

**SB 1259**

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:

## SENATE COMMITTEE ON ENERGY & ENVIRONMENT

### S.B. 1259, Relating to Environmental Response

Testimony of Chiyome Leinaala Fukino, M.D.  
Director of Health

February 17, 2009

1 **Department's Position:** The Department appreciates the intent but opposes this measure as worded.

2 We prefer S.B. 935, and whichever bill advances, we propose changes in the language.

3 **Fiscal Implications:** None.

4 **Purpose:** This bill apparently seeks to provide state consistency with federal law on the liability of  
5 bona fide prospective purchasers and contiguous property owners for contaminated land.

6 **Justification:** The Department of Health supports the intent of this bill but respectfully opposes this bill  
7 for reasons of technical language and scope. Both this measure and the Administration bill, SB 935  
8 resulted from extensive stakeholder involvement conducted by the Department over a two year period  
9 that identified inconsistencies between state and federal brownfields liability protections as a significant  
10 obstacle to safe and successful redevelopment of contaminated properties in Hawaii. While at first  
11 glance, both measures may appear quite similar, the Department has the following major concerns:

12 1. SB 1259 is incomplete in its attempt to establish consistency with the federal Brownfields  
13 amendments that it is intended to mirror, and is missing key definitions and purpose statements needed  
14 to facilitate public compliance. For example, it lacks a specific reference to federal law for bona fide  
15 prospective purchasers.

1           2. There are organizational issues. Establishing the bona fide prospective purchaser defense is  
2 the keystone of the 2002 federal brownfield amendments, and the single most requested change from  
3 stakeholders. SB 1259 does not define this important term, or refer to it except in changes to the  
4 Voluntary Response Program. This is confusing because VRP liability relief and bona fide prospective  
5 purchaser protections are separate and distinct from each other. Similarly, protections for contiguous  
6 property owners are inserted separately from existing 128D-6 liability language, creating redundancy  
7 and confusion about application of liability to these classes of owners.

8           3. SB 1259 unnecessarily amends HRS 128D, Part II, altering and expanding the Voluntary  
9 Response Program, a Hawaii-specific liability protection program that does not have a federal corollary.  
10 These changes were not raised, discussed, or requested at any of the four major stakeholder meetings  
11 held in the past in two years.

12           We strongly support passage of SB 935. This alternate bill is a direct result of extensive  
13 stakeholder involvement led by the Department, closely matches the needs identified, discussed and  
14 endorsed by the community, while carefully maintaining environmental protections.

15           Alternately, we respectfully request that SB 1259 be replaced in its entirety by the contents of SB  
16 935. With either bill, the Department recommends minor amendments suggested by stakeholders  
17 reviewing SB 935 to ensure that the final bill closely mirrors the all appropriate inquiries requirements  
18 from the federal statute. The Department opposes any changes to the Voluntary Response Program at  
19 this time, but is prepared to facilitate stakeholder discussion over the course of the next year to evaluate  
20 the need and advisability of making statutory changes.

21           The proposed minor technical amendments to sections 2 and 3 to the text of SB 935 are  
22 specifically described in the attached letter to the Chair.

23           It is for the above stated reasons that the DOH respectfully opposes this bill as written.

24           Thank you for the opportunity to testify on this measure.

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](mailto: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



# Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803

808.537.9019 hawaii.chapter@sierraclub.org

## SENATE COMMITTEE ON ENERGY AND ENVIRONMENT

February 17, 2009, 2:45 P.M.

(Testimony is 2 page long)

### TESTIMONY IN OPPOSITION TO SB 1259

Chair Gabbard and members of the Committees:

The Sierra Club, Hawai'i Chapter, with 5500 dues paying members statewide, opposes SB 1259, which purportedly brings Haw. Rev. Stat. Ch. 128D in compliance with federal law. While the Sierra Club supports the concept of maximizing the clean-up and usage of brownfield sites, there are too many questions regarding the language of this bill to allow it to proceed.

SB 1259 purportedly brings our environmental response laws into compliance with federal law. There is at least one example, however, where it appears to endeavor to do more, .e.g., it attempts to broaden the sweep of immunity. For this reason, *the Sierra Club recommends either holding SB 1259 until it can be vetted better or utilizing the language contained in HB 1117*, which was subject to public participation and comment from the Department of Health.

Specifically, on page 18, lines 9 - 11, SB 1259 includes a contiguous property owner in the Voluntary Response Program. The Voluntary Response Program has no counterpart in federal law. It is unclear why it needs to be revised.

Moreover, a liability exemption for a contiguous property owner is inapplicable to the Voluntary Response Program. A complete cleanup, which is the intent of the Voluntary Response Program, is impossible without the originating property's participation. Under the proposed language, owners of the contiguous property would not be liable for future hazardous waste that leached from the original contaminated property. In these times of fiscal restraint, why would the legislature want to take away the right of the Administration to pursue—via lawsuit if necessary—clean up actions for hazardous waste sites?

There are additional concerns about some of the omissions contained in this bill, such as the omission of a definition of a "bona fide prospective purchaser." Such language issues can create more problems than this bill is intended to solve.

Thank you for the opportunity to testify.