

California Land Reuse & Revitalization Act of 2004 Frequently Asked Questions & Answers

March 2005

I. Lead Agency Questions

1) How will the lead agency be designated?

CalEPA, DTSC and the Water Boards entered into a Memorandum of Agreement on March 1, 2005 that spells out the factors and procedures they will use to determine the appropriate lead agency.

2) How will DTSC and the Water Boards comply with CEQA under CLRRRA?

The agencies will comply with CEQA for CLRRRA in accordance with their existing practices and procedures. CEQA application must be determined on a project-by-project basis. It should be noted that CLRRRA requires coordination with the host jurisdiction and other agencies associated with the development of the property, to avoid duplication to the extent feasible.

II. Eligibility Questions

3) When does a person seeking to qualify as a bona fide purchaser, innocent landowner or contiguous property owner have to conduct all appropriate inquiries?

On or before the date on which the person acquired the site. Note that to qualify as a bona fide purchaser, a person may not have acquired the site before January 1, 2005. Moreover, to qualify as an innocent landowner or contiguous property owner, the person must have made all appropriate inquiries at the time the person acquired the property. U.S. EPA's proposed rule for "all appropriate inquiries" would require that "all appropriate inquiries" be conducted within one year of the date the person takes title to the property in order to be considered to be "at time of acquisition". (69 Fed. Reg. 52542, 52556 (Aug. 26, 2004).

4) What is "passive migration" and how does it relate to a "release"?

"Passive migration" is defined in CLRRRA as "the leaking, leaching or movement of a hazardous material into or through the environment, for which no human activity by the bona fide purchaser, innocent landowner or contiguous property owner preceded the initial entry of that substance into the environment." (Section 25395.77.) This is a new term not previously defined in statute. One example of "passive migration" might be a regional contaminated groundwater plume that extends underneath an otherwise

uncontaminated property. However, for the purposes of determining whether a person may qualify as a bona fide purchaser, contiguous property owner or innocent landowner under CLRRRA, such “passive migration” is not considered to be a release.

5) Are hazardous waste facilities that are subject to closure or corrective action requirements under chapter 6.5 excluded from CLRRRA?

No. Note however that entering into a CLRRRA agreement does not provide immunity from chapter 6.5 requirements, including closure and corrective action requirements. While cleanups under CLRRRA should generally satisfy the substantive requirements for corrective action under chapter 6.5, closure of hazardous waste management units are also subject to additional requirements.

III. Site Assessment Questions

6) Does a CLRRRA site assessment have to include characterization of underlying groundwater if the site is not a source of the groundwater contamination?

A person seeking to qualify as a BFP/ILO/CPO must enter into an agreement that includes the performance of a site assessment and submittal of a site assessment plan. In general, the plan must provide for evaluation of whether a release has occurred at the site and whether any release poses an unreasonable risk to public health and safety or the environment. The plan must include adequate characterization of the hazardous materials released at, or from, the site; reasonably available information about the site; and *if the release has impacted groundwater, reasonable characterization of underlying groundwater, including present and anticipated beneficial uses of that water.* To the extent that such evaluation, characterization and information are already available because of ongoing regional investigations or other activities, their documentation may be included in the site assessment plan. If the agency determines that the documentation is adequate to meet the requirements for assessment of that site, the evaluation and characterization would not have to be duplicated for the site.

IV. Immunity Questions

7) When does an agency make a determination regarding “appropriate care”?

Within 60 days after receiving a response plan, the agency must determine whether proper completion of the response plan will constitute “appropriate care.” The requirements for what must be included in the response plan are specified in sections 25395.96 and 25395.97.

8) Do immunities apply to the entire site covered by a CLRRRA agreement or do they apply only to the releases and threatened releases identified in the site assessment or the response plan?

The immunities that attach when a person enters into a CLRRRA agreement apply only to the releases subsequently identified in the site assessment or response plan. The statute provides for specified immunities for response costs or other damages associated with a release or threatened release at the site characterized in the site assessment or response plan. Therefore, in order to qualify for CLRRRA immunities, the release (or threatened release) at the site must be characterized in the site assessment or response plan, either by including documentation of existing information in the site assessment plan or by conducting site assessment activities in accordance with the plan.

9) Does immunity automatically apply to a new release found at the site?

No. If a new release is discovered, the person must appropriately resolve the release to the satisfaction of the agency to remain eligible for immunity. If a release occurs during a response action, the release is de minimis, and the agency determines all necessary response actions to address the release have been taken, the person remains eligible for immunity.

10) When can a person lose immunity provided under CLRRRA?

Unreasonable Risk. When a release that poses an unreasonable risk is discovered before the response action is complete or an agency determines no further action is necessary, unless the release is resolved to the satisfaction of the agency,

Unreasonable Risk, After Completion. If a release that poses an unreasonable risk is discovered after the response action is complete or an agency determines no further action is necessary, unless the owner did not cause or contribute to the release and the release is resolved to the satisfaction of the agency.

Cause or Contribute. If a person causes or contributes to a release, that person is responsible for responding to that release even if the person has entered into a CLRRRA agreement.

Change in Property Use. If the use of the property changes after a response plan is approved, the agency may require preparation and implementation of a new response plan if the new use requires a higher level of protection.

Noncompliance. If an agency sends a written notice of an unapproved, material deviation from a CLRRRA agreement to a qualifying owner, the owner's immunities are no longer in effect. A person who commits fraud,

intentional nondisclosure or misrepresentation to an agency does not qualify for the immunities.

Agreement Termination or Withdrawal. If an agency or a qualifying owner terminates or withdraws from a CLRRRA agreement before the response action is completed or a no further action determination is made, the owner's immunities are no longer in effect.

V. Withdrawal from Agreement Questions

11) May a qualifying owner withdraw from a CLRRRA agreement?

Yes, under certain conditions. (section 25395.93.) The owner must provide 30-day written notice to the agency and must reimburse the agency for all costs incurred pursuant to the agreement. The owner must also demonstrate to the agency that conditions do not pose an endangerment to public health and safety or the environment. If the agency nevertheless determines an endangerment exists, the agency may take, or cause responsible persons to take, appropriate response actions.

12) May an agency withdraw from a CLRRRA agreement?

Yes, under certain conditions. (section 25935.93(d).) An agency may withdraw from an agreement if the agency provides 30-day written notice of withdrawal based on either the agency's written notice of an unapproved, material deviation from the agreement to the qualifying owner or based on the qualifying person committing fraud, intentional nondisclosure, or misrepresentation to the agency.

VI. Definition Questions

13) Is endangerment, as defined in CLRRRA, different from an "imminent and/or substantial endangerment" under Chapter 6.8 or RCRA?

Yes. The CLRRRA definition of "endangerment" is limited to human health and safety and does not include risk to the environment. The risk must also be "*actual*." This is different than the standard under "imminent and substantial endangerment," where the endangerment may be actual, *threatened*, or *potential*.

14) What is "unreasonable risk"?

"Unreasonable risk" is a criterion used for an agency determination that response action is required and therefore appropriate to conduct under

CLRRRA. “Unreasonable risk” is “a condition at a site [that] requires a response action pursuant to [Chapter 6.8 or Water Code Division 7].” “Unreasonable risk,” unlike “endangerment,” considers effects on the environment as well as on public health or safety (or human health and safety). Note that “unreasonable risk” is one of the criteria used to determine whether “endangerment” exists.

VII. Legal Questions

15) What does “agree to take all actions required for a response action pursuant to Chapter 6.8 and Division 7 of the Water Code” mean?

“All actions required” to be taken by a BFP, ILO or CPO under CLRRRA are those response actions determined by the agency to be necessary based on the statutory guidance of Chapter 6.8 and Division 7 regarding cleanup standards. The phrase refers to those actions necessary to ensure that the cleanup result of the response action is consistent with and no less stringent than would be achieved by a response action carried out under Chapter 6.8 or Division 7, regardless of the process or procedures employed. “All actions required” under CLRRRA does not incorporate the process requirements of Chapter 6.8 and Division 7 except where those requirements are specifically incorporated by reference in CLRRRA (e.g. provisions regarding health risk assessments to be prepared in accordance with HSC section 25356.1.5).