# APPENDIX A

## CALIFORNIA ENVIRONMENTAL LIABILITY PROTECTION PROCESSES

# FACT SHEET

California Environmental Protection Agency
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

# PROSPECTIVE PURCHASER POLICY

*April 1998*
*(Revised 5/01)*

Many communities contain abandoned or underutilized properties that are contaminated or thought to be contaminated, which have not been redeveloped due to concerns about the perceived cost of remediation and liability. These properties are commonly known as "Brownfields." When industrial and commercial facilities are built on "Greenfields" (land with no previous commercial or industrial use), roads, sewers, schools, residences and other infrastructure must be developed, and new units of government created to levy the taxes to pay for them. Redundant infrastructure not only wastes scarce tax dollars, it adds to the burden on the environment. Redevelopment of Brownfields properties represents an optimal alternative and is a critical factor in ensuring renewed prosperity in California.

The Department of Toxic Substances Control (DTSC) has developed a number of tools for addressing Brownfields. More specific information on this subject can be obtained by reading "Redevelopment and Revitalization of Brownfields, Department of Toxic Substances Control Initiatives," an article authored by Barbara Coler and Steve Koyasako, dated October 1995, and "August 1996 Update" by Barbara Coler. Both articles are available from DTSC.

To address some of the major Brownfields issues and remove or lessen the liability that prospective purchasers face, DTSC has developed a Prospective Purchaser Policy. This policy and procedure discusses how to enter into a Prospective Purchaser Agreement (PPA), includes a model Prospective Purchaser Agreement (which includes a covenant not to sue) and an application form, and outlines eligibility criteria. The process has been streamlined to reduce negotiation and DTSC review time, lower transaction costs, ensure statewide consistency, and promote compliance with current settlement practices and procedures.

As a matter of general policy, DTSC will not pursue site mitigation enforcement against prospective purchasers/ tenants/lessors who become site owners or operators if all of the following conditions are met:

- they do not exacerbate or contribute to the existing contamination;
- their operation will not result in health risks to persons on the site;
- they are not a responsible party (or affiliate of a responsible party) with respect to the existing contamination;
- they allow access for, and do not interfere with, remediation activities;
- unauthorized disposal is not occurring on the site; and
- there are other viable responsible parties who are willing to conduct any necessary remediation.

DTSC also recommends that prospective purchasers do not engage in activities which require use of substances of concern at the site to ensure that no question would arise regarding any contribution to, or exacerbation of, the existing contamination. Generally, DTSC does not participate in private real estate transactions. However, DTSC will consider entering into an agreement with a bona fide prospective purchaser if it will result in substantial benefits for the State, if remediation would not otherwise be conducted without agency action, and if the prospective purchaser satisfies the eligibility criteria stated below.

DTSC acknowledges that a PPA with prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a commitment to perform response actions. Additionally, PPAs can benefit the affected community, or the State as a whole, by encouraging the reuse of properties where the perceived liability may pose a barrier. A critical factor for determining eligibility for a PPA is that the prospective purchaser must establish with DTSC the project benefits to the public in terms of job creation, an increased tax base, and/or opportunities for disadvantaged groups.

All the following criteria will be considered before DTSC contemplates entering into a PPA. These criteria are intended to reflect DTSC's commitment to removing the barriers to proposed redevelopment of property imposed by potential liability, while ensuring the protection of public health and the environment.

1. The site falls under the jurisdiction of DTSC because of an actual hazardous substance release.
2. The prospective purchaser is willing to enter into an agreement with DTSC. The agreement provides that: a) the prospective purchaser is willing to pay DTSC oversight costs and b) the response action will completely remediate the site or will make significant progress toward a complete remedy.
3. Unauthorized disposal of hazardous waste is not currently occurring at the site.
4. The prospective purchaser is not a responsible party or affiliate of a responsible party with respect to the hazardous substance release(s) existing at the time the prospective purchaser agreement is executed.
5. A Preliminary Endangerment Assessment (PEA) or equivalent has been performed and provided to DTSC identifying the hazardous substance releases at the site.
6. The hazardous substance release site is not the subject of an active enforcement action or agreement with another agency with jurisdiction to address the remediation at the site unless that agency transfers oversight to DTSC.
7. A substantial benefit will be received by the public as a result of the prospective purchaser agreement, which would not otherwise be available (e.g., potential environmental benefits, significant progress towards site remediation, value to the community in terms of additional jobs, an increased tax base or opportunities for disadvantaged groups).
8. The continued operation at the site or new site development, with the exercise of due care, will not exacerbate or contribute to the existing contamination or interfere with the investigation of the extent, source and nature of the hazardous substance release(s), and/or the implementation of remedial or removal actions.
9. The effect of continued operation or new development on the site will not result in health risks to those persons likely to be present at the site.
10. The prospective purchaser is financially viable and willing to provide instruments of financial assurance. Financial assurance is needed to ensure that: a) the PP has sufficient funds to complete the agreed upon investigation and remedial action; b) any existing site condition is not exacerbated due to lack of action; and c) DTSC is reimbursed for its oversight.
11. The prospective purchaser is a "bona fide prospective purchaser" (i.e., a person or entity that is purchasing all or part interest in real property, but is not affiliated with any person potentially liable for response actions at a site). The bona fide prospective purchaser must provide evidence of these conditions to DTSC.

Since not all Brownfields properties are eligible for a PPA, the policy also outlines several other options that prospective purchasers may pursue to limit their potential liability. DTSC's objective is to strike a balance between providing sufficient assurance to PPs to foster redevelopment and treating Responsible Parties (RPs) in a reasonable manner. This serves to ensure that RPs will not "warehouse" (keep properties off the real estate market) Brownfields properties. Such "warehousing" would clearly inhibit redevelopment and reuse.

DTSC only has authority to negotiate a PPA on behalf of DTSC and no other State agency. The State Water Resources Control Board has recently issued a similar guidance memo on Prospective Purchaser Agreements.

The Prospective Purchaser Policy is available for review on DTSC's internet address [http://www.dtsc.ca.gov]; additional information may be available at the State Water Board's internet address [http://www.swrcb.ca.gov].

Copies of the policy are also available at a cost of $9.75 from the individuals listed below.

## FOR MORE INFORMATION .....

To find out more about the California Environmental Protection Agency, Department of Toxic Substances Control's Prospective Purchaser Policy, obtain a PPA application, or inquire about other Brownfields Initiatives, contact:

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**Lynn Nakashima or Janet Naito**
Northern California-Coastal Cleanup Operations Branch
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**Environmental Insurance Products**

Environmental insurance in California provides crucial coverage for pollution incidents, cleanup costs, third-party bodily injury, and property damage not covered by standard general liability policies. Key products include Contractors Pollution Liability (CPL), Site Pollution Liability (PLL), Storage Tank Liability, and specialized coverage for mold, asbestos, and transportation risks.

Key Environmental Insurance Products in California:

- Contractors Pollution Liability (CPL): Protects contractors from pollution incidents caused by their work, including third-party claims and cleanup.
- Site Pollution Liability (PLL)/Environmental Impairment Liability: Covers known and unknown pre-existing or new contamination on a specific property, vital for real estate developers and owners.
- Combined Policies (Package): Combines General Liability with pollution liability (e.g., AIG's EAGLE program).
- Storage Tank Liability: Covers Aboveground (AST) or Underground (UST) storage tanks for leaks and spills.
- Professional Liability (E&O): Covers errors or omissions by environmental consultants, engineers, or architects.
- Transportation Pollution Liability: Covers pollution incidents during the transport of materials.
- Non-Owned Disposal Site (NODS) Liability: Protects against liability from waste disposed of at a third-party facility.

Important Coverage Details:

- Coverage Scope: Policies typically cover cleanup, legal defense, bodily injury, property damage, and sometimes business interruption.
- Specific Risks: Coverage can include mold, legionella, asbestos, and lead paint.
- Policy Structure: Available as standalone policies or combined with General Liability, with options for excess or umbrella coverage.
- Targeted Industries: Construction, real estate development, manufacturing, and logistics companies.

Providers like Burns & Wilcox, AIG, Liberty Mutual, and Victor Insurance offer specialized, tailored solutions for the California market.

# California Land Reuse and Revitalization Act (CLRRA) Quick Reference Guide

The California Land Reuse and Revitalization Act (CLRRA) (Health and Safety Code Chapter 6.82 and 6.83) provides liability protections to:

- Bona Fide Purchasers
- Innocent Landowners
- Contiguous Property Owners
- Prospective Purchasers; and
- Bona Fide Ground Tenants*

The liability protections are intended to promote the cleanup and redevelopment of blighted contaminated properties. The law establishes a process for eligible property owners to obtain immunities, conduct a site assessment, and implement a response action as necessary, to ensure that the property can be reused or redeveloped. Immunities begin when a party enters into a CLRRA agreement. CLRRA was first effective January 1, 2005. The sunset date for the original CLRRA bill has been extended multiple times. The current sunset date is January 1, 2027.

***If you plan to apply for CLRRA as a Bona Fide Ground Tenant please contact Maryam Tasnif-Abbasi at maryam.tasnif-abbasi@dtsc.ca.gov to discuss the eligibility requirements and timing of the CLRRA agreement.**

## All Appropriate Inquiries

One of the eligibility requirements for CLRRA is that All Appropriate Inquiries (AAI), per ASTM E1527-13, be conducted within one year before purchase, with the following components conducted or updated within 180 days of the date of purchase:

i. interviews with owners, operators, and occupants;
ii. searches for recorded environmental cleanup liens;
iii. reviews of government records;
iv. visual inspections of the property and surroundings; and
v. the declaration by the environmental professional responsible for the assessment or update.

(See H&S Code Section 25395.65)

## How different is the CLRRA process from other DTSC voluntary agreements?

- CLRRA encourages streamlined environmental approaches
- CLRRA requires both applicant and site to meet specific eligibility criteria
- Prior to entering into a CLRRA agreement, the DTSC notifies relevant regulatory agencies of the upcoming agreement, and that immunities will attach
- By entering into the CLRRA agreement, the Applicant receives specific immunities
- Through CLRRA, subsequent owners or lessees may benefit via Assignment & Assumption or Successor Agreements
- The CLRRA assessment and cleanup implementation is expedited, while being as protective as any other DTSC process
- DTSC public participation, California Environmental Quality Act, and tribal consultation requirements apply

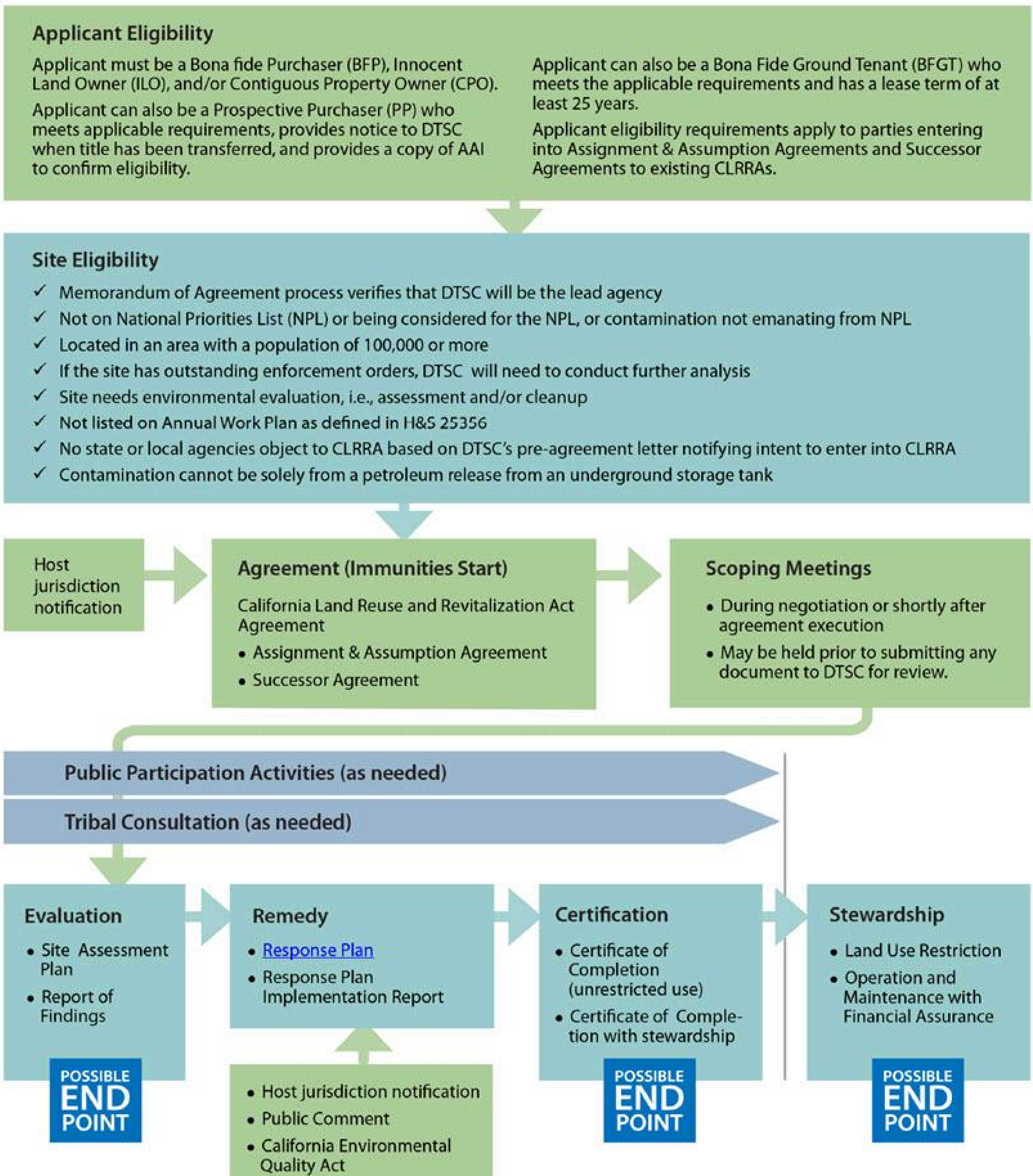
## Who can enter into a CLRRA Agreement?

1. Must be a Bona Fide Purchaser (BFP), Innocent Land Owner (ILO), and/or Contiguous Property Owner (CPO) who:
   - Took title after January 1, 2005
   - Did not cause or contribute to contamination
   - Is not affiliated with the party responsible for contamination
   - Conducted AAI as per ASTM E1527-13 prior to purchase
   - Is planning redevelopment and/or reuse
2. Can also be a Prospective Purchaser (PP) who meets the applicable requirements, provides notice to DTSC when title has been transferred, and provides a copy of AAI prior to purchase to confirm eligibility.
3. Can also be a Bona Fide Ground Tenant* (BFGT) who meets the applicable requirements, has a lease term of at least 25 years, and completed AAI prior to signing the lease.

(See H&S Code Sections 25395.69, .70, .75, .91 and .102 (a)(2).)

For more information, contact Maryam.Tasnif-Abbasi@dtsc.ca.gov.

Download a collection of all DTSC Voluntary Agreements Quick Reference Guides




**Possible End Points:**

1. Based on site assessment results, projects may conclude without the need for any further action;
2. based on assessment results, projects may conclude with only a Land Use Covenant, in which case a public notice process will be implemented via a Report of Findings; and,
3. Cleanup may either be conducted to unrestricted land use or require long-term stewardship.

Download PDF version of this diagram.

This document is intended to be guidance only and it does not supersede or implement laws or regulations. The information in this advisory is intended solely as guidance and as educational reference material and should not be considered enforceable or regulatory in nature.

**Environmental Law Firms**

Several California law firms specialize in environmental law with a specific focus on the California Land Reuse and Revitalization Act (CLRRA), which helps redevelop brownfield sites by providing liability protections for purchasers and developers.

The following law firms specialize in CLRRA and related brownfield redevelopment:

- SVLG (Silicon Valley Law Group): Explicitly highlights expertise in negotiating CLRRA (H&S Code Sections §25395.69), Voluntary Cleanup Agreements (VCA), Remedial Action Agreements (RAA), and Bona Fide Prospective Purchaser Agreements to turn unused properties into productive resources.
- Rutan & Tucker, LLP: Specializes in the evaluation of environmental liabilities, specifically in the redevelopment of brownfield properties and urban infill projects under CLRRA, including negotiating remediation and indemnity agreements.
- Cox, Castle & Nicholson LLP: Known for expertise in environmental and land use, with a strong focus on brownfield redevelopment tools and sustainability in California.
- Meyers Nave: Handles comprehensive environmental law, including cleanup and contamination litigation (CERCLA/RCRA) and issues relating to hazardous materials, often working with developers on land reuse.
- Downey Brand LLP: Features a large Natural Resources Group that handles complex environmental and land-use matters across California, including regulatory compliance for contaminated sites.
- Carstens, Black & Minteer LLP: Specializes in environmental law throughout California, focusing on regulatory compliance and litigation.
- Alvarez-Glasman & Colvin (AGC): Provides counsel on environmental compliance, including toxic cleanup and hazardous material litigation under CERCLA, RCRA, and California state laws.
- Demetriou, Del Guercio, Springer & Francis, LLP: Focuses on environmental regulatory frameworks, often working with scientific experts on remediation projects.

These firms are generally well-versed in negotiating with the Department of Toxic Substances Control (DTSC) or Regional Water Quality Control Boards to secure the necessary agreements under CLRRA.