

NOTICE OF CHANGE
11/14/97

The citation of authority for and list of sections implemented by Section 11-451-1, Hawaii Administrative Rules, are changed to read as follows:

(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-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-17, 128D-18, 128D-19, 128D-24)

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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.

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"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 17 1995] (Auth: HRS §128D-7) (Imp: HRS §128D-3)

§11-451-3 Definitions. (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. Interim 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 cost-effective 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. AUG 17 1995]
 (Auth: HRS §128D-7) (Imp: HRS §128D-3)

SUBCHAPTER 2

NOTIFICATION OF RELEASES OF HAZARDOUS SUBSTANCES

§11-451-4 Discovery and notification. (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 17 1995] (Auth: HRS §128D-7) (Imp: HRS §128D-7)

§11-451-5 Designation of hazardous substances.

(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 17 1995] (Auth: HRS §§128D-3, 128D-4, 128D-6, 128D-7, 128D-13, 128D-20) (Imp: HRS §§128D-3, 128D-4, 128D-6, 128D-7, 128D-13, 128D-20)

§11-451-6 Determination of reportable quantities. (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
- (2) Unlisted hazardous wastes, which exhibit toxicity 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. If an 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 quantities. The reportable quantities described in this paragraph apply to the weight of the entire amount of material released, not merely to the hazardous substance component. [Eff. AUG 17 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 solution. If the exact concentration of all the hazardous 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 guideline; 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 General. (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.

(h) 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 point of contact and their phone number. The legend must 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.

(l) 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 17 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 17 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. AUG 17 1995] (Auth: HRS §128D-7) (Imp: HRS §128D-7)

§11-451-11 Assessment of Facilities or Vessels.

(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;
- (3) Collection of or development of additional 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. [Eff. AUG 17 1995] (Auth: HRS §§128D-4, 128D-7) (Imp: HRS §§128D-4, 128D-7)

§11-451-12 Determination of appropriate response action. (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 17 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 on-site.
 - (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 17 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. The 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);

- (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 17 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^{-4} 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 a newspaper 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
 - (2) 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.

(l) 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 17] 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. [Eff AUG 17] 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 17 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. [Eff^{AUG 17} 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.
- (2) If information which forms the basis for the selection 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. The 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 17 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 17 1995] (Auth: HRS §§128D-7, 128D-14) (Imp: HRS §§128D-7, 128D-14)

§11-451-21 Public inspection of and public comment on administrative records for removal actions. (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. AUG 17 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 17 1995] (Auth: HRS §§128D-7, 128D-14) (Imp: HRS §§128D-7, 128D-14)

§11-451-23 Supplementation of administrative records for orders. (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 17 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 17 1995] (Auth: HRS §§128D-4, 128D-7) (Imp: HRS §§128D-4, 128D-7)

Chapter 11-451, Hawaii Administrative Rules, was adopted on AUG 17 1995 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 Miike

LAWRENCE MIIKE
Director of Health

Date: 7/30/95

LIEUTENANT GOVERNOR'S
OFFICE

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Benjamin J. Cayetano

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Date: August 2, 1995

AUG 07 1995

Filed

APPROVED AS TO FORM:

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