CONTAMINATED PROPERTY ACQUISITION

COMPLYING WITH PD-02

This document provides instructions for complying with the Project Delivery Directive No. 02, Contaminated Property Acquisition (PD-02). PD-02 and these instructions apply to all properties incorporated into the State right of way, including those acquired by implementing agencies. This includes all properties that will be owned or controlled by the Department. Referenced forms including: ENV-0001-A Hazardous Materials Disclosure Document (HMDD), ENV-0002 Request for Acquisition of Contaminated Property (RACP), 6-EX-9 Certificate of Sufficiency (CoS) are posted on Caltrans Electronic Forms System (CEFS).

DIRECTIVE

The California Department of Transportation (Department) shall avoid contaminated properties, have responsible parties accept responsibility for remediation, and seek reimbursement from responsible parties when remediation and/or monitoring must be conducted. All properties, including those acquired by an implementing agency, shall be investigated for contamination before being considered for incorporation into the State right of way. Property containing or potentially containing contamination shall only be acquired or accepted if the benefits and risks are documented, available risk reduction mechanisms are employed, and a policy exception is approved by Department management, using criteria established by the Department's Chief Engineer.

DEFINITIONS

Appraisal – a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

Acquisition – securing property rights necessary for a project.

Certificate of Sufficiency (CoS) – form 6-EX-9, issued by the Project Engineer to District Right of Way (R/W), certifying the need for specific parcels for a specific project and notifying R/W that acquisition can proceed. A complete CoS includes the Hazardous Materials Disclosure Document – Acquisition. (HMDD-A) Appraisal reports can be started but not approved until the CoS is completed and signed.

Contaminated - means that hazardous materials have been released into the soil, surface water, groundwater, or air. The hazardous material released into these media is contamination.

Hazardous Material - any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. "Hazardous materials" include, but are not limited to, hazardous substances, hazardous waste, and any material that a handler or the administering agency has a reasonable basis to believe would be injurious to the health and safety of persons or harmful to the environment if released.

Hazardous Materials Disclosure Document (HMDD) - Acquisition (see Attachment 1.) – form ENV-0001-A, completed by the District Hazardous Waste Technical Specialist, documenting property condition, need for additional studies, and property acquisition restrictions due to contamination. The HMDD-A is a required attachment of the CoS and when appropriate, documents that the District Hazardous Waste Technical Specialist recommends property acquisition.

Implementing Agency - entity charged with successful completion of each project component as defined in Deputy Directive-23R1 and GC Section 14529 (b).

Request for Acquisition of Contaminated Property (RACP; see Attachment 2.) – form ENV-0002, completed by the District documenting the risk analysis for a contaminated property acquisition and requesting the Chief Engineer's approval for acquisition. The RACP provides the Chief Engineer with adequate project information to make an informed decision regarding property acquisition. This form is required when there is large potential liability associated with acquisition (see specific criteria in "*Determination of Required Approvals for Contaminated Property Acquisition & Approval Documentation*" below).

PROCESS

Contamination Identification

All properties considered for incorporation into the State right of way are investigated for contamination. The District Hazardous Waste Technical Specialist must identify and begin investigation of contaminated property in the Project Initiation Document (PID) or Project Approval and Environmental Document (PA&ED) phases of project development, because contamination is a risk to the cost, scope, and schedule of a project and may create long-term liability for the Department. Contamination identification includes determining:

- type of contamination
- extent of contamination
- impacted media
- impacted receptors, and
- regulatory framework

Investigations must be conducted with appropriate regulatory agency oversight and concurrence.

Risk Analysis

If the property is identified as contaminated, the risk of acquisition must be analyzed, minimized whenever possible, and documented prior to acquisition regardless of whether a local agency or the Department initiates the process. The impact to project cost, scope, and schedule, and the risk of acquiring long-term liability must be quantified. The following type of issues must be addressed in the risk analysis (see RACP for details):

- alternative properties considered and reasons that acquisition is infeasible;
- nature and extent of possible contamination of the parcel, in all media (soil, groundwater, and vapor)
- potential costs and funding sources, timing, and residual liability associated with the contamination and any necessary cleanup
- identification of parties potentially responsible for the contamination
- the potential, either before or after acquisition, for requiring a responsible party to conduct or fund the cleanup, by agreement or otherwise
- additional properties that have been or may be acquired for the project, and their potential for contamination
- risk reduction mechanisms including acquisition by easement, and establishment of an escrow account for cleanup funds

The property condition is documented on the HMDD-A which acts as the primary district exception approval document. An interim HMDD-A can be used to document the need for any further site investigations in order to adequately assess the presence of contamination. The appraisal process can continue with an interim HMDD-A so that the District R/W Appraiser can complete the valuation of the property. The property value becomes an important component of the overall risk analysis.

Determination of Required Approvals for Contaminated Property Acquisition & Approval Documentation

When property contamination is documented on the HMDD-A, District Director exception approval is needed to acquire the property before cleanup. In addition, if threshold criteria, as outlined below, are exceeded for the property, then exception approval is also required by the Department's Chief Engineer.

A Headquarter's policy exception approved by the Department's Chief Engineer before property acquisition is required when a large potential for liability exists. A large potential for liability exists when any of the following four threshold criteria are met:

1. Estimated remediation costs of the parcel, (but excluding investigation costs) exceeds $300,000, and either,
   (a) exceeds 50% of a parcel's value as if clean, or
   (b) exceeds 10% of the total capital costs for the project (right of way and construction).
2. The net value of the property after fair market value deduction for contamination cleanup is $0 (or the cost of cleanup exceeds the fair market value of the property) and the parcel is to be presented to the CTC for approval of a Resolution of Necessity.

3. Contamination on the parcel has resulted in groundwater contamination requiring cleanup.
4. The parcel(s) is or was a high-risk site (such as a mining, milling, or salvage site -see the Standard Environmental Reference (SER) Chapter 10 and the Project Development Procedures Manual Chapter 18), or a site with previously known contamination that was closed meeting federal and state standards less stringent than those currently in effect.

If any properties needed for the project are suspected to meet any of the four criteria listed above, they must be assessed using the RACP. If any of the four criteria are met, approval of the Chief Engineer is required before the property can be acquired. Approval is requested by submitting a complete RACP, with a transmittal memo signed by the District Director responsible to the HQ Chief, Division of Environmental Analysis (DEA). As soon as District Hazardous Waste determines that it will be necessary to complete a RACP, they should confer with DEA Hazardous Waste and begin compiling the document.

If it is determined that threshold criteria are not met, the decision to grant a policy exception to acquire contaminated property is made at the district level.

Risk Reduction Mechanisms

All viable risk reduction mechanisms must be used when acquiring contaminated property. Examples of risk reduction mechanisms include:

- acquisition by easement rather than fee
- alignment adjustment to avoid contaminant source areas
- design adjustments to avoid contaminant source areas
- design adjustments to avoid impacting contaminated groundwater
- indemnification from the property owner and/or responsible parties
- identification of funding sources should additional cleanup costs or long-term monitoring be incurred
- contacting the appropriate regulatory agencies to inform them of proposed Caltrans project activities
- documentation from the appropriate regulatory agencies acknowledging that the Department does not have responsibility for the contamination (e.g. Department of Toxic Substances Control (DTSC) "comfort letter")
- establishment of a project escrow account to deposit fair market value deductions or other mechanism that ensures that cleanup funds are available throughout the life of the project and beyond if needed

The District must provide reasons for acquiring a contaminated parcel without using all possible risk reduction mechanisms. For example, the District's decision to request acquisition of a property in fee must be based on careful analysis of prior, current, and future project activity impacts and this analysis documented on the RACP. Risk reduction mechanisms diminish the Department's potential liability for cleanup costs, however they do not eliminate it. For example, even with acquisition of an easement, the Department may still incur liability for cleanup as an operator under the Federal Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA). Therefore, careful risk analysis of property acquisition is still necessary in all cases.

In addition, the District Director must identify investigation, remediation and monitoring funding source(s) and assignment of oversight responsibilities within the District if any of these activities may occur when project funds are not available, e.g. after project completion.

Completion of Contaminated Property Acquisition Request

When the Chief Engineer's approval is required for property acquisition, the District Project Engineer works with the Project Manager, R/W, HW, and Legal to complete the RACP. Coordination with the DEA Hazardous Waste Office is recommended throughout the process to ensure that assumptions are realistic. Once the RACP is completed and signed by the Project Manager, District Legal Counsel, Project Engineer, District Deputy of Right of Way, and District Hazardous Waste Manager, a transmittal memo signed by the District Director is attached and the package is sent to the HQ Chief, Division of Environmental Analysis (DEA). DEA Hazardous Waste sends the Chief Engineer's response letter and attached RACP back to the PE. If acquisition is approved, the RACP and Chief Engineer's approval become an attachment of the final HMDD-A. The CoS, with HMDD-A and attachments, is completed and appraisal maps and appraisals can then be finalized and approved.

When the Chief Engineer's approval is not required for acquisition, the final HMDD-A approving property acquisition and indicating that Chief Engineer approval is not required is prepared and the risk analysis performed to support the decision is documented in the project files. The District Director is responsible for establishing the specific approval process and form of documentation for district exceptions; however the documentation should be consistent with the RACP and must include documentation of the determination that the Chief Engineer's approval is not required. Once the district exception is documented and approved, the CoS with HMDD-A attached is completed and appraisal maps and appraisals can then be finalized and approved.

Appraisal Approval and Acquisition

Appraisal approval and acquisition of contaminated property shall occur only after conducting adequate site investigation for contaminant identification, determining the cost of any cleanup and long-term liability, performing a risk analysis, employing risk reduction mechanisms, and if required, obtaining approval from the Chief Engineer. The CoS and the HMDD-A are required for an approved R/W appraisal. If a property presents a large potential liability for the Department (as defined above), a RACP, approved by the Chief Engineer is also a necessary attachment of the final HMDD-A.

PROCESS RESPONSIBILITIES

Chief Engineer

- considers the recommendation of the Chief, Division of Environmental Analysis and approves or denies the acquisition of contaminated property and signs the response letter

Chief, Division of Environmental Analysis

- recommends approval or denial of the RACP and submits it to the Department's Chief Engineer

The DEA Hazardous Waste Office

- provides support and consultation to the District during determination of need for and preparation of the RACP
- reviews the RACP for completeness
- sends a copy of the RACP to HQ R/W
- recommends approval or denial to the Chief, DEA within 30 calendar days of receipt of a complete RACP
- drafts a response letter for the Chief Engineer's signature
- sends the Chief Engineer's response letter and attached RACP to the PE

District Director

- ensures that all properties considered for incorporation into the State right of way are investigated for contamination
- ensures that property owners perform cleanup of any contamination prior to property incorporation into the State right of way
- identifies funding source(s) for any activities not funded by a project.
- is responsible for approval of all policy exceptions to acquire or accept contaminated property
- documents district approval by signing the RACP transmittal memo when approval by the Chief Engineer is required

Implementing Agency Project Manager

- coordinates with District Hazardous Waste (HW), R/W, Design, and Legal to ensure all tasks necessary for successful project delivery are performed, including:
  - ensuring that any property acquired by or for the Department is free of contamination
  - ensuring that any property to be acquired has been adequately investigated for contamination and responsible parties (RPs) have been identified, and their potential to accept responsibility for cleanup assessed and assigned
  - documenting that taking possession of contaminated property, where necessary, is in the best interest of the State
  - documenting the risks associated with the contaminated property and the effect on project cost, scope and schedule
  - consulting with Legal (regarding liability and preparation and review of any required letters of indemnification or agreements between the Department, the current property owners, or regulatory agencies) as

needed and in all cases when the Chief Engineer's approval is required for a policy exception
  - identifying funding sources for cleanup and any long term post-project monitoring or remediation
  - ensuring that all risk reduction measures have been implemented
  - ensure the timely preparation of exception requests (e.g. RACP) for submittal to Department management
  - ensuring that cooperative agreements for project delivery work reference this directive and associated procedures
- signs the RACP, when one is required

District Legal Counsel

- consults with the Project Delivery Team as requested, and in all cases when the Department's Chief Engineer's approval is required for a policy exception
- advises on liability for contaminated property
- develops and/or reviews all needed agreements, indemnifications, etc. related to the contamination and responsibilities of the parties involved
- assists with cost recovery from responsible parties
- signs the RACP, when one is required

Project Engineer (PE)

- works with the PM, R/W, and HW to avoid contaminated property
- designs the project to minimize the risks and liabilities from any contamination
- completes the CoS in consultation with Project Delivery partners on all properties
- receives the completed HMDD-A from the District Hazardous Waste Technical Specialist and provides it and the executed CoS to R/W prior to approval of the appraisal
- with assistance from R/W, HW, and Legal, prepares exception requests, including RACP, for acquisition of contaminated property
- signs the completed RACP, when one is required, certifying that the property is necessary for the project design

Right of Way Agent

- secures the appropriate permit to enter for hazardous waste testing (8-EX-13 and 8-EX-14)
- appraises property and assists with HW risk reduction measures
- assists with determination of need for and completion of exception requests and the RACP when one is required
- uses the executed CoS, HMDD-A and when required the RACP, to finalize the appraisal after considering cleanup costs when applicable, and acquires contaminated property only after receiving District/HQ management approval to proceed

District Deputy of Right of Way

- signs the completed RACP when one is required

Hazardous Waste Technical Specialist

- provides Design and R/W with a list of properties needed for investigation
- requests permits to enter from R/W, when needed
- assesses the nature and extent of contamination and costs to remediate it
- evaluates regulatory risks, and past, current and potential future liability to the Department
- contacts appropriate regulatory agencies, as needed
- identifies the status of property contamination on the HMDD-A and submits it to Design
- notifies HQ Hazardous Waste as early as possible that Chief Engineer approval may be required
- with the District R/W Appraiser, determines whether a RACP is necessary for Chief Engineer approval and documents this on the HMDD-A
- assists the PE in completing the exception request and RACP when needed

District Hazardous Waste Manager

- signs the completed RACP when one is required