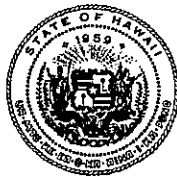


SB 139



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

In reply, please refer to:
File:

COMMITTEE ON ENERGY AND ENVIRONMENT

SB139, Relating to Developer Liability

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Acting Director of Health

February 8, 2011
3:00 P.M.

1 **Department's Position:** The Department of Health opposes this measure.

2 **Fiscal Implications:** Uncertain, but potentially huge staffing requirement, as exposure to measurable
3 levels of hazardous substances is likely at virtually every new development project in Hawaii.

4 **Purpose and Justification:** SB139 seeks to add developer liability for exposure to hazardous
5 substances to HRS 128D. Adding these two new concepts, "developer liability" and "exposure to
6 contaminated substances", creates a new, duplicative and vague liability section to the statute, without
7 clear environmental benefit.

8 The existing liability language in HRS 128D-6 provides a broad definition of responsible parties
9 which already includes developers, in their capacities as "owners or operators" of facilities. 128D-6
10 holds responsible parties strictly liable for "releases or threatened releases, which causes the incurrence
11 of response costs of a hazardous substance". This measure would add additional liability to developers
12 for "exposure of any person, property or natural resources to a hazardous substance".

13 This definition is overly broad, and moves away from assigning liability based on risks of
14 hazardous substances to liability for exposure, whether harmful or not. Further, it does not limit sources
15 of exposures to environmental releases or threatened releases that occur on a property, but could include

1 exposures from commercial or construction uses of materials that contain legal hazardous constituents,
2 such as solvents, pesticides, paints, metals, etc. These exposures are more appropriately regulated by
3 HIOSH and consumer product safety agencies. The proposed language does not provide any new
4 mechanism to identify or define injury from contaminant exposures that are not associated with
5 exceedances of environmental action levels, or to define appropriate remedies for exposures that are not
6 associated with health effects.

7 The description of strict liability is the same as 128D-6, except that it now applies to
8 “exposures.” As written, it could suggest that all such identified “exposures” need to have removal or
9 remedial actions taken to the extent that the exposure is no longer present, clearly a nearly impossible,
10 costly and unnecessary objective.

11 People and our environment are constantly exposed to low levels of hazardous substances,
12 through our food supply, our clothing, cosmetics, household goods, cleaning supplies and the myriad of
13 chemicals we use in our daily lives. HRS 128D is designed to protect the community and our
14 environment from exposures to unsafe levels of environmental contamination that results from spilled or
15 residual chemicals on specific real property.

16 Implementation of this measure could cause greatly increase development costs, add confusing
17 and duplicative regulation and slow economic progress without providing added health protection. We
18 oppose this measure.

19 Thank you for the opportunity to testify.



Sierra Club Hawai'i Chapter

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SENATE COMMITTEE ON ENERGY AND ENVIRONMENT

February 8, 2011, 3:00 P.M.

(Testimony is 2 pages long)

TESTIMONY IN OPPOSITION TO SB 139

Aloha Chair Gabbard and Members of the Committee:

The Hawai'i Chapter of the Sierra Club, with 8,000 dues-paying members and supporters, *opposes* SB 139. This measure drastically limits developer liability for hazardous waste by altering Hawai'i's equivalent to the federal CERCLA law. While the Sierra Club supports the concept of maximizing the clean-up and usage of brownfield sites, the proposed language undermines years of effort to encourage voluntary cleanups of contaminated sites.

Our current law already fulfills the intent of SB 139, namely to encourage the development of potentially hazardous sites (brownfields). In 2002, the federal was changed to allow prospective, innocent purchasers to do an "all appropriate inquiry" in order to avoid liability for unknown amounts of contamination.

To the extent known amounts of contamination are discovered, Hawai'i has devised a voluntary response program designed to encourage all potentially responsible parties to negotiate -- in cooperation with the State -- a way to cleanup the contamination. Grants and other funding is available to encourage the development of these types of properties. This system has been effective. The development of a Costco at Iwilei, for example, is a success story arising out of the voluntary response program.

Under the language of SB 139, however, several new and dangerous exceptions to liability are created. For example, in section (i) it states "No liability shall be imposed under this section, where the developer has demonstrated that the subject damages to natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement . . ." In other words, a future chemical or industrial plant would only have to indicate the potential for hazardous waste contamination and be free from any future liability from the State of Hawai'i. The costs of cleanup would either have to be borne by a future owner (unlikely), the State, or not be cleaned up.

A complete cleanup, which is the intent of the voluntary response program, is impossible without the originating property's participation. Under the proposed language, current owners and or developers would have sweeping exceptions to potential liability and, thus, would have little incentive to participate in a cleanup effort. In these times of fiscal restraint, why would the legislature want to take away the right of the State to pursue—via lawsuit if necessary—clean up actions for hazardous waste sites?

Moreover, this proposal seems to have little regard for the potential impacts of hazardous waste on the health of our communities. Waiving the obligation to cleanup contaminate properties -- by definition, with pollutants dangerous to human health -- simply to encourage more residential or commercial development seems terribly shortsighted.

Thank you for this opportunity to provide testimony.

February 8, 2011

Senate Committee on Energy and Environment
Senator Mike Gabbard, Chair
Senator J. Kalani English, Vice Chair
Public Hearing: February 8, 2011, 3:00 p.m., Room 225

Re: SB 139, Relating to Developer Liability

Dear Chair Gabbard, Vice Chair English and members of the Committee,

I oppose SB 139.

This bill provides for several dangerous exceptions to developer liability for hazardous waste, and to developer liability for the potential impacts of hazardous waste on communities and human health. Moreover, the measures in this bill might exempt developers from responsibility for cleanup, leaving these costs to the State.

Thank you for the opportunity to testify

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