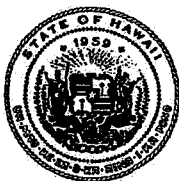


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LINDA LINGLE  
GOVERNOR OF HAWAII



CHIYOME LEINAALA FUKINO, M.D.  
DIRECTOR OF HEALTH

STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P.O. Box 3378  
HONOLULU, HAWAII 96801-3378

In reply, please refer to:  
File: EHA/HEER Office  
09-090 FG

February 13, 2009

The Honorable Mike Gabbard  
Chair, Senate Committee on Energy and Environment  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Dear Senator Gabbard,

Per our testimony to the Senate Committee on Energy and the Environment, the Department of Health submits the following proposed amendments to the language of SB 1259, should the bill be carried forward.

Insert the entire text of SB 935 into and replace the entire existing text of HB 1259. In addition, the Department recommends minor amendments to the SB 935 language suggested by stakeholders to ensure that the final bill closely mirrors the all appropriate inquiries requirements from the federal statute. The suggested amendments to the text of SB 935 are as follows:

§2(2) Page 2, line 3, Replace the text [In general, appropriate inquiries were made when:] with:  
The person carried out all appropriate inquiries when, on or before the date on which the person acquired the facility:

§ 2(2)(B) Page 2, line 11, Insert  
and 40 Code of Federal Regulations Part 312 are used unless the director requires by rules adopted pursuant to chapter 91. so that subparagraph (B) reads,

(B) The standards and practices referred to in 42 United States Code 9601(35)(B)(ii) and (iv) and 40 Code of Federal Regulations Part 312 are used unless the director requires by rules adopted pursuant to chapter 91.

§3Page 16, line 22 Insert within the meaning of United States Code section 9601(35)(b) so that subsection (k)(1)(A)(viii)(I) reads:

(I) Conducted all appropriate inquiry within the meaning of United States Code section 9601(35)(b) with respect to the property; and

For ease of editing, a hard copy version of SB 935 with the changes highlighted in yellow and displayed in track changes mode is included as an attachment. Should you have questions or need any clarification about these suggested amendments, please contact Fenix Grange directly at 586-5815 or fenix.grange@doh.hawaii.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Chiyome Leinaala Fukino".

Chiyome Leinaala Fukino, M.D.  
Director of Health

PROPOSED ALL APPROPRIATE INQUIRIES AMENDMENT TO HB 1117 and SB 935. REVISED LANGUAGE HEREIN WILL REPLACE THE TEXT IN HB 428 IN ITS ENTIRETY AND IS RECOMMENDED TO REPLACE THE TEXT IN SB 1259 IN ITS ENTIRETY.

**Report Title:**

Environmental Response Law

**Description:**

Amends chapter 128D, Hawaii Revised Statutes, to be consistent with federal law, which protects innocent purchasers of, and property owners who are contiguous to, contaminated property from liability for addressing contamination they did not cause.

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1           (2) The person carried out all appropriate inquiries  
2           when, on or before the date on which the person  
3           acquired the facility:

4           (A) The person made all appropriate inquiries into  
5           the previous ownership and uses of the facility  
6           in accordance with generally accepted good  
7           commercial and customary standards and practices  
8           in accordance with subparagraphs (B) and (C).

9           (B) The standards and practices referred to in 42  
10           United States Code section 9601(35)(B)(ii) and  
11           (iv) and 40 Code of Federal Regulations Part 312  
12           are used unless the director requires otherwise  
13           by rules adopted under chapter 91.

14           (C) In the case of property in residential or other  
15           similar use at the time of purchase by a  
16           nongovernmental or noncommercial entity, a  
17           facility inspection and title search reveal no  
18           basis for further investigation.

19           (3) The person provides all legally required notices with  
20           respect to the discovery or release of any hazardous  
21           substances at the facility.

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1           (B) Does not impede the effectiveness or integrity of  
2                   any institutional control employed at the vessel  
3                   or facility in connection with a response action.

4       (7) The person complies with any request for information  
5           or administrative subpoena issued by the President  
6           under 42 United States Code chapter 103 or by the  
7           director under chapter 128D or issued by any state or  
8           federal court.

9       (8) The person is not:

10           (A) Potentially liable or affiliated with any other  
11                   person that is potentially liable, for response  
12                   costs at a facility through:

13                   (i) Any direct or indirect familial  
14                           relationship; or

15                   (ii) Any contractual, corporate, or financial  
16                           relationship (other than a contractual,  
17                           corporate, or financial relationship that is  
18                           created by the instruments by which title to  
19                           the facility is conveyed or financed or by a  
20                           contract for the sale of goods or services);

21                           or

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1           which causes the incurrence of response costs of a  
2           hazardous substance;  
3 shall be strictly liable for (A) all costs of removal or  
4 remedial actions incurred by the State or any other person; to  
5 the extent such costs and actions are consistent with this  
6 chapter, the state contingency plan, and any other state rules;  
7 (B) damages for injury to, destruction of, or loss of natural  
8 resources, including the reasonable costs of assessing such  
9 injury, destruction, or loss resulting from such release; and  
10 (C) the costs of any health assessment or health effects study  
11 carried out consistent with this chapter, the state contingency  
12 plan, or any other state rules.

13           (b) The amounts recoverable in an action under this  
14 section shall include interest on the amounts recoverable under  
15 subparagraphs (A) through (C). Such interest shall accrue from  
16 the later of (1) the date payment of a specified amount is  
17 demanded in writing, or (2) the date of the expenditure  
18 concerned. The rate of interest on the outstanding unpaid  
19 balance of the amounts recoverable under this section shall be  
20 the same rate as is specified for interest on investments of the  
21 State's fund.

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1           against foreseeable acts or omissions of any such  
2           third party and the consequences that could  
3           foreseeably result from such acts or omissions; or

4           (4) Any combination of the foregoing paragraphs.

5           (d) A defendant may also avoid liability under subsection

6           (a) where the defendant is able to establish that the real  
7           property on which the facility concerned is located was acquired  
8           by the defendant after the disposal or placement of the

9           hazardous substance on, in, or at the facility. In addition to  
10          establishing the foregoing, the defendant must establish that

11          the defendant has satisfied the requirements of section 128D-

12          6(c)(3) and one or more of the following circumstances described

13          in paragraph (1), (2), [or] (3), (4), or (5) is also established

14          by the defendant by a preponderance of the evidence:

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

20          (2) The defendant is a government entity which acquired  
21                the facility by escheat, or through any other  
22                involuntary transfer or acquisition, or through the

1           Nothing in this subsection or in section 128D-6(c)(3) shall  
2 diminish the liability of any previous owner or operator of such  
3 facility who would otherwise be liable under this chapter.  
4 Notwithstanding this definition, if the defendant obtained  
5 actual knowledge of the release or threatened release of a  
6 hazardous substance at such facility when the defendant owned  
7 the real property and then subsequently transferred ownership of  
8 the property to another person without disclosing such  
9 knowledge, the defendant shall be treated as liable under  
10 section 128D-6(a)(1) and no defense under section 128D-6(c)(3)  
11 shall be available to the defendant.

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

17           (e) No person shall be liable under this chapter or  
18 otherwise under the laws of the State or any of the counties,  
19 including the common law, to any government or private parties  
20 for costs, damages, or penalties as a result of actions taken or  
21 omitted in the course of rendering care, assistance, or advice  
22 in compliance with this chapter, the National Contingency Plan,

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1 for any liability under this section. Nothing in this chapter  
2 shall bar a cause of action that an owner or operator or any  
3 person subject to liability under this section, or a guarantor,  
4 has or would have, by reason of subrogation or otherwise against  
5 any person.

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

19 (i) Provided that no liability shall be imposed under this  
20 chapter, where the party sought to be charged has demonstrated  
21 that the damages to natural resources complained of were  
22 specifically identified as an irreversible and irretrievable



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

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

10          (ii) The person is not:

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

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- 1                   (v) The person:
- 2                    (I) Is in compliance with any land use
- 3                       restrictions established or relied on
- 4                       in connection with the response action
- 5                       at the facility; and
- 6                    (II) Does not impede the effectiveness or
- 7                       integrity of any institutional control
- 8                       employed in connection with a response
- 9                       action;
- 10                  (vi) The person is in compliance with any request
- 11                    for information or administrative subpoena
- 12                    issued by the President or by the director
- 13                    under chapter 128D or issued by any state or
- 14                    federal court;
- 15                  (vii) The person provides all legally required
- 16                    notices with respect to the discovery or
- 17                    release of any hazardous substances at the
- 18                    facility; and
- 19                  (viii) At the time at which the person acquired the
- 20                    property, the person:
- 21                    (I) Conducted all appropriate inquiry
- 22                       within the meaning of United States

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1           (D) With respect to a hazardous substance from one or  
2           more sources that are not on the property of a  
3           person that is a contiguous property owner that  
4           enters ground water beneath the property of the  
5           person solely as a result of subsurface migration  
6           in an aquifer, subparagraph (A)(iii) shall not  
7           require the person to conduct ground water  
8           investigations or to install ground water  
9           remediation systems, except as the director may  
10           deem necessary or in accordance with the policy  
11           of the Environmental Protection Agency concerning  
12           owners of property containing contaminated  
13           aquifers, dated May 24, 1995.

14           (2) With respect to a person described in this subsection,  
15           nothing in this subsection:

16           (A) Limits any defense to liability that may be  
17           available to the person under any other provision  
18           of law; or

19           (B) Imposes liability on the person that is not  
20           otherwise imposed by section 128D-6(a).

21           (3) The director may: