Hawaii State Emergency Response Commission (HSERC) 919 Ala Moana Boulevard, Room 206 Honolulu, Hawaii 96814-4912

HSERC Members:

Under authority of Hawaii Revised Statutes, Chapter 128E-2(c), I hearby designate:

Name	Mariette Cooray			
Title	Environmental Health Spec IV			
Organization	Department of Labor, HIOSH			
Address	830 Punchbowl Street, Room 423			
Phone	586-9090			
Fax	586-9104			

as my representative to the HSERC for the <u>Department of Labor</u>

Organization

Sincerely,

Monibor's Signature and Date

Lorraine H. Akiba, Director

Member's Printed Name

JÖSEPH D. REED

OAHU CIVIL DI

CITY AND COUN'

650 ŞQUTH HONOLULU, PHQNE:

MARSIM MEALET	LELAND MAKAL	
CO. HEER	CO. OCPA	
Dept.	Phone# 527-5481	
Fax# 586-7577	Fax #	

JEREMY HARRIS PAYOR

October 12, 1995

Dr. Lawrence Miike, M.D., J.D. Director of Health State of Hawaii P.O. Box 3378 Honolulu, Hawaii 96801

Dear Dr. Milke:

I would like to designate Leland Nakai, who is the Coordinator for the Honolulu Local Emergency Planning Committee (LEPC), to act in my behalf when I am not available to represent the LEPC in matters before the Hawaii State Emergency Response Commission (HSERC).

This designation will ensure that the Honolulu LEPC will be adequately represented in future meetings of the HSERC.

Sincereta

Carter Davis

Chair, Honolulu Local Emergency

Planning Committee

Stephen K. Yamashiro Mayor



Jay A. Sasan Safety Coordinator

County of Hawaii

DIVISION OF INDUSTRIAL SAFETY

25 Aupuni Street • Hilo, Hawaii 96720-4252 (808) 961-8215

TO:

MAYOR STEPHEN K. YAMASHIRO

FROM:

JAY SASAN, SAFETY COORDINATOR

SUBJECT:

LOCAL EMERGENCY PLANNING COMMITTEE (LEPC) MEMBERS

DATE:

SEPTEMBER 8, 1995

Please find attached an updated LEPC Membership list. Along with a memo from Police Chief Wayne Carvalho.

Replacement listed below:

Elroy Osorio - replaces Wayne Carvalho

Upon your approval this list will be forwarded to the Hawaii State Emergency Response Commission (HSERC) for their information and approval.

APPROVAL / DISAPPROVAL

Stephen K. Yamashiro

JS/ss/590-4

cc: William Davis

Nelson Tsuji - LEPC Chairperson

Local Emergency Planning Commission (LEPC) County of Hawaii As of September 1995

IAN BIRNIE
Hawaii District Manager
Port of Hilo
Hilo, HI 96720
933-4778

CLIFTON TSUJI Central Pacific Bank Chamber of Commerce (Rep.) 180 Kincole Street Hilo, HI 96720 935-5251

BILL GREEN
PCI Chem Corp.
100 Kaiulani Street
Hilo, HI 96720
934-7014

FRANK KAMAHELE Airports District Manager Keahole Airport P.O. Box 1660 Kailua-Kona, HI 96745 329-2484

BRIAN DELIMA Hawaii County Council 25 Aupuni Street Hilo, HI 96720 961-8225 (Sue)

REPRESENTATIVE ROBERT N. HERKES 49 Painiu Place Volcano, HI 96785 1-800-468-4644 (ext. 66530) 985-8901 (R)

JAY SASAN
Safety Coordinator
Division of Industrial Safety
25 Aupuni Street
Hilo, HI 96720
961-8215

JOHN RONEY 401 Wainaku Street Hilo, HI 96720 961-6443

KEIKO BONK-ABRAMSON Hawaii County Council 25 Aupuni Street Hilo, HI 96720 961-8225 (Sue)

ROSALIND ISHISAKA
Office Manager
Department of Agriculture
75 Aupuni Street
Hilo, HI 96720
933-4361

MIKE LUCE
M. Luce Contracting Inc.
P.O. Box 1299
Kapaau, HI 96755
Kohala - 889-6829
Waimea - 885-7270
Mobile - 925-5369

STANLEY TAKAMURA District Engineer P.O. Box 4277 Hilo, HI 96720 933-4640

JUNE KUNIMOTO
District Health Service
Department of Health
P.O. Box 916
Hilo, HI 96720
933-4210

DONNA FAY K. KIYOSAKI Chief Engineer Department of Public Works 25 Aupuni Street Hilo, HI 96720 961-8321 DR. JOHN BOWEN
University of Hawaii
P.O. Box 1115
Hilo, HI 96720
959-9460 (Komohana Location)

SENATOR RICHARD MATSUURA 131 Halai Street Hilo, HI 96720 1-800-468-4644 (ext. 6690) 935-7944

HARRY KIM
Administrator
Civil Defense Agency
920 Ululani Street
Hilo, HI 96720
961-8229

YOULIN KALIMA American Red Cross Service Center Director 55 Ululani Street Hilo, HI 96720 935-8305

GALEN ENRIQUES Fire Chief KMC 470 W. Lanikaula Street Hilo, HI 96720 WAYNE AWAI Hawaii County Fire Department 466 Kinoole Street Hilo, HI 96720 961-8297

ROMEL DELA CRUZ Deputy Administrator Hilo Medical Center 1190 Waianuenue Avenue Hilo, HI 96720 969-4155

KEN MATSUZAKI
Brewer Environmental Industries
60 Kuhio Street
Hilo, HI 96720
933-7800

ED KATAHIRA
University of Hawaii at Hilo
523 W. Lanikaula Street
Hilo, HI 96720
933-3333

ELROY OSORIO Hawaii County Police Department 349 Kapiolani Street Hilo, HI 96720 961-2349 Stephen K. Yamashiro Mayor



Wayne G. Carvalho
Police Chief

James S. Correa
Deputy Police Chief

DEP 0 7 REC'D

County of Hawaii POLICE DEPARTMENT

349 Kapiolani Street • Hilo, Hawaii 96720-3998 (808) 935-3311 • Fax (808) 961-2702

August 24, 1995

95-142

TO

ALL COMMANDS

FROM

WAYNE G. CARVALHO, POLICE CHIEF

SUBJECT:

LOCAL EMERGENCY PLANNING COMMITTEE (LEPC)

HAZARDOUS MATERIALS (HAZMAT) COORDINATOR

Effective August 23, 1995, Captain Elroy Osorio, Commander of the South Hilo Patrol Division, will be the Department's HAZMAT coordinator and representative on the Local Emergency Planning Committee (LEPC).

WGC:lli

bcc: Chief Tsuji
Harry Kim
Jay Sasan
Capt. Osorio

Sierra Club 223 South King Street, Suite 400 Honolulu, Hawaii 96813 Lt. Governors Office State Capitol, 5th Floor 415 S. Beretania Street Honolulu, Hawaii 96713

(Denise Antoline)
Sierra Legal Defense Fund
212 Merchant St., Suite 202
Honolulu, Hawaii 96813

Alan L. Remick U.S. Dept. of Energy P.O. Box 808, L-575 Livermore CA, 94550

Bruce C. McClure
Chief Engineer
Department of Public Works, County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Captain Mike Compton Hawaiian Air National Guard 3949 Diamond Head Road Honolulu, Hawaii 96816

Chris Morakis Maui Pineapple Company P.O. Box 187/120 Kahului, Hawaii 96732 Chulee Grove
Honolulu Community College
Occupational Safety & Health Program
874 Dillingham Boulevard
Honolulu, Hawaii 96817

Clyde Takekuma
Department of Health
District Health Office, Kauai
3040 Umi Street
Lihue, Hawaii 96766

Eileen Yoshinaka U.S. Department of Energy P.O. Box 50168 Honolulu, Hawaii 96850

Eugene Pon, M.D. Epidemiology Branch, DoH P.O. Box 3378 Honolulu, Hawaii 96801 Gerald Kinro
Hawaii Dept. of Agriculture
1428 South King Street
Honolulu, Hawaii 96814

Helen Burke
U.S. EPA Region 9
75 Hawthorne Street (A-4-3)
San Francisco, CA 94105

John Nolan
Dept. of Wastewater Mgmt
650 South King Street, 14th Floor
Honolulu, Hawaii 96813

Kathleen N.A. Watanabe County Attorney Office of the County Attorney, Kauai 4396 Rice Street, Suite 202 Lihue, Hawaii 96766

Ronald K. Takahashi Department of Civil Defense 101 Aupuni Street, Suite 133 Hilo Lagoon Centre Hilo, Hawaii 96720

Stacy Rogers
Community College Fire Science
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Civil Defense Coordinator Honolulu Police Department 1455 South Beretania Street

Honolulu, Hawaii 96814

Refuge Project Leader U.S. Fish and Wildlife Service P.O. Box 50167 Honolulu, Hawaii 96850

(Capt. Carter Davis)
HazMat Specialist
Honolulu Fire Department
1455 S. Beretania Street
Honolulu, Hawaii 96814

(John Harrison)
University of Hawaii
Environmental Center
2550 Campus Road, Crawford 317
Honolulu, Hawaii 96822

LCDR Ken Hertzler and LCDR Ray Petow U.S. Coast Guard MSO 433 Ala Moana Blvd. Honolulu, Hawaii 96813-4909

Senator Lehua Fernandes Salling The Senate State Office Tower, Room#310 235 S. Beretania Street Honolulu, Hawaii 96813

Kauai County Councilman
County of Kauai
4396 Rice Street, Room 206
Lihue, Hawaii 96766

no minutes

Board of Water Supply 630 South Beretania Street Honolulu, Hawaii 96843

(Vice Director of Civil Defense) State Civil Defense, Department of Defense 3949 Diamond Head Rd. Honolulu, Hawaii 96816-4495

(Captain Joseph Blackburn)
Maui Representative
Maui Fire Department
200 Dairy Road
Kahului, Hawaii 96732

Alejandro Lomosad Fire Chief Kauai Fire Department 4223 Rice Street Lihue, Hawaii 96766 Arthur Suzuki
Brewer Environmental Industries, Inc.
65 Kahului Beach Road
Kahului, Hawaii 96732-1250

Capt. Carter Davis
Honolulu Representative/LEPC Chair
Honolulu Fire Department
890 Valkenburg Street
Honolulu, Hawaii 96818

Chief Calvin C. Fujita Kauai Police Department 3060 Umi Street Lihue, Hawaii 96766

David Frankel 1638A Mikahala Way Honolulu, Hawaii 96816

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COMNAVBase N452
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Dr. Bruce Anderson
Deputy Director, Environmental Health
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Honolulu, Hawaii 96801

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Edward E. Coleman
Dept. of Health & Human Services
Public Health Service
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San Francisco, CA 94102

Eugene Lee Chief Engineer's Office City & County of Honolulu, Dept. of Public Works 650 S. King Street, 11th Fl., Honolulu Municipal Bldg. Honolulu, Hawaii 96813 Gilbert S. Coloma-Agaran
Deputy to the Chairperson
Department of Land and Natural Resources, For the
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Honolulu, Hawaii 96813

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DOH, SHWB
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National Marine Fisheries Service, NOAA
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Department of Defense
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Mr. Clifford Ikeda Kauai Representative/LEPC Chair Kauai Civil Defense 4396 Rice Street, Room 107 Lihue, Hawaii 96766 Glenn R. Hamberg, MICT
Instructor/Coordinator
Kauai EMS Training Center, c/o Kauai Community
College
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Hilo, Hawaii 96720

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CRM Administrator
Commonwealth of the Northern Mariana Islands
Coastal Resources Management, Office of the Governor
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Department of the Attorney General, Regulatory Div.
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Mr. Gary Gill
Director
Environmental Quality Control Office
220 S. King Street, 4th floor
Honolulu, Hawaii 96813

Mr. James Nagatani Chairperson Board of Agriculture P.O. Box 22159 Honolulu. Hawaii 96822

Mr. Kazu Hayashida Director Dept. of Transportation 869 Punchbowl Street Honolulu, Hawaii 96813

Mr. Ralph E. Moore
Hazardous Materials Specialist
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Mr. Sean O'keefe
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Hawaiian Commercial & Sugar Company
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Patrick Fevella
State of Hawaii, Department of Transportation (Fire00)
Kahului Airport Terminal
Kahului, Hawaii 96732

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Mr. Michael D. Wilson Chairman Board of Land and Natural Resources P.O. Box 621 Honolulu, Hawaii 96809

Mr. Ralph Woolley Acting Interim Dean School of Public Health, University of Hawaii 1960 East-West Road Honolulu, Hawaii 96822

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Mr. Seiji Naya Director DBEDT P.O. Box 2359 Honolulu, Hawaii 96804

Ms. Lorraine Akiba Director Department of Labor and Industrial Relations 830 Punchbowl Street, Room 321 Honolulu, Hawaii 96813

Prema Menon Muranaka Environmental Consultants P.O. Box 4341 Honolulu, Hawaii 96812 Ralph Yoshizumi Hawaii County Fire Dept. 466 Kinoole Street Hilo, Hawaii 96720

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Dept. of Business, Economic Dev. & Tourism
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Environmental Engineer
Aliamanu Military Reservation
US Army Garrison, Hawaii Attn: APGV-GWV
Schofield Barracks, HI 96857

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MCBH Kaneohe Bay
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Charlene Richardson Environmental Protection Specialist MCBH Camp H.M. Smith Building 600, P.O. Box 64122 Camp H.M. Smith, HI 96861

David R. Anderson Environmental Engineer Pacific Missile Range Facility P.O. Box 128 (Code 7031.5) Kekaha, HI 96752

Pete Madrigal
Environmental Engineer
NAS Barbers Point
Naval Air Station
Barbers Point, HI 96862

Ralph Wakumoto Navy PWC, Waiawa Water Station Navy PWC, Code 09E Pearl Harbor, HI 96860

T. O'Callaghan
Head, Health Division
Pearl Harbor Naval Shipyard
Pearl Harbor Naval Shipyard, Code 106.1
Pearl Harbor, HI 96860

Ron Walker Fish and Wildlife Biologist U.S. Fish and Wildlife Service 300 Ala Moana Blvd., Room 5302 Honolulu, Hawaii 96850





LAWRENCE MIIKE DIRECTOR OF HEALTH

STATE OF HAWAII DEPARTMENT OF HEALTH

P.O. BOX 3378 HONOLULU, HAWAII 9680 I

IN REPLY, PLEASE REFER TO: HEER OFFICE

HAWAII STATE EMERGENCY RESPONSE COMMISSION MEETING #22

Wednesday, November 15, 1995 from 9:00 p.m. to 12:00 p.m.

Department of Health 919 Ala Moana Boulevard, 5th Floor Conference Room Honolulu, Hawaii 96814

AGENDA

9:00	Call To Order Opening Remarks Discussion/Approval of Minutes from Meeting #21	Bruce Anderson, Deputy Director for Environmental Health	
9:15	Video From the August Full Scale Exercise	Mike Ardito, USEPA Region IX Carter Davis	
	Sub Committee Comments	Carter Davis	
9:30	Legislation, Policy and Funding	Steve Armann, HEER Office Manager	
9:40	Business, Industry and Information Management	Carter Davis, Honolulu Fire Department	
9:50	Planning, Exercise and Training	Roy Price, State Civil Defense	
10:00	Overview of 128D Rule	Steve Armann	
	LEPC Updates & Nomination of New Members		
10:30	Hawaii	Jay Sasan, Industrial Safety	
10:40	Kauai	Clifford Ikeda, Kauai Civil Defense	
10:50	Maui	Joseph Blackburn, Maui Fire Dept.	
11:00	Oahu	Carter Davis	
11:10	NGA State Emergency Response Commission Conf.	Marsha Mealey, HEPCRA Coor.	
11:15	EPA Updates - Due to Federal Government Furlough	Mike Ardito	
11:45	Other Business	Bruce Anderson	
11:55	Schedule Next HSERC meeting		

PUBLIC SAFETY AND INTERNAL SECURITY 128D-1

CHAPTER 128D **ENVIRONMENTAL RESPONSE LAW**

SECTION

- 128D-1 DEFINITIONS
 - 128D-2 ENVIRONMENTAL RESPONSE REVOLVING FUND
 - 128D-3 REPORTABLE QUANTITIES; DUTY TO REPORT
 - 128D-4 STATE RESPONSE AUTHORITIES; USES OF FUND
 - 128D-5 RECOVERY OF COSTS
 - 128D-6 LIABILITY
 - 128D-7 STATE CONTINGENCY PLAN; RULES
 - 128D-8 CIVIL PENALTIES
 - 128D-9 INJUNCTIVE RELIEF
 - 128D-10 KNOWING RELEASES
 - 128D-11 RECORDIKEEPING REQUIREMENTS
 - 128D-12 CONFIDENTIALITY OF INFORMATION
 - 128D-13 REPORTING REQUIREMENTS
 - 128D-14 PUBLIC PARTICIPATION
 - 128D-15 EMPLOYEE PROTECTION
 - 128D-16 REPEALED
 - 128D-17 JUDICIAL REVIEW
 - 128D-18 APPORTIONMENT AND CONTRIBUTION
 - 128D-19 ADMINISTRATIVE REVIEW OF ORDERS
 - 128D-20 DE MINIMIS SETTLEMENTS
 - 128D-21 CITIZEN'S SUITS
 - 128D-22 Exemption from duplicative regulation
 - 128D-23 EXEMPTION FROM STATE AND COUNTY PERMITS

Chapter title amended by L 1990, c 298, pt of §18.

Law Journals and Reviews

Liability Insurance Coverage for Pollution Claims. 12 UH L. Rev. 83. An Analysis of Hawaii's Superfund Bill, 1990. 13 UH L. Rev. 301.

§128D-1 Definitions. As used in this chapter, unless the context otherwise requires:

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510 (42 U.S.C. §§9601-9675), as amended.

"Clean Water Act" means the Federal Water Pollution Control Act of 1972, P.L. 92-500 (33 U.S.C. §§1251-1387), as amended.

- "Contractual relationship" means relationships involving land contracts, deeds or other instruments transferring title or possession.
 - "Department" means the department of health.
 - "Director" means the director of health.
- "Environment" means any waters, including surface water, ground water, or drinking water supply, any land surface or any subsurface strata, or any ambient air within the State of Hawaii or under the jurisdiction of the State.
- "Facility" means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance or pollutant or contaminant has been deposited, stored, disposed of, or placed, or otherwise comes to be located; but does not include any consumer product in consumer use.

"Federal on-scene coordinator" means the federal official predesignated by the United States Environmental Protection Agency or the United States Coast Guard to coordinate and direct federal responses under subpart D, or the official designated by the lead agency to coordinate and direct removal under subpart E, of the National Contingency Plan.

"Fund" means the environmental response revolving fund.

"Hazardous substance" includes any substance designated pursuant to section 311(b)(2)(A) of the Clean Water Act; any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA; any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act; any toxic pollutant listed under section 307(a) of the Clean Water Act; any hazardous air pollutant listed under section 112 of the Clean Air Act, as amended (42 U.S.C. §§7401-7626); any imminently hazardous chemical substance or mixture regulated under section 7 of the Toxic Substances Control Act, as amended (15 U.S.C. §§2601-2671), oil, trichloropropane, and any other substance or pollutant or contaminant designated by rules adopted pursuant to this chapter.

In adopting rules, the director shall consider any substance or mixture of substances, including but not limited to feedstock materials, products, or wastes, which, because of their quantity, concentration, or physical, chemical, or infectious

characteristics, may:

(1) Cause or significantly contribute to an increase in serious irreversible or incapacitating reversible illness; or

(2) Pose a substantial present or potential hazard to human health, to property, or to the environment when improperly stored, transported, released, or otherwise managed.

"National contingency plan" means the national contingency plan published under section 311(c) of the Clean Water Act or revised pursuant to section 105 of CERCLA.

"Natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Hawaii, any county, or by the United States to the extent that the latter are subject to state law.

"Oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes, crude oil or any fraction

or residue.

"Owner" or "operator" means (1) in the case of a vessel, any person owning, operating, or chartering by demise the vessel, (2) in the case of an onshore facility or an offshore facility, any person owning or operating the facility, and (3) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of a state or local government, any person who owned, operated, or otherwise controlled activities at the facility immediately beforehand. "Owner" or "operator" does not include a person or financial institution who holds or held a lien, encumbrance, security interest, or loan agreement that attaches or is attached to the facility, vessel, or real property; provided that the person or financial institution makes or made no decision or takes or took no action that causes or caused or contributes or contributed to a release or threatened release of a hazardous substance from or at a facility, vessel, or real property.

"Person" means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, county, commission, political subdivision of the State, or, to the extent they are subject to this chapter, the United

States or any interstate body.

"Pollutant or contaminant" means any element, substance, compound, or mixture, which after release into the environment and upon exposure, ingestion,



128D-1 PUBLIC SAFETY AND INTERNAL SECURITY

inhalation, or assimilation into any organism either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance or pollutant or contaminant into the environment, (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant); but excludes:

(1) Any release which results in exposure of persons solely within a workplace, with respect to a claim which such exposed persons may assert against their employer;

(2) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

(3) Release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 (42 U.S.C. §2011), if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under 42 U.S.C. §2210;

(4) Any release resulting from the normal application of fertilizer;

(5) Any release resulting from the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act;

(6) Releases from sewerage systems collecting and conducting primarily domestic wastewater; or

(7) Any release permitted by any federal, state, or county permit or other legal authority.

"Remedy" or "remedial action" means those actions consistent with permanent correction taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance or pollutant or contaminant into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

- (1) The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or pollutants or contaminants or associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health or welfare or the environment.
- The term includes the costs of permanent relocation of residents and businesses and community facilities where the director determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances or pollutants or contaminants, or may otherwise be necessary to protect the public health or welfare.

(3) The term does not include the offsite transport of hazardous substances or pollutants or contaminants, or the storage, treatment, destruction, or

secure disposition offsite of such hazardous substances or pollutants or contaminants or contaminated materials unless the director determines that such actions: are more cost-effective than other remedial actions; will create new capacity to manage hazardous substances in addition to those located at the affected facility; or are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such hazardous substances or pollutants or contaminants.

"Remove" or "removal action" means the cleanup of released hazardous substances or pollutants or contaminants from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances or pollutants or contaminants into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances or pollutants or contaminants, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, and any emergency assistance.

"Respond" or "response" means remove, removal, remedy, or remedial action; and all such terms include government enforcement activities related thereto.

"SARA" means the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

"State on-scene coordinator" means the state official designated by the department of health to coordinate and direct responses under this chapter.

"Vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §2; am L 1993, c 324, §1]

§128D-2 Environmental response revolving fund. (a) There is created within the state treasury an environmental response revolving fund, which shall consist of moneys appropriated to the fund by the legislature, moneys paid to the fund as a result of departmental compliance proceedings, moneys paid to the fund pursuant to court-ordered awards or judgments, moneys paid to the fund in courtapproved or out-of-court settlements, all interest attributable to investment of money deposited in the fund, moneys generated by the environmental response tax established in section 243-3.5, and moneys allotted to the fund from other sources; provided that when the total balance of the fund exceeds \$7,000,000, the department of health shall notify the department of taxation of this fact in writing within ten days. The department of taxation then shall notify all distributors liable for collecting the tax imposed by section 243-3.5 of this fact in writing, and the imposition of the tax shall be discontinued beginning the first day of the second month following the month in which notice is given to the department of taxation. If the total balance of the fund thereafter declines to less than \$3,000,000, the department of health shall notify the department of taxation which then shall notify all distributors liable for collecting the tax imposed by section 243-3.5 of this fact in writing, and the imposition of the tax shall be reinstated beginning the first day of the second month following the month in which notice is given to the department of taxation.

(b) Moneys from the fund shall be expended by the department for response actions, including removal and remedial actions, consistent with this chapter;

provided that the revenues generated by the "environmental response tax" and deposited into the environmental response revolving fund:

- (1) Shall be used:
 - (A) For oil spill planning, prevention, preparedness, education, research, training, removal, and remediation; and
 - (B) For direct support for county used oil recycling programs; and
- (2) May also be used to address concerns related to underground storage tanks, including support for the underground storage tank program of the department and funding for the acquisition by the State of a soil remediation site and facility. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 157, §8 and c 280, §3; am L 1992, c 259, §2; am L 1993, c 300, §4]
- \$128D-3 Reportable quantities; duty to report. (a) The director shall adopt rules pursuant to chapter 91 establishing the quantities of designated hazardous substances, and specifying the periods of time within which such quantities, when released, are reportable pursuant to this chapter. The director, at a minimum, shall adopt hazardous substances and reportable quantities as designated by the United States Environmental Protection Agency pursuant to parts 117 and 302 of Title 40 of the Code of Federal Regulations, and by the United States Department of Transportation pursuant to parts 171 and 172 of Title 49 of the Code of Federal Regulations. The designated quantity released of any hazardous substance shall be a reportable quantity, regardless of the medium into which the hazardous substance is released.
- (b) Any person in charge of a vessel or an offshore or onshore facility shall immediately notify the department as soon as the person has any knowledge of any release (other than a federal or state permitted release) of a hazardous substance from the vessel or facility in quantities equal to or greater than those determined pursuant to section 102 of CERCLA or rules adopted pursuant to this chapter. Releases which occurred prior to July 1, 1990, are excluded from this requirement. Unless the director requires otherwise by rule, the regulations adopted under section 103(b) of CERCLA shall apply to the implementation of this section.
- (c) Any person who fails to report a hazardous substance release to the department immediately upon knowledge of the release shall be subject to a civil penalty in an amount not to exceed \$10,000 for each day of failure to report or subject to prosecution for a criminal misdemeanor. Notification received by the department pursuant to this section or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for a prosecution for perjury or for giving a false statement; or a violation of section 128D-10. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §4]
- \$128D-4 State response authorities; uses of fund. (a) Whenever any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of such release into the environment of any pollutant or contaminant that may present a substantial danger to the public health, welfare, or the environment, the director is authorized to act, consistent with the state contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time, including its removal from any contaminated natural resources, or take any other response measure consistent with the state contingency

plan which the director deems necessary to protect the public health or welfare or the environment. The director may:

- (1) Issue an administrative order or conduct any other enforcement or compliance activities necessary to compel any known responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment;
- (2) Upon determining that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance, issue without a hearing, such orders as may be necessary to protect the public health, welfare, and the environment:
- (3) Solicit the cooperation of responsible parties prior to issuing an order to encourage voluntary cleanup efforts; and, if necessary, negotiate enforcement agreements with responsible parties to conduct needed response actions according to deadlines established in compliance orders or settlement agreements;
- (4) Undertake those investigations, monitoring, surveys, testing, sampling, and other information gathering necessary to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved and the extent of danger to the public health or welfare or to the environment;
- (5) Perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment; and
- (6) Contract the services of appropriate organizations to perform the actions set forth in paragraphs (1), (2), (3), (4), and (5).
- (b) For the purposes of determining or investigating an actual release or a suspected release, or choosing or taking any response action, or conducting any study, or enforcing this chapter, any person who has or may have information relevant to any of the following, upon the reasonable and necessary request of any duly authorized representative of the department, shall furnish information or documents in the person's possession relating to such matter:
 - (1) The identification, nature, and quantity of hazardous substances or pollutants or contaminants which have been or are generated, treated, or stored or disposed of at a facility or vessel or transported to a facility or vessel.
 - (2) The nature and extent of a release or threatened release of a hazardous substance or pollutant or contaminant from a facility or vessel.
 - (3) Information relating to the ability of a person to pay for or perform the cleanup.

In addition, upon reasonable notice, such person shall grant any such authorized representative of the department access at all reasonable times to any facility, vessel, establishment, site, place, property, or location to inspect same and to review and copy all documents or records relating to such matters or shall copy and furnish the officer, employee, or representative of the department all such documents or records, at the option and expense of such person.

- (c) Moneys in the fund may be expended by the director for any of the following purposes:
 - (1) Payment of all costs of removal or remedial actions incurred by the State or the counties in response to a release or threatened release of a hazardous substance or pollutant or contaminant; or
 - (2) Payment for the State's share of a removal or remedial action pursuant to section 104(c)(3) of CERCLA;

- (3) Payment of all costs incurred by the State in the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance or pollutant or contaminant;
- (4) Payment of all costs of response action for a release due to the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act; or
- (5) Payment of all costs or remedial action for any release permitted by any federal, state or local permit or other legal authority.
- (d) No response actions taken pursuant to this chapter by the department shall duplicate federal response actions. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §5]
- §128D-5 Recovery of costs. (a) Except for costs incurred in responding to a release or threatened release of any pollutant or contaminant and except for costs incurred in accordance with section 128D-4(c)(4), and (5), and except for costs incurred in accordance with section 128D-4(c)(3) for natural resources damage occurring wholly prior to July 1990, any costs incurred and payable from the fund shall be recovered by the attorney general, upon the request of the department, from the liable person or persons. The amount of any costs which may be recovered pursuant to this section for a remedial or removal action paid from the fund shall include the amount paid from the fund and legal interest.
- (b) Moneys recovered by the attorney general pursuant to this section shall be deposited into the account of the fund.
- (c) Any action for recovery of response costs referred to in section 128D-6(a)(4)(A) and (C) must be commenced within six years after the date of completion of all response actions.
- (d) Any action for recovery of natural resource damages referred to in section 128D-6(a)(4)(B) must be commenced within three years after the later of the following: (1) the date of the discovery of the loss and its connection with the release in question; or (2) the date on which the final regulations are promulgated under section 301(c) of CERCLA. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §6]
- §128D-6 Liability. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (c):
 - (1) The owner or operator or both of a facility or vessel;
 - (2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
 - (3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or on any vessel owned or operated by another party or entity and containing such hazardous substances; and
 - (4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release, which causes the incurrence of response costs of a hazardous substance:

shall be strictly liable for (A) all costs of removal or remedial actions incurred by the State or any other person; to the extent such costs and actions are consistent with this

chapter, the state contingency plan, and any other state rules; (B) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and (C) the costs of any health assessment or health effects study carried out consistent with this chapter, the state contingency plan, or any other state rules.

- (b) The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (C). Such interest shall accrue from the later of (1) the date payment of a specified amount is demanded in writing, or (2) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the State's fund.
- (c) There shall be no liability under subsection (a) for a defendant otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
 - (1) Any unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effect of which could not have been prevented or avoided by the exercise of due care or foresight;
 - (2) An act of war;
 - (3) An act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes by a preponderance of the evidence that the defendant exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and the defendant took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
 - (4) Any combination of the foregoing paragraphs.
- (d) A defendant may also avoid liability under subsection (a) where the defendant is able to establish that the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility. In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 128D-6(c)(3) and one or more of the following circumstances described in paragraphs (1), (2), or (3) is also established by the defendant by a preponderance of the evidence:
 - At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed on, in, or at the facility;
 - (2) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or
 - (3) The defendant acquired the facility by inheritance or bequest.

To establish that the defendant had no reason to know, as provided in paragraph (1), the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good

commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

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

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

- (e) No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law, to any government or private parties for costs, damages, or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in compliance with this chapter, the National Contingency Plan, or at the direction of a federal or state on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person.
- (f) No county or local government shall be liable under this chapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance or pollutant or contaminant generated by or from a facility owned by another person. This subsection shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the county or local government.
- (g) No indemnification, hold harmless, or similar agreement or conveyances shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person, the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section. Nothing in this chapter shall bar a cause of action that an owner or operator or any person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.
- (h) In the case of an injury to, destruction of, or loss of natural resources under section 128D-6(a)(4)(B), liability shall be solely to the State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to the State. The natural resource trustee for the State shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the natural resource trustee under section 128D-6(a)(4)(B) shall not be limited by the sums which can be used to restore or replace such resources. Any damages recovered by the state attorney general for damages to natural resources

shall be deposited in the fund and credited to a special account for the purposes provided above.

- (i) Provided that no liability shall be imposed under this chapter, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resources. Notwithstanding any other provision of this chapter, there shall be no recovery under this chapter for natural resource damages where such damages have occurred wholly before July 1, 1990.
- (j) No person other than a government entity may recover costs or damages under this chapter arising from a release which occurred before July 1, 1990. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §7; am L 1993, c 324, §2]
- §128D-7 State contingency plan; rules. (a) The department shall adopt, by rules, and from time to time update a Hawaii state contingency plan which, as nearly as the department deems appropriate and practicable, shall comport with and complement the National Contingency Plan prepared under the authority of the Clean Water. Act and CERCLA. The state contingency plan shall include methods and criteria for evaluating the degree of hazard present at a site with releases of hazardous substances or pollutants or contaminants, including whether the site poses an imminent or substantial hazard, and whether it is a priority site, and whether response actions are feasible and effective. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans.
- (b) The department shall adopt, by rules, the criteria for the selection and for the priority ranking of sites pursuant to subsection (c) for removal and remedial action under this chapter, and shall adopt criteria for the ranking of sites in order of priority. The criteria shall take into account the pertinent factors relating to the public health and the environment, which shall include, but are not limited to, potential hazards to public health and the environment, the risk of fire or explosion, toxic hazards, the extent to which the deferral of remedial action will result, or is likely to result, in a rapid increase in cost or in a hazard to human health and the environment. The criteria may include a minimum hazard threshold below which sites shall not be listed pursuant to this section.
- (c) The department shall publish and revise, at least annually, a listing of the sites subject to this chapter and any de minimis settlements made under this chapter. The sites shall be categorized and placed on one of the following lists:
 - (1) A list of the sites with releases of hazardous substances for which the department has identified a responsible party, and the responsible party is in compliance, as determined by the department, with an order issued, or an enforceable agreement entered into.
 - (2) A list of the sites with releases of hazardous substances for which all of the following apply:
 - (A) The department has not been able to identify a responsible party or the responsible party is not in compliance, as determined by the

- department, with an order issued or an enforceable agreement entered into;
- (B) The nature and extent of the release of hazardous substances at the site have not been adequately characterized by the responsible party or the department.
- (d) Funds appropriated to the department for response actions shall be expended in conformance with the priority ranking of sites, as established on the list of sites specified in subsection (c), except that funds appropriated for removal action may be expended without conforming to the priority ranking if any of the following apply:
 - (1) The funds are necessary to monitor removal actions conducted by private parties at sites listed pursuant to subsection (c)(1);
 - (2) State funds are necessary for the State's share of a removal or remedial action pursuant to section 104(c)(3) of CERCLA:
 - (3) The funds are used to assess, evaluate, and characterize the nature and extent of a release of hazardous substances or pollutants or contaminants at sites listed pursuant to this section; or
 - (4) The director determines that immediate removal action at a facility or site is necessary because there may be an imminent and substantial endangerment to the public health or welfare or the environment.
- (e) The criminal penalties set forth in sections 128D-3 and 128D-10 shall not take effect until the state contingency plan has been adopted. Until the state contingency plan is adopted, the National Contingency Plan, as it exists on the effective date of this chapter, will be considered to be the state contingency plan for purposes of enforcing the remaining sections of this chapter.
- (f) The department may adopt such rules, as it deems necessary for the implementation, administration, and enforcement of this chapter, CERCLA, the Clean Water Act, and other pertinent laws. [L 1988, c 148, pt of §2; am L 1990, c 298, pt of §18; am L 1991, c 280, §8]

Note

Effective date of L 1991, c 280 is June 17, 1991.

- \$128D-8 Civil penalties. (a) Any person who is liable for a release, or threat of a release, of hazardous substances, and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an administrative order issued by the director, may be liable to the department for punitive damages up to three times the amount of any costs incurred by the fund pursuant to this chapter as a result of the failure to perform the actions specified in the order. The director is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 128D-5.
- (b) In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release or a threat of a release of hazardous substances, any person who wilfully, knowingly, or recklessly violates or fails or refuses to comply with any provision of this chapter, or any order issued, or rule adopted under this chapter, shall be subject to a civil penalty not to exceed \$50,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The director is authorized to commence a civil action in the appropriate circuit court to recover such penalties.
- (c) Any rule issued pursuant to this chapter shall be adopted in accordance with chapter 91.

- (d) Civil penalties collected under this chapter shall be paid to the department for deposit into the revolving fund and may be recovered in a civil action in a court of competent jurisdiction where the violation is alleged to have occurred.
- (e) In determining the amount of any civil penalty assessed pursuant to this section, the court shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit of savings, if any, resulting from the violation, and such other matters as justice may require. The director may compromise and settle any claim for a penalty pursuant to this chapter. [L 1990, c 298, pt of §17; am L 1991, c 280, §§9, 10]
- [§128D-9] Injunctive relief. The director may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent any violation of this chapter, of any rule adopted pursuant to this chapter, or of any order issued pursuant to this chapter. The court shall grant relief in accordance with the Hawaii rules of civil procedure. [L 1990, c 298, pt of §17]
- \$128D-10 Knowing releases. Any person who knowingly releases a hazardous substance into the environment in an amount above the reportable quantity established in the rules (other than a permitted release pursuant to and in accord with a federal, state, or county permit), shall be subject to prosecution for a class C felony or shall be punished by a civil penalty of not more than \$100,000 per day of violation. [L 1990, c 298, pt of §17; am L 1991, c 280, §11]
- §128D-11 Recordkeeping requirements. No person, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any investigative action or request made under this chapter, or any enforcement action taken under this chapter, shall remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any record, report, or information that is the subject of or who has reason to believe that they may be the subject of any investigative action or request under section 128D-4(a) and (b). [L 1990, c 298, pt of §17; am L 1991, c 280, §12]

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- §128D-12 Confidentiality of information. (a) Any record, report, or information obtained from any persons under section 128D-4(a) and (b) shall be available to the public, except as provided in subsection (b).
- (b) Upon a showing satisfactory to the department that public disclosure of records, reports, or information, or a particular part thereof, obtained by the department, its personnel or contractors pursuant to this chapter, would divulge commercial or financial information entitled to protection under state or federal law, the department shall consider such information to be confidential and not a public record open to disclosure.
- (c) No records, reports, or information for which confidentiality is claimed by the person from whom they are obtained shall be disclosed until such person has received reasonable notice under the procedures set forth in 40 Code of Federal Regulations Part 2, Section 2.201 et seq. and has had the opportunity to demonstrate why these should not be disclosed, including a reasonable opportunity to obtain judicial relief. In any such proceeding, confidentiality shall be accorded to any documents which satisfy the criteria set forth in 40 Code of Federal Regulations Part 2 or any rules adopted by the department.
- (d) No confidential information, obtained pursuant to this chapter by any official or employee of the department within the scope and cause of this official's or

employee's employment in the prevention, control, or cleanup of releases of hazard-ous substances or pollutants or contaminants into the environment, shall be disclosed by the official or employee with the following exception: the document or information may be disclosed to officers, employees, or authorized representatives of the State or of the United States, including local government entities, who have been charged with carrying out this chapter, including a cost recovery or an enforcement action, or to comply with any state law, CERCLA, or the Clean Water Act, or when relevant in any proceeding under this chapter. Persons receiving information pursuant to this subsection shall maintain the confidentiality of the information which is provided in this section to the maximum extent allowed by law. [L 1990, c 298, pt of §17; am L 1991, c 280, §13]

- [§128D-13] Reporting requirements. The department shall submit to the legislature an annual report, including a comprehensive budget to implement remedial action plans requiring funding by the environmental response revolving fund. This report shall identify those sites eligible for remedial action under CERCLA, including a statement as to any appropriation that may be necessary to pay the State's share of the plan. [L 1990, c 298, pt of §17]
- [§128D-14] Public participation. Public participation activities may be implemented by the department and required of responsible parties, in accordance with the state contingency plan, or any other state rule. [L 1990, c 298, pt of §17]
- §128D-15 Employee protection. No person shall terminate from employment or in any other way discriminate against, or cause to be eliminated from employment or discriminated against, any person on the grounds that the person has provided information to the State, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter, or has refused to act because of the good faith belief that one would be acting in violation of this chapter. No criminal penalty shall be imposed under this chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority. [L 1990, c 298, pt of §17; am L 1991, c 280, §14]

§128D-16 REPEALED. L 1991, c 280, §16.

- §128D-17 Judicial review. (a) Any person who receives and complies with the terms of any order issued under this chapter may bring and maintain an action in the circuit court to review the order as provided for in this section, prior to the completion of all action required in this order, provided that the person shall not seek any form of injunctive relief and at all times is in compliance with the order.
- (b) The director's order may be issued without a hearing and shall be supported by an administrative record consisting of the documents and other papers and materials considered by the director in issuing the order. The order shall be effective immediately unless it provides otherwise. The person receiving the order may supplement the administrative record with other documents, writings, or material within thirty days after receipt of the order. In the sole discretion of the director, the administrative record may be supplemented further by a proceeding in which testimony and other evidence may be received. A person aggrieved by the order who is and continues to be in compliance with the order may petition the circuit court for an expedited review of the order after service of a certified copy of the

order. The review by the court shall be confined to the administrative record. The court shall, upon request by any party, hear oral arguments and receive written briefs. Discovery shall not be permitted. The court shall affirm the order or, if it finds that the order is arbitrary and capricious, it shall reverse or modify the order. The court's order in any expedited review shall be without prejudice to any party in any other proceeding.

- (c) In an expedited review of the director's order concerning the determination that the aggrieved party is subject to liability under this chapter, the court shall affirm the order unless it is clearly shown to be arbitrary and capricious.
- (d) If the court reverses the director's determination that the objecting party is subject to liability under this chapter, the court shall vacate the order of the director in its entirety and award the objecting party reimbursement from the fund, or if sufficient funds are not available, then from the State, of all costs incurred in complying with the order, which may include the party's reasonable attorney's fees.
- (e) In reviewing a director's order under this section, the court shall uphold the director's decision on technical issues, including the nature and scope of the action ordered, unless the objecting party demonstrates, based on the administrative record, that the decision is arbitrary and capricious.
- (f) If the court finds that the director's order is arbitrary and capricious under subsection (e), the court shall issue findings of fact and conclusions of law sufficient to advise the parties of the deficiencies in the order. The court shall thereafter allow the contesting parties a thirty-day period following the entry of its findings of fact and conclusions of law to agree to mutually acceptable technical modifications to the challenged order. However, if the contesting parties are unable to reach agreement within the thirty-day period, then the parties shall notify the court and each party shall select a technical panel member in accordance with subsection (g) at the conclusion of the thirty-day period. The court shall order that the outstanding issues be submitted to a technical panel for binding resolution of the issues identified by the court in a manner consistent with the court's findings and conclusions, and the state contingency plan.
- (g) The technical panel shall consist of three members, each of whom shall have expertise in engineering, or expertise in the physical, chemical, biological, or health sciences.
- (h) A majority of the technical panel members shall determine an appropriate resolution to the technical issues identified by the court in the period of time the court orders. The technical panel members shall be selected as follows:
 - (1) One member shall be selected by the director;
 - (2) One member shall be selected by the objecting party, or a majority of the objecting parties challenging the order; and
 - (3) The foregoing two members shall select the third member of the panel within thirty days of their selection.
- (i) After making a decision that resolves the technical issues, the technical panel shall submit its final decision to the court. The court shall vacate the order found arbitrary and capricious and enter an order adopting the decision submitted by the technical panel unless the court finds that:
 - (1) The decision is not consistent with the court's findings of fact and conclusions of law and the state contingency plan;
 - (2) The decision was procured by corruption, fraud, or undue means;
 - (3) There was evident partiality or corruption in the panel, or any of the members:
 - (4) The panel was guilty of misconduct by which the rights of any party have been prejudiced; or

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- (5) The panel exceeded its powers or so imperfectly executed them that a mutual, final, and definite decision upon the subject matter submitted was not made.
- (j) Any action for concurrent review under this section shall have priority on the civil trial calendar of the circuit court.
- (k) The petitioner, in any action pursuant to section 128D-19, may seek judicial review of any partial or complete denial of the petition. The review shall be conducted pursuant to section 91-14. In addition to any other relief that may be awarded, the court may award to the petitioner reimbursement from the fund, or if there are insufficient funds then from the State, which may include appropriate costs, fees, and other expenses, including reasonable attorney's fees.
- (1) In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had the errors not been committed. [L 1990, c 298, pt of §17; am L 1991, c 280, §15]
- [§128D-18] Apportionment and contribution. (a) Liability to the State for any costs or expenditures under this chapter shall be joint and several. Wholly apart from such liability to the State, as between parties who are liable under this chapter, there shall be the rights of apportionment and contribution as provided in this section.
- (b) Any party found liable for any costs or expenditures may institute an action for apportionment under this section at any time after receiving an order or after costs or expenditures are incurred by the liable party. Any party found liable for any costs or expenditures may join any other parties that may be liable under section 128D-6 in an action for apportionment.
- (c) Any action for apportionment under this section shall be without prejudice to any other action that may be brought by an objecting party under this chapter.
- (d) Any party who has incurred removal or remedial action costs in accordance with this chapter may seek contribution or indemnity from any person who is liable pursuant to this chapter. An action to enforce a claim for indemnity or contribution may be brought by any defendant in an action brought pursuant to this chapter or in a separate action after the party seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter. In resolving claims for indemnity or contribution, the court may allocate costs among liable parties using those equitable principles which are appropriate.
- (e) Any party who receives compensation for response costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same response costs or damages or claims pursuant to any other state or federal law. Any party who receives compensation for response costs or damages or claims pursuant to any other state or federal law shall be precluded from receiving compensation for the same response costs of damages or claims as provided in this chapter.
- (f) Any party found liable for any costs or expenditures under this chapter except under section 128D-5, who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion. All recoverable costs or expenditures shall be allocated by the court. If any share of the response costs is not paid by a liable party because of insolvency or otherwise, that share shall be assigned to an orphan share. If there is an orphan share, the court shall adjust the allocations of

the remaining liable parties so that in addition to paying their allocated shares, they proportionately pay the entire orphan share.

- (g) In the process of apportionment of costs among the parties found liable and the establishment of the orphan share, the court shall consider the following criteria:
 - (1) The volume of hazardous substances transported to the site by each party. For purposes of determining volume, the volume of each transport of a hazardous substance shall be allocated between the arranger for the transport and the transporter of a hazardous substance in apportioning a percentage share of response costs;

(2) The anticipated impact of the hazardous substance and control of the hazardous substance on the cost of response activity at the site;

- (3) The degree of care exercised in the disposal or treatment, or both of the hazardous substance by each party that may be liable under section 128D-6:
- (4) The manner in which the site was operated and the degree of care exercised by the owner or operator;

(5) The degree of a party's involvement in site operations;

- (6) Whether all applicable permits and licenses required by law were obtained and complied with;
- (7) The degree to which the party cooperated with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release; and
- (8) Any other aggravating or mitigating factor that the court determines to be relevant.
- (h) If the court finds the evidence insufficient to establish each party's portion of the costs or expenditures under subsection (f), the court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the parties.
- (i) Any costs or expenditures required by this chapter made by a liable party shall be credited toward the party's apportioned share. Costs shall include reasonable attorney's fees. [L 1991, c 280, pt of §1]
- [§128D-19] Administrative review of orders. (a) Any person who receives and complies with the terms of any order issued under this chapter, within sixty days after completion of the required order, may petition the director to appoint a hearings officer for review of the order and for reimbursement from the fund or the State for the reasonable costs of complying with the order, including interest.
- (b) Within thirty days of receipt of the petition, the hearings officer shall commence a contested case hearing in compliance with chapter 91, and, within thirty days of the completion of the hearing, grant in whole or in part, or deny the petition.
- (c) In the contested case hearing, in order to obtain reimbursement, the petitioner shall establish by clear and convincing evidence that the petitioner is not liable under this chapter and that the costs for which the petitioner seeks reimbursement are reasonable in light of the action required by the order.
- (d) A petitioner who is liable under this chapter may recover the petitioner's reasonable costs of compliance with the order from the fund, or, if there are not sufficient moneys in the fund to satisfy the claims, then from the State, to the extent that the petitioner can demonstrate, on the administrative record, that the director's decision in selecting the action ordered was arbitrary and capricious or was otherwise not in accordance with the law. Reimbursement awarded under this subsection shall include all costs incurred by the petitioner pursuant to the order. If only a

portion of the order is found to be arbitrary and capricious or otherwise not in accordance with law, reimbursement awarded under this paragraph shall include all costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with the law.

(e) Reimbursement awarded under subsections (c) and (d) may include appropriate costs, fees, and other expenses, including reasonable attorney's fees. [L

1991, c 280, pt of §1]

[§128D-20] De minimis settlements. (a) Whenever practicable and in the public interest, the director, in consultation with the attorney general, as promptly as possible, shall reach a final settlement with a potentially responsible party in any administrative or civil action brought under this chapter, provided that the settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the director, the conditions in either paragraph (1) or (2) are met:

(1) Both the amount of the hazardous substances contributed by that party to the facility and the toxic or other hazardous effects of the substances contributed by that party to the facility are minimal in comparison to other

hazardous substances at the facility; or

(2) The potentially responsible party is the owner of the real property on or in which the facility is located, and did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subsection shall not apply if the potentially responsible party purchases the real property with actual or constructive knowledge that the property was used for the

generation, storage, treatment, or disposal of any hazardous substance.

(b) The director may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this section unless such a covenant would be inconsistent with the public interest.

(c) The director shall reach any such settlement or grant such covenant not to sue as soon as possible after the director has available the information necessary to

reach such a settlement or grant such a covenant.

(d) A settlement under this section shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. Any state court with jurisdiction may enforce any such consent decree or administrative order.

(e) A party who has resolved its liability to the State under this section shall not be liable for claims for contribution or indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(f) Nothing in this section shall be construed to affect the authority of the director to reach settlements with other potentially responsible parties. [L 1991, c

280, pt of §1]

[§128D-21] Citizen's suits. (a) Except as provided in subsections (c) and (d) and in section 128D-17, any person may commence a civil action in the circuit court on the person's own behalf against:

 Any person, including the State and any other governmental instrumentality or agency, who is alleged to be in violation of any rule, requirement, or order that has become effective pursuant to this chapter;

OF

- (2) The director, where there is alleged a failure of the director to perform any act or duty under this chapter, that is not discretionary with the director.
- (b) The circuit court shall have jurisdiction in actions brought under subsection (a)(1) to enforce the rule, requirement, or order concerned, to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The circuit court shall have jurisdiction in actions brought under subsection (a)(2) to order the director to perform the act or duty concerned.
 - (c) The following shall apply to actions brought pursuant to subsection (a)(1):
 - (1) No action may be commenced before sixty days after the plaintiff has given notice in accordance with rules adopted under chapter 91 of the violation to:
 - (A) The director; and
 - (B) Any alleged violator of the rule, requirement, or order concerned; and
 - (2) No action may be commenced if the director has issued a notice letter to the violator concerning the violation or has undertaken a response action, including investigation, with respect to the violation.
- (d) No action may be commenced under subsection (a)(2) before the sixtieth day following the date on which the plaintiff gives notice to the director that the plaintiff will commence the action. Notice under this subsection shall be given in such manner as the director shall adopt by rule.
- (e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.
- (f) The State, if not a party to any action under this section, may intervene as a matter of right.
- (g) This chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in section 128D-17.
- (h) No action shall be brought under this section for two years following June 17, 1991. [L 1991, c 280, pt of §1]

Revision Note

"June 17, 1991" substituted for "the effective date of this Act".

- [§128D-22] Exemption from duplicative regulation. When there has been a response to a release pursuant to an order issued under federal law, the director may use this chapter to address the same release provided that:
 - (1) The release creates an imminent and substantial harm to the public health or welfare; and
 - (2) The federal law has not provided a remedy consistent with the state contingency plan.

In those circumstances, the director shall avoid actions in conflict with federal law. A single release may be addressed either by CERCLA or by this chapter, but not both, except in the case of a joint enforcement. Nothing in this chapter shall prevent the director from taking action pursuant to the common law or other statutory provisions necessary to protect the public health and welfare, safety, or the environment. [L 1991, c 280, pt of §1]

§128D-23 Exemption from state and county permits. No state or county permit shall be required for the portion of any removal or remedial action conducted

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entirely on site where such response action is carried out in compliance with this chapter, or where such removal or remedial action is in response to a release of a hazardous substance or pollutant or contaminant that occurred in or on the coastal waters of the State and such removal or remedial action is carried out in compliance with this chapter, the National Contingency Plan, or at the direction of a federal or state on-scene coordinator. [L 1991, c 280, pt of §1; am L 1993, c 324, §3]

[CHAPTER 128E] HAWAII EMERGENCY PLANNING AND COMMUNITY **RIGHT-TO-KNOW ACT**

SECTION

- 128E-1 DEFINITIONS
- 128E-2 DESIGNATION AND FUNCTIONS OF THE HAWAII STATE EMERGENCY RESPONSE COMMISSION
- 128E-3 POWERS; RULEMAKING; APPOINTMENT OF HEARING OFFICERS
- 128E-4 ESTABLISHMENT OF EMERGENCY PLANNING DISTRICTS
- 128E-5 ESTABLISHMENT AND FUNCTIONS OF LOCAL EMERGENCY PLANNING COMMITTEES
- 128E-6 REPORTING REQUIREMENTS.
- 128E-7 EMERGENCY NOTIFICATION REQUIREMENTS
- 128E-8 FUNDS FOR OPERATION
- 128E-9 FILING FEES
- 128E-10 IMMUNTTY FROM CIVIL LIABILITY
- 128E-11 PENALTIES AND FINES
- 128E-12 ENPORCEMENT
- 128E-13 RELATIONSHIP TO OTHER LAWS

[§128E-1] Definitions. As used in this chapter, unless the context otherwise requires:

"Administrator" means the administrator of the United States Environmental

Protection Agency.

- "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§9601-9675.
 - "Commission" means the Hawaii state emergency response commission.
- "Committee" means the local emergency planning committee within each county responsible for preparing hazardous material plans and performing other functions under the Emergency Planning and Community Right-to-Know Act of 1986 and [this chapter].

"County agency" means a county or any officer or agency thereof.

"Department" means the department of health.

"Director" means the director of health.

"EPCRA" means the Emergency Planning and Community Right-to-Know Act of 1986, as amended, 42 U.S.C. §§11001-11050.

"Environment" means any waters, including surface water, ground water, or drinking water; any land surface or any subsurface strata; or any ambient air, within the State or under the jurisdiction of the State.

"Extremely hazardous substance" means any substance listed in Appendix A of 40 Code of Federal Regulations Part 355, as amended, or as defined by rules

adopted by the commission.

"Facility" means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly-owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor carrier, rolling stock, aircraft, site, or area where a hazardous substance or pollutant or contaminant has been deposited, stored, disposed of, or placed, or otherwise comes to be located. The term does not include any consumer product in consumer use.

"Hazardous material" or "hazardous substance" means any hazardous substance as defined in chapter 128D.

"HEPCRA" means the Hawaii Emergency Planning and Community Right-

to-Know Act.

"Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, county, commission, or, to the extent the United States or an interstate body is subject to this chapter, the United

States or the interstate body.

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance, or pollutant or contaminant into the environment, including the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance, or pollutant or contaminant. The term does not include:

(1) Any release that results in the exposure of persons solely within a workplace, with respect to claims that these persons may assert against

their employer:

(2) Emissions from the engine exhaust of a motor vehicle, rolling stock,

aircraft, vessel, or pipeline pumping station engine;

(3) Release of a source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 et seq., if this release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under 42 U.S.C. §2210;

(4) Any release resulting from the normal application of fertilizer;

(5) Any release resulting from the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended: or

(6) Any release from sewerage systems collecting and conducting primarily

domestic wastewater.

"Reportable quantity" means the quantity of a hazardous material stated on

the various lists of hazardous substances as defined in chapter 128D.

"Threshold planning quantity" means the threshold planning quantity for an "extremely hazardous substance" as defined in 40 Code of Federal Regulations Part 355.

"Toxic chemical" means a substance appearing on the list of chemicals described in section 313 of the Emergency Planning and Community Right-to-Know Act of 1986, as set forth in 40 Code of Federal Regulations Part 372. [L 1993, c 300, pt of §1]

[§128E-2] Designation and functions of the Hawaii state emergency response commission. (a) There is created the Hawaii state emergency response commission, which shall be placed within the department for administrative purposes and carry out the requirements of this chapter.

(b) The commission shall consist of the following members, who shall be

appointed by the governor as provided in section 26-34:

(1) The director of health;

(2) The chairperson of the board of agriculture;

(3) The adjutant general;

- (4) The director of labor and industrial relations;
- (5) The chairperson of the board of land and natural resources; The director of the office of environmental quality control;
- (7) The director of business, economic development, and tourism;

(8) The director of transportation;

(9) The dean of the University of Hawaii school of public health;

(10) The director of the environmental center of the University of Hawaii;

(11) One representative from each committee designated by the mayor of each respective county; and

(12) Other persons appointed by the governor to meet the minimum requirements of the Emergency Planning and Community Right-to-Know Act of

(c) A state officer who serves as a member of the commission may designate, in writing, another person to act in place of the officer. The designated person shall have all the powers of a commission member.

(d) The director shall be the chairperson of the commission. A vice-chairperson shall be designated by the chairperson to serve in the chairperson's absence. The chairperson or the vice-chairperson may assign, delegate, or transfer tasks, duties, and responsibilities to members of the commission.

(e) Commission members shall serve without compensation, but shall be reimbursed for actual and necessary expenses, including travel expenses, incurred in

carrying out their duties.

(f) Commission and committee support personnel shall be supervised and administered by the chairperson as the primary agent responsible for performing the functions and duties of the commission. The department shall employ such professional, technical, administrative, and other staff personnel as may be deemed necessary to carry out the purposes of this chapter.

(g) The commission shall:

(1) Carry out the duties and responsibilities of a state emergency response commission as specified in the Emergency Planning and Community Right-to-Know Act of 1986;

(2) Develop state contingency plans relating to the implementation of this

chapter;

(3) Supervise, coordinate, and provide staff support to the committees for the implementation of this chapter and the Emergency Planning and Community Right-to-Know Act of 1986;

(4) Develop a public information, education, and participation program for the public and facility owners covering the requirements of this chapter, and the interpretation of the chemical information collected pursuant to this chapter and the risks that these chemicals pose to the public health and environment;

(5) Appoint the members of the committees;

- (6) Develop a state chemical inventory form to be used in lieu of the federal Tier II form and chemical list requirements; and
- (7) Do all other things necessary for the implementation of this chapter and the requirements of the Emergency Planning and Community Right-to-Know Act of 1986. [L 1993, c 300, pt of §1]

[§128E-3] Powers; rulemaking; appointment of hearing officers. (a) The commission may adopt rules in accordance with chapter 91 to implement this chapter. The rules shall include, but not be limited to, requirements for reporting releases. Any person heard at a public hearing on the adoption of any rule shall be given written notice of the action taken by the commission with respect to the rule.

(b) In addition to other specific powers provided in this chapter, the commission may appoint, without regard to chapters 76 and 77, hearing officers to conduct

public participation activities, including public hearings and public informational meetings. [L 1993, c 300, pt of §1]

- [§128E-4] Establishment of emergency planning districts. Each county is designated as an emergency planning district for the purposes of this chapter; provided that the department shall be responsible for Kalawao county. [L 1993, c 300, pt of §1]
- [§128E-5] Establishment and functions of local emergency planning committees. (a) A minimum of one local emergency planning committee shall be established in each county. The committee shall be subject to the requirements of this chapter and section 303 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §11003.
- (b) The members of a committee shall be appointed by the commission, based upon the recommendations of the respective mayor of a county. The list of recommended persons shall contain at least one person from each of the groups listed in subsection (c). The commission may reject any recommendation made by the mayor of a county and appoint persons who did not receive a recommendation from the mayor.

(c) A committee shall be composed of at least one person from each of the

following groups:

(1) Elected state and county officials;

(2) Law enforcement, first aid, health, environmental, hospital, and transportation personnel;

(3) Firefighting personnel;

(4) Civil defense and emergency management personnel;

(5) Broadcast and print media personnel;

(6) Community groups not affiliated with emergency service groups;

- (7) Owners and operators of facilities subject to the requirements of the Emergency Planning and Community Right-to-Know Act of 1986; and
- (8) Other groups recommended by the mayor and appointed by the commission.
- (d) Not more than sixty days after the occurrence of a vacancy, the commission, based upon the recommendations of the mayor, shall appoint a successor member to the committee, unless the requirements of subsection (c) have been fulfilled.
- (e) Upon the failure of the mayor of a county to submit a list of nominees to the commission not more than forty-five days after notice of a vacancy, the commission shall make the appointment on its own initiative unless the requirements of subsection (c) have been fulfilled.

(f) Each committee shall:

- (1) Adopt bylaws and other administrative procedures to carry out the duties, requirements, and responsibilities set forth in this chapter, and as required by the commission and the Emergency Planning and Community Right-to-Know Act of 1986;
- (2) Take appropriate actions to ensure the preparation, implementation, and annual update and review of the local emergency response plan required by this chapter and the Emergency Planning and Community Right-to-Know Act of 1986. The local emergency response plans shall include, but not be limited to, the following:

(A) Identification of each facility subject to the requirements of section 303 of the Emergency Planning and Community Right-to-Know

Act of 1986, 42 U.S.C. §11003 and within the emergency planning district; identification of routes likely to be used for the transportation of substances on the list of extremely hazardous substances; and identification of additional facilities contributing or subjected to additional risk due to their proximity to facilities subject to the requirements of this section, such as hospitals or natural gas facilities;

- (B) Methods and procedures to be followed by facility owners and operators and local emergency and medical personnel in responding to any release of these substances;
- (C) Designation of a community emergency coordinator and facility emergency coordinators, who shall make determinations necessary to implement the plan;
- (D) Procedures providing reliable, effective, and timely notification by facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and the public, that a release has occurred, consistent with the notification requirements of this chapter and section 304 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §11004;
- (E) Methods for determining the occurrence of a release, and the area or population likely to be affected by the release;
- (F) A description of emergency equipment and facilities in the county and at each facility in the county subject to the requirements of this section, and the identification of the persons responsible for the equipment and facilities;
- (G) Evacuation plans, including provisions for precautionary evacuation and alternate traffic routes:
- (H) Training programs, including schedules for training of local emergency response and medical personnel; and
- (I) Methods and schedules for exercising the emergency plan;
- (3) Request additional information from the facilities, if necessary, to develop emergency response plans;
- (4) Submit local emergency response plans to the commission for review, and to other affected agencies upon request;
- (5) Report to the commission on alleged violations of this chapter;
- (6) Prepare reports, recommendations, and other information related to the implementation of this chapter, as requested by the commission;
- (7) Have the primary responsibility for receiving, processing, and managing hazardous chemical information forms and data, trade secrets, and public information requests pursuant to this chapter;
- (8) Accept and deposit into the state treasury any grants, gifts, or other funds received for the purpose of carrying out this chapter; and
- (9) Evaluate the need for resources necessary to develop, implement, and exercise the emergency plan, and make recommendations with respect to additional resources that may be required and the means for providing these additional resources.
- (g) The administrative and operational expenses of a committee may be paid by the State. [L 1993, c 300, pt of §1]

[§128E-6] Reporting requirements. (a) The owner or operator of a facility in the State that stores, uses, or manufactures any hazardous substance shall comply with the following requirements:

- (1) Each owner or operator of a facility in the State shall comply with the emergency planning and notification requirements of sections 302 and 303 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§11002 and 11003, if an extremely hazardous substance is present at the facility in an amount in excess of the threshold planning quantity established for the substance;
- (2) Each owner or operator of a facility in this State that is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970, as amended, 15 U.S.C. §651 et seq., and regulations promulgated under that Act, for all hazardous substances present at the facility in amounts not less than 10,000 pounds, and extremely hazardous substances present at the facility in amounts not less than 500 pounds, or the threshold planning quantity for that substance, whichever is less, shall comply with the following reporting requirements:
 - (A) Complete a chemical list by March 1 of each year and submit material safety data sheets not more than thirty days after a request;
 - (B) Complete the state chemical inventory form by March 1 of each year; provided that a Tier II list shall be used until a state form is available;
 - (C) Submit facility diagrams and location area maps by March 1 of each year, and update the maps annually as needed; and
 - (D) Upon request, submit emergency response plans required under state or federal law.

The information described in subparagraphs (A) through (D) shall be submitted to the commission, the respective committee, and the fire department upon request by the same;

- (3) Each owner or operator of a facility in this State that is subject to section 313 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §11023, shall comply with the toxic chemical release form requirements of section 323 of the Emergency Planning and Community Right-to-Know Act of 1986 by July 1 of each year; and
- (4) Each owner or operator of a facility in this State covered under section 304 of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §11004, shall comply with the notification requirements of section 304 of the Emergency Planning and Community Right-to-Know Act of 1986, and section 128E-7, if a release of an extremely hazardous substance occurs from the facility.
- (b) The commission shall adopt rules in accordance with chapter 91 establishing the specific information required on the state chemical inventory form. The chemical inventory form shall facilitate ease in complying with the requirements of [this chapter] by consolidating the necessary information into one form. The chemical inventory form may include, but is not limited to:
 - (1) The chemical name:
 - (2) Quantity stored on the site;
 - (3) Hazardous components;
 - (4) Health and physical hazards; and
 - (5) Storage information. [L 1993, c 300, pt of §1]

- 28E-7] Emergency notification requirements. The commission shall adopt rules in accordance with chapter 91 establishing the contents of hazardous substance release reports. The rules shall address, but are not limited to, the following:
 - (1) The quantities of designated hazardous substances that are deemed reportable pursuant to this chapter when released;
 - (2) The specific periods of time within which these quantities are deemed reportable pursuant to this chapter after being released;
 - (3) The agencies to which reports of releases must be made; and
 - (4) The format in which the release is to be reported. [L 1993, c 300, pt of §1]
- [§128E-8] Funds for operation. (a) All moneys to meet the general operating needs and expenses of the emergency planning and community right-to-know program of the department shall be allocated by the legislature through appropriations out of the state general fund. The department shall include in its budgetary request for each upcoming fiscal period, the amounts necessary to effectuate the purposes of this chapter.
- (b) The department of health, with the assistance of the department of budget and finance and department of accounting and general services, shall prepare a report for the legislature concerning the amount of moneys collected during the preceding fiscal year, the amount of moneys collected to date during the current fiscal year, and the amount of moneys to be collected during the upcoming fiscal year, pursuant to sections 128E-9 and 128E-11, and accruing to the credit of the state general fund. The department shall submit the foregoing report to the legislature not less than twenty days prior to the convening of each regular session of the legislature. [L 1993, c 300, pt of §1]
- [§128E-9] Filing fees. Facilities that are required to report according to section 128E-6(a)(2), shall remit \$100 with each submission of chemical inventory forms or Tier II forms to the commission by March 1 of each year. All moneys collected by the department pursuant to this section shall be deposited in the state treasury and accrue to the credit of the state general fund. [L 1993, c 300, pt of §1]
- [§128E-10] Immunity from civil liability. (a) No employee, representative, or agent of a state or county agency, or persons requested by a state or county agency to engage in any emergency service or response activities involving a hazardous material release at a facility or transportation accident site, shall be liable for the death of or any injury to persons, or the loss of or damage to property, resulting from that hazardous material release, except for any acts or omissions that constitute wilful misconduct.
- (b) No commission or committee member shall be liable for the death of or any injury to persons, the loss of or damage to property, or any civil damages, resulting from any act or omission arising out of the performance of the functions, duties, and responsibilities of the commission or a committee, except for acts or omissions that constitute wilful misconduct. [L 1993, c 300, pt of §1]
- [§128E-11] Penalties and fines. (a) Any person who violates any of the emergency reporting, planning, or notification requirements of section 128E-6 or 128E-7, or fails to pay the fees required by section 128E-9, shall be subject to a civil penalty of not less than \$1,000 but not more than \$25,000 for each separate offense. Each day of each violation shall constitute a separate offense.
 - (b) Any person who:

- (1) Knowingly fails to report the release of a hazardous substance or extremely hazardous substance, as required by section 128E-7, shall be guilty of a misdemeanor and, upon conviction, be fined not less than \$1,000 but not more than \$25,000 for each separate offense, or imprisoned for not more than one year, or both. For the purposes of this paragraph, each day of each violation shall constitute a separate offense; or
- (2) Intentionally obstructs or impairs, by force, violence, physical interference, or obstacle, a representative of the department, a hazardous materials response team, or a committee attempting to perform the duties and functions set forth in section 128E-5, shall be guilty of a misdemeanor and, upon conviction, be fined not less than \$5,000 but not more than \$25,000 for each separate offense, or be imprisoned for not more than one year, or both.
- (c) All moneys collected under this section shall be deposited in the state treasury and accrue to the credit of the state general fund. [L 1993, c 300, pt of §1]
- [§128E-12] Enforcement. If the commission determines that any person has violated or is violating this chapter, or any rule adopted pursuant to this chapter, the commission:
 - (1) Shall cause written notice to be served upon the alleged violator or violators. The notice shall specify the alleged violation and may contain an order specifying a reasonable time during which the facility shall submit the required reports, forms, and notifications;
 - (2) May require the alleged violator or violators to appear before the commission for a hearing at a time and place specified in the notice or to be set later, and to answer the charges complained of; and
 - (3) May impose penalties as provided in section 128E-11 by sending a written notice describing the violation, either by certified mail or personal service, to the alleged violator or violators. [L 1993, c 300, pt of §1]
- [§128E-13] Relationship to other laws. (a) This chapter shall be read in conjunction with the federal statutes and regulations providing for the identification, labeling, and reporting of information concerning hazardous material releases, and any other health and safety provisions relating to hazardous materials, and is intended to supplement federal statutes and regulations in the interest of protecting the health and safety of the citizens of the State.
- (b) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other laws of the State.
- (c) This chapter shall preempt any ordinances passed or adopted by any county that are effective on, before, or after June 21, 1993, to the extent that these ordinances conflict or are inconsistent with the provisions of this chapter. [L 1993, c 300, pt of §1]

Revision Note

"June 21, 1993" substituted for "the effective date of this chapter".

CHAPTER 129 BLACKOUTS AND ILLUMINATION CONTROL

REPEALED. L 1989, c 135, §2.

DEPARTMENT OF HEALTH

Adoption of Chapter 11-451 Hawaii Administrative Rules

August 2, 1995

SUMMARY

Chapter 11-451, Hawaii Administrative Rules, entitled "State Contingency Plan", is adopted.

"HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 451

STATE CONTINGENCY PLAN

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SUBCHAPTER 1

GENERAL PROVISIONS

§11-451-1 Objective. (a) The objective of these rules is to establish the Hawaii state contingency plan in order to implement, administer, and enforce chapter 128D, Hawaii Revised Statutes (HRS). The Hawaii state contingency plan:

- (1) Identifies those hazardous substances, pollutants, or contaminants, which are subject to the requirements and procedures set forth herein;
- (2) Designates the hazardous substances and their corresponding reportable quantities to be used in determining when notification of appropriate organizations is required pursuant to section 128D-3(b), HRS;
- (3) Establishes the notification requirements owners or operators of facilities or vessels shall follow in the event of a release of a hazardous substance that exceeds the reportable quantity;
- (4) Describes the process the department may follow, pursuant to section 128D-4(a)(4), HRS, to solicit the cooperation of potentially responsible parties, and if necessary, enter into a consent agreement or issue an order which requires potentially responsible parties to conduct any response actions;
- (5) Establishes the methods, pursuant to section 128D-

- 7(a), HRS, for collecting preliminary data and evaluating the actual or potential hazard posed by a release or threat of release of a hazardous substance or pollutant or contaminant;
- (6) Describes the criteria for listing and prioritizing sites for response actions, pursuant to section 128D-7(b) and (c), HRS;
- (7) Describes the factors which may be considered by the department in determining the type of response action to be taken at a site;
- (8) Describes those response actions and associated public participation activities, which the department may implement or require to be implemented, at sites where the department determines that there is a need to investigate, stabilize, prevent, minimize, eliminate, mitigate, control, or otherwise respond to a release or threat of a release, which may pose an immediate or substantial risk, or both, to public health or welfare, the environment, or natural resources;
- (9) Provides the process the department shall use or require to be used, for evaluating alternatives for response actions to respond to sites that present an endangerment to the public health or welfare, the environment, or natural resources;
- (10) Describes the activities the natural resource trustee may take to fulfill the trustee's duties and responsibilities, when there has been injury to, destruction of, loss of, or a threat to natural resources as a result of a release or threat of release of a hazardous substance or pollutant or contaminant;
- (11) Describes the activities that persons other than the department may undertake in response to a release of a hazardous substance or pollutant or contaminant, and the requirements to recover costs for those actions;
- (12) Establishes when the department shall establish administrative records, guidelines for the content and location of administrative records, and the procedures by which administrative records may be supplemented and commented upon by the public; and
- (13) Describes the authority the department or its representatives may exercise for the purposes of determining the need for a response, or choosing or taking a response action or otherwise enforcing the provisions of this chapter. [Eff. AUG 1 7] 1995 (Auth: HRS \$\$128D-3, 128D-4, 128D-5, 128D-6, 128D-7, 128D-8, 128D-9, 128D-10, 128D-13, 128D-14,

128D-15, 128D-16, 128D-17, 128D-18, 128D-19, 128D-24]) (Imp: HRS \$\$128D-3, 128D-4, 128D-5, 128D-6, 128D-7, 128D-8, 128D-9, 128D-10, 128D-13, 128D-14, 128D-15, 128D-16, 128D-17, 128D-18, 128D-19, 128D-24)

\$11-451-2 Applicability. (a) These regulations are applicable to hazardous substances, pollutants, or contaminants, any release of hazardous substances, pollutants, or contaminants in quantities equal to or exceeding their reportable quantities, or any release or threat of release of hazardous substances, pollutants, or contaminants which poses or which may pose a substantial endangerment to public health or welfare, the environment, or natural resources, and all actions taken pursuant to chapter 128D, HRS, or these rules. [Eff. AUG 1 7 1995] (Auth: HRS \$128D-7) (Imp: HRS \$128D-3)

\$11-451-3 <u>Definitions</u>. (a) As used in this chapter, unless the context otherwise requires:

"Alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

"Applicable requirements" means those federal, state, and local requirements that are legally applicable to a hazardous substance or pollutant or contaminant, response action, location, or other circumstance found at a facility, vessel, or site. However, pursuant to section 128D-23, HRS, no state or county permit shall be required for the portion of any removal or remedial action conducted entirely on site where such response action is carried out in compliance with chapter 128D, HRS.

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510 (42 U.S.C. §§9601-9675), as amended.

"Clean Water Act" means the Federal Water Pollution Control Act of 1972, P.L. 92-500 (33 U.S.C. §§1251-1387), as amended

"Consent agreement" means an agreement which the department and a potentially responsible party enter into pursuant to this chapter.

"Consumer product" shall have the meaning stated in 15 U.S.C. §2052.

"Department" means the department of health.

"Director" means the director of health.

"Drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act) or as drinking water by one or more individuals.

"Environment" means any waters, including surface water, groundwater, or drinking water supply, any land surface or any subsurface strata, or any ambient air within the State of Hawaii or under the jurisdiction of the State.

"EPA" means the U.S. Environmental Protection Agency.
"Facility" means any building, structure, installation,
equipment, pipe or pipeline (including any pipe into a sewer
or publicly owned treatment works plant), well, pit, pond,
lagoon, impoundment, ditch, landfill, storage container,
motor vehicle, rolling stock, or aircraft, or any site or
area where a hazardous substance, pollutant, or contaminant
has been deposited, stored, disposed of, or placed, or
otherwise comes to be located; but does not include any
consumer product in consumer use.

"Fund" means the environmental response revolving fund established pursuant to section 128D-2, HRS.

"Ground water" means water in a saturated zone or stratum beneath the surface of land or water.

"Hazardous substance" means hazardous substance as defined in section 128D-1, HRS, and designated in section 11-451-5.

"Interim remedial action" means a discrete remedial action or series of remedial actions that comprises an incremental step toward comprehensively addressing a release or threat of release of a hazardous substance or pollutant or contaminant. This discrete portion of a remedial action manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure. The cleanup of a facility or vessel can be divided into a number of interim remedial actions, depending on the complexity of the problems associated with the facility or vessel. remedial actions may address geographical portions of a site, specific facility or vessel problems, or initial phases of a remedial action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site. Interim remedial actions should not conflict with, be inconsistent with nor preclude implementation of the expected final remedial action.

"Natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of Hawaii, any county, or by the United States to the extent that the latter is subject to state law.

"Navigable water" means the waters of the United States including the territorial seas.

The term includes:

- (1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (2) Interstate waters, including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (A) That are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce:
 - (C) That are used or could be used for industrial purposes by industries in interstate commerce:
- (4) All impoundments of waters otherwise defined as navigable waters under this section;
- (5) Tributaries of waters identified in paragraphs (1) through (4) of this definition, including adjacent wetlands; and
- (6) Wetlands adjacent to waters identified in paragraphs (1) through (5) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

"Oil" means crude oil and any fraction or residue thereof, in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes.

"On-Scene-Coordinator" means the state official designated by the department to coordinate and direct state response actions under this chapter.

"Order" means administrative, compliance, director's, or any other orders as may be issued by the department pursuant to chapter 128D, HRS, these rules, or judicial proceedings.

"Owner or operator" means (1) in the case of a vessel, any person owning, operating, bareboat chartering, or chartering by demise the vessel, (2) in the case of an onshore facility or an offshore facility, any person owning or operating the facility, and (3) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or

similar means to a unit of a state or local government, any person who owned, operated, or otherwise controlled activities at the facility immediately beforehand. "Owner" or "operator" does not include a person or financial institution that holds or held a lien, encumbrance, security interest, or loan agreement that attaches or is attached to the facility, vessel, or real property; provided that the person or financial institution makes or made no decision or takes or took no action that causes or caused or contributes or contributed to a release or threatened release of a hazardous substance, pollutant, or contaminant from or at a facility, vessel, or real property.

"Person" means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state, county, commission, political subdivision of the State, and to the extent they are subject to this chapter, the United States or any interstate body.

"Petroleum" means any petroleum, including crude oil and any fraction thereof that is liquid at standard temperature and pressure (60 degrees fahrenheit and 14.7 pounds per square inch absolute).

"Pollutant or contaminant" means any element, substance, compound, or mixture, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"Potentially responsible party" means persons potentially liable under Chapter 128D, HRS.

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any hazardous substance, pollutant, or contaminant into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes:

- (1) Any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against their employer;
- (2) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;
- (3) Release of source, byproduct, or special nuclear

material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 (42 U.S.C. \$2011), if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 42 U.S.C. \$2210;

- (4) Any release resulting from the normal application of fertilizer:
- (5) Any release resulting from the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act;
- (6) Releases from sewerage systems collecting and conducting primarily domestic wastewater; or
- (7) Any release permitted by any federal, state, or county permit or other legal authority, if such release is specifically addressed by the permit and is in compliance with the permit.

"Remedy" or "remedial action" means those actions consistent with permanent correction taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance, pollutant, or contaminant into the environment, to prevent or minimize the release of hazardous substances, pollutants, or contaminants, so that they do not migrate to cause substantial danger to present or future public health or welfare, the environment, or natural resources.

- (1) The term includes, but is not limited to, actions at the location of a release such as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances, pollutants, contaminants, or associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health or welfare, the environment, or natural resources.
- (2) The term includes the costs of permanent relocation of residents and businesses and community facilities where the department determines that, alone or in combination with other measures, such relocation is more costeffective than and environmentally preferable to

the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, pollutants, or contaminants, or may otherwise be necessary to protect the public health or welfare.

- (3) The term does not include the offsite transport of hazardous substances, pollutants, or contaminants, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances, pollutants, or contaminants or contaminated materials unless the department determines that such actions:
 - (A) Are more cost-effective than other remedial actions;
 - (B) Will create new capacity to manage hazardous substances, in addition to those located at the affected facility or vessel; or
 - (C) Are necessary to protect public health or welfare, the environment, or natural resources from a present or potential risk which may be created by further exposure to the continued presence of such hazardous substances, pollutants or contaminants.

"Remove" or "removal action" means: 1) action taken when a release constitutes an emergency and the director or an on-scene coordinator has determined that actions are immediately required to prevent, limit, or mitigate an emergency; or 2) the cleanup of released hazardous substances, pollutants, or contaminants from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances. pollutants, or contaminants into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, pollutants, or contaminants, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access. provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, and any emergency assistance. Removal actions may include any of those types of actions contained in the definition of "remedy" or "remedial action".

"Reportable quantity" means reportable quantity as defined in section 11-451-6.

"Respond" or "response action" means remove, removal, remedy, or remedial action; and all such terms including government enforcement activities related thereto.

"Site" means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

"Sheen" means an iridescent appearance of any petroleum on the surface of any surface water, ground water, or any navigable water of the State which is caused by the release of such petroleum.

"Source control action" means the construction or installation and start-up of those actions necessary to prevent the continued release of hazardous substances, pollutants, or contaminants(primarily from a source on top of or within the ground, or in buildings or other structures) into the environment.

"State Contingency Plan" means Hawaii Administrative Rules title 11, Hawaii state department of health, chapter 451.

"State Priority List" means the list compiled by the department pursuant to section 128D-7, HRS.

"Surface water" means both contained surface water that is, water upon the surface of the earth in bounds
created naturally or artificially including, but not limited
to, streams, other watercourses, lakes, reservoirs, and
coastal waters subject to state jurisdiction - and diffused
surface water - that is, water upon the surface of the
ground other than in contained waterbodies. Water from
natural springs is surface water when it exits from the
spring onto the earth's surface.

"Vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. [Eff. (Auth: HRS \$128D-7) (Imp: HRS \$128D-3)

SUBCHAPTER 2

NOTIFICATION OF RELEASES OF HAZARDOUS SUBSTANCES

\$11-451-4 <u>Discovery and notification</u>. (a) A release may be discovered through:

- (1) Notification in accordance with section 11-451-7;
- (2) Discovery or investigation by government authorities:
- (3) Inventory or survey efforts, environmental assessments or investigations, and random or incidental observation by government agencies,

private contractors, the public, or other persons; or

- (4) Other sources. [Eff. AUG 1 7 1995] (Auth: HRS \$128D-7)
- \$11-451-5 <u>Designation of hazardous substances.</u>
 (a) This section designates the hazardous substances which are subject to the notification requirements contained in section 11-451-7.
- (b) Listed hazardous substances. The following are listed hazardous substances under this chapter:
 - (1) The list of elements, compounds, and hazardous substances contained in Title 40 of the Code of Federal Regulations (40 C.F.R.) Part 355, Appendices A and B, revised as of July 1, 1993;
 - (2) The list of elements, compounds, and hazardous substances contained in Part 302, Table 302.4 of 40 C.F.R., revised as of July 1, 1993;
 - (3) Trichloropropane; and
 - (4) Oil.
- (c) Unlisted hazardous substances. A hazardous waste as defined in section 11-261-3, as of June 18, 1994, is a hazardous substance under this chapter if it exhibits any of the characteristics of ignitability, corrosivity, reactivity or toxicity identified in subchapter C of chapter 11-261, as of June 18, 1994. [Eff. AUG | 7 1995] (Auth: HRS §\$128D-3, 128D-4, 128D-6, 128D-13, 128D-20) (Imp: HRS §\$128D-3, 128D-4, 128D-6, 128D-7, 128D-13, 128D-20)
- §11-451-6 <u>Determination of reportable quantities</u>. (a) Purpose. This section establishes the reportable quantities for those hazardous substances designated pursuant to section 11-451-5.
- (b) Reportable quantities for listed hazardous substances. Listed hazardous substances designated under section 11-451-5(b), have the following reportable quantities:
 - (1) The reportable quantities contained in 40 C.F.R. Part 355, Appendices A and B, as of July 1, 1993;
 - (2) The reportable quantities contained in 40 C.F.R. Part 302, Table 302.4, as of July 1, 1993;
 - (3) The reportable quantities contained in 58 Federal Register 54840, Table 302.4;
 - (4) 10 pounds for trichloropropane; and
 - (5) For oil:
 - (A) Any amount of oil which when released into the environment causes a sheen to appear on

surface water, or any navigable water of the State:

- (B) Any free product that appears on ground water;
- (C) Any amount of oil released to the environment greater than 25 gallons; and
- (D) Any amount of oil released to the environment which is less than 25 gallons, but which is not contained and remedied within 72 hours.
- (c) Reportable quantities for unlisted hazardous substances. Unlisted hazardous substances designated under section 11-451-5(c), have the following reportable quantities:
 - (1) Unlisted hazardous substances have the reportable quantity of 100 pounds, except for those unlisted hazardous wastes which exhibit toxicity characteristics pursuant to paragraph (2); and
 - Unlisted hazardous wastes, which exhibit toxicity (2) characteristics when tested with the TCLP test method 1311 have the reportable quantities listed in 40 C.F.R. Part 302, Table 302.4, as of July 1, 1993, for the hazardous substance on which the toxicity characteristic is based. If an unlisted hazardous waste exhibits toxicity characteristics on the basis of more than one hazardous substance, the reportable quantity of that material shall be the lowest of the reportable quantities listed in 40 C.F.R. Part 302, Table 302.4, as of July 1, 1993, for those hazardous substances. unlisted hazardous waste exhibits toxicity characteristics and one or more of the other characteristics referenced in section 11-451-5(c), the reportable quantity for that material shall be the lowest of the applicable reportable The reportable quantities described quantities. in this paragraph apply to the weight of the entire amount of material released, not merely to the hazardous substance component. [Eff. AIIG 1 7]1995 (Auth: HRS \$\$128D-3, 128D-7) (Imp: HRS \$\$128D-3, 128D-7)

\$11-451-7 Notification requirements. (a) Purpose. The purpose of this section is to describe the notification process which shall be followed when there is a release of a hazardous substance that meets or exceeds a reportable quantity. The purpose of the notification process is to ensure that the appropriate organizations are notified of releases of hazardous substances that present or may present

a substantial danger to the public health or welfare, the environment, or natural resources.

- (b) Initial notification. Any person in charge of a facility or vessel shall immediately notify the organizations listed in subsection (c), by telephone or in person, of any release from such facility or vessel occurring on or after the effective date of these rules of:
 - (1) A listed hazardous substance designated under section 11-451-5(b), in quantities equal to or exceeding the reportable quantity criteria in section 11-451-6(b) in any 24-hour period, except that for releases of oil of less than 25 gallons in any 24-hour period which is not contained and remedied within 72-hours need only be reported pursuant to paragraph (e) of this section;
 - (2) An unlisted hazardous substance designated under section 11-451-5(c), in quantities equal to or exceeding the reportable quantity criteria in section 11-451-6(c) in any 24-hour period.
 - (c) Organizations to notify:
 - (1) The department, by calling a telephone number published by the department and designated for this purpose; and
 - (2) All affected local emergency planning committees by calling a telephone number published by the department and designated for this purpose.
- (d) Notification contents. Verbal notification to the department shall consist of providing the following information, but shall not be delayed due to incomplete notification information related to the release:
 - (1) The name (trade and chemical) and chemical abstract service registry number, if available, of the hazardous substance, pollutant, or contaminant which has been released;
 - (2) The approximate quantity of the hazardous substance, pollutant, or contaminant which has been released;
 - (3) The reportable quantity or other notification threshold that is the basis for notification;
 - (4) The location of the release;
 - (5) A brief description of the release including the medium or media into which the release occurred or is likely to occur, and the cause of the release;
 - (6) The date, time, and duration of the release, and the date and time that the person in charge of the facility or vessel where the release occurred, obtained knowledge of the release;
 - (7) The source of the release;
 - (8) The name, address and telephone number of the

caller;

- (9) The name, address and telephone number of the owner and operator of the facility or vessel where the release has occurred;
- (10) The name and telephone number of a contact person at the facility or vessel where the release has occurred;
- (11) Measures taken or proposed to be taken in response to the release as of the time of the notification, and any appropriate information relating to the ability of the owner or operator of the facility or vessel where the release has occurred to pay for or perform any proposed or required response actions;
- (12) The names of other federal, state, or local government agencies that have been notified of the release;
- (13) Any known or anticipated acute or chronic health risks associated with the releasee and where appropriate, advice regarding medical attention necessary for exposed individuals; and
- (14) Any other information which is relevant to assessing the hazard posed by the release, including but without limitation potential impacts to public health or welfare, or the environment.
- (e) Written notification. Notice, including all information provided pursuant to subsection (d), and any other information not previously provided in subsection (d), shall also be made in writing to the department. This written notice shall be post-marked no later than thirty (30) days after initial discovery of a release, and sent by certified mail or another means which provides proof of delivery.
- (f) Releases of mixtures or solutions. Releases of mixtures or solutions containing a hazardous substance or substances are subject to the notification requirements contained in this section, only where a component hazardous substance of the mixture or solution is released in a quantity equal to or greater than its reportable quantity. This provision only applies if the person in charge of a facility or vessel knows the exact concentrations of all the hazardous substance components present in the mixture or If the exact concentration of all the hazardous solution. substance components present in the mixture or solution is not known, reporting is required if the quantity of the entire amount of material released equals or exceeds the reportable quantity of any hazardous substance component.
- (g) Continuous releases. For continuous releases that are stable in quantity and rate, reporting shall be made in

accordance with 40 CFR §302.8, as of July 1, 1993, except that reporting shall be made to the director and not to the Environmental Protection Agency or the National Response Center.

- (h) Notification received by the department pursuant to this section or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for a prosecution for perjury or for giving a false statement, or for prosecuting a knowing release.
- (i) Notification exemptions. The following categories of releases are exempt from the notification requirements of this section:
 - (1) Releases of hazardous substances emanating from bituminous pavement, landscaping materials, or building materials that are in good repair and serving their original intended use;
 - (2) Releases of gasoline or diesel fuel that results from the rupture of the fuel tank of a passenger vehicle as a result of an accident involving such vehicle;
 - (3) Sheens resulting from discharges of oil from a properly functioning vessel engine;
 - (4) Releases of radionuclides regulated by EPA under 42 USC Section 9602, 33 USC Sections 1321 and 1361, and 40 CFR Part 302 et seq.;
 - (5) Releases of hazardous substances that are discharged or emitted from an outfall, stack or other point source, or as fugitive emissions, any of which are regulated under and have received a valid permit, license, or approval, or which are operating under a valid registration, order or guideline issued under a federal or state statute or regulation, unless the release
 - (A) exceeds the amount allowed by permit, license, approval, registration, order or quideline; and
 - (B) may pose a substantial endangerment to public health, welfare or the environment. The provision shall not relieve any person from any other duty to notify which may exist under any other statute or regulation, nor shall it in any way limit the authority of any other agency, political subdivision or authority of the federal or state government or of any office or division of the department to enforce or otherwise carry out the duties assigned to it by law. [Eff. AUG 1 7] 1995 (Auth: HRS §\$128D-3, 128D-7) (Imp: HRS §\$128D-3, 128D-7)

SUBCHAPTER 3

HAZARDOUS SUBSTANCE RESPONSE

§11-451-8 <u>General</u>. (a) Purpose. This subchapter establishes procedural requirements that the department shall follow or require another person to follow when responding to a release or threat of a release of a hazardous substance, pollutant, or contaminant that may pose a substantial endangerment to public health or welfare, the environment, or natural resources, including:

- (1) Methods and criteria for determining the appropriate extent and type of response actions authorized by chapter 128D, HRS;
- (2) Procedures for gathering sufficient information to characterize a release or threat of release;
- (3) Procedures to identify and analyze potential response options;
- (4) Procedures for implementing removal or remedial actions; and
- (5) Procedures the department shall follow in selecting remedial actions.
- (b) Limitations on departmental response. Unless the department determines that a release constitutes a public health or environmental emergency and no other person with the authority and capability to respond will do so in a timely manner, the department shall not use the fund monies to conduct a response action under section 128D-4, HRS, in response to a release:
 - (1) Of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;
 - (2) From products that are part of a building, and result in exposure within the building; or
 - (3) Into public or private drinking water supplies due to deterioration of the water supply system through ordinary use.
- (c) Guiding principles. In determining the need for and in planning or undertaking a response action, the department will to the extent practicable:
 - (1) Engage in prompt response actions;
 - (2) Consider, or require to be considered the following hierarchy of response action alternatives in order of descending preference:

(A) Reuse or recycling;

(B) Destruction or detoxification;

- (C) Separation, concentration, or volume reduction, followed by reuse, recycling, destruction or detoxification of the residual hazardous substance or pollutant or contaminant:
- (D) Immobilization of hazardous substances or pollutants or contaminants;
- (E) On-site or off-site disposal, isolation, or containment at an engineered facility designed to minimize the future release of hazardous substances, pollutants, or contaminants and in accordance with applicable requirements; and

(F) Institutional controls or long term monitoring.

- (3) Conserve fund monies by soliciting the cooperation of potentially responsible parties, and if necessary, entering into consent agreements or issuing orders, which require potentially responsible parties to conduct any necessary response action or actions;
- (4) Seek to recover any cost incurred and payable from the fund in accordance with section 128D-5, HRS; and
- (5) Ensure that the concerns of affected or potentially affected public and private interests, including local communities, are considered.

(d) Potentially responsible party notification. In soliciting the cooperation of potentially responsible parties, the department, at its discretion, may:

- (1) Provide the potentially responsible parties notice of their potential liability under section 128D-6, HRS, and a description of the conditions believed by the department to exist at the facility or vessel which warrant a response action; and
- (2) Provide potentially responsible parties with the opportunity to conduct any required response action.
- (e) Compliance with applicable requirements. All response actions, including assessment and investigation activities, must at a minimum comply with applicable requirements. In addition to complying with applicable requirements, the department may, as appropriate, identify other advisories, criteria, or guidance to be considered for a particular release. The "to be considered" category consists of advisories, criteria, or guidance developed by the department, EPA, other federal agencies, or states that

may be useful in developing response actions.

- (f) Timing of response action implementation. Response actions are to be implemented as soon as site data and information make it possible to do so, especially, when the department determines that removals or interim remedial actions are necessary or appropriate to achieve significant early risk reduction.
- (g) Removals or interim remedial actions should not be inconsistent with nor preclude implementation of the expected final remedial action.
- Posting of signs. If the department determines that posting a sign to inform persons of the potential presence of hazardous substances, pollutants, or contaminants is appropriate, the department shall post, or require to be posted, a sign with the legend, "Notice -Hazardous Substances, Pollutants, or Contaminants May Be Present - Unauthorized Personnel Keep Out, " at each entrance to the facility or vessel, and at other locations, in sufficient numbers to be seen from any approach to the facility or vessel. The sign shall include a designated The legend must point of contact and their phone number. be written in English, and must be legible from a distance of at least 25 feet. Existing signs may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the facility or vessel, and that entry onto the facility or vessel can be dangerous. The sign may be removed once the department has determined that no further response action is appropriate or that posting the sign is no longer appropriate.
- (i) Oversight. The department may provide oversight for actions taken by potentially responsible parties to ensure that a response is conducted consistent with this chapter. The department may provide oversight when the response is pursuant to an order issued by the department, or pursuant to a judicial order or an enforceable agreement which the department and a potentially responsible party enter into pursuant to this chapter.
- (j) This chapter does not establish any preconditions to enforcement action by the state government to compel response actions by potentially responsible parties.
- (k) Except as provided in section 11-451-18, nothing in this chapter is intended to limit the rights of any person to seek recovery of response costs from responsible parties pursuant to section 128D-5, HRS.
- (1) Activities by the department in implementing this chapter may be discretionary governmental functions. This chapter does not create in any private party a right to department response or enforcement action. This chapter does not create any duty of the department to take any

response action at any particular time.

- (m) Cost recovery documentation. Pursuant to 128D-5 HRS, the department may request the attorney general to recover any costs incurred and payable from the fund. During all phases of response, the department shall, to the extent practicable and considering the exigencies of the situation, complete and maintain documentation to form the basis for cost recovery pursuant to section 128D-5, HRS. In general, documentation shall address the following:
 - (1) The source and circumstances of the release;
 - (2) The response action taken; and
 - (3) An accounting of state costs incurred, including personnel and indirect costs, for response actions.
- (n) During all phases of response, the department shall make available, upon request, to the trustees of affected natural resources, all available information and documentation that can assist the trustees in the determination of actual or potential natural resource injuries.
- (o) If the department determines that public participation activities in addition to those specifically required in section 11-451-13 and section 11-451-15 are appropriate, the department shall conduct or require to be conducted additional public participation activities including but not limited to:
 - (1) Issuing press releases;
 - (2) Issuing fact sheets:
 - (3) Making personal contacts with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate; and
 - (4) Preparation and implementation of a community relations plan.
- (p) Severability. If any provision of this chapter or its application to any person or circumstance is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-4, 128D-7) (Imp: HRS \$\$128D-4, 128D-7)

\$11-451-9 Criteria for listing and prioritization of facilities or vessels. (a) The purpose of this section is to define the criteria for listing and prioritizing sites for response actions pursuant to this chapter.

(b) Criteria for listing of sites. In developing the list of sites, which will be published and revised at least annually by the department, for the purpose of identifying

those sites subject to this chapter and 128D, HRS, the department shall identify those sites:

- (1) That have not been adequately characterized to determine if they present a substantial endangerment to public health or welfare, the environment, or natural resources; or
- (2) For which the department has determined removal or remedial action may be appropriate, pursuant to sections 128D-7(b) and (c), HRS.

In identifying the subject sites the department shall consider the following minimum hazard threshold criteria:

- (A) Actual or probable release to ground water which is a drinking water supply:
- (B) Actual or probable release to surface water which is a drinking water supply;
- (C) Actual or probable release to air that poses a threat to public health;
- (D) Actual or probable release to and extensive contamination of soil that poses a direct contact hazard due to uncontrolled facility access;
- (E) Actual or probable existence of uncontrolled hazardous substances, pollutants, or contaminants, such as leaking containers or impoundments, that pose a direct contact hazard due to uncontrolled facility access;
- (F) Actual or probable adverse impact to natural resources;
- (G) Actual or probable imminent danger of fire or explosion; or
- (H) A determination by the director that a facility or vessel poses a substantial endangerment to public health or welfare, the environment, or natural resources.
- (c) Basis for prioritization. Generally, the number of criteria listed in subsection (b) that a facility or vessel exhibits, or the severity of any one condition, along with other factors, shall serve as a basis to guide its prioritization.
- (d) Site priority designation. To prioritize facilities or vessels for assessment, removal, and remedial actions, the department will designate sites as either high, medium, or low priority.
- (e) Reevaluation of facilities or vessels. The department may reevaluate a facility or vessel for listing and prioritization if the department receives additional information which would cause a change in the facility's or vessel's status or priority. This additional data, includes but is not limited to data collected during the assessment

conducted pursuant to Section 11-451-11. [Eff. AUG 1 7 1995 (Auth: HRS \$128D-7) (Imp: HRS \$128D-7)

\$11-451-10 Criteria for no further action. (a) Determination of no further action. A facility or vessel shall no longer be subject to response actions under section 128D-7, HRS, when the department determines that no further response appears appropriate based on all of the information that may then reasonably be obtained. In making such a determination, the department shall consider:

- (1) Any appropriate information to determine whether the facility or vessel does not meet any of the minimum hazard threshold criteria contained in section 11-451-9(b)(2) and, therefore, taking response actions is not appropriate; or
- (2) If response actions taken have been sufficient to address the release or threat of release in accordance with the requirements of these rules.
- (b) Deletion from the list. The facility or vessel shall not be included in the next revised list published pursuant to 128D-7(c), HRS if (1) the facility or vessel does not meet any of the criteria in section 11-451-9(b), (ii) potentially responsible parties or other persons have implemented all appropriate response actions as determined by the Director, or (iii) all appropriate Fund-financed response actions under chapter 128D, HRS have been implemented and the Director determines that no further response action by potentially responsible parties is appropriate.
- (c) Re-listing. All facilities or vessels are eligible for re-listing if the department determines, using the criteria in section 11-451-9(b), that any additional response actions under chapter 128D, HRS, may be warranted. [Eff. ANG 1 7 1995] (Auth: HRS \$128D-7) (Imp: HRS \$128D-7)
- \$11-451-11 <u>Assessment of Facilities or Vessels</u>.

 (a) Purpose. The purpose of the assessment is to collect preliminary data, and evaluate the degree of hazard a release or threat of a release poses to public health or welfare, the environment, or natural resources. In addition, in order to accelerate response action, data collected during this phase of response may provide the basis for the selection of a removal or remedial action, should the department determine that such action is warranted. The goal of the process is to:
 - (1) Eliminate from further action those facilities or vessels that do not pose a substantial

endangerment to the public health or welfare, the environment, or natural resources; or

- (2) Determine if a facility or vessel may meet one or more of the minimum hazard threshold criteria contained in section 11-451-9(b), and therefore, taking additional response actions is appropriate.
- (b) Assessment activities. Assessment activities may include, but are not limited to, the following:
 - (1) Review of existing information about a release such as information identifying actual and potential receptors, source, nature and magnitude of a release or a threat of release, and actual and potential pathways of exposure;

(2) An off-site (i.e., perimeter) or on-site inspection, or both, taking into consideration whether such inspection can be performed safely;

information to further evaluate the source and nature of a release or threat of release, the actual or potential receptors and the actual or potential pathways of exposure and to better characterize the release for more effective and rapid initiation of appropriate response action. If this step requires field sampling, sampling and analysis plans may be developed that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. The sampling and analysis plans may consist of two parts:

(A) The field sampling plan, which describes the number, type, and location of samples, and the type of analyses; and

(B) The quality assurance project plan, which describes the project, quality assurance objectives for data measurements, sample collection and quality control measures, sample and document custody procedures, analytical and quality control procedures and data quality management;

(4) Preparation of a report that may include, but is not limited to, the following:

- (A) A description of the facility or vessel, including the history and nature of waste handling;
- (B) A description of known contaminants;
- (C) A description of the release or threat of release:
- (D) A description of the pathways of migration of hazardous substances or pollutants or contaminants;

- (E) An identification and description of actual and potential human and environmental receptors; and
- (F) A recommendation on whether further action is warranted, who should conduct further action, and whether a removal action should be considered.
- (c) In determining whether to conduct a removal action prior to completing the assessment, the director may consider a number of factors including but not limited to those factors contained in section 11-451-12. [EffAUG 1] 7 1995 (Auth: HRS \$\$128D-4, 128D-7) (Imp: HRS \$\$128D-4, 128D-7)
- §11-451-12 <u>Determination of appropriate response</u> <u>action.</u> (a) Purpose. This section identifies some of the factors which may be considered by the director in determining whether the response action required at a site should be a removal or remedial action.
- (b) Factors for determination of appropriate response action. The director may consider a number of factors including but not limited to:
 - (1) The immediacy of the threat;
 - (2) Planning time (including site characterization);
 - (3) Implementation time;
 - (4) The degree of risk to public health or welfare, the environment, or natural resources, including but not limited to:
 - (A) Actual or potential exposure to nearby human populations, animals or the food chain from hazardous substances or pollutants or contaminants;
 - (B) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
 - (C) Hazardous substances, pollutants, or contaminants in drums, barrels, tanks, or other bulk storage containers, that pose or may pose a threat of release;
 - (D) High levels of hazardous substances, pollutants, or contaminants in soils largely at or near the surface, that may migrate;
 - (E) Weather conditions that may cause a release of hazardous substances, pollutants, or contaminants to migrate or be released; and
 - (F) Threat of fire or explosion;
 - (5) Cost, including the extent to which deferral from removal to remedial will result in increased cost or increased risk to public health or welfare, the environment, or natural resources;

- (6) Community interest;
- (7) Site complexity;
- (8) The availability of other appropriate federal, state, county, or private response mechanisms to respond to the release; and
- (9) Other situations or factors that may pose an imminent and substantial endangerment to public health or welfare, the environment, or natural resources. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-4, 128D-7) (Imp: HRS \$\$128D-4, 128D-7)

\$11-451-13 Removal actions. (a) Review of existing information. If the department determines that a removal action may be appropriate, the department shall review or require to be reviewed, all existing assessments of the facility or vessel, including any assessment conducted under section 11-451-11, to enable the department to determine if sufficient information is available to select the appropriate removal action. Based on the available information, only the most qualified technologies that apply to the media or source of contamination should be considered.

- (b) Information to select removal actions. If the department determines that sufficient information is not available to select the appropriate removal action, and the exigencies of the situation do not allow for an assessment pursuant to section 11-451-11, the department shall collect or require to be collected, information sufficient to supplement any existing information and enable the department to select an appropriate removal action. This information should at a minimum address the following:
 - (1) Identification of the source and nature of the release or threat of release;
 - (2) Identification of the magnitude of the threat to public health or welfare, the environment, or natural resources;
 - (3) Information necessary to determine whether a removal is appropriate; and
 - (4) Information necessary to determine whether another party is undertaking the proper response action.
- (c) Removal action requirements. Removal actions shall, to the extent practicable as determined by the department:
 - (1) Address all immediate threats;
 - (2) Permanently and completely address the threat posed by the entire site;
 - (3) Contribute to the efficient performance of any anticipated remedial action with respect to the

release concerned; and

- (4) Take into consideration the identification and selection of presumptive response actions as described in 11-451-15(d).
- (d) Removal action reports. For all removal actions, the department shall complete a removal action report documenting the decision selecting a removal action.
 - (1) Removal action reports shall describe the following:
 - (A) The location of the release or threat of release;
 - (B) The cause of the release or threat of release;
 - (C) The initial situation at the facility or vessel which preceded the decision to conduct a removal action;
 - (D) Any efforts conducted by the department to obtain a response by other parties, if appropriate;
 - (E) The removal action and any alternatives considered;
 - (F) The resources expended; and
 - (G) A description of any hazardous substances, pollutants, or contaminants remaining onsite.
 - (2) In those instances where it is practicable, as determined by the department, the department shall complete a removal action report before the initiation of the removal action. In these instances, the removal action report shall be supplemented to include those items in paragraph (1)(G) and (1)(H) after the completion of the removal action.
 - (3) If the department determines, that it is not practicable to complete a removal action report before initiation of a removal action due to the urgency of the initial situation at the facility or vessel, the department shall complete, a removal action report after the completion of the removal action.
- (e) Additional data collection or studies. If the department determines that the removal action may not fully address the threat posed by the release and the release may require further action, the department may undertake or require data collection efforts or studies, as appropriate, to determine what further response actions may be necessary, and if necessary conduct or require to be conducted any appropriate remedial action.

- (f) Public participation in removal actions conducted by the department using fund monies. For removal actions conducted by the department using fund monies, if based on the site conditions, the department determines that the cost of a removal action could reasonably be anticipated to exceed \$25,000; or that public participation activities are in the public interest or significant concern has been expressed or is likely to be expressed by affected or potentially affected public or private interests, including local communities, as a result of the implementation of removal action activities, the department shall conduct the following public participation activities:
 - (1) Publish a notice of availability, pursuant to chapter 91, HRS, of the administrative record file established pursuant to section 11-451-19 in a newspaper which is printed and issued at least twice weekly in the county affected by the response action, and if appropriate, in a newspaper of general circulation in the state, within 60 days of initiation of on-site removal activity; and
 - (2) Provide a public comment period of not less than 30 days from the time the administrative record file is made available for public inspection, pursuant to section 11-451-21.
- (g) Public participation in removal actions conducted by potentially responsible parties. For removal actions conducted by potentially responsible parties, if based on the site conditions, the department determines that public participation activities are in the public interest or significant concern has been expressed or is likely to be expressed by affected or potentially affected public or private interests, including local communities, as a result of the implementation of removal action activities, potentially responsible parties shall conduct the following public participation activities:
 - (1) Publish a notice of availability, pursuant to chapter 91, HRS, of the administrative record file established pursuant to section 11-451-19 in a newspaper which is printed and issued at least twice weekly in the county affected by the response action, and if appropriate, as determined by the department, in a newspaper of general circulation in the state, within 60 days of initiation of on-site removal activity; and
 - (2) Provide a public comment period of not less than 30 days from the time the administrative record file is made available for public

- inspection, pursuant to section 11-451-21.

 (h) Further removal actions. All facilities or vessels are eligible for further removal actions should the department determine that facility or vessel conditions warrant such action.
- (i) Notification of natural resource trustees. Where determined appropriate by the department, if natural resources are or may be affected by the release, the department shall ensure that state and federal trustees of the affected natural resources have been notified in order that trustees may initiate appropriate actions, including cost recovery for damages. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-4, 128D-7, 128D-14) (Imp: HRS \$\$128D-4, 128D-7 128D-14)
- \$11-451-14 Remedial investigations. (a) Purpose. The purpose of this section is to describe the methods, procedures, and criteria the department shall follow or require to be followed, as appropriate, to develop and conduct a remedial investigation, including project scoping, data collection and development of remedial alternatives. The goal of the remedial investigation is to define and evaluate the nature and magnitude of the threat to public health or welfare, the environment, or natural resources, including the source, amount, location, probable direction of migration and nature or threat of the release, and to develop appropriate potential remedial alternatives. remedial investigation assesses facility or vessel conditions and evaluates potential remedial action alternatives to the extent necessary to select a remedial action or actions.
- (b) Sufficient information to select remedial actions. If the department determines that a remedial action may be appropriate, the department shall review or require to be reviewed all existing assessments of the facility or vessel, including any assessment conducted under section 11-451-11, to determine if sufficient information is available to select the appropriate remedial action. If sufficient information is not available, the department shall conduct or require to be conducted further investigations, called a remedial investigation. The remedial investigation will be conducted to supplement existing information and to enable the department to select the appropriate remedial action.
- (c) Project scoping. The remedial investigation should be tailored to facility or vessel circumstances so that the scope, timing and detail of the remedial investigation is appropriate to the complexity of facility or vessel problems being addressed. During scoping, to the

extent practicable, the actions necessary to evaluate and address facility or vessel problems shall be identified, or required to be identified, by the department. Where determined appropriate by the department, the following tasks shall be conducted:

- (1) Assemble and evaluate existing data on the facility or vessel, including the results of any removal or remedial actions, and assessments;
- (2) Develop a conceptual understanding of the site, based on the evaluation of existing data;
- (3) Identify likely remedial actions and potentially applicable technologies that may be used to address site problems, including the identification of presumptive remedies pursuant to section 11-451-15(d);
- (4) Identify the type, quality, and quantity, of the data that needs to be collected during the remedial investigation to support decisions regarding response actions:
- (5) Prepare site-specific health and safety plans that shall specify, at a minimum, protective equipment, medical and surveillance requirements, standard operating procedures, and a contingency plan that conforms with Title 29 of the Code of Federal Regulations \$1910.120, revised as of July 1, 1993;
- (6) Preliminarily identify the nature and magnitude of the threat to public health or welfare, the environment, or natural resources, including the source, amount, location, probable direction of migration, and nature or threat of the release;
- (7) If natural resources are or may be affected by the release, ensure that state and federal trustees of the affected natural resources have been notified in order that the trustees may initiate appropriate actions, including cost recovery for damages;
- (8) Develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs. In certain instances, the department may accept or use existing sampling and analysis plans developed pursuant to section 11-451-11(b)(3). The sampling and analysis plans shall consist of two parts:
 - (A) The field sampling plan, which describes the number, type, and location of samples and the types of analyses; and
 - (B) The quality assurance project plan, which describes the project, quality assurance objectives for data measurements, sample

collection and quality control measures, sample and document custody procedures, analytical and quality control procedures and data quality management.

(9) Initiate the identification of applicable requirements and, as appropriate, advisories, criteria, or guidance to be considered for a particular release, as set forth in section 11-451-8(e);

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- (10) Identify potentially responsible parties.
- (d) Data collection and evaluation. In collecting data for the remedial investigation, the department may conduct, or require to be conducted, one or more phases of sampling to focus efforts and increase the efficiency of the investigation. Because estimates of actual or potential exposures and associated impacts on human and environmental receptors may be refined throughout the phases of the remedial investigation as new information is obtained, facility or vessel characterization activities should be fully integrated with the development and evaluation of remedial action alternatives. To characterize the facility or vessel, the department, may, as appropriate, conduct or require to be conducted a baseline risk assessment and field investigations, including treatability studies (bench- or pilot- scale), to provide additional data to support design of response alternatives. The field investigations may assess the following factors:
 - (1) Physical characteristics of the facility or vessel, including but not limited to, important surface features, soils, geology, hydrogeology, meteorology, and ecology;
 - (2) Characteristics or classifications of air, surface water, and ground water;
 - (3) The general characteristics of the hazardous substances, pollutants, or contaminants released or threatened to be released, including quantities, state, concentration, toxicity, propensity to bioaccumulate, persistence, and mobility;
 - (4) The extent to which the source can be adequately identified and characterized;
 - (5) Actual and potential exposure pathways through environmental media;
 - (6) Actual and potential exposure routes, for example, inhalation and ingestion;
 - (7) Other factors, such as sensitive populations, that pertain to the characterization of the facility or vessel or support the analysis of potential remedial action alternatives;

- (8) The actual or potential affect of the release on natural resources and the environment, especially sensitive habitats and critical habitats of species protected under chapter 195D, HRS. This should include a survey of the area affected by the release to determine if natural resources are, or potentially may be, affected;
- (9) The feasibility of conducting a removal action; and
- (10) The range of remedial action alternatives.
- (e) Remedial investigation termination. A remedial investigation may be terminated when the department determines that:
 - (1) There is no release;
 - (2) The source of the release is determined not subject to chapter 128D, HRS;
 - (3) The release does not involve a hazardous substance, pollutant, or contaminant that may present a substantial endangerment to public health, welfare, or the environment;
 - (4) The amount, quantity, or concentration of a hazardous substance, pollutant, or contaminant released does not warrant a response; or
 - (5) The remedial investigation is completed. [Eff.] AUG 1 7 1995 (Auth: HRS \$\\$128D-7, 128D-14) (Imp: HRS \$\\$128D-7, 128D-14)
- \$11-451-15 Remedial action development and selection.

 (a) Purpose and goal. The purpose of the remedial action selection process is to select remedial actions that eliminate, reduce, prevent, minimize, mitigate, or control risks to public health or welfare, the environment, or natural resources. The goal of the process is to select remedial actions that provide for efficient, cost effective, and long-term reliable solutions which are protective of public health or welfare, the environment, or natural resources.
- (b) Developing remedial action alternatives. Alternatives shall be developed that protect public health or welfare, the environment, or natural resources by recycling waste or by eliminating, reducing or controlling risks posed by a site. The number and type of alternatives to be analyzed shall be determined at each site, taking into account the scope, characteristics, and complexity of the site problem that is being addressed. As appropriate, in developing the alternatives, the department shall establish or require to be established acceptable cleanup levels that are protective of public health or welfare, the environment,

or natural resources by considering the following:

(1) Applicable requirements, if available;

- (2) For systemic toxicants, acceptable cleanup levels shall represent concentration levels to which the human population, including sensitive subgroups, may be exposed without adverse effect during a lifetime or part of a lifetime, incorporating an adequate margin of safety;
- (3) For known or suspected carcinogens, acceptable cleanup levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10⁻⁶ and 10⁻⁶ using information on the relationship between dose and response. The 10⁻⁶ risk level shall be used as the point of departure for determining acceptable cleanup levels for alternatives when chemical specific state or federal requirements are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure;
- (4) The findings of the natural resource assessment conducted to address impacts to ecological receptors.
- (c) Threshold criteria for remedial action alternatives. Based on available information, the department shall not consider or require to be considered, those remedial action alternatives which:
 - (1) Fail to protect public health or welfare, the environment, or natural resources; or
 - (2) Fail to meet applicable requirements.
- (d) Presumptive remedial actions. The department, to the extent practicable, shall identify, or require to be identified, and select presumptive remedial actions to address sites where the contamination present can be treated, contained, or disposed of in a manner which has proved successful at similar sites with similar contamination. The development and selection of presumptive remedial actions may be based on analyses conducted for other similar sites with similar contamination, with only limited data collection and analysis required for the site under consideration.
- (e) Source control actions. For source control actions, the department shall develop or require to be developed:
 - (1) One or more alternatives, as determined appropriate by the department, in which treatment that reduces the toxicity, mobility, or volume of the hazardous substances, pollutants, or

contaminants is a principal element. As appropriate, the range shall include an alternative that removes or destroys hazardous substances, pollutants, or contaminants to the maximum extent feasible, eliminating or minimizing to the degree possible, the need for long-term management. The department shall develop or require to be developed, as appropriate, other alternatives which at a minimum, treat the principal threats posed by the site but vary in the degree of treatment employed and the quantities and characteristics or the treatment residuals and untreated waste that must be managed; and

- (2) One or more alternatives that involve little or no treatment, but provide protection of public health or welfare, the environment, or natural resources primarily by preventing or controlling exposure to hazardous substances, pollutants, or contaminants, through engineering controls, for example, containment, and, as necessary, institutional controls to protect public health or welfare, the environment, or natural resources and to assure continued effectiveness of the response action.
- (f) Ground-water remedial actions. For ground-water remedial actions, the department shall develop or require to be developed a limited number of remedial alternatives that attain site-specific remediation levels within different restoration time periods utilizing one or more different technologies.
- (g) Analysis of remedial action alternatives. A detailed analysis shall be conducted on those remedial action alternatives which meet the threshold criteria described in subsection (c). The detailed analysis consists of an assessment of individual alternatives against each of the three evaluation criteria described in paragraphs (1),(2), and (3), and a comparative analysis that focuses upon the performance of each alternative against these criteria.
 - (1) Effectiveness. The effectiveness criterion focuses on the degree to which an alternative reduces toxicity, mobility, or volume through treatment; minimizes residual risks and affords long-term reliable protection; complies with applicable requirements; minimizes short-term impacts and how quickly it achieves protection. Alternatives providing significantly less effectiveness than other more promising alternatives may be eliminated.

- (2) Implementability. The implementability criterion focuses on the technical feasibility and availability of the technologies each alternative would employ and the administrative feasibility of implementing the alternative. Alternatives that are technically or administratively infeasible or that would require equipment, specialists, or facilities that are not available within a reasonable period of time may be eliminated from further consideration. The implementability criterion also includes the level of community acceptance of the remedial action.
- (3) Cost. The cost criterion considers cost of construction and the cost to operate and maintain the equipment. Costs that are excessive compared to the overall effectiveness of other alternatives may be considered as one of several factors used to eliminate alternatives. Alternatives providing effectiveness and implementability similar to that of another alternative by employing a similar method of treatment or engineering control, but at greater cost, may be eliminated.
- (h) Draft response action memorandum. The department shall prepare for public comment a draft response action memorandum. The purpose of the draft response action memorandum is to document and make available for public comment the department's preliminary remedy selection decision. The draft response action memorandum shall summarize the site conditions discovered, the problems posed by the release or threat of release, the remedial alternatives analyzed by the department or other party, a preferred remedial action alternative and the technical aspects of the selected remedy. The content and level of detail will vary depending on the scope of the remedial action.
- (i) Public participation activities. After the draft response action memorandum is prepared, the department shall conduct, or require to be conducted if appropriate, the following public participation activities:
 - (1) Publish a notice of availability, pursuant to chapter 91, HRS, of the draft response action memorandum in a newspaper which is printed and issued at least twice weekly in the county affected by the proposed response action, and if appropriate, as determined by the department, in anewspaper of general circulation in the state; and
 - (2) Make the draft response action memorandum and supporting analysis available in the administrative record required under section 11-

451-20, for public inspection and copying prior to the commencement of any remedial action.

(3) Provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments on the draft response action memorandum and the supporting analysis including the remedial investigation;

(4) Upon timely request and at the discretion of the department, extend the public comment period;

(5) Hold a public meeting, if the department determines that there is sufficient public interest; and

(6) Prepare a transcript, recording or minutes of any public meeting held and make such transcript, recording or minutes available to the public.

(j) If after publication of the draft response action memorandum and prior to the selection by the department of the final response, new information is made available that fundamentally changes the basic features of the remedy with respect to scope, performance, or cost, such that the remedy fundamentally differs from the original proposal in the draft response action memorandum and the supporting analysis and information, the department shall:

(1) Include a discussion in the final response action memorandum of the fundamental changes and reasons for such changes, if the department determines such changes could be reasonably anticipated by the public based on the alternatives and other information available in the draft response action memorandum or the supporting analysis and information in the administrative record; or

Seek additional public comment on a revised draft response action memorandum, when the department determines the fundamental changes could not have been reasonably anticipated by the public based on the information available in the initial draft response action memorandum or the supporting analysis and information in the administrative record. The department shall, prior to adoption of the selected remedy in the response action memorandum, issue a revised draft response action memorandum, which shall include a discussion of the fundamental changes and the reasons for such changes, in accordance with the public participation requirements described in paragraphs (1) through (6).

- (k) Based upon the public comments on the draft response action memorandum, the department shall reassess whether the initial determination was appropriate, make a final decision on the remedial action, and document the decision in the response action memorandum, for inclusion in an administrative record, as described in section 11-451-19.
- (1) After the response action memorandum is finalized, the department shall or require another to make the response action memorandum and supporting analysis available for public inspection and copying, in the affected county, prior to the commencement of any response action. [Eff AUG 1 7] 1995 (Auth: HRS \$\$128D-4, 128D-7, 128D-14) (Imp: HRS \$\$128D-4, 128D-7, 128D-14)
- \$11-451-16 Remedial design and remedial action.

 (a) Scope. The remedial design and remedial action phase includes the actual design and construction and implementation of the final remedy selected and documented in the final response action memorandum.
- (b) Conformance with response action selected. All RD/RA activities shall be conducted in conformance with the response action selected and set forth in the response action memorandum for the facility or vessel. [EffAUG | 7] 1995 (Auth: HRS §\$128D-4, 128D-7]) (Imp: HRS §\$128D-4, 128D-7)

SUBCHAPTER 4

NATURAL RESOURCES

\$11-451-17 Natural resources. (a) Purpose. The purpose of this section is to describe the activities that the natural resources trustee for the state may conduct to fulfill the trustee's duties and responsibilities under this chapter.

- (b) Duties and responsibilities of the natural resource trustee. Upon notification or discovery of injury to, loss of, or threat to natural resources, the natural resource trustee shall act on behalf of the public to initiate claims for and recover damages to those natural resources. The natural resources trustee shall request that the attorney general seek compensation from the potentially responsible parties for the costs of natural resource damages, injury, destruction or loss, which may include but are not limited to the following costs:
 - (1) The cost of restoration planning, restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources:
 - (2) The diminution in value of those natural resources pending restoration; and
 - (3) The cost of assessing natural resource damages. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-4, 128D-5, 128D-6, 128D-14) (Imp: HRS \$\$128D-4, 128D-5, 128D-6, 128D-14)

SUBCHAPTER 5

PARTICIPATION BY OTHER PERSONS

\$11-451-18 Activities by other persons. (a) Any person who has incurred costs for undertaking a response action in accordance with chapter 128D, HRS, may seek contribution, indemnity or any other relief as provided by section 128D-18, HRS, and subject to any other provisions of law.

(b) Persons liable pursuant to section 128D-6(a), HRS, may be liable for any or all response costs incurred by any other person, provided that those response costs incurred by any other person are a result of response actions conducted consistent with this chapter and section 128D-18, HRS.

(c) Actions under subsection (a) which are private party response actions will be considered to be consistent with this chapter as provided in section 128D-6(a), HRS, based on the absence of material or substantial deviations from the provisions of this chapter, when evaluated as a whole by the department, the

court or a finder of fact.

- (d) Private party response actions are those response actions taken at sites where:
 - (1) The department is not providing oversight pursuant to 11-451-8(i); or
 - (2) The response action is not carried out pursuant to a consent agreement or an order issued by the department.
- (e) Response actions carried out pursuant to a consent agreement or an order issued by the department must be in compliance with the terms of the agreement or order to be considered consistent with this chapter as provided in section 128D-6(a), HRS.
- (f) Implementation of response measures by potentially responsible parties or by any other person does not release those parties from liability under section 128D-6, HRS. [EffAilG 1 7] 1995 (Auth: HRS \$\$128D-7, 128D-18) (Imp: HRS \$\$128D-7, 128D-18)

SUBCHAPTER 6

ADMINISTRATIVE RECORDS

- \$11-451-19 Establishment and content of administrative records.

 (a) The purpose of this subchapter is to establish guidelines for the contents of administrative records; the location of the administrative records; when the department shall establish administrative records; and the procedures by which the public, potentially responsible parties, and other persons may comment on administrative records.
- (b) Content of administrative records for response action selection. The department shall establish administrative records that contain the documents that form the basis for the selection of a response action. The department shall compile and maintain administrative records in accordance with this section.
 - (1) The administrative record for the selection of a response action may contain the following types of documents:
 - (A) Documents containing factual information, data and analysis of the factual information, and data that may form the basis for the selection of a response action;
 - (B) Guidance documents, technical literature, and site-specific policy memoranda that may form the basis for the selection of the response action;
 - (C) Documents received, published, or made available to the public under section 11-451-20 for remedial actions, or section 11-451-21 for removal actions;

- (D) Decision documents, including response action memorandums and removal action reports;
- (E) Orders issued, or enforceable agreements which the department and potentially responsible parties enter into pursuant to this chapter; and
- (F) An index of the documents included in the administrative record file. If documents are customarily grouped together, as with sampling data chain of custody documents, they may be listed as a group in the index to the administrative record file.
- If information which forms the basis for the selection (2) of a response action is included only in a document containing confidential or privileged information and is not otherwise available to the public, the information, to the extent feasible, shall be summarized in such a way as to make it disclosable and the summary shall be placed in the publicly available portion of the administrative record file. confidential or privileged document itself shall be placed in the confidential portion of the administrative record file pursuant to sections 92F-13.3 and 92F-13.4, HRS. If information, such as confidential business information, cannot be summarized in a disclosable manner, the information shall be placed only in the confidential portion of the administrative record file pursuant to sections 92F-13.3 and 92F-13.4, HRS. All documents contained in the confidential portion of the administrative record file shall be listed in the index to the file.
- (3) Administrative records for the selection of a response action need not contain the following types of documents:
 - (A) Sampling and testing data, quality control and quality assurance documentation, chain of custody forms, publicly available technical literature not generated for the facility or vessel at issue, provided that the index to the administrative record files indicates the location and availability of this information.
 - (B) Documents which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff.
- (4) Administrative records for the selection of a response action shall not contain privileged documents except where such privilege is waived. Privileged documents include but are not limited to documents subject to the

attorney-client, attorney work product, deliberative process, or other privileges recognized by law.

- (c) Administrative record docket. The department shall establish a docket at an office of the department at which documents included in the administrative record files shall be located and be made available for public inspection.
- (d) Administrative records for orders. The department shall establish separate administrative records consisting of the documents and other papers and materials considered by the director in issuing an order pursuant to section 128D-17, HRS. [Eff. AUG | 7 1995] (Auth: HRS \$\$128D-7, 128D-14) (Imp: HRS \$\$128D-7, 128D-14)
- \$11-451-20 Public inspection of and public comment on administrative records for remedial actions. (a) Availability. The administrative record for the selection of a remedial action shall be made available for public inspection when the draft response action memorandum is made public or issued pursuant to section 11-451-15 (i).
- (b) Public comment period. The department shall provide a public comment period pursuant to section 11-451-15(i) so that interested persons may submit comments on the draft response action memorandum. All timely written and oral comments on the draft response action memorandum will be included in the administrative record. Documents generated or received after the response action memorandum is signed shall be added to the administrative record only as provided in section 11-451-22. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-7, 128D-14) (Imp: HRS \$\$128D-7, 128D-14)
- \$11-451-21 <u>Public inspection of and public comment on administrative records for removal actions.</u>

 (a) Availability. The administrative record for those removal actions requiring public participation activities pursuant to section 11-451-13, shall be made available for public inspection no later than 60 days after initiation of on-site removal activity.
- (b) Public comment. The department shall provide or require to be provided, a public comment period pursuant to section 11-451-13, so that interested persons may submit comments on the removal action. All timely written and oral comments on the removal action will be included in the administrative record. [Eff. $\Delta UG 1 7 1995$] (Auth: HRS §\$128D-7, 128D-14) (Imp: HRS §\$128D-7, 128D-14)

- \$11-451-22 Record requirements after the decision document has been finalized. (a) Addition of documents to the administrative record. The department may add documents to the administrative record after the decision document selecting the response action has been signed if the documents concern a portion of a response action decision that the decision document does not address or defers to be decided at a later date.
- (b) Additional public comment periods. The department may hold additional public comment periods or extend the time for the submission of public comment after a decision document has been signed on any issues concerning selection of the response action. All additional comments submitted during such comment periods that are responsive to the request, and any response to these comments, along with documents supporting the request and any final decision with respect to the issue, shall be placed in the administrative record.
- (c) Consideration of additional public comments. The department shall consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record which could not have been submitted during the public comment period and which substantially supports the need to significantly alter the response action. All such comments and any responses thereto shall be placed in the administrative record. [Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-7, 128D-14)
- §11-451-23 <u>Supplementation of administrative records for orders.</u> (a) Supplementation by person receiving an order. The administrative record for an order may be supplemented, by the person receiving the order, with other documents, writings, or material within thirty days after receipt of the order.
- (b) Supplementation by proceedings. In the sole discretion of the director, the administrative record may be supplemented further by a proceeding in which testimony and other evidence may be received. [Eff. AUG | 7 1995] (Auth: HRS \$\$128D-7, 128D-14) (Imp: HRS \$\$128D-7, 128D-14)

SUBCHAPTER 7

ENTRY AND ACCESS

§11-451-24 Entry and access. (a) Pursuant to section 128D-4, HRS, for purposes of determining the need for response, or choosing or taking a response action, or otherwise enforcing the provisions of chapter 128D, HRS, the department may enter any

facility or vessel, establishment, property, or other place or location described in paragraphs (1),(2),(3), or (4) to conduct, complete, operate, or maintain any response actions authorized by chapter 128D, HRS. The department may, upon reasonable notice and at reasonable times, enter:

- (1) Any facility or vessel, establishment, property, or other place or location where any hazardous substance, pollutant, or contaminant may be or has been generated, stored, treated, disposed of, or transported from;
- (2) Any facility or vessel, establishment, property or other place or location from which, or to which, a hazardous substance, pollutant, or contaminant has been, or may have been, released or where such release is or may be threatened;
- (3) Any facility or vessel, establishment, property or other place or location where entry is necessary to determine the need for response or the appropriate response or to effectuate a response action; or
- (4) Any facility or vessel, establishment, property or other place or location adjacent to those facilities or vessels, establishments, properties or other places or locations described in paragraphs (1),(2), or (3).
- (b) Once a determination has been made by the department that there is a reasonable basis to believe that there has been or may be a release, the department may enter all facilities or vessels, establishments, properties or other places or locations specified in subsection (a)(1),(2), or (3), at which the release or threat of release is believed to be, and all other facilities or vessels, establishments, properties or other places or locations that are related to the response or are necessary to enter in responding to that release or threat of release.
- (c) Designated department representatives. The department may designate as its representative solely for the purpose of access, among others, one or more potentially responsible parties, including representatives, employees, agents, and contractors of such parties. The department may exercise the authority contained in section 128D-4, HRS, to obtain access for its designated representative. A potentially responsible party may only be designated as a representative of the department where that potentially responsible party has agreed to conduct response activities pursuant to an order issued or an enforceable agreement entered into between the department and the potentially responsible party.
- (d) If consent is not granted under the authorities described in section (a), or if consent is conditioned in any manner, the department may issue an order pursuant to section 128D-4(a)(1), HRS, directing compliance with the request for access made under section 128-4(b), HRS.

- (e) The department reserves the right to proceed, where appropriate, under applicable authority other than section 128D-4, HRS.
- (f) An administrative order may direct compliance with a request to enter or inspect any facility or vessel, establishment, property, or other place or location described in subsections (a)(1),(2),(3), or (4).

(g) Each order shall contain:

(1) A determination by the department that it is reasonable to believe that there may be or has been a release or threat of a release of a hazardous substance, pollutant, or contaminant and a statement of the facts upon which the determination is based;

(2) A description, pursuant to chapter 128D, HRS, of the purpose and estimated scope and duration of the entry, including a description of the specific anticipated activities to be conducted pursuant to the order;

- (3) A provision advising the person who failed to grant consent that an officer or employee of the agency that issued the order will be available to confer with respondent prior to effective date of the order; and
- (4) A provision advising the person who failed to consent that a court may impose a penalty of up to \$50,000 per day for unreasonable failure to comply with the order.
- (h) Orders shall be served upon the person or potentially responsible party who failed to consent prior to the orders effective date. Force shall not be used to compel compliance with an order.
- (i) Orders may not be issued for any criminal investigations. "[Eff. AUG 1 7 1995] (Auth: HRS \$\$128D-4, 128D-7) (Imp: HRS \$\$128D-4, 128D-7)

§11-451-24

Chapter 11-451, Hawaii Administrative Rules, was adopted on AUG | 7 |995 following public hearings in Hilo, Hawaii on April 11, 1995, in Kailua-Kona, Hawaii on April 12, 1995, in Honolulu, Oahu on April 17, 1995, in Lihue, Kauai on April 18, 1995, and in Kahului, Maui on April 19, 1995, after a notice of public hearing was published on March 9, 1995 in the Hawaii Tribune Herald, the West Hawaii Today, the Honolulu Advertiser, the Garden Isle, and the Maui News.

LAWRENCE MIKE

LAWRENCE MIIKE
Director of Health

Date: 7/30/95

UIENANT GOVERNOR'S
OFFICE

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Duyamin Legelano
BENJAMIN J. CAYETANO
Governor

State of Hawaii

Date: (lignt 2, 1995

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Filed

APPROVED AS TO FORM:

KATHLEEN S V HO

Deputy Attorney General





In reply, please refer to: HEER OFFICE

HONOLULU, HAWAII 96801

September 1, 1995

THE STATE CONTINGENCY PLAN HAWAII'S APPROACH TO THE CLEANUP OF HAZARDOUS WASTE SITES

The State of Hawaii Department of Health announces the promulgation of regulations which address the cleanup of releases of hazardous substances (including oil) into the environment of the State of Hawaii. These regulations were adopted pursuant to the Hawaii Environmental Response Law, Chapter 128D, Hawaii Revised Statutes. The new regulations took effect on August 17, 1995.

The State Contingency Plan ("SCP") has been designed to balance the need for certainty and flexibility by the regulated community with the needs of all of Hawaii's citizens for timely and permanent cleanups which leave no significant risk to the public health, safety, welfare or the environment.

The SCP addresses responsible party cleanups at sites where there has been a release or threat of a release of a hazardous substance into the environment that may present a substantial danger to the public health or welfare, the environment, or natural resources. Responsible parties are past or current owners and operators of sites at which a release or threat of release has occurred, and transporters and generators of hazardous substances at those sites.

The SCP identifies those hazardous substances and their reportable quantities which are subject to the requirements and procedures set forth in the rules. The rules establish the notification requirements owners and operators of facilities or vessels shall follow in the event of a release of a hazardous substance that exceeds a reportable quantity. The SCP also

describes the process the Department will use, or require to be used, for conducting site investigations and evaluating and selecting cleanup alternatives for response actions at sites.

KEY FEATURES OF THE NEW PROGRAM AND THE SCP

1. ROLES OF THE POTENTIALLY RESPONSIBLE PARTIES AND THE STATE

The program is designed around a liability and enforcement scheme which encourages prompt and cooperative response actions by those legally responsible to conduct those actions. The Department of Health's Hazard Evaluation and Emergency Response Office will focus its resources on conducting response actions at sites where the private sector is unable to conduct the response and on the oversight of private party response actions at high priority sites.

2. NOTIFICATION REQUIREMENTS

The State Contingency Plan clearly describes which releases of hazardous substances require reporting to the Department. The SCP defines specific thresholds and time frames for reporting releases in Subchapter 2, Notification of Releases, of the SCP. Please take the time to carefully review this section of the rules. Please be advised that releases of hazardous substances at or above the reportable quantities listed in these rules must be reported to the Hazard Evaluation and Emergency Response Office and to the Local Emergency Planning Committee in accordance with the requirements of these rules. Failure to report a release may result in penalties of up to \$10,000 per day.

3. RISK REDUCTION MEASURES AND ACCELERATED CLEANUPS

Early risk reduction measures and accelerated assessment and response actions are encouraged. The Department will assess the need for early response actions and will conduct, or require responsible parties to conduct, emergency response actions if the conditions warrant them. Emergency response actions may be necessary in response to sudden releases, imminent hazards, and other time-critical conditions. Response actions that are not time-critical (both removal and remedial actions) will be taken following any emergency response if site conditions warrant such actions. If sufficient risk reduction and cleanup can be achieved through emergency response actions or through a simple, removal or remedial actions, extensive investigation and evaluation of cleanup alternatives may not be necessary.

4. TECHNICAL GUIDANCE MANUAL

The Hazard Evaluation and Emergency Response Office is developing a Technical Guidance Manual ("TGM") which will provide guidance to those conducting investigations and cleanups under this program. The TGM will address such program areas as Release Notification, Site Assessment and Prioritization, Field Investigation, Response Action Decisions, Cleanup Requirements, and Public Participation. Prior to completion of the TGM, the Department will provide guidance to responsible parties on a site by site basis as issues arise.

5. PUBLIC INFORMATION AND INVOLVEMENT

The Department is committed to involving citizens in the hazardous waste cleanup process. Our effort will be based on two-way communication designed not only to keep citizens informed about site progress, but also to give them the opportunity to provide input into site decisions. Because not every site will have a significant impact on a local community, the Department will conduct its community relations efforts according to community needs and interest in site activities.

RESPONSE TO COMMENTS ON PROPOSED STATE CONTINGENCY PLAN

1.

One commenter stated that the SCP is far reaching in its applicability, and as proposed has a great deal of overlap with other regulated programs. Activities governed by other state and federal regulations...should be exempt from coverage under the SCP. Examples include: marine spills (Coast Guard); RCRA corrective action; and hydrocarbon vapors (CAA). Additional oversight and approval requirements by another organization will further complicate the cleanup process.

The Department agrees that there is the potential for overlap between the SCP and some of the other environmental programs managed at the state and federal levels. The Department will make every effort to minimize any duplication of effort and extra burdens placed on industry by these new rules, including the use of memoranda of understanding with other state and federal agencies who have responsibilities in the area of hazardous materials response and the implementation of existing area-wide response planning documents, such as Federal On-Scene Coordinator's Area Contigency Plan. Section 128D-22 exempts the Department from taking duplicative response action when there has been a response order issued under federal law provided that there is not an imminent and substantial harm to public health or welfare, and the remedy under federal law is consistent with In addition, the Department has provided an these rules. exemption from release notification for releases regulated under other environmental programs. See §11-451-7(i)(5) of the final rules and response to comment 62.

2.

One commenter stated that it is unclear how these new regulations will be enforced What kind of enforcement will be done by the DOH with regards to the Notification of Releases? What is the schedule of enforcement? HAR 11-451 should include details of enforcement and the fines/penalties structure.

The Department will make every effort to work cooperatively with potentially responsible parties to address the release or threat of release of hazardous substances under these rules. Depending on the nature and threat of the hazard, the Department may require response actions to proceed under an enforceable agreement with the Department. In other instances where the threat may be low, the Department may allow response actions to proceed voluntarily with minimal Department oversight.

With respect to notification of releases, the Department has deleted the reporting requirements regarding the notification to the Department of historical releases occurring prior to the effective date of these rules. The Department intends to obtain information regarding historical releases on a facility by facility basis as resources permit using the information gathering authorities in Chapter 128D. The Department will target those facilities at which historical releases are likely to have occurred and at which the impacts of such releases may be significant. For releases occurring after the effective date of these rules, the Department expects PRPs to comply with the reporting requirements outlined in the rules. Failure to comply with this section of the rules may subject a PRP to penalties of up to \$10,000 per day, per violation. The Environmental Response Law, Chapter 128D HRS, specifies penalties for failure to comply with certain sections of the law. Penalties may range from \$10,000 to \$100,000 per day, per violation, depending on the nature of the violation.

3.

One commenter was concerned that the rules are directed almost entirely to the response and remediation of land based spills. The plan should recognize that response to an oil spill in the marine environment is far different than responding to land based spills. The commenter felt that the State of Hawaii should follow the lead of the federal government in its NCP and provide for separate sections to address land-based hazardous substance cleanups as distinct from marine oil spills.

The Department agrees with the commenter that there is a difference in responding to land based spills and marine based spills. We also understand that responding to an air release is far different from responding to a release to soil. These rules have been developed to provide the director with broad discretion with regard to assessing and responding to hazardous substance threats. The basic process described in these rules provides enough flexibility to be appropriate in both marine and land situations. In a simplified manner, any release above a reportable quantity will need to be reported. Following reporting, an assessment of the release is necessary. The rules are very flexible as to what constitutes an assessment and subsection 11-451-11(c) allows the director to permit a response action prior to conducting an assessment based on the criteria in section 11-451-12. Following the assessment, if appropriate, the response action will be implemented. For marine releases the initial response action will be classified as a removal, thereby allowing rapid response. Following the initial response action, a removal action report shall be completed.

One commenter stated that there are many aspects of the proposed rule that are clearly inapplicable and are confusing in the context of a marine oil spill response. For example, much of what is contained in Subchapter 3 of the proposed rule is clearly inapplicable to an emergency oil spill response in marine waters. Also, the terminology is different, for example, the term "site" should not be confused with the term "response area" as defined under federal rules.

The Department acknowledges that some of the terminology differs between marine response and land based response. This difference in terminology should not affect the response to a release. The Department will follow the plans already in effect for marine spills. However, the administrative requirements to be followed apply to both marine and land based spills. See response to comment 3.

5.

One commenter felt that the SCP should clearly recognize the role of the federal OSC and identify the role of the State OSC in spill response, and should cross reference and be consistent with the area contingency plan. The present proposal fails to recognize the key responsibility and authority of the federal OSC under OPA 90. See 33 USC Section 1322(c)(2). In addition, the rules should address various specific matters related to oil spills in marine waters such as authorization of incidental discharge of oil/oily water during a spill response, and clarify that recovered oil and oily debris are not hazardous waste unless and until so characterized after being collected and transported to shoreline temporary storage.

Chapter 128D defines the federal and state On-Scene Coordinator. By definition, the OSC is the state representative "on-scene" for the Department. As such, the OSC is a representative of the director and has the authorities and responsibilities given to the director of health. Specific response roles for the state and federal OSC are described in both the State of Hawaii, Oil and Hazardous Substances Emergency Response Plan and the FOSC's Area Contingency Plan. We believe that the agreements in place under the aforementioned plans clearly delineate the specific jurisdictional authorities of the federal and state OSCs.

Chapter 128D was amended in 1993 to address your concerns regarding incidental discharges during a response action. The amendment provides that as long as the response is conducted in accordance with the pre-approved plans or at the direction of a federal or state OSC that liability is limited. We do not believe that it is appropriate in these rules to address specific response issues. These issues should be addressed in planning

and policy documents. Oil is not a hazardous waste in Hawaii under chapter 342J. It is a hazardous substance for the purpose of conducting a response action under Chapter 128D and these rules. The oily waste disposal subcommittee of the Area Planning Committee is currently working on resolving this issue.

6.

One commenter questioned how the HEER Office will handle increased staffing requirements for DOH personnel to expeditiously review results of field investigations and requests for closure on remediated sites?

The Department intends to prioritize all release notifications and release discoveries into three categories: high; medium; and low priority. The Department will focus its limited resources on the high and medium priority sites and will provide oversight primarily to these sites. Oversight for low priority sites will be limited, although PRPs at low priority sites will be encouraged to undertake response action on a voluntary basis. The Department will assess this approach periodically to ensure that program goals are being met without creating delays in cleanup activities.

7.

One commenter stated that the phrase "imminent and substantial" endangerment and variants thereof is used throughout the text. Nowhere is this phrase or its alternates defined. Provide a common and consistent definition.

These terms are not defined because they are broad in scope and allow the Department the flexibility to respond to a broad range of situations. What constitutes an "imminent and substantial" may be interpreted differently at different sites based on the nature and extent of the release, the location of the release, the potential receptors, and other factors.

8.

One commenter felt that the use of the word "any" in \$11-451-1(a)(4) ("Objectives") regarding the "conduct of any response actions" pursuant to 128D is too broad and should be deleted.

The Department believes the use of the word "any" in this instance is not overly broad. The Department will use its best judgement in determining the appropriate response actions to take in any given situation.

9.

One commenter stated that the phrase "applicable requirements"

makes reference to "local requirements". It is respectfully suggested that the State occupy the field with respect to all Plan "requirements", because otherwise there could be arbitrary variability from county to county.

The Environmental Response Law, Chapter 128D, HRS, does not allow the Department to waive any applicable federal, state or local laws in conducting cleanups as does the federal Superfund law. However, the ERL does exempt the Department and PRPs conducting response actions pursuant to an enforceable agreement from the obligation to obtain state or county permits for response actions conducted on site. The variability from county to county in regard to county codes or environmental requirements will have to be addressed by the Department and any PRP conducting response actions under this law. As a policy matter, the Department will encourage PRPs to obtain permits for response actions where obtaining permits would not significantly delay the implementation of the response action. PRPs conducting voluntary response actions without an enforceable agreement in place with the Department are not authorized to conduct a response action without first obtaining permits.

10.

One commenter raised concerns regarding the definition of "applicable requirements" with respect to permits. If State and County permits are excluded, should City permits also be excluded? Is the permit exclusion really such a good idea? What about county grading/fill permits that would typically be required on a site with over 50 yards of cut and fill or a cut that exceeds three feet in vertical height? Without proper controls and regulatory oversight, potential hazards associated with excavations or fills placed too close to existing structures or property boundaries might endanger human health and welfare.

The exclusion from the requirement to obtain state or county permits is derived from Section 128D-23 and applies only to the administrative aspects of the permit requirements. "substantive" requirements of applicable state and county laws, including permit requirements, must still be met. The permit exclusion is designed to streamline the cleanup process by eliminating the need to apply for and process permits for response actions. However, in conducting those response actions, all "substantive" requirements must be met. As a practical matter, the Department would encourage PRPs to obtain permits in those instances where obtaining a permit would not create any significant delays in cleanup. By obtaining permits and the accompanying review by state and county agencies, PRPs will benefit from a more detailed review of proposed remediation plans.

One commenter provided alternative language for the definition of "applicable requirements" which more closely follows the definition in the National Contingency Plan ("NCP").

The Department believes that the definition provided in the proposed rules is the appropriate definition rather than the definition in the NCP because all response actions carried out under Chapter 128D must meet all "legally applicable" federal, state and local laws without exception. In fact, the federal Superfund law (CERCLA, Section 121(d)) uses the phrase "legally applicable" rather than the commenter's proposed language "specifically address" when describing the degree of cleanup necessary at a site.

12.

One commenter suggested that the Department define "facility" and "facility boundary" as distinguished from "environment".

The terms "facility" and "environment" are already defined in both Chapter 128D and the proposed rules. The term "facility boundary" is not defined because it would not have any useful application in the rules. Releases to the environment occurring from a facility may occur solely within the property boundaries of the physical plant or it may extend off of the property boundaries. In either case, the release would trigger the notification requirements contained in the rules. If a release is contained such that it does not reach the "environment", then it is not considered a "release" for purposes of applicability under these rules. (See response to comments 21 and 26.)

13.

One commenter suggested that the Department define "ground water".

The following definition of "ground water" will be included in the rules.

"Ground water" means any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise.

14.

One commenter suggested that the Department define "navigable water".

The following definition of "navigable water" will be added to

the rules.

"Navigable water" means the water of the United States including the territorial seas. The term includes:

- (1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
 - (2) Interstate waters, including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
- (A) That are or could be used by interstate or foreign travellers for recreational or other purposes;
- (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
- (C) That are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as navigable waters under this section;
- (5) Tributaries of waters identified in paragraphs (1) through (4) of this definition, including adjacent wetlands; and
- (6) Wetlands adjacent to waters identified in paragraphs (1) through (5) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

15.

- a. Definition of "petroleum". Two commenters suggested expanding the definition of petroleum or oil more in line with 40 CFR 11, Appendix E. (CWA OPA rules.) Because petroleum products differ greatly based on their persistence in the environment, petroleum products should be defined differently so that the risk and response associated with each product can be appropriately assessed. Under OPA, oils are categorized as persistent or non-persistent. The commenters suggested reporting requirements that are different for different fractions of oil.
- b. Also, one commenter cites as an example the fugitive emissions from its facility that would require continuous reporting of thousands of pieces of equipment that would have no discernable benefit to the environment.
- a. The Department agrees with the commenters that petroleum products differ greatly in their persistence, risk posed, and cleanup response. The Department also has some concerns about developing a complex set of notification requirements which depend on extensive knowledge of the material released. After considering the benefits of a risk-based reporting scheme, the

Department has decided to retain the existing reporting requirements with minor modifications rather than set up a more complex risk-based reporting scheme which may result in significant confusion regarding notification for less sophisticated PRPs or where the exact nature of the material is unknown.

b. Fugitive emissions such as those from a refinery may be exempt from reporting if they are addressed by a state or federal permit, license, or approval, or which are operating under a valid registration, order or guideline issued under a federal or state statute or regulation. See §11-451-7(i)(5) of the final rules and response to comment 62. If the continuous emissions are not exempt, reporting may be accomplished through the reporting process for continuous releases.

16.

One commenter suggests the addition of the term "non-halogenated hydrocarbon" and identification of common refined fractions of petroleum in the definition of petroleum.

The Department believes that the current definition of petroleum is sufficient for purposes of these rules.

17.

One commenter suggested that in the definition of "owner or operator", the term "chartering by demise" may be ambiguous. Recent Coast Guard regulations for Financial Responsibility for Water Pollution under OPA (7/1/94 FR 34229, Sect 138.20) added a new definition of "operator" to make it clear that "Demise Charterer" is synonymous with the common term "Bareboat Charterer".

The Department has revise the definition of "owner or operator" to include this clarification.

18.

One commenter offered the following comments:

a. The state's financial institutions can have a great deal of influence over the activities that occur on the properties they hold as security. They are also among those least in need of a regulatory loophole. To the definition of "owner or operator" should be added "or did not knowingly omit to take any action or make any decision that would likely have prevented or mitigated such release or threatened release." This language is necessary to close a loophole in liability for lienholders that stand by and allow, at facilities forming security for their loans, activities that they know are likely to result in a release, when

they have the ability provided by loan terms that are now routine to prevent or mitigate such releases.

b. Second, former lienholders that acquire a facility through foreclosure or otherwise ought not to be able to indefinitely allow releases at those facilities with impunity, merely because they once held a lien on the property. This enormous loophole would create a strong disincentive for former lienholders to halt polluting activities once they acquire legal title, or to reduce the likelihood of such activities by prudent prelending inquiry, monitoring during the life of the loan, and enforcement of common, reasonable loan provisions. This loophole is also unfair, and could prove very costly to, PRPs and the State, who are less able to afford (and in many cases should not be any more responsible for) cleanup. Therefore, the language "or held" should be deleted from the definition of those not considered "owners" or "operators."

The Department agrees in principle that financial institutions and other lienholders could exert more influence over owners and operators of property used to secure loans. However, the Department does not believe that these financial institutions should be held liable for response actions provided they made no decisions or took no actions which caused or contributed to the release. The definition of "owner or operator" is taken from Chapter 128D. The Department will, therefore, not make the changes proposed by the commenter.

19.

Several commenters suggested that the definition of "pollutant and contaminant" is indeterminate and unworkable. This definition should contain the qualifying statement that "pollutants and contaminants will be identified and any applicable reportable quantities will be specified through rulemaking prior to their becoming subject to these rules. Without this qualifier, pollutant and contaminant could include virtually anything and a violation could occur without the violator being aware. One commenter felt that in defining a pollutant or contaminant, there should be good scientific evidence that the substance causes harm to human health and/or the environment in the quantities that may have the likelihood of being released. There should be a requirement in the rules that all available scientific evidence and/or risk assessment be considered when setting a reportable quantity. Not just a number that sounds low and good.

The Department believes that much of the concern regarding the definition of the term "pollutant and contaminant" stems from the inclusion of "pollutants and contaminants" in Section 11-451-7, Notification requirements, of the proposed rules. The Department.

believes that the term "pollutants and contaminants" was mistakenly included in this section of the proposed rules and has deleted it from the final rules. Therefore, the rules will require the reporting of only hazardous substances as designated in Section 11-451-5, <u>Designation of hazardous substances</u>, with the reportable quantities as defined in Section 11-451-6, <u>Determination of reportable quantities</u>. The Department may, through future rulemaking, establish notification requirements and reportable quantities for hazardous substances not currently identified in these rules.

20.

One commenter recommended the inclusion of the term "illness" in the definition of pollutant and contaminant.

The Department believes that the definition already contains the concept of "illness" in the terms "disease, behavioral abnormalities, cancer, etc." In addition, the definition in the proposed rules is identical to the definition contained in the statute.

21.

One commenter recommended adding the following to the exclusions from the definition of "release". "(8) Any oil that is contained such that it will not enter the environment and will be recovered within 24 hours." Other commenters stated that releases to secondary containment systems which prevent the release from entering the environment should also be exempt from the definition of "release."

The Department agrees that releases to secondary containment systems or other systems or structures which prevent the release from entering the "environment" should be exempt from the definition of the term "release." However, the containment system must have been designed, constructed and maintained appropriately for the material and the quantity of material stored, and have completely contained the material released. A paved parking lot would not meet these requirements. lined concrete secondary containment system around an above ground tank, pipeline or other piece of equipment may meet these requirements. In determining whether a particular surface, structure or stratum is part of the "environment" as defined in the rules, parties who have the responsibility to report releases should evaluate whether the surface, structure or stratum is designed, constructed and maintained to enable it to contain the discharged hazardous substance.

22.

One commenter requested that "legal authority" in the definition

of "release" be defined as Consent Orders, Consent Agreements, Consent Decrees, Court Orders, permit modifications, or any contingency/mitigation requirements imposed by a regulatory agency.

The Department will interpret the term "legal authority" on a case by case basis. While the Department believes that no change is necessary to the rules, as a policy matter the Department will generally interpret "legal authority" as including Consent Orders, Consent Agreements, Consent Decrees, Court Orders and other requirements imposed by regulation.

23.

One commenter suggested that subsection (3) of the definition of "remedy" or "remedial action" should be deleted because it is not contained in the NCP.

This subsection will be retained in the rules because it comes directly out of the definition in the statute.

24.

One commenter has suggested changing "department" to "director" wherever it appears in the rules.

The Department believes that the use of the terms "director" and "department" are generally interchangeable.

25.

- a. A number of commenters recommended defining the term "surface water."
- b. Several commenters had specific questions regarding man-made structures such as whether settling ponds or containment basins (which collect water) would be considered surface waters? Does it include only <u>natural</u> bodies of surface water? Does it include <u>man-made</u> bodies of water, such as reservoirs? Does it include <u>sediment settling ponds</u>, such as those used in the asphalt industry?
- a. The Department will include the following definition of "surface water" in the final rules.

"Surface water" means both contained surface water - that is, water upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other watercourses, lakes, reservoirs, and coastal waters subject to state jurisdiction - and diffused surface water - that is, water occurring upon the surface of the ground other than in contained water bodies. Water from natural springs is surface water when

it exits from the spring onto the earth's surface.

b. In interpreting this definition, surface water would include natural and man-made bodies of water, including reservoirs and sediment settling ponds.

26.

One commenter suggested that the term "land surface" be defined.

The Department believes that the term "land surface" should be interpreted on a case by case basis and therefore will not include a definition in the final rules.

As part of the definition of "environment", the terms "land surface" and "subsurface strata" are used to encompass a wide variety of natural and artificial surfaces, structures and strata (i.e., paved surface or sewer). In determining whether a particular surface, structure, or stratum is part of the environment, parties who have the responsibility to report a release should evaluate whether the surface, structure or stratum is designed, constructed and maintained to enable it to contain the discharged hazardous substance that may be the subject of a reportable release. While the Department recognizes that this places the burden on a facility owner or operator of initially interpreting whether a release has occurred, the Department feels that the interpretation of "land surface" must be made on a case by case basis depending on the circumstances at the facility.

27.

One commenter suggested that the title of Section 11-451-5 should be expanded to read, "Designation of hazardous substances, pollutants and contaminants". Pollutants and contaminants should also be added to paragraph (a). A new paragraph (d) should be added to this section to list, by rule, pollutants and contaminants. If these cannot be defined, the term should be dropped throughout the plan.

The Department has deleted the notification requirement for pollutants and contaminants. (See response to comment 19.)

28.

One commenter suggested that DOH should consider a reduction or exemption from notification requirements for No.6 fuel oil and bunker C contained within a facility property. At ambient temperature, these fuels exhibit a tar-like consistency, minimizing surface and subsurface migration. Cleanups are often limited to the first three to six inches of soil and are quickly and easily contained. The physical characteristics make it a low risk hazardous substance, especially for a release to designated

containment areas or within the facility's property.

The Department appreciates the commenter's position with regard to No. 6 fuel oil and bunker C. However, the Department is reluctant to set up a notification scheme which includes different reportable quantities for different constituents of oil or petroleum. Therefore, the Department will retain the proposed reporting scheme in the final rules. However, reporting may not be required if the spill is contained by an appropriately engineered, constructed and maintained containment system or if the spill is less than 25 gallons and is cleaned up within 72 hours. (See response to comments 21 and 26.)

29.

One commenter stated that fuel oil and petroleum are not considered to be hazardous substances under 40 or 49 CFR, and we definitely disagree with such a title being slapped onto these terms.

Oil is defined as a hazardous substance under the Environmental Response Law, Chapter 128D.

30.

Several commenters stated that the reportable quantity for oil is too low and will put an undue burden of reporting on industry and all agencies involved in the process. Some commenters also suggested that the reportable quantity be exempted (deleted) or at a minimum, be set at 200 gallons for reporting purposes and a requirement that releases of quantities greater than 25 gallons, but no more than 200 gallons be recorded on site and remediated using best management practices.

The Department will retain the reportable quantity for oil as proposed in the rules. The reportable quantity designated in the rules is the same as that for the Underground Storage Tank program. The Department feels that it is important to maintain consistency between programs managed by the Department. In addition, it is possible that a release of oil at or below 25 gallons to some sensitive environments could pose a significant threat to public health or welfare or the environment. (See response to comment 32.)

31.

One commenter suggested that the oil sheen test should be deleted for groundwater. While a "sheen" of oil on surface water has the potential to cause environmental damage, this is not the case for ground water. Apart from the fact that it would be virtually impossible to determine without subsurface investigation, there is no evidence that a sheen on ground water, especially in

Hawaii's coastal environment where most ground water is unusable, causes any environmental damage. Since even a "drop" of oil with the requisite characteristics can cause a sheen, all oil spills or releases would be potentially reportable. Rainwater runoff over roadways or paved areas, where incidental oil/grease spills have occurred, for example, typically create sheens in puddles or waters which may leach or drain to ground water. proposed oily sheen test for ground waters is neither practical nor necessary. The proposed test is apparently based on the EPA rule for surface waters. However, there is no scientific basis for applying the sheen test to ground water. The EPA's rationale for application of the test to surface waters is set forth at 52 Federal Register 10712, 10716 (April 2,1987). The EPA reasoned that an oily sheen on surface waters could harm wildlife. sheen could lead to asphyxiation of fish and benthic fauna. However, this rationale would not apply to ground water. To the extent the proposed rule is based on the assumption that, in some instances, ground water could eventually reach surface water, that potential is obviated by a rule applying the sheen test only to surface waters in the same manner as the EPA rule.

The oil sheen test has been historically applied because of ease of application. (United States v. Chevron, 583 F.d 1357, 1362 (1978)). A sheen is easily observable on surface waters, while a quantity must be calculated or estimated. However, this factor is not present in applying the test to ground water. It would be obviously difficult to observe a sheen in ground water. In many cases, it would be problematic, if not impossible, to determine the source of a sheen in ground water. Furthermore, a sheen might only be present at the time a well is developed or appear only intermittently as a mobile residual from historic, remote and/or indeterminate sources. One further problem with the screen test is the fact that free product or other oil constituents may create no sheen in ground waters.

The Clean Water Act adequately covers releases of oil to surface water; if reasonable reporting quantities are specified for land spills, using the persistence groupings suggested above, adequate response oversight will be achieved without overburdening the regulated community or the State's ability to respond.

Other commenters objected to the sheen test, recommending that the Department adopt something more quantifiable.

The Department has decided to delete the reporting requirement for sheens on ground water. Instead, the Department will require the reporting of free product on ground water and will revise §11-451-6(b) accordingly.

32.

A number of commenters objected to the reportable quantity for

oil of 25 gallons or more contained in paragraph 11-451-6(b)(5)(B). Among the concerns expressed were that the 25 gallon limit was apparently based on the Underground Storage Tank Rule which addresses gasoline service stations located in areas where there are potentially high population exposures. Industrial operations such as refineries are usually located away from these populations and present less of a health risk. Concern was expressed that DOH resources would become overwhelmed. Other commenters suggested that a tiered approach be used for reporting depending on the nature of the material at ambient temperatures.

The Department believes that the reportable quantity for oil of 25 gallons is appropriate given the potential threat to sensitive environments posed by a release of this magnitude. This limit is also consistent with other reportable quantity limits for other Department programs. The choice of a 25-gallon reporting threshold for oil for the federal underground tank program is based on two separate rationales. First, data shows that this amount of oil is often left in the delivery lines of tanker trucks after delivery to a UST, and has often been drained out The second rationale is based on an analysis done and spilled. in establishing a CERCLA RQ for used oil when it was proposed for listing as a hazardous waste. The Department has decided to modify the reporting requirements for releases of less than 25 gallons of oil to eliminate the requirement for verbal notification of these releases. (See response to comment 33 below.)

33.

Many commenters objected to paragraph 11-451-6(b)(5)(C) regarding reporting of releases of oil less that 25 gallons. Among the comments, some felt that this paragraph should be deleted, since it negates the purpose of a "reportable quantity"; which is to have a lower limit so that every spill, regardless of quantity, doesn't have to be reported. Some commenters felt that any oil spill less than 25 gallons seems overly restrictive and unenforceable. One suggested that instead of the "less than 25 gallons", a change to "between 2 and 25 gallons" would be appropriate.

The Department has modified the reporting requirements for releases of oil of less than 25 gallons. For releases of oil of less than 25 gallons which are cleaned up within 72 hours, no notification will be required as provided in the proposed rules. For releases of oil of less than 25 gallons which are not cleaned up within 72 hours, only written notification will be required. Written notification will be required within 30 days of the date of the discovery of the release. This approach should remove some of the reporting burden and reflects the probability that releases of this magnitude do not, in general, require immediate notification to the Department.

Several commenters suggested that paragraph 11-451-6(b)(5)(C) be changed from "cannot be contained" to "will not be contained". The change would make it clear that reporting is required unless the owner or operator is <u>sure</u> that the release can be contained, and actually does contain it.

The Department agrees with the commenter and will make a change in the final rules. Also, because the Department has deleted the requirement for verbal notification of releases of less than 25 gallons, the written notification of such releases will only apply to those that are not cleaned up within 72 hours.

35.

Several commenters pointed out that the 24-hour time interval is necessary to define a release.

The Department agrees that inclusion of a 24-hour time period over which a release occurs is necessary in order to define a release. A 24-hour period will be included in the final rules.

36.

One commenter stated that the directive that reported quantities "apply to the weight of the entire amount of the material released, not merely to the hazardous substance component", is vague and ambiguous. For example, if 10,000 gallons of water containing 1 oz. of TCA are released, the purpose of the release reporting is made meaningless.

The Department does not believe that this paragraph is vague or ambiguous. However, the Department will provide guidance in this area in the future. In the meantime, please contact the Department if you have questions regarding the interpretation of this requirement.

37.

One commenter expressed concern regarding how the Department would implement reporting requirements for hazardous substances, pollutants or contaminants for which a reportable quantity is established in the future.

If the Department establishes a reportable quantity in the future, the reporting requirements for that material would begin on the effective date of the newly established reportable quantity. The Department would not at that time require retroactive reporting of releases of the material.

One commenter questioned whether paragraph 11-451-7(b) referred to the actual date of release or date of the discovery of release?

The paragraph applies to the date of the release of the hazardous substance.

39.

One commenter suggested that the Department define the terms "substantial danger" or "endangerment."

The Department will determine what environmental conditions constitute a "substantial danger" or "endangerment" on a case by case basis. It would be overly restrictive to apply a strict definition to this term.

40.

One commenter suggested that §11-451-7(b) needs to make clear that it is only a "release" which commences after July 1, 1990 which is subject to the reporting requirement.

The final rules have been revised to require reporting of releases that occur on or after the effective date of the rules.

41.

One commenter suggested the Department specify a definitive time instead of the term "immediately". Also, according to the requirement, the Director of the Department of Wastewater Management would have to contact DOH immediately upon the effective date of the rules. We request this requirement be modified to allow us time to assess our facilities or vessels. After assessment, we will "immediately" notify.

See response to comment 40.

42.

One commenter asked if the reporting requirement applies to releases at a facility that are contained within the facility fenceline or secondary containment, and do not pose an imminent and substantial endangerment to human health, welfare or the environment?

See response to comments 21 and 26.

One commenter stated that the requirement for notifying multiple agencies is an unnecessary burden on the regulated community. There should be a single government agency contact.

The Department agrees that notifying the National Response Center is an unnecessary burden and has decided to eliminate this notification requirement. However, the Department will retain the requirement to notify the LEPC along with Department notification.

44.

One commenter suggested that the department should define "person in charge" of a facility or vessel.

The Department will interpret the "person in charge" of a facility or vessel on a case by case basis.

45.

Several commenters were concerned that the proposed rule applied retroactively to reportable releases occurring after July 1, 1990 and prior to the effective date of the SCP. They felt that such an interpretation places an unreasonable regulatory burden on a person in charge of a facility or vessel who reported a release in accordance with Section 128D-3. One commenter suggested that such ambiguity could be eliminated from subsection (b) by replacing "July 1, 1990" with "the effective date of these rules". "...retroactive application would be both inequitable and unreasonable". "It would be far more reasonable for reporting to begin after the rules are finalized, with the definitions of oil, surface water and land surface appropriately focused as discussed above."

The Department has deleted the requirement for reporting prior to the effective date of the rules. See response to comment 40.

46.

One commenter stated that \$11-451-7(b)(3) is vague in that it does not specify any particular chemicals, compounds or mixtures or other materials which would be deemed to be a hazardous substance, pollutant or contaminant; nor does it specify any RQs, etc.

The Department agrees with the commenter. This subsection of the rules has been deleted. Should the Department decide in the future to establish reportable quantities for certain chemicals, compounds or mixtures, it will do so through rulemaking.

One commenter suggested that the department should specify the telephone numbers in the rules for regulatory agencies for which immediate notification must be made.

Because these telephone numbers may be subject to change in the future, the Department has decided not to list the telephone numbers for agencies to be notified in the event of a release.

48.

One commenter suggested that the notification requirement be modified to read as follows: "Verbal notification to the department shall consist of providing the following information as completely as possible, but shall not be delayed due to incomplete information related to the release."

The Department agrees with this clarification of this section and has made the change to the rules.

49.

One commenter recommended that specific information regarding the location of the release be included in the reporting requirement in Section 11-451-7(d)(4), such as address and TMK.

The Department feels that the term "location" is sufficient to encompass the necessary information needed to locate the release.

50.

One commenter recommended including the address of the caller and owner in the notification requirement in Section 11-451-7(d)(8) and (9).

The Department has included the address in the reporting requirements.

51.

Several commenters recommended changing the written notification period to a longer period (30 to 45 days) to allow the owner more time to assess the nature and extent of the release. The verbal notification requirement would provide for regulatory input and oversight in the interim period.

The Department agrees that the written notification period should be extended. The rules have been revised to require that written notification to the Department be postmarked within 30 days of the discovery of the release.

One commenter suggested clarifying the language in Section 11-451-7(d)(14) regarding additional information to be submitted under the notification requirements.

The Department has made changes to this section to more accurately reflect the intent of the section.

53.

Several commenters suggested changes to Section 11-451-7(e), including the following: "Written notification shall not be delayed due to incomplete notification information or unavailability of a department form."

The Department feels that this language and other proposed changes are not necessary. Any delay in written reporting would be considered a violation of these rules.

54.

One commenter recommended requiring follow-up written notice only if also required by 42 U.S.C. Section 11004(c). In addition, the referenced notification form(s) should include all information which is required to be reported pursuant to 42 U.S.C. Section 11004(c) and should be published as an appendix to Chapter 451.

- a. The Department believes that follow-up written notice will, in most instances, provide the Department with sufficient information regarding the release and the response to the release to allow the Department to assign a priority to the site for oversight purposes. Without follow-up written notice, the Department may need to expend additional resources at low priority, "voluntary cleanup" sites to determine whether adequate response actions have been taken.
- b. The Department may, from time to time, decide to modify the notification forms it uses for reporting releases. As a result, the Department will not publish this form as an appendix to the rules. Notifications made using older versions of the forms. published by the Department (or other formats) will not subject a notifying party to any penalty provided the information required in Section 11-451-7(d) and (e) is contained in the report.

55.

One commenter stated that federal regulations (40 CFR 302.8) require written notification only for continuous releases and that notification is required within 30 days of initial telephone notification and within 30 days of the date of the initial written notification. The commenter felt that written

notification in addition to telephone notification for every release in excess of a RQ, especially where there is no 24-hr period, will overly burden facility owners and operators as well as the department. Consequently, he proposed the adoption of the requirements of the federal regulations concerning written notification.

See response to comments 35 and 54.

56.

One commenter proposed the following additions to Section 11-451-7.

- a) (f) Timely notifications made pursuant to 42 U.S.C. Section 11004(c) shall constitute compliance with subsection (c).
- b) (g) Notification provided pursuant to this rule or information obtained by use of that notification shall not be used against any person providing the notification in any criminal case, except in a prosecution for perjury or giving a false statement.
- c) (h) The person in charge of a facility or vessel shall provide to the owner of the facility and the real property on which the facility is located a copy of any written notification made in accordance with subsection (e).
- a) The Department has eliminated the requirement to notify the National Response Center from the final rules. Notification must be made to the Department and any affected local emergency planning committee. While notifications made pursuant to 42 U.S.C. Section 11004(c) may satisfy the notification requirements under Section 11-451-7, the Department will not include the language proposed in a) above.
- b) The Department has included a new paragraph 7(h) which restates the conditions set forth in Chapter 128D-3(c) regarding the use of information received by the Department through notification.
- c) The Department believes that notification to the Department is sufficient to provide for adequate response to the release or threat of release of a hazardous substance. Such information is generally available to the public. Notifications to facility or property owners by persons in charge should be the subject of agreements between those parties. Therefore, the Department has not included the proposed language in the final rules.

57.

One commenter suggested that the last sentence in subsection 7(f)

should be changed to: "If the exact concentration of all the hazardous..., reporting is required <u>if</u> the <u>quantity</u> of the entire amount of material released <u>equals</u> or exceeds the reportable quantity of any hazardous substance component."

The Department has made the suggested change.

58.

Paragraph 7(g)(1) should be clarified by adding the words as follows: "Releases of bituminous pavements and roofing materials serving their intended purpose, including, but not limited to, the application of asphalt and tar to roadways, paved areas, roofing, waterproofing or other construction improvements."

The Department has made changes to this paragraph which will exempt releases of hazardous substances emanating from bituminous pavement, landscaping materials, or building materials that are in good repair and serving their original intended use.

59.

One commenter questioned what is meant by "releases of bituminous pavements serving their original intended use?" Does the term "bituminous pavements" encompass all forms of bituminous materials, including asphalt emulsions, asphalt cement, and hot mix asphalt? Bituminous pavements are solid at STP and therefore do not appear to fall under the definition of petroleum or oil which suggests that these materials should not be considered a hazardous substance as defined under HAR 11-451. Why then should "releases" of these pavements be considered at all in HAR 11-451?

The Department has clarified the language in paragraph 7(g)(1) to apply to "releases of hazardous substances from bituminous pavements,...." Bituminous pavements would encompass all forms of bituminous materials, including asphalt emulsions, asphalt cement and hot mix asphalt. Bituminous pavements would fall under the definition of oil. The definition of oil does not require that the material be a liquid at standard temperature and pressure, only that it be any fraction or residue of crude oil.

60.

One commenter noted that \$11-451-7(g)(2) exempts releases from passenger vehicles as a result of an accident. Since agricultural and construction equipment are often on private property and a release of fuel or hydraulic oil from the equipment systems' tank, malfunctioning component, or from an equipment accident does not pose a serious threat to human health or the environment, we feel that in such cases, this too should be exempt from release reporting.

The Department does not believe that spills from agricultural and construction activities should be exempt from notification requirements. Spills on private property constitute a release to the environment and may pose a treat to human health, welfare and the environment. Therefore, the Department will not exempt spills from agricultural or construction activities from the reporting requirements.

61.

Several commenters noted the following regarding the exemption for sheens from outboard motors:

Paragraph 7(g)(3) exempts sheens on water from recreational outboard motors. This exemption does not appear in the statute, and to our knowledge, seems to conflict with the Clean Water Act.

Paragraph 7(g)(3) - This subsection should read: Sheens resulting from...outboard motors in "normal" recreational use. "For purposes of this section, normal recreational use shall not include spills or discharges from leaking or ruptured tanks or fuel lines."

Paragraph 7(g)(3) - The City and County requests an exemption from the reporting of sheens from their boats used for sampling, which it claims does not deviate from the recreational mode.

Perhaps you could clarify why one sheen is exempt and another is not.

The Department has decided to delete the reporting exemption for sheens from outboard motors in recreational use. The department will instead add an exemption similar to that found at 40 CFR §110.7. This section of the EPA water program rules provides for an exception from reporting for discharges of oil from properly functioning vessel engines.

62.

One commenter suggested that in §11-451-7(g) a new section (4) should be added to include releases which are already covered by regulation under RCRA (including the UST and Corrective Action programs), NPDES, CAA or UIC rules.

The Department agrees with the commenter and has added a new paragraph 7(i)(5).

63.

One commenter suggested that for purposes of consistency, DOH should adopt the EPCRA hazardous substance release notification requirement into the SCP. Federal and State EPCRA emergency

notification requirements only require notification if a hazardous substance release exceeding its RQ migrates from the facility's property.

See response to comments 21 and 26.

64.

One commenter noted that federal regulations under 40 CFR §302.8 contain special reporting requirements for continuous releases. One commenter recommended that these reporting requirements be included in the proposed rules.

The Department agrees with the commenter and has included a new paragraph 7(g) addressing continuous releases in the final rules.

65.

One commenter stated that federal regulations under 40 CFR §302.6(c) and (d) contain exemptions from reporting for certain categories of releases. The Department should include these exemptions in the proposed rules or justify their exclusion.

The Department has added a new paragraph 11-451-7(i)(4) to the rules to include exemptions for radionuclide releases from soils, coal and coal ash and from large diameter particles of certain metals to be consistent with the federal program regarding release notification.

66.

One commenter stated that no cleanup criteria are presented, and the circumstances under which risk analysis will be acceptable are not defined.

The Department will develop guidance on the use of risk assessment and other means of setting cleanup levels. Because several approaches to setting cleanup levels are contemplated, the Department believes that this process is more appropriately addressed through the development of guidance rather than through rulemaking.

67.

One commenter suggested that public participation requirements should involve the responsible party.

The Department will involve the responsible parties when appropriate in conducting community relations and soliciting public participation in decisions regarding site activities.

One commenter suggested that paragraph 8(a) regarding the general purpose of the State Contingency Plan be revised to conform to the language in the National Contingency Plan.

The Department believes that the current language in the rules adequately describes the purpose of the subchapter.

69.

One commenter suggested that a "public health or environmental emergency" should be defined.

The Department will determine a "public health or environmental emergency" on a case by case basis. The Department believes that defining the term "public health or environmental emergency" could be overly restrictive and could prevent the Department from responding appropriately under some situations.

70.

One commenter recommended inclusion of a reference to "aquifers" in paragraph 8(b)(3) to make sure that ground-water supplies are addressed. Additionally, the term "system" might be modified to read water distribution system.

The Department has made minor changes to this section to clarify that this limitation applies to water supply systems but not to aquifer systems.

71.

One commenter suggested adding in risk assessment alternatives or approaches in paragraph 8(c)(2) concerning guiding principles for response action (ie., risk screening, risk analysis, passive remediation, no action, etc.)

The Department has retained the current hierarchy of guiding principles for planning and conducting a response. Risk management and risk assessment principles will be used to in determining the appropriate cleanup levels for a response action. Risk assessment will be the subject of future guidance for implementing the rules.

72.

One commenter stated that the phrase "applicable requirements" is vague and ambiguous and should be given better definition.

The Department believes that the term "applicable requirements" has been adequately defined. Chapter 128D does not provide for

any exemptions from federal, state, or local laws in conducting response actions. Therefore, "applicable requirements" means those federal, state, and local requirements that are legally applicable to a hazardous substance, pollutant, or contaminant, response action, location, or other circumstance found at a facility, vessel, or site.

73.

One commenter noted an error in numbering in paragraph 8(c) and suggested minor grammatical changes to new paragraph 8(c)(3).

The Department has made these changes.

74.

One commenter proposed changes to paragraph 8(e) to conform to the NCP.

The Department believes that the current language in 8(e) is appropriate.

75.

Several commenters proposed changes to the language regarding the posting of signs, such as:

The proposed legend on signage may run the risk of unduly alarming the public. Great care and concern needs to be used by the Department in the signage.

Posting of signs. It is insufficient to post signs with written warnings. Graphics need to be a part of any sign in order to provide sufficient warning to children and non-English speaking residents. The rules should include a requirement that the signs have an easily understandable graphic illustrating the danger. It could be the "Mr. Yuck" sign. Or a skull and crossbones. The rules themselves should identify what the graphic is to ensure consistency.

We request the lettering size be specified. Because visibility is highly variable, we request standard letter sizes for the signs to be specified.

The Department has retained the proposed language regarding the posting of signs. The Department will address the exact language and lettering size in future guidance on this subject.

76.

One commenter felt that the provision relating to "enforcement preconditions", paragraph 8(j), is vague and ambiguous.

Clarification needs to be provided as to the Department's intent.

Section 11-451-8 contains general provisions which govern response actions. Paragraph 8(j) generally provides that there are no preconditions placed upon the Department in its exercise of its enforcement authorities. The intent of this paragraph is to provide the Department with the ability to quickly address the release or threat of release of a hazardous substance.

77.

One commenter felt that paragraph 8(1) on the discretionary function should be deleted as inaccurate. It is incorrect since the proposed rules impose duties on the department.

The Department agrees with the commenter that some of the activities of the Department in implementing these rules are not discretionary. Paragraph 8(1) has been modified to reflect this comment by substituting the word "are" with the words "may be."

78.

One commenter felt that paragraph 8(m) concerning cost recovery documentation was unclear. In the first sentence, there is some question as to who the AG will recover costs from? Cost accounting should not include any costs associated with state personnel and indirect costs.

Chapter 128D provides that any costs incurred and payable from the fund shall be recovered by the attorney general from the liable person or persons. In general, costs incurred would include personnel and indirect costs in addition to other costs.

79.

One commenter suggested defining the term "direct contact hazard".

The Department will define a "direct contact hazard" on a case by case basis. The Department is concerned that an overly restrictive definition of the term would prohibit the Department from taking action in circumstances where a threat may exist.

80.

One commenter suggested defining the term "uncontrolled facility access".

The Department will define "uncontrolled facility access" on a case by case basis. Again, the Department is concerned that an overly restrictive definition of the term would prohibit the Department from taking action in circumstances where a threat may

exist.

81.

One commenter recommended changing "is" to "appears" appropriate "based on all of the information that may then reasonably be obtained" in paragraph 10(a).

The Department has made the recommended changes to clarify that the Department will use its judgement in evaluating the need for further response.

82.

One commenter recommended changing "to determine whether" to "that demonstrates that" in paragraph 10(a)(1).

The Department believes that the current language is appropriate.

83.

One commenter proposed revisions to paragraph 10(b) to clarify when sites will be deleted from the state list of sites.

The Department has revised this paragraph to clarify when sites will be deleted from the list.

84.

One commenter proposed revisions to paragraph 10(c) regarding relisting to make this section consistent with the NCP.

The Department believes that the current language is appropriate.

85.

One commenter stated that in its Criteria for No Further Action, the Department needs to limit the time for its determination for no further action. The present wording of this section would indicate that the Department need only remove a site from its published annual listing. This section should require a determination of no further action if the Department does not make specific recommendations within a given time period from the time removal or remediation have been completed and all reports have been submitted, say 30 days.

The Department appreciates the interests of potentially responsible parties regarding liability they may have with respect to a site and the desire to obtain a "no further action" determination from the Department. The Department will make every effort to make these determinations in a timely manner. However, the Department does not believe that it is in the

interest of the public or the PRPs to require these determinations to be made within a specified time frame which may not allow for full consideration of any available information. Therefore, the Department will retain the proposed language regarding "no further action."

86.

One commenter raised the question, under paragraph 11(b)(3), what type of release would typically not require sampling.

If sufficient sampling has already been conducted at a site to enable the Department to select an appropriate response action, additional sampling may not be required.

87.

One commenter suggested adding additional language from the NCP regarding termination of assessments.

Termination of assessments has been addressed in §11-451-10, Criteria for No Further Action, of the rules.

88.

One commenter suggested, in paragraph 12(b)(4), after the phrase "but not limited to" should be inserted the phrase "the relative degree of" in order to communicate that sound and measured technical judgement will be applied.

The Department will apply sound and measured technical judgement in determining the appropriate response, but believes the language in this paragraph is adequate as proposed.

89.

One commenter noted that in paragraph 12(b)(4), the text discusses the "degree of risk" but there is no specific discussion of concepts related to risk assessment.

The Department will develop policy and guidance which addresses risk assessment and the development of cleanup levels. In addition, the federal guidance regarding risk assessment provides useful guidance on how to assess risk at hazardous waste sites.

90.

In paragraph 12(b)(7), "site complexity" is identified as one factor to be used in determining the appropriate response action at a site. One commenter felt that this term should be clarified since there are many factors that contribute to site complexity (e.g., physical accessibility, hydrogeology, joint ownership).

In deciding whether to use the removal or remedial process to address a site, "site complexity" is one of many factors the Department will weigh in making its determination. Since the decision process requires the judgement of the Department, it would not be appropriate to rigorously define each of the considerations going into this decision. Therefore, the Department will not further define this factor. However, the Department does, in general, prefer to use removal authority whenever possible to streamline the investigation and cleanup of contaminated sites.

91.

One commenter would delete "community interest" as a factor in deciding between the removal and remedial process because it is not objective and does not pertain to the actual threat.

Community interest is an important factor in this decision because the public notification requirements for removal and remedial are different, with the remedial requirements allowing for more public input throughout the response process. The Department will consider community interest in making a determination whether to use the removal or remedial process. Therefore, this factor will remain in the rules.

92.

One commenter suggested the following:

Insert the word "relative" in front of the word "magnitude" in paragraph 13(b)(2)in order to reflect the Department's measured judgement.

In paragraph 13(d), the element of "gravity of risk" should be included in any assessment of the need for removal actions.

The Department does not believe that these changes are necessary to clarify the intent of the rules.

93.

In paragraph 13(d)(2), one commenter recommended that the term "removal action report" be modified to read "removal action workplan" or "removal action plan" since this document will be prepared prior to the initiation of the removal action.

The "Removal Action Report" is a report that documents the decision selecting a removal action. As such, it is a decision document, not a work plan. A "removal action work plan" should be developed to clearly outline the work to be conducted in the assessment and cleanup phases of a removal.

One commenter suggested more extensive notification of the public comment period as well as a longer comment period starting from the "later of the date" of the administrative record availability...pursuant to section 11-451-21, "or the last date of publication of the notice of availability pursuant to section 11-451-21(f)(1)." The same comment is made for the public participation activities under Section 11-451-15.

The Department believes that the current notice requirements for public comment are adequate. On a case by case basis, the Department will determine whether it is appropriate to extend the length of a public comment period.

95.

One commenter suggested that paragraph 13(g) of this rule should be modified to ensure that potentially responsible parties are apprised of any determination by the department that public participation activities are warranted.

The Department will apprise PRPs of the need to conduct public participation activities at removal sites. The Department will notify PRPs as a matter of policy; therefore, a change in the rules will not be made.

96.

One commenter suggested that paragraph 13(h) should be modified in a manner consistent with the proposed modifications to 11-451-10(c).

See response to comment 84. The Department believes that the current language in 13(h) is appropriate.

97.

One commenter recommended that paragraphs (a) and (b) be inverted in Section 11-451-14. The "Purpose" paragraph should come first.

The Department has made the proposed change and has also moved paragraph 14(c) into the new paragraph 14(a).

98.

One commenter suggested adding the following underlined text to paragraphs 14(a) and 14(c)(6): "...probable direction of migration, and nature...."

The Department has made the suggested changes.

One commenter suggested that paragraph 14(d)(4) should be modified to conform to the NCP.

The Department believes that the qualifying language from the NCP is unnecessary.

100.

One commenter recommended inserting the word "materially" before the phrase "affected by the release" in 14(d)(7) and in 14(e)(8).

The Department does not believe that word "materially" would substantially change or improve upon the meaning of these paragraphs.

101.

One commenter suggested replacing paragraph 14(f)(5) with proposed language on remedial investigation termination taken from the NCP.

The Department believes that the reasons for terminating a remedial investigation are adequately spelled out in the proposed rules and will therefore not make the proposed changes to this paragraph.

102.

One commenter stated that the provision "applicable requirements, if available" is too vague to be included in paragraph 15(b)(1).

The Department believes that the meaning in this paragraph is clear. See response to comment 72.

103.

One commenter stated that in paragraph 15(b)(3), no rationale for the 10-6 risk level is provided. Without justification, the uniform adoption of that criterion is arbitrary and capricious.

The risk management criteria incorporated into the proposed rules parallels the federal NCP. The risk range of 10-4 to 10-6 has been utilized by regulatory agencies for years and has been used as the basis for other Department risk assessment and management decisions. The Department does not believe that the use of this risk range is arbitrary and capricious and will retain this portion of the proposed rules.

One commenter proposed changes to the "cost" criterion in paragraph 15(g)(3) to clarify that all operation and maintenance costs should be considered in the evaluation of total costs. Also recommended was the elimination of the qualifying word "grossly" in the phrase "grossly excessive."

The Department agrees with the commenter and has made the recommended changes to clarify the rules.

105.

One commenter stated that there is no provision in the proposed rules on how or by what criteria natural resource damages will be assessed. Or how much does a seagull cost? A system of evaluating the unit costs of environmental damage should be established in the rules.

The Department has not developed guidance in the area of natural resource damage assessment. Because the methodologies used in conducting natural resource damage assessments are still evolving, the Department does not believe that it is in the best interests of any of the parties involved in the assessment or payment of natural resource damages to fix by rule the criteria for conducting damage assessments. The Department believes that in those instances where natural resource damages will be assessed, it will be more appropriate to approach each site on a case by case basis. The Department will evaluate this policy on an ongoing basis to ensure consistency and effectiveness in this area.

106.

One commenter suggested that, as drafted, the proposed rule arguably applies to response actions begun or completed before the effective date of the regulation. Absent revision, pre-SCP response actions might be judged by standards not then in effect, thereby putting successful cost recovery in jeopardy. Generally speaking, case law developed pursuant to CERCLA addresses this issue by ascertaining whether the response actions undertaken were consistent with the NCP in effect at the time the remedial efforts were carried out. Given the potential harsh implications of a contrary interpretation, we recommend that subsection 18(b) of the proposed rule be revised.

The Department believes that this is a matter that should be decided based on the body of case law that has developed. Since the NCP has been in effect under Chapter 128D, and will remain in effect until the rules are promulgated, response costs that are incurred for cleanups that are consistent with the NCP (including those addressing non-CERCLA wastes) should provide the basis for

cost recovery actions between private parties for responses conducted prior to the effective date of these rules.

107.

One commenter suggested that where response actions are conducted by private parties without the oversight of the department, the proposed rules should be clarified to identify with specificity the activities that must be undertaken, at a minimum, to ensure consistency with the SCP for purposes of cost recovery.

The Department has decided not to specify the activities that must be undertaken to ensure consistency with the SCP in order to afford parties undertaking voluntary response actions sufficient flexibility to conduct those activities most efficiently and effectively and still arrive at a cleanup which is consistent with the SCP.

108.

One commenter recommended that the proposed SCP be amended to identify the specific standard of review and procedures that will govern the determination of whether response actions undertaken by private parties without the oversight of the department are consistent with the SCP.

See response to comment 107. Also, the Department will defer to the courts regarding what standard of review will apply to these actions.

109.

Two commenters noted that they often conduct removals of materials dumped on its property by another party, often unknown. If they want reimbursement from the fund, they must conduct the response in response to an order from the Department. This could cause a delay in the response if the Department has to issue an order. The commenters suggested that this be dealt with in policy or rules.

The Department appreciates the concerns expressed by the commenters and will address this matter in policy development following completion of rulemaking activities.

110.

One commenter suggested that \$11-451-24 regarding access needs careful attention and rewrite. It should allow the department to promptly investigate releases. Section (a) allows entry and access only after reasonable notice and at reasonable times. In an emergency, notice may be impossible. Furthermore, the authority provided by section (b) appears to be triggered only

after the requirements of section (a) are fulfilled -- making it even more difficult for the department to ensure speedy cleanup of a toxic spill.

Chapter 128D-4(b) uses the words "reasonable notice" in describing the Department's access authority. The Department's interpretation of "reasonable notice" is what is reasonable given the site circumstances and the nature of the threat. Clearly, if the magnitude of the threat is great, reasonable notice would have a different standard than if the threat were a minor threat. The Department will make decisions regarding reasonable notice on a case by case basis and has decided not to revise the rules regarding notice.

111.

One commenter suggested that paragraph 24(c) be modified to clarify that, in connection with the entry and access of the department or of potentially responsible parties, owners of facilities or the real property located thereunder may establish reasonable limitations on such entry or access. Such a modification is consistent with related requirements, including that the department may enter a facility or vessel "upon reasonable notice and at reasonable times." The commenter proposed additional language to 24(c) to clarify that a PRP must make diligent and reasonable efforts to obtain voluntary consent for entry and access.

The Department does not believe that changes are necessary to this section of the rules to address the issue of access. The Department will require potentially responsible parties to negotiate access agreements with facility or property owners wherever appropriate prior to using its authority to secure access.

112.

One commenter proposed a reduction in the penalty limit of up to \$50,000/day to \$25,000/day for failure to comply with an order.

The penalty limits are set by statute. See Chapter 128D.

113.

One commenter suggested adding a limitation contained in the NCP that orders may not be issued for any criminal investigations.

The Department agrees with this comment and has made the suggested change.

The Department received a number of comments that were not related to the proposed rules. The Department will respond to those comments in separate communications with the parties submitting the comments.

In addition, the Department received a number of comments related to typographical errors and minor editorial comments. Many of these comments were incorporated into the final rules.



County of Hawaii

DIVISION OF INDUSTRIAL SAFETY

25 Aupuni Street • Hilo, Hawaii 96720-4252 (808) 961-8215

TO:

HSERC (MEETING #22)

FROM:

JAY SASAN 🚿

SUBJECT:

LEPC UPDATE - HAWAII COUNTY

DATE:

NOVEMBER 15, 1995

- 1. Resignation: Bill Green Effective October 12, 1995
- 2. Hazardous Materials Program Coordinator named:
 Hawaii County Fire Department Battalion Chief
 Thomas J. Bello
 - Coordinator trained and able to demonstrate competency in emergency response operations, incident command systems and program administration.
 - b. Coordinator will be responsible for:
 - 1. program development and implementation
 - employee training
 - 3. medical surveillance
 - 4. materials/equipment acquisition
 - 5. record keeping
- 3. Hazwoper Training 16 hours
 - a. Training status as of July 17, 1995: 213 of 293 Fire personnel completed 16 hours of hazmat awareness/first responding training (all personnel to complete training by 12/31/95)
 - b. 14 department persons qualified to conduct Hazwoper classes
 - C. Specifications for acquisition of a Hazmat vehicle is being development.

BRIEF

November 13, 1995

HAWAII STATE EMERGENCY RESPONSE COMMISSION MEETING #22

Wednesday, November 15, 1995 from 9:00 p.m. to 12:00 p.m.

Department of Health 919 Ala Moana Boulevard, 5th Floor Conference Room Honolulu, Hawaii 96814

AGENDA

(DR. BRUCE ANDERSON, CHAIR)

- ▼ (CHECK FOR A QUORUM)
- 1 Call to Order
- THE MEETING WILL PLEASE COME TO ORDER.

Time:	
T LLLIC.	

Welcome

I'D LIKE TO WELCOME MEMBERS OR THEIR DESIGNATED REPRESENTATIVES, FACILITY REPRESENTATIVES FOR INDUSTRY AND FEDERAL FACILITIES AS WELL AS ANY OTHERS WHO ARE ATTENDING.

Opening Remarks

Discussion/Approval of Minutes from Meeting #22

MEMBERS RECEIVED DRAFT COPIES OF THE AUGUST HSERC MINUTES WITH THE ANNOUNCEMENT OF TODAY'S MEETING.

THERE ARE EXTRA COPIES FOR THOSE WHO WOULD LIKE THEM. PLEASE TAKE SOME TIME TO REVIEW THE DRAFT MINUTES.

- **▼**DO I HEAR A MOTION TO ACCEPT THE MINUTES?
- ▼DOES ANYONE WANT TO SECOND THE MOTION?
- ▼THE MOTION TO ACCEPT THE MINUTES HAS BEEN SECONDED. IT'S NOW OPEN TO DISCUSSION. ARE THERE ANY CHANGES?
- ▼THE CHAIR RECOGNIZES...
- ▼THOSE IN FAVOR OF ACCEPTING THE MINUTES AS PRINTED/WITH THE CHANGES DISCUSSED SAY YES. (PAUSE FOR THE YES VOTES) THOSE OPPOSED SAY NO.

▼THE MOTION IS CARRIED. THE MINUTES ARE ACCEPTED.

- 2 I'D LIKE TO INTRODUCE Mike Ardito FROM THE OFFICE OF EMERGENCY PLANNING, U.S. EPA REGION IX.

 HE WILL PRESENT A VIDEO OF THE AUGUST FULL SCALE EXERCISE.
- 3 LAST MEETING, THE ESTABLISHMENT OF SUBCOMMITTEES WAS DISCUSSED.
 THREE SUBCOMMITTEES WERE NAMED. IT SHOULD BE NOTED THAT WHENEVER
 TWO OR MORE COMMISION MEMBERS MEET, THERE MUST FIRST BE A NOTICE OF
 PUBLIC MEETING POSTED. WE'LL HAVE SOME COMMENTS FROM EACH OF THE
 SUBCOMMITTEE LEADS.

FIRST, I'D LIKE TO PRESENT **Steve Armann**, MANAGER OF THE HEER OFFICE. HE WILL SPEAK ABOUT THE *LEGISLATION*, *POLICY AND FUNDING* SUBCOMMITTEE.

Carter Davis, HAZMAT CAPTAIN WITH THE HONOLULU FIRE DEPARTMENT AND LEPC CHAIR, WILL DISCUSS <u>BUSINESS</u>, <u>INDUSTRY AND INFORMATION MANAGEMENT</u> SUBCOMMITTEE ACTIVITIES.

Roy Price, STATE CIVIL DEFENSE, WILL DISCUSS ISSUES REGARDING THE <u>PLANNING</u>, <u>EXERCISE AND TRAINING</u> SUBCOMMITTEE.

- NOW WE'LL HEAR FROM STEVE ARMANN AGAIN.
 HE'LL BE GIVING AN OVERVIEW OF THE 128D RULE, TITLE 11 CHAPTER 451 HAWAII
 ADMINISTRATIVE RULES, WHICH WENT INTO EFFECT ON AUGUST 17TH OF THIS
 YEAR. HSERC MEMBERS HAVE BEEN GIVEN PACKETS WITH A COPY OF THE RULES,
 A COVER LETTER DESCRIBING THE STATE CONTINGENCY PLAN AND RESPONSE TO
 PUBLIC COMMENTS ABOUT THE RULE.
- 5 AT THIS POINT, I'D LIKE TO GIVE THE LEPC REPRESENTATIVES AN OPPORTUNITY TO UPDATE THE COMMISSION ON COUNTY EMERGENCY PLANNING ACTIVITIES.
 - 1. Jay Sasan, Hawaii
- 2. Clifford Ikeda, Kauai
- 3. Joe Blackburn, Maui
- 4. Carter Davis, Oahu
- 6 NEXT, Marsha Mealey, OF THE HEER OFFICE, WILL GIVE HIGHLIGHTS OF THE NATIONAL GOVERNORS' ASSOCIATION'S STATE EMERGENCY RESPONSE COMMISSION CONFERENCE WHICH SHE ATTENDED LAST WEEK IN ORLANDO.
- 7 Mike Ardito WILL GIVE SOME EPA UPDATES NOW. (MIKE IS ON A 15% FURLOUGH FROM THE FEDERAL GOVERNMENT DUE TO THE FUNDING FOR HIS POSITION.)
- 8 Other Business

IS THERE ADDITIONAL BUSINESS TO BE DISCUSSED?

9 Schedule next HSERC meeting

THE CHAIR PROPOSES THAT THE NEXT MEETING BE HELD IN FEBRUARY AROUND THE MIDDLE OF THE MONTH IN KEEPING WITH A QUARTERLY SCHEDULE.

- ▼DO I HEAR A MOTION TO SCHEDULE THE NEXT HSERC MEETING IN FEBRUARY?
- ▼DOES ANYONE WANT TO SECOND THE MOTION?
- ▼THE MOTION HAS BEEN SECONDED.
- ▼THOSE IN FAVOR SAY YES. (PAUSE FOR THE YES VOTES)
- ▼THOSE OPPOSED SAY NO.
- ▼THE MOTION IS CARRIED.
- ▼DO I HEAR A MOTION TO ADJOURN THE MEETING?
- **▼**DOES ANYONE WANT TO SECOND THE MOTION?
- ▼THE MOTION TO ADJOURN HAS BEEN SECONDED.
- ▼THOSE IN FAVOR SAY YES. (PAUSE FOR THE YES VOTES)
- ▼THOSE OPPOSED SAY NO.

THE MOTION IS CARRIED. THE MEETING IS ADJOURNED UNTIL FEBRUARY.

Time:	

THOSE OF YOU WHO WILL BE STAYING FOR THE LEPC WORKSHOP SHOULD NOTE THAT THE PARKING PERMITS FOR THE HSERC MEETING ARE GOOD ONLY UNTIL 12:00. IF YOU ARE PARKED IN THE LOT, THERE SHOULD BE STREET PARKING NOW AVAILABLE TO MOVE YOUR CAR. ALSO NOTE THAT THE AFTERNOON MEETING WILL BE HELD DOWNSTAIRS IN ROOM 215.

BENJAMIN J. CAYETANO
GOVERNOR OF HAWAII



LAWRENCE MIIKE

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

REPLY, PLEASE REFER TO HEER OFFICE

October 11, 1995

To:

Hawaii State Emergency Response Commission Members

From:

Bruce Anderson, Acting Chair Sun Amelina

Hawaii State Emergency Response Commission

Subject:

Notice for HSERC Meeting #22

This is to invite you to attend the next meeting of the Hawaii State Emergency Response Commission (HSERC) to be held on Wednesday, November 15, 1995, 9:00 am to 12:00 noon. The meeting will be held at the Department of Health, 919 Ala Moana Boulevard in the 5th Floor Conference Room.

Topics will include a review of the August full scale exercise, Operation Diamond Head, and an overview of the new State Contingency plan, Title 11 Chapter 451 of the Hawaii Administrative Rules, which went into effect on August 17, 1995.

There will be a workshop for the LEPC Chairpersons in the afternoon following the HSERC meeting.



Date:

Friday, October 13, 1995

Time:

1:45 PM

To:

HSERC Members or Representatives

Company:

State of Hawaii

Fax Phone #:

8085867537

CC:

From:

Marsha Mealey, EPCRA Coordinator, HEER Office

Subject:

Agenda for the November HSERC Meeting

Total # of Pages (including cover): 4

Memo:

The following is a draft announcement and agenda for the upcoming HSERC meeting which has been scheduled for Nov. 15, 1995. Please contact me by Fax ((808)586-7537 or phone ((808)586-4694)) to submit additional items for the agenda or if you have questions.

From: Hawaii DOH HEER Off.



LAWRENCE MILKE DIRECTOR OF HEALTH

IN REPLY, PLEASE REFER TO: HEER OFFICE

Draft

BENJAMIN J. CAYETANO

GOVERNOR OF HAWAII

October 11, 1995

To:

Hawaii State Emergency Response Commission Members

From:

Bruce Anderson, Acting Chair

Hawaii State Emergency Response Commission

Subject: Notice for HSERC Meeting #22

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From: Hawaii DOH HEER Off.

BENJAMIN J. CAYETANO GOVERNOR OF HAWAII

LAWRENCE MIKE

STATE OF HAWAII DEPARTMENT OF HEALTH

P 0 BOX 3.378 FONOLULU, HAWAII DEBOI

IN REPLY, PLEASE REFER TO HEER OFFICE

October 11, 1995

HAWAII STATE EMERGENCY RESPONSE COMMISSION MEETING #22

Wednesday, Nevember 15, 1995 from 9:00 p.m. to 12:00 p.m.

Department of Health 919 Ala Moana Boulevard, 5th Floor Conference Room Honolulu, Hawaii 96814

AGENDA (DRAFT)

Call to Order Bruce Anderson, DOII, Environmental Health Administration Opening Remarks

Discussion/Approval of Minutes from Meeting #21

Video From the August Full Scale Exercise Mike Ardito, USEPA Region IX

Sub Committee Updates Steve Armann, HEER Office Manager

Carter Davis, Honolulu Fire Department

Roy Price, State Civil Defense

Overview of 128D Rule Steve Armann, HEER Office Manager

LEPC Updates and Nomination of New Members

Jay Sasan, Hawaii Clifford Ikeda, Kauai Sean O'Keefe, Maui Carter Davis, Oahu

NGA State Emergency Response Commission Conference EPA Updates

Mike Ardito, USEPA Region IX

8.

5.

- Other Business
- 10. Schedule next HSERC meeting

From: Hawaii DOH HEER Off.

Fax #: (808)586-4563

HSERC Distribution:

Anderson, Dr. Bruce
Blackburn, Captain Joe
Boesch, Bob
Charlton, Russel
Coloma-Agaran, Gilbert
Davis, Captain Carter
Gill, Gary
Harrison, Dr. John
Ikeda, Clifford
Moore, Ralph
Naya, Seiji
Price, Sr., Roy C.
Sasan, Jay
Woolley, Ralph
Yule, Kalhy



LAWRENCE MILKE

in reply, please refer to: HEER OFFICE

STATE OF HAWAII **DEPARTMENT OF HEALTH**

P. O. BOX 3378 HONOLULU, HAWAII 96801

August 21, 1995

FINAL MEETING SUMMARY HAWAII STATE EMERGENCY RESPONSE COMMISSION MEETING #20

WEDNESDAY, August 31, 1994 from 9:00 a.m. to 12:00 p.m.

Department of Health Kinau Hale Board Room, 1st Floor 1250 Punchbowl Street Honolulu, Hawaii 96813

Attendees

Bruce S. Anderson, DOH Robert Buesch for Yukio Kitagawa, Board of Agriculture Roy Price for Major General Richardson, DOD Manette N. Courvay for Dayton Nakanelua Clifford Ikeda, Kauai County LEPC Captain Carter Davis, Honolulu County LEPC Jay Sasan, Hawaii County LEPC

Other Attendees

Sean O'Keefe, Maui LEPC, HC&S Chulee Grove, Honolulu Community College Michael Choy, HECO Rian Adachi for Barry Usagawa, BWS Steve Armann, DOH Marsha Mealey, DOH Chris Takeno, DOH

I. Call to Order

The 20th meeting of the HSERC was called to order at 9:25 am on August 31, 1994 by Dr. Anderson.

Α. Opening Remarks

Introductions:

Rachel Loftin and Tom Mix of the EPA are in Hawaii to perform the year end

review of the federal Superfund Core grant programs and are attending as observers of this HSERC meeting.

Announcement:

On June 21st of this year, Captain Carter W. Davis of the Honolulu Fire Department was elected chairperson of the Honolulu Local Emergency Planning Committee and will therefore represent the City and County on the Hawaii State Emergency Response Commission.

Captain Davis has been with the Honolulu Fire Department for 14 years and specializes in the area of hazardous materials. He is an instructor with the National Fire Academy and is recognized nationally and internationally as an expert in the field of emergency response to hazardous materials incidents.

B. Discussion/Approval of Minutes from Meeting #19

The draft meeting summary of HSERC meeting #19 was reviewed and approved with one change.

II. Nomination and appointment of LEPC members

The following members were appointed to the Honolulu LEPC. These appointments supersede previous appointments made for the listed offices, divisions and departments.

Thomas S. Vendetta, Chief Industrial Safety and Worker's Compensation Division Department of Personnel

Stanley Maekawa, Assistant Division Chief Customer Service Division Board of Water Supply

Captain Carter Davis Hazardous Material Officer Honolulu Fire Department

Captain Terrance Yuen Civil Defense Coordinator Honolulu Police Department

Eugene Lee Program Coordinator Department of Public Works

James Barr Vice President of Operations Brewer Environmental Industries

Gary Susag
Radiological Defence and Logistics Officer
Oahu Civil Defence Agency.
Gary will fill the vacancy until a permanent replacement is hired for Chris Takeno's former position.

- III. Providing the public with Information Dissemination of Materials such as Meeting announcements and minutes and Emergency
 - Dissemination of Materials such as Meeting announcements and minutes and Emergency Plans
 - 1) HSERC meeting notices are sent to:

Lt. Governor's Office State Capitol, 5th floor 415 Beretania Street Honolulu, HI 96713.

LEPC meeting notices should be sent to the county seat (in Honolulu, the County Clerk's Office) and the Lt. Governor's Office. Six copies should be sent. Notice should be given at least six (6) days before the meeting.

2) The state and county emergency plans may be submitted to:

Hawaii Documents Center Hawaii State Library Honolulu, HI 96813 attn: Pat McNally ph.:586-3543.

Provide 7 copies, specify that the documents will be submitted annually and that they are to go to regional distribution. The library will catalog and distribute them.

State and County Civil Defense plans are already placed with the library.

3) Minutes (both HSERC and LEPC) and facility emergency plans are on file at:

State of Hawaii Department of Health Hazard Evaluation and Emergency Response Office 919 Ala Moana Blvd., Room 206 Honolulu, HI 96814-4912.

If a need arises for sign language interpreters for a meeting, contact the HEER office for the DOH procedure.

IV. Draft Enforcement Policy

Steve Armann called for the formation of a subcommittee to generate the enforcement policy for 128E.

Three strikes; you're out policy. This means that once the SERC is notified by the LEPC (or other source) that a facility may be required to provide information under HEPCRA that it is not providing, the HEER office will send a letter requesting that information. If no reply is made, a second letter will be sent to managers higher up the facility's chain of command indicating that a violation will be issued if there is not an adequate response. The third communication will be a notice of violation.

HSERC must approve policy.

All LEPC representatives will be members of the subcommittee.

Draft a policy before next meeting.

LEPC representatives should open membership to their LEPC members.

V. HSERC Review of Emergency Plans

Roy Price discussed the Civil Defense side of emergency plan review.

- 1. Currently the hazmat plan is a Supplement to Volume 3.
- 2. HazMat annexes to the EOP were created over time.
- 3. A FEMA crosswalk is done by the State Civil Defense.
- 4. Plans should use state and county infrastructure for communications, etc.
- 5. SOP and exercises for implementation must also be developed.
- 6. Plans have been approved by:

Mayor

County Council

General Richardson and

FEMA.

- 7. In October of 1982 a group met to discuss emergency plan review.
- 8. In Honolulu a 1988 Annex was sent to South Oahu CD. In 1992 it was sent to CD (approved) and SERC.
- 9. What is the SERC for purposes of review?

Staff review: HEER and CD

HSERC approve based on staff recommendations.

10. HEER will send memos to LEPCs requesting plans for review by HSERC.

Submission Dates for LEPC Plans

Proposed Schedule:

1st Quarter Honolulu 2nd Quarter Maui 3rd Quarter Hawaii 4th Quarter Kauai

VI. Budget for Next Year

Marsha Mealey, HEER Office

SEE THE SPREADSHEET AND JUSTIFICATION PACKET.

The proposed budget is approximately \$242,0000.

Should Federal Facilities pay the HCIF Filing Fee to the State General Fund?

The Navy expressed doubt regarding the legality of federal facilities paying the HCIF filing fee to the state general fund. Loren Volpini of EPA Region IX notes that federal facilities pay fees in states other than Hawaii. It must be stressed that this is a fee for <u>service</u>, such as technical support, etc.

The HEER Office will request an opinion from the AG's Office.

Innovative Funding Programs for LEPCs

- 1. Peer Exchange Group
- 2. Obtain local sponsor for LEPCs as an association of concerned citizens.

Discussion of the Budget

•Amend EPCRA to establish a special fund and divide for ways for appropriations.

•Request revenues generated.

- •Have contributors to the fund send letters and FAXs lobbying for specific uses of the money.
- •Submit bill for the actual costs of running the LEPCs and SERC as a reference document.

VII. DOT Planning Grant

Chris Takeno, of the HEER Office discussed the status of the grant.

1993-1994 The HEER Office can use contractual hire but must encumber the money by September under the extension.

- •Not for equipment.
- •Money for training reimbursement doesn't go back to supervisor but to the general fund.
- •Advertising must also be done.
- •OSHA must apply pressure before supervisors will let their people go to 40 hour training.

VIII. Review of the Regional Response Team Exercise on June 7-9, 1994.

Steve Armann, of the HEER Office, commented that State participation was less than anticipated.

IX. Other Business

Kauai participated in an excellent HazMat exercise. A video of the exercise is available.

X. Schedule next HSERC meeting

The next meeting of the HSERC will be held on Wednesday, November 16, 1994.

The meeting was adjourned at 11:36.

BRIEF

November 13, 1995

HAWAII STATE EMERGENCY RESPONSE COMMISSION **MEETING #22**

Wednesday, November 15, 1995 from 9:00 p.m. to 12:00 p.m.

Department of Health 919 Ala Moana Boulevard, 5th Floor Conference Room Honolulu, Hawaii 96814

AGENDA

(DR. BRUCE ANDERSON, CHAIR)

- (CHECK FOR A QUORUM)
- 1 Call to Order
- THE MEETING WILL PLEASE COME TO ORDER.

Welcome

I'D LIKE TO WELCOME MEMBERS OR THEIR DESIGNATED REPRESENTATIVES, FACILITY REPRESENTATIVES FOR INDUSTRY AND FEDERAL FACILITIES AS WELL AS ANY OTHERS WHO ARE ATTENDING.

Opening Remarks

Discussion/Approval of Minutes from Meeting #22

MEMBERS RECEIVED DRAFT COPIES OF THE AUGUST HSERC MINUTES WITH THE ANNOUNCEMENT OF TODAY'S MEETING.

THERE ARE EXTRA COPIES FOR THOSE WHO WOULD LIKE THEM. PLEASE TAKE SOME TIME TO REVIEW THE DRAFT MINUTES.

▼DO I HEAR A MOTION TO ACCEPT THE MINUTES?

▼DOES ANYONE WANT TO SECOND THE MOTION?

▼THE MOTION TO ACCEPT THE MINUTES HAS BEEN SECONDED. IT'S NOW OPEN TO DISCUSSION. ARE THERE ANY CHANGES?

▼THE CHAIR RECOGNIZES...

▼THOSE IN FAVOR OF ACCEPTING THE MINUTES AS PRINTED WITH THE CHANGES DISCUSSED SAY YES. (PAUSE FOR THE YES VOTES) THOSE OPPOSED SAY NO.

Time: 9:20

3. Vinfoed Command lacktriangle THE MOTION IS CARRIED. THE MINUTES ARE ACCEPTED I'D LIKE TO INTRODUCE Mike Ardito FROM THE OFFICE OF EMERGENCY PLANNING, U.S. EPA REGION IX. HE WILL PRESENT A VIDEO OF THE AUGUST FULL SCALE EXERCISE. LAST MEETING, THE ESTABLISHMENT OF SUBCOMMITTEES WAS DISCUSSED. THREE SUBCOMMITTEES WERE NAMED. IT SHOULD BE NOTED THAT WHENEVER TWO OR MORE COMMISION MEMBERS MEET, THERE MUST FIRST BE A NOTICE OF PUBLIC MEETING POSTED. WE'LL HAVE SQME COMMENTS FROM EACH OF THE SUBCOMMITTEE LEADS. FIRST, I'D LIKE TO PRESENT Steve Armann, MANAGER OF THE HEER OFFICE. WILL SPEAK ABOUT THE LEGISLATION, POLICY AND FUNDING SUBCOMMITTEE SAN Declared : Single Poctor EXCRAdata Usearchafo Main Sigue 98A. Carter Davis, HAZMAT CAPTAIN WITH THE HONOLULU FIRE DEPARTMENT AND LEPC CHAIR WILL DISCUSS BUSINESS, INDUSTRY AND INFORMATION MANAGEMENT SUBCOMMITTEE consolidated CIVIL DEFENSE, WILL DISCUSS ISSUES REGARDING THE PLANNING. EXERCISE AND TRAINING SUBCOMMITTEE. DOT entergraph Rewrite State response plans to reflect 2555 6-10 months RP: Jester NOW WE'LL HEAR FROM STEVE ARMANN AGAIN. 9HE'LL BE GIVING AN OVERVIEW OF THE 128D RULE, TITLE 11 ADMINISTRATIVE RULES, WHICH WENT INTO EFFECT ON AUGUST 17TH OF THIS YEAR. HSERC MEMBERS HAVE BEEN GIVEN PACKETS WITH A COPY OF THE RULES, A COVER LETTER DESCRIBING THE STATE CONTINGENCY PLAN AND RESPONSE TO alagrements to oversel remediation AT THIS POINT, I'D LIKE TO GIVE THE LEPC REPRESENTATIVES AN OPPORTUNITY TO under OPA UPDATE THE COMMISSION ON COUNTY EMERGENCY PLANNING ACTIVITIES 1. Jay Sasan, Hawaii Carter Davis, Oahu Ontgoni3th Dwill submit 3. Joe Blackburn, Maui Sist corr, sent to CD & ready to begin pacility profile (3) Planning grants? NEXT, Marsha Mealey, OF THE HEER OFFICE, WILL GIVE HIGHLIGHTS OF THE WATIONAL GOVERNORS' ASSOCIATION'S STATE EMERGENCY RESPONSE COMMISSION CONFERENCE WHICH SHE ATTENDED LAST WEEK IN ORLANDO. get data out Mike Ardito WILL GIVE SOME EPA UPDATES NOW. (MIKE IS ON A 15% FURLOUGH FROM THE FEDERAL GOVERNMENT DUE TO THE FUNDING FOR HIS POSITION.) Carter. Other Business WWW o local co IS THERE ADDITIONAL BUSINESS TO BE DISCUSSED? Schedule next HSERC meeting Yale MSDC PM Sch & Publiched

▼THE MOTION HAS BEEN SECONDED. to Spills Conf. ▼THOSE IN FAVOR SAY YES. (PAUSE FOR THE YES VOTES) **▼THOSE OPPOSED SAY NO.** ▼THE MOTION IS CARRIED. 'DO I HEAR A MOTION TO ADJOURN THE MEETING? \checkmark DOES ANYONE WANT TO SECOND THE MOTION? ▼THE MOTION TO ADJOURN HAS BEEN SECONDED. ▼THOSE IN FAVOR SAY YES. (PAUSE FOR THE YES VOTES) ▼THOSE OPPOSED SAY NO. THE MOTION IS CARRIED. THE MEETING IS ADJOURNED UNTIL FEBRUARY. Time: 12:03 THOSE OF YOU WHO WILL BE STAYING FOR THE LEPC WORKSHOP SHOULD NOTE THAT THE PARKING PERMITS FOR THE HSERC MEETING ARE GOOD ONLY UNTIL 12:00. IF YOU ARE PARKED IN THE LOT, THERE SHOULD BE STREET PARKING NOW AVAILABLE TO MOVE YOUR CAR. ALSO NOTE THAT THE AFTERNOON MEETING WILL BE HELD DOWNSTAIRS IN ROOM 215. gary: PC are View with data on op Rom will prot soon Mari - 2 yes out of date HE - send computer CD CF18H could only be on a single PC PM has student help. Det Flag \$456,000 in Equip UH PSAT

Likes microsoft access

Could be data regoistory! Will putility servers could be data repository!

THE CHAIR PROPOSES THAT THE NEXT MEETING BE HELD IN FEBRUARY AROUND THE

MIDDLE OF THE MONTH IN KEEPING WITH A OUARTERLY SCHEDULE.





STATE OF HAWAII DEPARTMENT OF HEALTH

In reply, please refer to: HEER OFFICE

P. O. BOX 3378 HONOLULU, HAWAII 96801

October 13, 1995

DRAFT MEETING SUMMARY HAWAII STATE EMERGENCY RESPONSE COMMISSION MEETING #21

TUESDAY, AUGUST 15, 1995 from 9:00 p.m. to 12:00 p.m.

Department of Health
919 Ala Moana Boulevard, 5th Floor Conference Room
Honolulu, Hawaii 96814

Attendees Voting

Dr. Bruce Anderson, Chair, Department of Health, Environmental Health

Gary Gill, Environmental Quality Control Office

Bob Boesch, Board of Agriculture

Roy Price, State Civil Defense

Russell Charlton, Department of Labor and Industry

Gil Agaran, Bureau of Land and Natural Resources

Ralph Moore, Department of Transportation

Jay Sasan, Hawaii LEPC Representative

Clifford Ikeda, Kauai LEPC Representative

Joseph Blackburn, Maui LEPC Representative

Capt. Carter Davis, Oahu LEPC Representative

Dr. John Harrison, University of Hawaii Environmental Center

Non Voting

Jim Bac, Department of Business, Economics and Tourism

Tim O'Callaghan, Health Division, Pearl Harbor Naval Shipvard

Donna Maiava, Department of Health, Emergency Management Services

Barry Usagawa, Board of Water Supply

Leighton Au Cook, State Civil Defense

Chris Takeno, Department of Health, Hazard Evaluation and Emergency Response Office

Terry Corpus, Department of Health, Hazard Evaluation and Emergency Response Office

Steve Armann, Department of Health, Hazard Evaluation and Emergency Response Office

Marsha Mealey, Department of Health, Hazard Evaluation and Emergency Response Office

Pete Madrigal, Naval Air Station Barbers Point

Leland Nakai, Oahu Civil Defense

Mike Ardito, USEPA Region IX

Al Kang, State Civil Defense

Cliff Takanaka, Army Garrison Hawaii

James Abbot, Marine Corps Air Base Kaneohe Bay

Charlene Richarson, Camp Smith Ron Walker, US Fish and Wildlife Service Mike Cripps, Department of Health, Hazard Evaluation and Emergency Response Office

Call to Order - The 21st meeting of the HSERC was called to order at 9:12 am by Dr. Bruce Anderson.
 Welcome - Members, their designated representatives, facility representatives for industry and newly covered federal facilities were welcomed.

Opening Remarks - Bruce Anderson, Deputy Director for Environmental Health has been designated in writing as the chair of the HSERC by Lawrence Miike, Director of Health.

Introductions - All attendees introduced themselves to the group.

Discussion/Approval of Minutes from Meeting #20 -

Minutes were reviewed.

Voting Members were identified.

A motion to accept the minutes was made and seconded. The floor was opened to discussion. Roy Price noted that under Item VII "Money for training" should read "Money for training reimbursement". The motion to accept the minutes with above change was carried by a unanimous vote.

(Handouts and overhead materials from the speakers may be found with the HEER Office file of HSERC Meeting #21.)

2. Mike Ardito, from the Office of Emergency Planning, U.S. EPA Region IX, presented a review of the February LEPC Peer Exchange and the Nationwide LEPC Survey and an overview of the Hawaii Risk Assessment.

RC-HSERC Members were not notified of this meeting because only LEPC members were included in the limited scope.

CD-Legislative representation was very important.

JS-Mainland viewpoint was valuable.

RP-Civil Defense should review.

BA-All members will receive copies for comment.

3. Marsha Mealey, of the HEER Office, updated the commission on the Section 312 filing status for the reporting year 1994.

\$81,500 in filing fees has been collected to date. Many facilities have petroleum products only; 264 facilities are service stations, 27 are terminals and 101 are propane only. There are 37 military facilities, which under the current fee structure, are nonpaying facilities.

4. Steve Armann, Manager of the HEER Office, gave an update of the activities of the Regional Response Team (RRT).

The RRT worked out a policy for in situ burning and preapproves the use of dispersants in the event of a major oil spill. Co-chaired by the USCG and the EPA for coastal and inland responses. The CG is approving vessel response plans for oil spills. Since HQ in DC is reviewing the plans they are allowing plans citing companies which do not have resources readily available in the Pacific. A letter from the Governor to the Commandant of the Coast Guard District here is being drafted expressing the concern that since mainland companies, not local companies are cited in the plans, funds to support local readiness may be lost.

5. Al Kang, of the State Civil Defense, described the upcoming HazMat exercise, Operation Diamond

Head, here in Hawaii.

- 6. Leighton Au Cook, State Civil Defense, spoke about HazMat training in the state.
- 7. LEPC Representatives updated the commission on county emergency planning activities.
 - 1. Jay Sasan, Hawaii

Member ship updates listed in a memo titled "Local Emergency Planning Committee (LEPC)

Members" dated June 9, 1995 from Jay Sasan to Mayor Stephen K. Yamashiro.

Funding for and ready access to training programs are a concern.

2. Clifford Ikeda, Kauai

Member ship updates listed in a letter titled "Kaua'i LEPC Membership" dated August 14, 1995 from Mayor Maryanne W. Kusaka to the State of Hawai'i Emergency Response Commission.

A motion was made, amended, and carried to adopt both the Hawaii and Kauai County membership updates.

3. Joe Blackburn, Maui

The LEPC is to finalize the Maui Emergency Action Plan and will then resume meetings.

4. Carter Davis, Oahu

Oahu is rewriting its EOP and sending it for review.

Budget issues are a concern.

Legislative participation iscritical for LEPCs.

Exercise will bring together 3 technician teams including Hickam Federal Fire Team.

Thurs. 17th of August is the next scheduled meeting of the Honolulu LEPC.

- 8. Mike Cripps' presentation of the HEER Office Investigation of Explosive Conditions in Waikiki was postponed until after the formal meeting to allow time for voting on the establishment of subcommittees.
- 9. Steve Armann proposed the establishment of subcommittees to facilitate HSERC business.

The motion was made and carried to established the following subcommittees:

Planning, Exercise and Training with Civil Defense as the lead.

Legislation, Policy and Funding with DOH as the lead.

Business, Industry and Information Management with Carter Davis as the lead and a position for industry.

Maui Cost Recovery - Maui County has been reimbursed for the NAPA Fire response.

Legislative Briefing - Title 11 Chapter 451 has been signed by the Governor.

- 11. The motion was carried to schedule the next meeting for November, the week of the 13th.
- 12. The motion was carried to adjourn the meeting. The meeting was adjourned at 11:45 until November.