

Environmental Liability Protection

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Overview

- Superfund liability
- Defenses
 - Innocent purchaser
 - Bona fide prospective purchaser
 - Contiguous property owner
- Voluntary Response Program
- Insurance
- Contractual language

Statutes

CERCLA (Superfund),
42 U.S.C. § 9601 et seq.

Hawaii Environmental Response Law,
Haw. Rev. Stat. Chapter 128D

Liability

Current
Owner/Operator

Past
Owner/Operator

Generator

Transporter

Defenses

- Unanticipated grave natural disaster
- Act of war
- Act or omission of third party other than Employee or agent
- Innocent purchaser

Liability

Release or threat of a release
of a hazardous substance
from a facility
that causes the
incurrence of response costs

Brownfield Amendments



- Created new defenses to CERCLA liability

Who is the person or entity seeking protection?

Innocent
Landowner?

Bona Fide
Prospective
Purchaser?

Contiguous
Property
Owner?

Have they
conducted
all
appropriate
inquiry?

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graph TD; A["Innocent Landowner?"] --> D["Have they conducted all appropriate inquiry?"]; B["Bona Fide Prospective Purchaser?"] --> D; C["Contiguous Property Owner?"] --> D;
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Appropriate Inquiry Objectives

- Inquiry is made on or **before** closing
- Looks at previous ownership and uses
- In accordance with “generally accepted good commercial and customary standards and practices.”

ASTM E1527-05



Timing

- Shelf life of Phase I reports = 1 year
- If the following are conducted within 180 days prior to acquisition:
 - interviews
 - lien searches
 - government records reviews
 - visual inspections
 - environmental professional's declaration

Notification and Cooperation



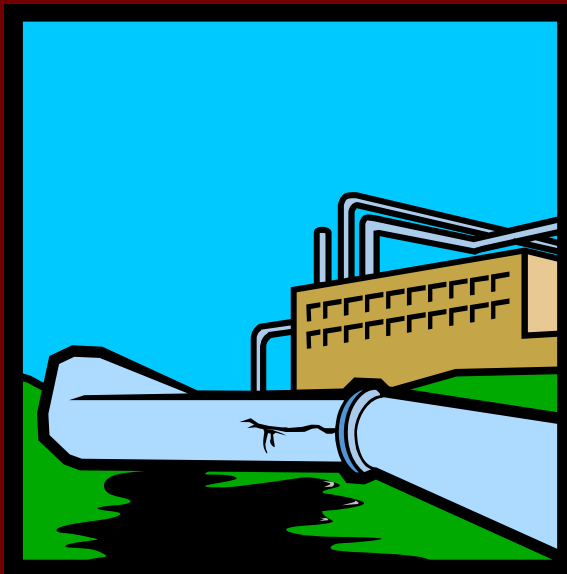
Release reporting requirements

Cooperation with response actions and natural resource restoration



Reasonable Steps

Stop any continuing
release



Prevent exposure
to previous
releases

Reasonable Steps

- A site-specific, fact-based inquiry.
- Consider making “reasonable steps” the contractual obligations of third parties
 - *Environmental professionals*
 - *Sellers*
 - *Other responsible parties*

Innocent Purchaser

- No reason to know that any hazardous substance was disposed at the facility
- All appropriate inquiry
- “Reasonable steps” to:
 - Stop any continuing release
 - Prevent exposure to previous releases

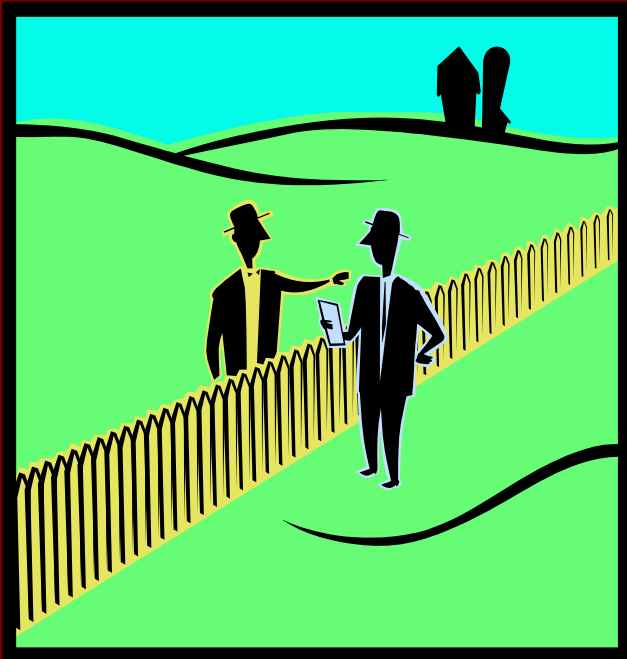
Bona Fide Prospective Purchaser

- Disposal occurred before purchaser acquired the facility
- All appropriate inquiry
- “Reasonable steps” to:
 - Stop any continuing release
 - Prevent exposure to previous releases

Bona Fide Prospective Purchaser

- Makes required release notices
- Cooperates with response actions and natural resource restoration
- Is not potentially liable or affiliated with any other person that is potentially liable for response costs at the facility
- Not in violation of any land use restrictions or institutional controls

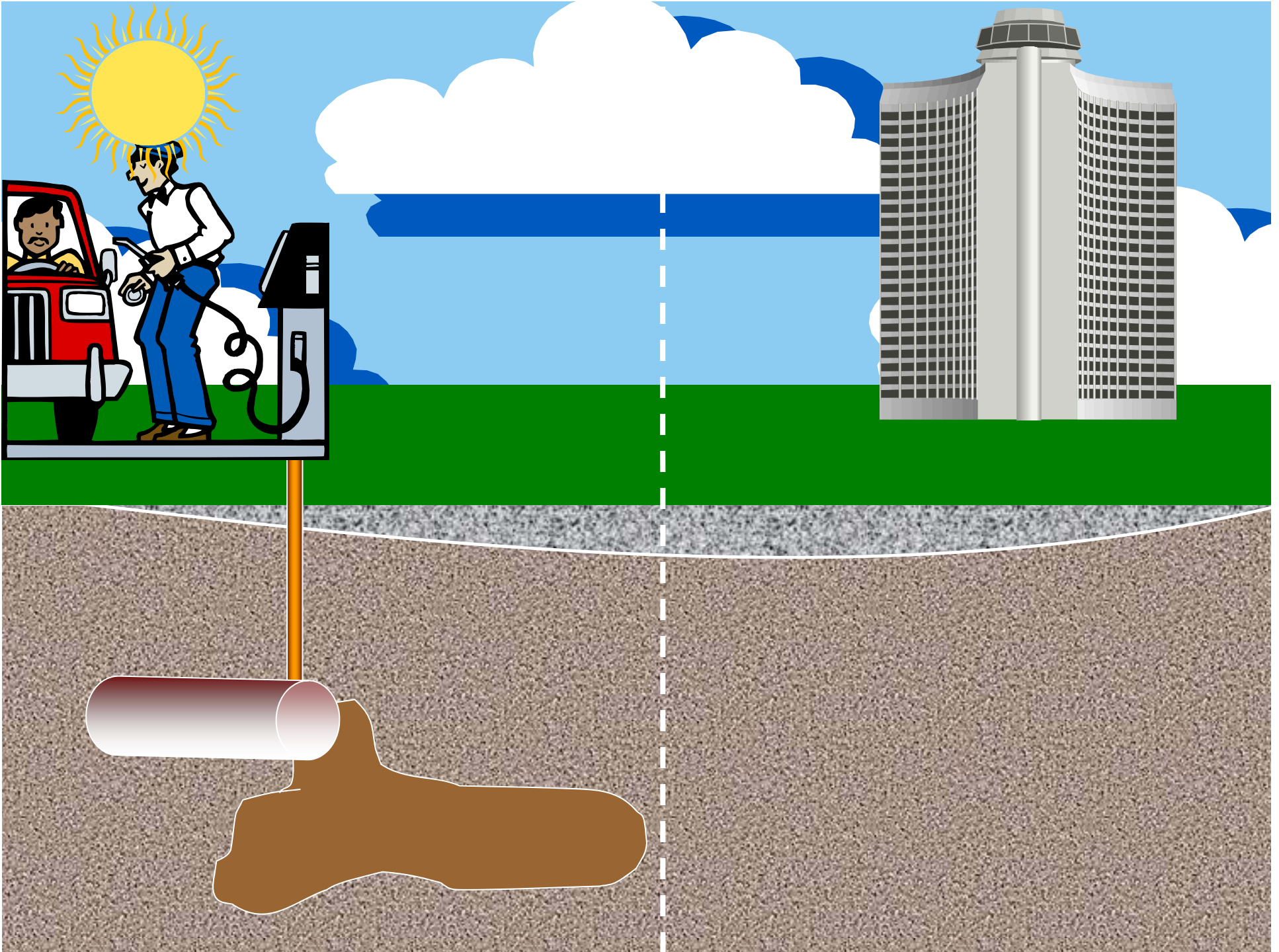
Contiguous Property Owner



- Did not cause, contribute or consent to the release
- Didn't own the property where the release occurred
- Not liable for response costs through family, contractual, corporate or financial relationship
- Not a reorganization of a liable entity

Contiguous Property Owner

- Complies with information requests and administrative subpoenas
- All appropriate inquiry
- “Reasonable steps” to:
 - *Stop any continuing release*
 - *Prevent exposure to previous releases*
- Makes required release notices
- Cooperates with response actions and natural resource restoration



Hawaii Voluntary Response Program

- Exemption from future liability
- Ensures work meets state cleanup standards
- Enhances property value
- Prompt response from HDOH

Examples of VRP Projects

- Home Depot Store, Iwilei District, Honolulu (*first VRP project in Hawaii*)



Examples of VRP Projects

- Costco Iwilei



Examples of VRP Projects

- Moana Pacific (Kapiolani/Piikoi)



Environmental Insurance

Pollution Legal Liability

Designed to cover claims arising from pollution on, within or under properties listed in the policy or emanating from the properties

Insurance

- PLL is for the “unknowns” including
 - Existing unknown contamination
 - Unknown cleanup costs
 - Third party claims for migration
 - Toxic torts
 - Diminution in property value
 - Stigma damages
 - Natural resource damages
 - Defense costs

Insurance

- Pollution Legal Liability covers:
 - New conditions, such as:
 - Spills
 - Business interruption
- PLL Excludes:
 - Pre-existing conditions known to the insured
 - Willful/intentional acts or omissions
 - Underground storage tanks
 - Contractual liability

Insurance

■ Cost Cap Coverage

- Covers overruns in cleanup costs, including:
 - More contamination
 - Different kind of contamination
 - Regulatory standard changes
- Does not cover 3rd party claims
- Costs roughly 10% of cleanup cost
- Limited in time (usually 10 years)

Contractual Language

■ Consultant contracts

- *Should require compliance with the applicable appropriate inquiry regulations and ASTM standard*

■ Purchase Agreements and LOI

- *Sellers should respond in good faith to interview requests*
- *Act in good faith in providing property access*
- *Use best efforts to assist buyer and environmental professional to obtain interviews of other tenants and occupants.*

Contractual Indemnifications

- Seller indemnifies buyer for all environmental liability
- Risks
 - Unknown extent of contamination
 - Unknown type/concentration of contamination
 - Financial viability of seller

Additional Due Diligence

- When is a Phase I ESA not enough?
 - If property value is an issue
 - If construction or renovations are planned

Additional Due Diligence

- Not included in Phase I ESA
 - Asbestos-containing building material
 - Lead-based paint/lead in drinking water
 - Wetlands
 - Regulatory compliance
 - Cultural and historic resources
 - Industrial hygiene
 - Health and safety
 - Ecological resources
 - Endangered species
 - Indoor air quality
 - Biological agents
 - Mold

Additional Due Diligence

- Stock Purchase of Corporation
 - *Existing environmental liabilities may pass to new owner*
 - *Potential successor liability issues*
 - *Owned and leased properties*
 - *Formerly owned properties*
 - *Offsite disposal issues*

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