

RESOLUTION 4-09-06

DIGEST

Hazardous Substance Cleanup: Notice To Owner

Amends Health & Safety Code section 33459.1 to require notice of suspected contaminants prior to development of a remediation plan.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons

This resolution amends Health & Safety Code section 33459.1 to require notice of suspected contaminants prior to development of a remediation plan. This resolution should be disapproved because it does not identify an existing problem that requires a change in law and fails to take into account other statutes with which this proposal may be inconsistent.

The California Environment Quality Act (CEQA, California Resources Code §§21000, et seq.,) among other statutes, identifies property owners as potentially responsible parties for the clean-up of contaminants. When a remediation plan is required, the property owner is generally aware that something on its property requires remediation. There is no mystery in most cases. For there to be a legally enforceable order by a regional or state board with regulatory authority over a landowner, that order must enumerate the causes of harm, the types of harm and potential risks and burdens associated with the harm.

This proposed amendment to the Health and Safety Code appears to be unnecessary and may cause confusion with other statutes, including CEQA and other environmental contamination codes.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Health & Safety Code section 33459.1 to read as follows:

- 1 § 33459.1:
- 2 (a)(1) An agency may take any actions that the agency determines are necessary and
- 3 that are consistent with other state and federal laws to remedy or remove a release of
- 4 hazardous substances on, under, or from property within a project area, whether the agency
- 5 owns that property or not, subject to the conditions specified in subdivision (b). Unless an
- 6 administering agency has been designated under Section 25262, the agency shall submit for
- 7 approval a cleanup or remedial action plan and request cleanup guidelines from the
- 8 department or the California regional water quality control board before taking action to
- 9 remove, correct, clean up, or abate ~~remedy or remove~~ a release. The department or the

10 California regional water quality control board shall respond to the agency's request to
11 provide cleanup guidelines within a reasonable period of time. The agency shall thereafter
12 ~~implement~~ ~~submit for approval~~ a cleanup or remedial action plan ~~approved by~~ ~~to~~ the
13 department or the California regional water quality control board before taking action to
14 ~~remove, correct, clean up, or abate~~ ~~remedy or remove~~ a release. The department or the
15 California regional water quality control board shall respond to the agency's request for
16 approval of a cleanup or remedial action plan within a reasonable period of time.

17 (2) The agency shall provide the department and local health and building
18 departments, the California regional water quality control board, with notification of any
19 cleanup activity pursuant to this section at least 30 days before the commencement of the
20 activity. If an action taken by an agency or a responsible party to remedy or remove a
21 release of a hazardous substance does not meet, or is not consistent with, a remedial action
22 plan or cleanup plan approved by the department or the California regional water quality
23 control board, the department or the California regional water quality control board that
24 approved the cleanup or remedial action plan may require the agency to take, or cause the
25 taking of, additional action to remedy or remove the release, as provided by applicable law.
26 If an administering agency for the site has been designated under Section 25262, any
27 requirement for additional action may be imposed only as provided in Sections 25263 and
28 25265. If methane or landfill gas is present, the agency shall obtain written approval from
29 the California Integrated Waste Management Board prior to taking that action.

30 (b) Except as provided in subdivision (c), an agency may take the actions specified
31 in subdivision (a) only under one of the following conditions:

32 (1) There is no responsible party for the release identified by the agency.

33 (b)(2) A party determined by the agency to be a responsible party for the release has
34 been notified by the agency (such notice to include the type(s) of hazardous substance(s) the
35 agency knows or suspects to be at the property at the time the agency issues the notices), or
36 has received adequate notice from the department, a California regional water quality
37 control board, the Environmental Protection Agency, or other governmental agency with
38 relevant authority and has been given 60 days to respond and to proposed a remedial action
39 plan and schedule, and the responsible party has not agreed within an additional 60 days to
40 implement a plan and schedule to remedy or remove the release that is acceptable to the
41 agency and that has been found by the agency to be consistent, to the maximum extent
42 possible, with the priorities, guidelines, criteria, and regulations contained in the National
43 Contingency Plan and published pursuant to Section 9605 of Title 42 of the United States
44 Code for similar releases, situations, or events.

45 (3) The party determined by the agency to be the responsible party for the hazardous
46 substance release entered into an agreement with the agency to prepare a remedial action
47 plan for approval by the department, the California regional water quality control board, or
48 the appropriate local agency and to implement the remedial action plan in accordance with
49 an agreed schedule, but failed to prepare the remedial action plan, failed to implement the
50 remedial action plan in accordance with the agreed schedule, or otherwise failed to carry out
51 the remedial action in an appropriate and timely manner. Any action taken by the agency
52 pursuant to this paragraph shall be consistent with any agreement between the agency and
53 the responsible party and with the requirements of the state or local agency that approved or
54 will approve the remedial action plan and is overseeing or will oversee the preparation and

55 implementation of the remedial action plan.

56 (c) Subdivision (b) does not apply to either of the following agencies:

57 (1) An agency taking actions to investigate or conduct feasibility studies concerning

58 a release.

59 (2) An agency taking the actions specified in subdivision (a) if the agency

60 determines that conditions require immediate action.

61 (d) An agency may designate a local agency in lieu of the department or the

62 California regional water quality control board to review and approve a cleanup or remedial

63 action plan and to oversee the remediation or removal of hazardous substances from a

64 specific hazardous substance release site in accordance with the following conditions:

65 (1) The local agency may be so designated if it is designated as the administering

66 agency under Section 25262. In that event, the local agency, as the administering agency,

67 shall conduct the oversight of the remedial action in accordance with Chapter 6.65

68 (commencing with Section 25260) and all provisions of that chapter shall apply to the

69 remedial action.

70 (2) The local agency may be so designated if cleanup guidelines were requested from

71 a California regional water quality control board, and the site is an underground storage tank

72 site subject to Chapter 6.7 (commencing with Section 25280) of Division 20, the local

73 agency has been certified as a certified unified program agency pursuant to Section 25404.1,

74 the State Water Resources Control Board has entered into an agreement with the local

75 agency for oversight of those sites pursuant to Section 25297.1, the local agency determines

76 that the site is within the guidelines and protocols established in, and pursuant to, that

77 agreement, and the local agency consents to the designation.

78 (3) A local agency may not consent to the designation by an agency unless the local

79 agency determines that it has adequate staff resources and the requisite technical expertise

80 and capabilities available to adequately supervise the remedial action.

81 (4)(A) Where a local agency has been designated pursuant to paragraph (2), the

82 department or a California regional water quality control board may require that a local

83 agency withdraw from the designation, after providing the agency with adequate notice, if

84 both of the following conditions are met:

85 (i) The department or a California regional water quality control board determines

86 that an agency's designation of a local agency was not consistent with paragraph (2), or

87 makes one of the findings specified in subdivision (d) of Section 101480.

88 (ii) The department or a California regional water quality control board determines

89 that it has adequate staff resources and capabilities available to adequately supervise the

90 remedial action, and assumes that responsibility.

91 (B) Nothing in this paragraph prevents a California regional water quality control

92 board from taking any action pursuant to Division 7 (commencing with Section 13000) of

93 the Water Code.

94 (5) Where a local agency has been designated pursuant to paragraph (2), the local

95 agency may, after providing the agency with adequate notice, withdraw from its designation

96 after making one of the findings specified in subdivision (d) of Section 101480.

97 (e) To facilitate redevelopment planning, the agency may require the owner or

98 operator of any site within a project area to provide the agency with all existing

99 environmental information pertaining to the site, including the results of any Phase I or

100 subsequent environmental assessment, as defined in Section 25200.14, any assessment
101 conducted pursuant to an order from, or agreement with, any federal, state or local agency,
102 and any other environmental assessment information, except that which is determined to be
103 privileged. The person requested to furnish the information shall be required only to furnish
104 that information as may be within their possession or control, including actual knowledge of
105 information within the possession or control of any other party. If environmental assessment
106 information is not available, the agency may require the owner of the property to conduct an
107 assessment in accordance with standard real estate practices for conducting phase I or phase
108 II environmental assessments. [Subdivisions (b)(3), (c), (d), and (e) remain unchanged.]

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Existing law does not require that property owner be advised of the nature of the contaminants suspected prior to requiring the owner to develop a remediation plan. Failure to develop such a plan may subject the property owner to responsibility for all fees and costs incurred by the government related to the property – even before any contaminant has been identified.

Existing Law: As the Act is currently written, where the definition of “remedy” or “remove” includes action to “assess, evaluate, [and] investigate”, one could possibly argue that clean up standards need to be obtained before any action to investigate a property can occur. However, it is generally impossible to obtain clean up standards without knowing what contaminants are at issue. The purpose of an investigation is to determine the types and concentrations of contaminants at a property so that clean up guidelines can be developed. Accordingly, this amendment proposes to clarify that clean up guidelines are to be obtained when developing and prior to implementing a clean up or remedial action plan, and clean up guidelines are not necessary prior to performing simple investigations.

Resolution: This resolution clarifies that cleanup guidelines need only be sought when an agency seeks to perform a cleanup or remedial action at a property and that cleanup guidelines are not necessary when an agency only wishes to perform an investigation (as it is generally impossible to obtain cleanup guidelines when the types and concentrations of hazardous substances are unknown).

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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