



# MEMORANDUM



Cal/EPA

**TO:** Executive Officers  
Regional Water Quality Control Boards

Pete Wilson  
Governor

**State Water  
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/s/  
**FROM:** Walt Pettit  
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**SUBJECT:** GUIDANCE MEMO REGARDING BROWNFIELDS: PROSPECTIVE PURCHASER AGREEMENTS AND AGREEMENTS WITH CURRENT OWNERS FOR CLEANUP OF POLLUTED PROPERTY

The purpose of this memo is to provide guidance for evaluating requests that the RWQCBs issue documents which provide a measure of release of liability to parties who propose to conduct remediation activities at a property in exchange for the release.

Throughout the state there are many parcels of property with pollution problems that are not being addressed due to the inability of responsible persons to finance the required cleanup. Such properties are often unmarketable due to the pollution problems. The RWQCBs may be able to assist the parties involved to both market the property and effect the required cleanup by providing an appropriate written document. In some cases, a brief "comfort letter", which does not confer enforceable legal rights but expresses the RWQCBs' policies, may provide the level of release that will allow a real estate transaction to take place. In other cases, prospective purchasers may be available to clean up and, thereafter, develop the property. A disincentive to such prospective purchasers lies in the potential liability for the past pollution. In these cases, agreements between the Regional Boards, which specify the clean-up obligation and which include covenants not to sue if the terms of the agreement are carried out, may be an acceptable way to ensure the cleanup while releasing prospective purchasers from unknown clean-up liability.

The Department of Toxic Substances Control (DTSC) has adopted a policy which provides guidance to its staff regarding these cases. A copy is attached as Appendix "A" (BBS/WEB file : bflddpap.wp).

This memo sets forth, in broad terms, guidance that may be useful to the RWQCBs in evaluating such cases and in deciding



which written instrument is appropriate in a given case. It is consistent with DTSC's policy with additional guidance relative to water quality issues. In order to achieve a consistent approach statewide to liability release requests, this guidance contemplates that RWQCBs will consider the provisions herein and the DTSC's policy, which is incorporated by reference herein.

Since selection of the appropriate written instrument and the details of specific agreements will involve legal issues, the development of any such letter or agreement should involve the RWQCB counsel at the earliest stage.

#### I. THE PROPONENT

The party requesting a release of liability from the RWQCB may be the prospective purchaser or the current owner. Thus, there are two kinds of situations in which parties seek protection for successors in interest who would otherwise be responsible for cleanup of contamination, pollution, or nuisance. In the first situation, a prospective purchaser agreement is initiated by the prospective purchaser, who seeks an agreement by the RWQCB that it will not take enforcement action as to known, current contamination/pollution against the buyer if the prospective purchaser buys the land.

In the second situation the current landowner initiates a similar agreement to protect prospective buyers, lenders, and/or tenants. The landowner's goal is to encourage a buyer to purchase the property or to make the property more easily marketable to prospective buyers.

Regardless of whether the requesting party is the prospective purchaser or the current owner, there are various written instruments which may provide for the requesting party's needs. The most simple is a "comfort letter" that merely states the RWQCB's existing policies without making any legally binding commitments regarding the specific property. At the other extreme, a detailed, comprehensive prospective purchaser agreement which includes a covenant not to sue may be requested, which legally relieves the purchaser of liability for existing pollution, except as expressly provided in the agreement itself.

Upon submitting a request for release of liability, the proponent may suggest the preparation of a full prospective purchaser agreement without any discussion of alternative approa

ches. Even with the use of model agreements, the preparation of a prospective purchaser agreement is a very time-consuming undertaking for the RWQCB's technical and legal staff. Moreover, since it may involve a shifting of risk to the public in the long run, staff should scrutinize the request and explore whether another less time-consuming and less formal document or agreement will serve the proponent's needs.

## II. MISCELLANEOUS DOCUMENTS

Several kinds of written instruments may be used to satisfy the requesting party's needs for the appropriate level of release of liability. The proponent should be asked whether he/she has explored each of these mechanisms before embarking on preparation of a prospective purchaser agreement. The parties themselves may explore mechanisms short of a prospective purchaser agreement. For example, instead of a purchase, the prospective buyer's needs may be met through a lease with option to buy invocable once the clean-up work is completed by the current owner. The parties should also be encouraged to explore whether indemnification or insurance will satisfy their needs.

If RWQCB involvement is necessary, a comfort letter from the RWQCB may be sufficient to permit a real estate transaction to go forward. Appendix "B" is an example of a comfort letter. These may be crafted individually to fit the particular situation.

## III. PROSPECTIVE PURCHASER AGREEMENTS

A. Authority to enter into prospective purchaser agreements.

Under Water Code section 13304, the RWQCBs are authorized to issue Cleanup and Abatement Orders (CAOs) to address conditions of pollution or nuisance. The RWQCB has a broad range of discretion in determining the appropriate course of action in each CAO case, including how to resolve such orders. An RWQCB may determine, for example, in view of a landowner's satisfactory clean-up efforts, that it will forego enforcing against a prior owner or a tenant. Resolution of a CAO may, therefore, include a covenant not to sue an innocent prospective purchaser under appropriate conditions, such as when the combined earlier efforts by the owner and the actions proposed by the prospective purchaser will accomplish a satisfactory clean-up action.

B. Criteria for Prospective Purchaser Agreements.

A prospective purchaser agreement with a covenant not to sue has the consequence of absolving the purchaser from liability for the cleanup of existing contamination, potentially shifting the burden for remediation from that private entity to the public. Accordingly, the criteria used to evaluate the proposed agreement in a specific case should be evaluated carefully to assure that the risks to the public are minimized and that the public benefits outweigh those risks.

The following factors are taken from the current U.S. EPA guidance and from DTSC's Draft Prospective Purchaser Policy, with RWQCB considerations added. Appendix "C" is an updated guidance document from the U.S. EPA, titled, "Guidance on Agreements with Prospective Purchasers of Contaminated Property" (May 24, 1995). These factors should all be present before any decision is made regarding a prospective purchaser agreement.

1. The site is within the RWQCB's jurisdiction because of threatened or actual condition of pollution, nuisance, or contamination.
2. The current owner has satisfied the RWQCB staff that it is not financially able to perform the cleanup or indemnify the prospective purchaser for clean-up costs.
3. The prospective purchaser is financially viable and willing to enter into an agreement with the RWQCB that provides:
  - a. Payment by the prospective purchaser of the RWQCB staff's oversight costs and costs associated with developing the agreement;
  - b. A remediation/cleanup effort paid for by the prospective purchaser that will completely remediate the condition or substantially complete the remediation effort. A remediation Workplan, Remedial Action Plan, Operating and Maintenance Agreement or other appropriate document should be incorporated as part of the agreement. The projected cost of full cleanup must be compared to the amount being pledged by the prospective purchaser;

- c. Suitable instruments of financial assurance, such as escrow accounts, trust accounts, letters of credit, or corporate guarantees to fund the remediation effort;
- d. Reopeners which would limit the scope of the covenant not to sue under appropriate conditions.
4. Active discharge of pollutants/contaminants is not occurring at the site.
5. The prospective purchaser is not a responsible party or a party affiliated with a party responsible for the present contamination/pollution.
6. A Phase I/II environmental audit or Preliminary Assessment has been performed and provided to the RWQCB identifying the contaminants/pollutants released at the site. This should include a determination of the extent of any releases and the impacts on ground water.
7. The site is not the subject of an active enforcement action or agreement with another agency to address the remediation at the site.
8. A substantial benefit will be received by the public as a result of the agreement, which would not otherwise be available (e.g., potential environmental benefits, value to the community in terms of jobs, an increased tax base, or opportunities for disadvantaged groups). This factor includes the benefit to the public from conversion of a "brownfield" to productive use.
9. The agreement is consistent with the goals and purposes of the Porter-Cologne Act and the federal Clean Water Act.
10. Any activities at the site, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the investigation of the extent, source, and nature of the contamination/pollution releases or with the implementation of remedial or removal actions.
11. The effect of continued operation or new development at the site will not result in health risks to those persons likely to be present at the site. Land use restrictions may be considered as part of the agreement.

## C. Other Considerations

### 1. Public Participation

If there is a CAO and it was adopted by the RWQCB itself, the staff must bring the matter before the Board for approval and to afford notice and the opportunity for public discussion. In cases where the CAO was issued by the Executive Officer, there is no requirement for public participation. While public participation may be more time-consuming, it is encouraged because: (1) it may reveal new information relevant to the agreement, (2) entering such agreements publicly will increase the public's trust in the RWQCB's activities, and (3) it can be a source of positive publicity. Public participation can be accomplished through, for example, an "information item" at an RWQCB meeting.

### 2. Authority to Sign

Generally, the RWQCB itself should authorize the Executive Officer to sign each such agreement, thus eliminating validity issues. A simple resolution authorizing the Executive Officer to sign will suffice. Appendix "D" provides a draft resolution. The RWQCB may determine, however, that the Executive Officer, being properly delegated to issue and resolve CAOs, may sign such an agreement. This is a policy issue for each RWQCB to decide.

### 3. Coordination with Other Agencies

The RWQCB should attempt to coordinate negotiation of prospective purchaser agreements with DTSC and the U.S. EPA, if applicable, to ensure consistency. Following a trial period in implementation of this Guidance and DTSC's policy, the State Water Resources Control Board and DTSC plan to draft a Memorandum of Understanding regarding prospective purchaser agreements. In the meantime, the RWQCBs and DTSC should avoid duplication and/or a conflict by assuring that the lead agency develops and executes the prospective purchaser agreement or other documents with the proponent. The nonlead agency, after review of the agreement, should issue a comfort letter consistent

t with the agreement. Also, in appropriate cases, DTSC and the RWQCB may act as co-lead agencies and jointly enter into a prospective purchaser agreement. DTSC's policy provides a similar provision to assure consistency.

Contact with other agencies should be made as early as possible in the process. The OCC should be consulted, and if appropriate, such as when the prospective purchaser agreement is drafted as a consent decree, OCC should notify or involve the Attorney General's office.

#### IV. AGREEMENTS WITH CURRENT OWNERS

A current owner may seek to obtain a release of liability in order to enable itself to more easily market its property. These cases involve similar considerations as prospective purchaser agreements.

All factors should be present in these cases, as well, except No. 2 regarding ability to fund the remediation. In these, the current owner is financially viable and (perhaps already having explored lease, insurance, or indemnification agreements) seeks to protect future owners, tenants, and/or lenders from liability for known pollution.

A further consideration in these cases is that, since beneficiary successors (buyers, lenders, or tenants) are not signatory to the agreement, a mechanism must be developed to assure that they are legally bound by all requirements before a covenant not to sue is effective as to them. As beneficiary successors are identified, they can be required to sign on by "registering" as beneficiaries and agreeing to be bound by applicable provisions. Failure to do so should make the covenant not to sue ineffective as to that successor.

Attachments