

JAN 21 2011

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# A BILL FOR AN ACT

RELATING TO DEVELOPER LIABILITY.

**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- Developer liability. (a) Notwithstanding any  
5 other provision or rule of law, and subject only to the defenses  
6 set forth in subsections (c) and (d), a developer shall be  
7 strictly liable for the following costs resulting from exposure  
8 of any person, property, or natural resources to a hazardous  
9 substance as a result of the developer's activities:

10           (1) All costs of removal or remedial actions incurred by  
11 the State or any other person to the extent that the  
12 costs incurred and the actions taken are consistent  
13 with this chapter, the state contingency plan, and any  
14 other state rules;

15           (2) Damages for injury to, destruction of, or loss of  
16 natural resources, including the reasonable costs of  
17 assessing the injury, destruction, or loss resulting  
18 from exposure to hazardous substances; and



1       (3) The costs of any health assessment or health effects  
2           study carried out consistently with this chapter, the  
3           state contingency plan, or any other state rules.

4       (b) The amounts recoverable in an action under this  
5       section shall include interest on the amounts recoverable under  
6       subsection (a); provided that interest shall accrue from the  
7       later of the date that payment of a specified amount is demanded  
8       in writing, or the date of the expenditure concerned. The rate  
9       of interest on the outstanding unpaid balance of the amounts  
10       recoverable under this section shall be the same rate as is  
11       specified for interest on investments of the State's fund.

12       (c) There shall be no liability under subsection (a) for a  
13       developer who would otherwise be liable if the developer can  
14       establish by a preponderance of the evidence that exposure of  
15       persons, property, or natural resources to a hazardous substance  
16       and the resulting damages were caused solely by:

17       (1) An unanticipated grave natural disaster or other  
18           natural phenomenon of an exceptional, inevitable, and  
19           irresistible character, the effect of which could not  
20           have been prevented or avoided by the exercise of due  
21           care or foresight;

22       (2) An act of war; or



1       (3) An act or omission of a third party other than an  
2       employee of the developer, an agent of the developer,  
3       or a person whose act or omission occurs in connection  
4       with a direct or indirect contractual relationship  
5       with the developer; provided that the developer  
6       establishes by a preponderance of the evidence that  
7       the developer:

8       (A) Exercised due care with respect to the hazardous  
9       substance concerned, taking into consideration  
10      the characteristics of the hazardous substance  
11      and all relevant facts and circumstances; and

12      (B) Took precautions against the foreseeable acts and  
13      omissions of the third party and the consequences  
14      that could foreseeably result.

15      (d) There shall be no liability under subsection (a) where  
16      the developer is able to establish by a preponderance of the  
17      evidence that the developer acquired the real property on which  
18      the hazardous substance is located after the disposal or  
19      placement of the hazardous substance on, in, or at the property  
20      and exposure to the hazardous substance:

21      (1) Is the result of an act or omission of a third party  
22      other than an employee of the developer, an agent of



1 the developer, or a person whose act or omission  
2 occurs in connection with a direct or indirect  
3 contractual relationship with the developer; provided  
4 that the developer establishes by a preponderance of  
5 the evidence that the developer:

6 (A) Exercised due care with respect to the hazardous  
7 substance concerned, taking into consideration  
8 the characteristics of the hazardous substance  
9 and all relevant facts and circumstances; and

10 (B) Took precautions against the foreseeable acts and  
11 omissions of the third party and the consequences  
12 that could foreseeably result; and

13 (2) At least one of the following circumstances applies:

14 (A) At the time the developer acquired the property,  
15 the developer did not know and had no reason to  
16 know that any hazardous substance which is the  
17 subject of the exposure was disposed on, in, or  
18 at the property; provided that at the time of  
19 acquisition, the developer undertook all  
20 appropriate inquiry into the previous ownership  
21 and uses of the property consistent with good  
22 commercial or customary practice in an effort to



1 minimize liability taking into account any  
2 specialized knowledge or experience on the part  
3 of the developer, the relationship of the  
4 purchase price to the value of the property if  
5 uncontaminated, commonly known or reasonably  
6 ascertainable information about the property, the  
7 obviousness of the presence or likely presence of  
8 hazardous substance on, in, or at the property,  
9 and the ability to detect the hazardous substance  
10 by appropriate inspection;

11 (B) The developer is a government entity that  
12 acquired the facility by escheat, through any  
13 other involuntary transfer or acquisition, or  
14 through the exercise of eminent domain authority  
15 by purchase or condemnation;

16 (C) The developer acquired the property by  
17 inheritance or bequest;

18 (D) At the time the developer acquired the facility,  
19 the developer was a bona fide prospective  
20 purchaser; or

21 (E) The developer is a contiguous property owner, as  
22 described in subsection (k).



1       (e) Subsection (d) and paragraph (c)(3) shall not diminish  
2 the liability of any previous owner or developer of a property  
3 who would otherwise be liable under this chapter. If a  
4 developer obtains actual knowledge of the presence of a  
5 hazardous substance on, in, or at a property while the developer  
6 owns the property and the developer subsequently transfers  
7 ownership of the property to another person without disclosing  
8 that knowledge, the developer shall be liable under subsection  
9 (a) and no defense under paragraph (c)(3) shall be available to  
10 the developer.

11       Nothing in subsection (d) shall affect the liability under  
12 this section of a developer who, by any act or omission, caused  
13 or contributed to the exposure to a hazardous substance which is  
14 the subject of an action relating to the property.

15       (f) No person shall be liable under this section 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 exposure or  
2 threat of exposure to a hazardous substance or pollutant or  
3 contaminant; provided that this subsection shall not preclude  
4 liability for costs, damages, or penalties resulting from gross  
5 negligence or intentional misconduct.

6 (g) No county or local government shall be liable under  
7 this section for costs or damages as a result of actions taken  
8 in response to an emergency created by the exposure or threat of  
9 exposure to a hazardous substance, pollutant, or contaminant  
10 present on, in, or at a property owned by a developer; provided  
11 that this subsection shall not preclude liability for costs or  
12 damages as a result of gross negligence or intentional  
13 misconduct by the county or local government.

14 (h) No indemnification, hold harmless, or similar  
15 agreement or conveyance shall be effective to transfer the  
16 liability imposed by this section from the developer of any real  
17 property or from any person who may be liable under this section  
18 for an exposure or threat of exposure to a hazardous substance  
19 to any other person; provided that this subsection shall not bar  
20 any agreement or contract with an insurer as defined by section  
21 431:1-202 to insure, hold harmless, or indemnify a party to an  
22 insurance contract for any liability under this section.



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

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

17 No liability shall be imposed under this section, where the  
18 developer has demonstrated that the subject damages to natural  
19 resources were specifically identified as an irreversible and  
20 irretrievable commitment of natural resources in an  
21 environmental impact statement or other comparable environmental  
22 analysis, the decision to grant a permit or license for the





1 developer's activities authorizes that commitment of natural  
2 resources, and the developer was otherwise operating within the  
3 terms of its permit or license. There shall be no double  
4 recovery under this section for natural resource damages,  
5 including the costs of damage assessment or restoration,  
6 rehabilitation, or acquisition for damages to the same natural  
7 resources caused by any one exposure to hazardous substances.  
8 Notwithstanding any other provision of this section, there shall  
9 be no recovery under this section for natural resource damages  
10 where the damages occurred wholly before July 1, 1990.

11 (j) No person other than a government entity may recover  
12 costs or damages under this section arising from an exposure to  
13 hazardous substances which occurred before July 1, 1990.

14 (k) A person shall not be liable under this section if the  
15 person is engaged in the development of real property that is or  
16 may be contaminated by a hazardous substance because of an  
17 exposure that occurred at a property that is contiguous to or  
18 otherwise similarly situated with respect to the person's  
19 property if the person establishes by a preponderance of the  
20 evidence that:

21 (1) The person did not cause, contribute to, or consent to  
22 the exposure or threatened exposure;



- 1        (2) The person is not potentially liable or affiliated  
2        with any other person who is potentially liable for  
3        response costs through any direct or indirect familial  
4        relationship or any contractual, corporate, or  
5        financial relationship other than one created by a  
6        contract for the sale of goods or services, or as a  
7        result of a reorganization of a business entity that  
8        was potentially liable;
- 9        (3) The person took reasonable steps to stop, limit, or  
10       prevent any continuing or future exposure of persons,  
11       property, and natural resources to hazardous  
12       substances from property owned by that person;
- 13       (4) The person provided full cooperation, assistance, and  
14       access to persons or agencies authorized to conduct  
15       response actions or natural resource restoration at  
16       the person's property and the property from which  
17       persons, property, or natural resources have been  
18       exposed to hazardous substances;
- 19       (5) The person is in compliance with any land use  
20       restrictions established or relied on in connection  
21       with the response action at the real property and does  
22       not impede the effectiveness or integrity of any



1 institutional control employed in connection with a  
2 response action;

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

8 (7) The person has provided all legally required notices  
9 with respect to the discovery of or exposure to any  
10 hazardous substances at the real property; and

11 (8) At the time at which the person acquired the property,  
12 the person conducted all appropriate inquiries within  
13 the meaning of 42 United States Code Section  
14 9601(35)(B) with respect to the property, and the  
15 person did not know or have reason to know that the  
16 property was or could be contaminated by the exposure  
17 to one or more hazardous substances from other real  
18 property not owned or operated by the person; provided  
19 that:

20 (A) A person who had or had reason to have knowledge  
21 specified in this paragraph at the time of  
22 acquisition of the real property may qualify as a



1                   bona fide prospective purchaser if the person  
2                   meets the definition of a bona fide prospective  
3                   purchaser pursuant to section 128D-1; and  
4            (B) With respect to a hazardous substance from one or  
5                   more sources that are not on the property of a  
6                   person that is a contiguous property owner, where  
7                   the hazardous substance enters ground water  
8                   beneath the property of the person solely as a  
9                   result of subsurface migration in an aquifer, the  
10                  person shall not be required to conduct ground  
11                  water investigations or to install ground water  
12                  remediation systems, except as the director may  
13                  deem necessary or in accordance with the policy  
14                  of the Environmental Protection Agency concerning  
15                  owners of property containing contaminated  
16                  aquifers, dated May 24, 1995.

17            (1) Nothing in subsection (k) shall limit any defense to  
18            liability that may be available to a person under any other  
19            provision of law or impose any liability that is not otherwise  
20            imposed by subsection (a). The director may issue an assurance  
21            that no enforcement action under this chapter shall be initiated  
22            against a person described in paragraph (k) (1) and may grant a



1 person described in paragraph (k) (1) protection against a cost  
2 recovery or contribution action under section 128D-5."

3 SECTION 2. Section 128D-1, Hawaii Revised Statutes, is  
4 amended by adding two new definitions to be appropriately  
5 inserted and to read as follows:

6 "Developer" means a person, corporation, organization,  
7 partnership, association, or other legal entity constructing,  
8 erecting, enlarging, altering, or engaging in any new  
9 residential or commercial development activity.

10 "Exposure" means causing a person, property, or natural  
11 resource to come into contact with a hazardous substance that is  
12 present on a property in a solid, liquid, or gaseous form."

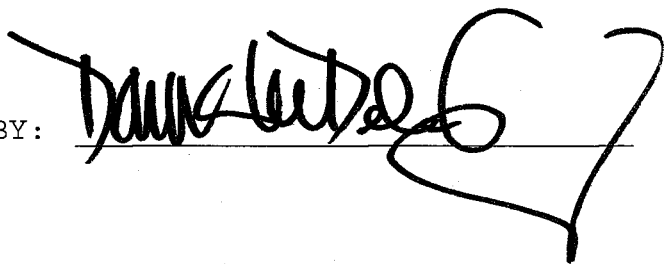
13 SECTION 3. This Act does not affect rights and duties that  
14 matured, penalties that were incurred, and proceedings that were  
15 begun before its effective date.

16 SECTION 4. New statutory material is underscored.

17 SECTION 5. This Act shall take effect on July 1, 2011.

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INTRODUCED BY:



**Report Title:**

Hazardous Substances; Developer Liability

**Description:**

Establishes criteria for, limits on, and defenses to developer liability for exposure to hazardous substances in the course of residential or commercial development activity.

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