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SB 3108 SD 1
RELATING TO ENVIRONMENTAL EMERGENCY RESPONSE

Statement for Senate Committee on
Judiciary
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SB 3108 SD 1 incorporates portions of federal laws relating to environmental emergency response into the State's Emergency Response Law. The intent of the amendments is to make the State's "Superfund Law" more consistent with the federal statute, and to enable the State to more effectively and efficiently administer a superfund program in Hawaii.

Our statement on this bill does not constitute an official position of the University of Hawaii.

The federal statute from which the majority of this proposed bill has been derived is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 USC Section 9601 et seq.). The Environmental Center perceives a crucial need to augment the existing State law (Chapter 128D, HRS) so that it is consistent with the federal statute for the following reasons:

1. Unlike other federal environmental statutes such as the Clean Water Act or the Clean Air Act, CERCLA does not include provisions to delegate responsibility for local implementation of the law to individual states. Primary responsibility for CERCLA implementation rests with the US Environmental Protection Agency (EPA).
2. Other than a minimally staffed information office, the EPA maintains no formal presence in Hawaii. Thus, there is no local federal authority for implementation of CERCLA. Emergency response to an environmental release of a hazardous material must be mobilized from EPA's Region IX office in San Francisco.

3. Analysis of the existing State Emergency Response law has shown that it provides an insufficient statutory foundation in the areas of response authority and enforcement authority as compared with CERCLA.
4. There are unique characteristics of the Hawaiian environment which require specific protection that is at least equivalent to that provided by the federal law. Our oceanic islands comprise a compressed assemblage of habitats which range over extremely short distances from alpine mountains to tropical rainforests to coral reefs. The native biota of Hawaii have been driven to increasingly remote refuges by the press of human activities. In a land labeled the "Eden of endemism", our proportion of endangered and extinct species exceeds that of all the other United States. Yet this beleaguered environment provides the major economic base for our state through its widely advertised intrinsic natural beauty.

For these reasons, the Environmental Center emphatically supports the initiative to provide for administration of an effective State superfund program. We have already experienced firsthand the contamination of our groundwater, and last spring, the threat of major oil contamination of our beaches was demonstrated vividly by the EXXON Houston.

In view of the crucial need for immediate environmental emergency response capability, the Environmental Center suggests that the proposed language of SB 3108 is insufficient to adequately provide the protection our State requires. Omissions and modifications in transcribing from CERCLA have left some severe shortcomings, and we recommend that the following amendments, largely drawn from the federal statute, be made to the bill.

1. CITIZENS SUITS

Most federal environmental laws contain provisions for individual citizens to bring civil actions in cases of alleged violations (e.g., Section 505 of the federal Clean Water Act). Similarly, CERCLA contains such a provision (42 USC Section 9659). Therefore, in the interest of consistency with CERCLA, and given the proven efficacy of such measures in assuring environmental protection, we suggest that the State statute also include provision for citizens suits. The following additional language, drawn from CERCLA, would provide such authority:

Section 128D- Citizens Suits.

(a) AUTHORITY TO BRING CIVIL ACTIONS.- Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf-

(1) against any person who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Chapter; or

(2) against the Governor or any other officer of the State of Hawaii where there is alleged a failure of the Governor or of such other officer to perform any act or duty under this Chapter.

(b) NOTICE.- No action may be commenced under this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The Governor

(B) The Director

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned.

2. PUBLIC PARTICIPATION (page 5, line 16)

Under CERCLA, State responsibilities for promoting public participation during a federal action are explicitly prescribed (42 USC Section 9617). Existing language in this bill is vague and meaningless and should be deleted.

3A. DEFINITION OF ENVIRONMENT (page 6, line 19)

For explicit clarity, we recommend that the definition of "environment" be amended as follows:

"Environment" means any marine, estuarine, or fresh waters, including, but not limited to, surface water, ...

3B. DEFINITION OF POLLUTANT OR CONTAMINANT (page 9, line 21)

The last sentence, which was added with amendments from the Senate Committee on Agriculture, is not consistent with language in CERCLA and should be deleted. Requiring the Director to designate individual pollutants and contaminants levies an undue administrative burden on an understaffed organization, and would have the effect of tying up the response and enforcement process, thereby compounding public health risks.

3C. DEFINITION OF RELEASE (page 11, line 1)

Previous episodes of groundwater contamination in central Oahu compel us to question the wisdom of a blanket exclusion of pesticides as proposed in amendments from the Senate Committee on Agriculture. We suggest the following amended language:

- (5) The legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, [or to the handling and storage of a pesticide product by an agricultural producer.]

4A. SECTION 128D-3(b) (page 15, line 15)

In amending this section, the Senate Committee on Agriculture inadvertently omitted necessary language. The section should read as follows:

(b) Any person in charge of a vessel or an offshore or an onshore facility, [shall] as soon as he has been made aware of any release ... pursuant to this chapter [.] shall notify the department immediately of such release.

4B. SECTION 128D-3 (c) (page 15, line 23)

For internal consistency, the following language should be deleted:

substance release to the department [within twenty-four hours of knowledge of the release] shall be subject ...

5A. SECTION 128D-4 (a) (page 16, line 13)

This section should be amended as follows to make it consistent with CERCLA:

(a) Whenever

(1) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
(2) there is a release or a substantial threat of a release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, or the environment,

the director, duly designated officers, employees, ...

In addition to consistency with CERCLA, this language provides the State more authority to act immediately in the case of a hazardous substance release, in that imminent and substantial danger to public health is presumed, rather than being subject to determination.

5B. SECTION 128D-4 (c) (page 19, line 13)

CERCLA contains additional language which provides for expenditure of superfund moneys to restore damaged natural resources. In view of the economic importance of natural resources in Hawaii, we recommend the inclusion of this language as follows:

(3) Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

6. SECTION 128D-6 (a) (page 21, line 6)

As presently written, this section creates the condition of several liability. To attain consistency with CERCLA, and to ensure application of joint as well as several liability, the following change should be made:

hazardous substances[;] or pollutants or contaminants;[or] and
(4) any person who accepts or accepted ...

In the same section, page 21, line 14 should be amended as follows:

shall be strictly liable for (A) all costs ...

Federal courts have construed such interpretation of the analogous section of CERCLA.

The Environmental Center strongly urges the Legislature to adopt the proposed bill with the suggested amendments, and we would be pleased to provide assistance in accommodating concerns which may be raised in public testimony.

Thank you for the opportunity to testify on this measure.