There shall be no double recovery under  
17 this chapter for natural resource damages, including the costs  
18 of damage assessment or restoration, rehabilitation, or  
19 acquisition for the same release and natural resources.  
20 Notwithstanding any other provision of this chapter, there shall  
21 be no recovery under this chapter for natural resource damages  
22 where such damages have occurred wholly before July 1, 1990.



1           ~~(j)~~ (k) No person other than a government entity may  
2 recover costs or damages under this chapter arising from a  
3 release which occurred before July 1, 1990."

4           SECTION 3. Section 128D-31, Hawaii Revised Statutes, is  
5 amended by amending subsection (c) to read as follows:

6           "(c) This part shall apply to any person who chooses to  
7 conduct a voluntary response action. However, the exemption  
8 from liability in section 128D-40 shall only apply to  
9 prospective purchasers~~(-)~~ and persons who own a contiguous  
10 property that are exempt from liability pursuant to section  
11 128D- ."

12           SECTION 4. Section 128D-32, Hawaii Revised Statutes, is  
13 amended by amending the definition of "prospective purchaser" to  
14 read as follows:

15           ""Prospective purchaser" means a prospective owner,  
16 operator, tenant, developer, lender, or any other party,  
17 including a person who would qualify as a bona fide prospective  
18 purchaser, who would not otherwise be liable under section 128D-  
19 6, prior to a voluntary response action being conducted."

20           SECTION 5. Section 128D-40, Hawaii Revised Statutes, is  
21 amended by amending subsections (a) and (b) to read as follows:



1           "(a) To qualify for an exemption from liability, a  
2 requesting party that is also a prospective purchaser or an  
3 owner of a contiguous property exempt from liability under  
4 section 128D- shall enter into a voluntary response agreement  
5 with the department prior to becoming the owner or operator of  
6 the property, or a property contiguous to the property, that is  
7 the subject of the agreement.

8           (b) Prospective purchasers or an owner of a contiguous  
9 property exempt from liability under section 128D- who  
10 complete a voluntary response action and receive a letter of  
11 completion from the department are exempt from future liability  
12 to the department for those specific hazardous substances,  
13 pollutants, contaminants, media, and land area addressed in the  
14 voluntary response action and specified in a letter of  
15 completion from the department. Prospective purchasers of  
16 property or properties contiguous to a property for which an  
17 owner has completed a voluntary response action and received a  
18 letter of completion from the department are exempt from future  
19 liability to the department for those specific hazardous  
20 substances, pollutants, contaminants, media, and land area  
21 addressed in the voluntary response action and specified in the



1 letter of completion issued to the party who conducted the  
2 voluntary response action."

3 SECTION 6. This Act does not affect rights and duties that  
4 matured, penalties that were incurred, and proceedings that were  
5 begun, before its effective date.

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

8 SECTION 8. This Act shall take effect upon its approval.

9

INTRODUCED BY:

Mike Hubbard

John Gannon

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~~D~~  
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**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.

