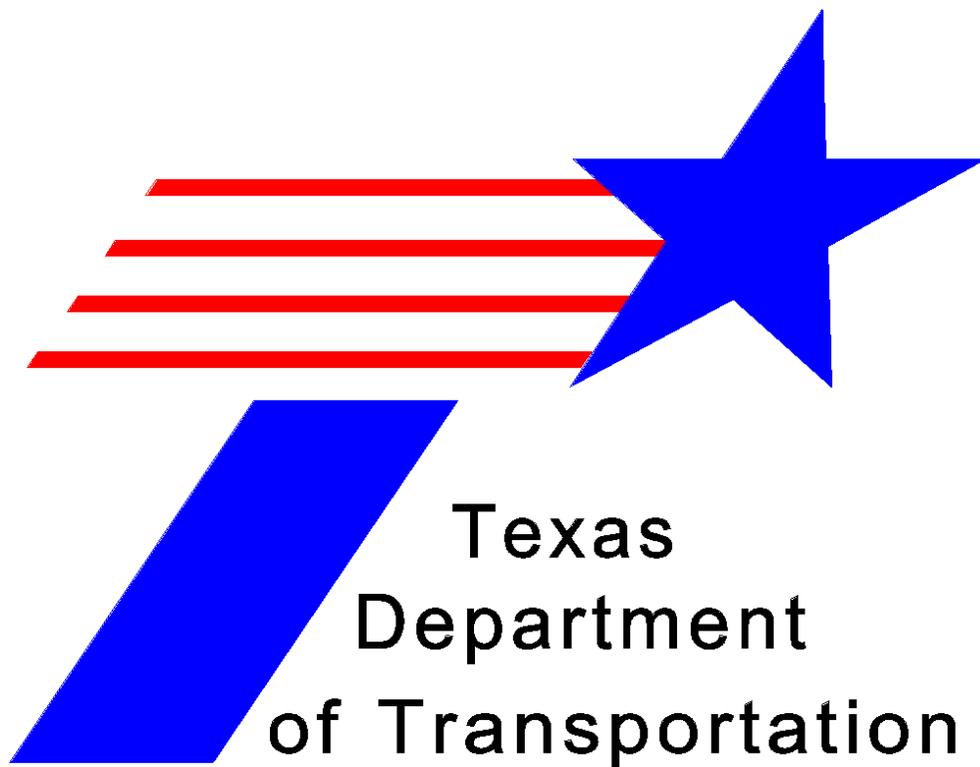


ROW Vol. 6 - Miscellaneous



May 2010

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Manual Notice 2010-1

From: John P. Campbell, P.E., SR/WA, Right of Way Division Director

Manual: Right of Way Manual Vol. 6 – Miscellaneous

Effective Date: May 01, 2010

Purpose

To add guidance on the use of environmental covenants for contaminated property. Effective September 1, 2009, under the authority of Senate Bill 480 as codified in Transportation Code §202.061, the Texas Transportation Commission may enter into an environmental covenant for the purpose of subjecting real property in which the department has an ownership interest to a plan or the performance of work for environmental correction action.

Changes

Chapter 1 – Hazardous Materials: In Section 3 - [Procedure Overview](#), added a reference to the new chapter on environmental covenants for contaminated property.

Chapter 2 – Environmental Covenants for Contaminated Property: This [new chapter](#) has been added, and subsequent chapters have been re-numbered.

Contact

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Archives

Past manual notices are available in a [pdf archive](#).

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Chapter 1

Hazardous Materials

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Section 1

List of Terms Used in this Chapter

CERCLA

The Comprehensive Environmental Response, Compensation Liability Act of 1980 (CERCLA), commonly referred to as "superfund," provides Environmental Protection Agency authority to respond to releases or threatened releases of hazardous substances, pollutants, or contaminants that may endanger human health or the environment. For more information on CERCLA, refer to the *TxDOT Environmental Procedures in Project Development Manual*.

- ◆ [Petroleum Storage Tank System](#)
- ◆ [Texas Commission on Environmental Quality](#)
- ◆ [Hazardous Materials](#)

Section 2

TxDOT Objectives in Regard to Hazardous Materials

Preventative or Corrective Action

ROW personnel must bear in mind the distinction between "preventative action" and "corrective action" when addressing TxDOT objectives in regard to hazardous materials. Preventative action refers to cleanup and related activities required as part of construction projects. Corrective action refers to regulated activities not specifically related to construction that are required for the protection of the environment.

Cost Recovery

Cost recovery and division of responsibility for cleanup depend on the motives for cleanup. If the cleanup is motivated solely by TxDOT's construction requirements, and the former property owner would not have been required by regulation to implement corrective action, then the costs of cleanup and future liability should not be borne by the former property owner. If, however, the contaminated property constitutes a health risk to the general public that is not directly related to construction activities (i.e., the site is, or should be, under enforcement), then cleanup costs and future liability should be borne by the former property owner.

Objectives

ROW Division and District objectives in regard to hazardous materials are as follows:

- ◆ To identify impediments to parcel acquisition involving hazardous materials that could adversely affect the ability to acquire ROW.
- ◆ To avoid liability for corrective action, and, when appropriate, to recover the costs of corrective action from responsible parties when acquiring fee or easement interests for contaminated property.

Section 3

Procedure Overview

Overview

Acquisition of contaminated property is complicated by the adoption of risk-based cleanup regulations that allow property owners to leave contaminants in place as long as it can be shown that the contaminants do not pose a health hazard, given current or projected property uses. As a result, TxDOT is increasingly confronted with the acquisition of, and construction on, contaminated parcels. Contamination may result in high project development costs, including use of specially trained workers, air and water monitoring, and the management of excavated soil and water as hazardous waste material. Therefore, ROW personnel must coordinate with the project manager and the District environmental coordinator to ensure that proper site assessment is performed before ROW acquisition.

The three most common contaminants addressed by ROW personnel are Petroleum Storage Tank Systems (PSTS), asbestos in buildings, and hazardous wastes. Achieving ROW Division and District objectives for each type involves a similar evaluation process. These contaminant types are distinctly different, however, in regard to cleanup procedures and governmental regulation.

See Chapter 1, Section 4-Environmental Procedures in Project Development Manual, Roles and Responsibilities for District responsibilities regarding contaminants. See the guidance in this manual for using Environmental Covenants for Contaminated Property. Specific procedures for each type of contaminant are listed in the following sections.

Section 4

Petroleum Storage Tank Systems (PSTS)

Overview

The release of environmental contaminants from petroleum storage tank systems is the most common problem involving hazardous materials encountered during project development. *Water Code*, §26.351 and *30TAC* §334.12 assigns liability for corrective action for discharges or spills of hazardous substances to the owner of a PSTS at the time the discharge or spill occurs. If the release is not discovered until after TxDOT has acquired the property, it may be difficult to assign responsibility for corrective action to the former property owner. The responsibility would then default to TxDOT in accordance with *Water Code*, §26.121.

Commonly encountered problems include the following:

- ◆ An offsite plume has migrated into existing ROW, with possible negative impact on subsurface utilities or proposed construction.
- ◆ A portion of contaminated property is acquired for ROW, the contamination source is on the remainder, and there is the possibility of negative impact on subsurface utilities or proposed construction.
- ◆ A contaminated property, including the contamination source, is acquired for ROW, and there is the possibility of negative impact on subsurface utilities or proposed construction. Moreover, the displacee, and any PSTS declared as personal property, is eligible for relocation assistance.

Petroleum Storage Tank Systems Treated as Personal Property

PSTS may be, under certain limited circumstances, declared as personal property eligible for relocation payments under the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970* (42USC. 4601-4665). The basis for the declaration could be that the system has been recently installed and can be re-certified prior to reinstallation. Payment to the displacee for relocation is made on an actual cost basis. Use the Form [ROW-N-PSTRA](#) when a system is declared as personal property.

Petroleum Storage Tank Systems Treated as Real Property

In the majority of ROW acquisitions involving PSTS, the systems are considered to be real property. Real property is acquired either through negotiation or donation, or by eminent domain proceedings.

Negotiation or Donation. Once an approved value has been determined for the land and improvements of a ROW parcel, the owner(s) of the real property is (are) presented with an offer of just compensation. The amount of compensation is based on an unimpaired or "as if clean" valuation. If PSTS are located wholly or partially within the acquired parcel, ask the owner to sign a Form ROW-N-PSTRA, Petroleum Storage Tank Removal Agreement. This agreement provides the owner the opportunity to retain title to the PSTS and to be reimbursed the eligible costs of system removal. The owner is not, however, obliged to sign the agreement, even though failure to sign may constitute failure of acquisition negotiation.

When the offer of compensation is accepted and the agreement executed, normal closing of the transaction can occur. The owner must remove the PSTS before expiration of the time allowance stated in the agreement.

The remaining issue of payment from TxDOT is based on the status of the PSTS site, as determined by the Texas Commission on Environmental Quality. If the site does not have a negative impact on public health and safety, and is not a threat to the environment, then [TCEQ](#) issues a "no further action" letter based on the closure information at the conclusion of the removal phase of the work performed.

If the site is identified with a Leaking Petroleum Storage Tank Identification Number (LPST ID No.), the owner must take corrective action subsequent to PSTS removal. In this case, TxDOT reimbursement to the owner will be based on an uncontested **Fund Payment Report** showing the amount that TCEQ will consider for reimbursement, ineligible expenses and the owner's deductible amount. Reimbursement can then be made for the ineligible expenses and deductible amount for the PSTS removal. TxDOT's obligation and involvement terminates at this point. Subsequent land use must be considered for a risk-based assessment and closure.

When the owner or his agent is pursuing mitigation activities, an **Indemnification Agreement** can be offered outlining each party's responsibilities and obligations after TxDOT has taken possession of the ROW.

It is not in the interest of TxDOT to accept donation of real property without an assessment of the property's condition. PSTS owners are often willing to donate contaminated land because they believe doing so will end their liability. Minimizing the risk associated with prior land use will reduce the costs incurred by corrective action.

Contact the ROW Division for assistance regarding any use of an **Indemnification Agreement or a Petroleum Storage Tank Removal Agreement**.

Eminent Domain. When condemnation proceedings are initiated for parcels that have PSTS located within or close to the area needed for ROW, process the review of the parcel for eminent domain proceedings with appropriate notation to the OAG.

Once the parcel has been processed through the ROW Division to the OAG, a **Petition or Statement of Condemnation** is filed in the court having jurisdiction in the county where the subject parcel is located. At the Special Commissioners hearing, the property is considered to be unimpaired or "as if clean," unless adequate information is available to the appraiser or a technical expert in support of an impacted valuation.

An objection to the **Award of the Special Commissioners** can be filed if adequate information exists that indicates the property may suffer a reduction in value due to the presence of a PSTS. After deposit of funds into the registry of the court, the State takes possession of the property. TxDOT can then employ the necessary consultant for an environmental assessment, in order to provide technical data, cost estimates, and testimony for trial. TxDOT can also employ a contractor for removal of the PSTS.

Section 5

Asbestos in Buildings

Overview

The National Emissions Standards for Hazardous Pollutants (NESHAP) requires an inspection for asbestos prior to renovation or demolition of buildings. If the inspection reveals regulated asbestos containing material (RACM) in excess of action levels of 260 linear feet of pipe insulation or 150 square feet of surfacing material the asbestos must be removed or stabilized by a licensed abatement contractor prior to demolition. Asbestos containing material is considered to be regulated if (1) it contains greater than one percent asbestos, and (2) is friable (easily crumbled), or will become friable under conditions of demolition.

Management

Pre-demolition asbestos management begins with an inspection for asbestos. If the quantity of RACM exceeds NESHAP action levels, the following regulated sequence of events, each performed by contractors licensed by the Texas Department of Health (TDH), must occur:

- ◆ Abatement planning (incorporating the data collected during the inspection);
- ◆ Ten day advanced notification to the appropriate regulatory agency;
- ◆ Abatement and air monitoring; and
- ◆ Reporting.

TxDOT surplus and salvage property procedures entail transferring the title to buildings and other improvements to the salvage contractor before demolition. However, TDH will not necessarily recognize the severability of improvements from the land and may consider TxDOT liable for the salvage contractor's non-compliance with NESHAP requirements.

To avoid potential liability for violations of NESHAP requirements by the salvage contractor, contract for asbestos inspection, abatement planning, notification, air and water monitoring, and reporting. Include the abatement plan (i.e., specification) in the bid package for the salvage contract. The salvage contractor must subcontract abatement activities using the specification developed by TxDOT's asbestos contractor.

In most cases, cost recovery from the former property owner for asbestos abatement is not possible because the requirement for abatement is triggered by demolition of the building before construction. Therefore, the abatement is classified as preventative action instead of corrective action.

Section 6

Hazardous Waste Contamination

CERCLA Immunity

Health and Safety Code, §361.275(e)(2)(C) and Federal statutes provide TxDOT immunity from CERCLA liability for hazardous waste contamination in acquiring property through eminent domain proceedings. However, TxDOT loses its immunity should it worsen the contamination after acquisition. This immunity applies only to existing hazardous waste contamination, not to contamination from leaking petroleum storage tanks. It should be noted that the costs of planning and constructing projects on sites contaminated with hazardous waste can be considerable.

See [Task 3280](#) - Perform hazardous materials assessment and investigation, *TxDOT Project Development Process Manual*, and the *TxDOT Environmental Procedures in Project Development Manual* for procedures to follow in dealing with contaminated sites.

Chapter 2

Environmental Covenants for Contaminated Property

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- Section 6 — Environmental Covenant Information
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- Section 9 — Zoning or Land Use Controls by Local Governments
- Section 10 — Cost Recovery for Third Party Environmental Covenants
- Section 11 — Tracking the Environmental Covenant for Future Reference

Section 1

Background

Background

Effective September 1, 2009, under the authority of Senate Bill 480 as codified in Transportation Code §202.061, the Texas Transportation Commission (TTC) may enter into an environmental covenant for the purpose of subjecting real property in which the department has an ownership interest to a plan or the performance of work for environmental corrective action.

The department may enter its real property into an environmental covenant at its own initiative or at a request from a third party.

Definition of an Environmental Covenant

An environmental covenant is a voluntarily imposed servitude on land which limits the uses of and activities on the land in conjunction with a plan or the performance of work for an environmental response (corrective action).

Examples of environmental covenants include covenants that restrict the use of the property (i.e. restricted to commercial use only) or covenants that stipulate the installation and maintenance of engineering controls, such as an engineered cover to prevent human exposure to contaminants located on the property.

Purpose of an Environmental Covenant

An environmental covenant allows performance of cost-effective corrective action and still permits safe and effective use of the property. In this guidance, corrective action refers to regulated activities that are required for the protection of the environment.

The potential negative effects of an environmental covenant include: 1) reduction of property value and 2) limited use of the property to industrial or commercial purposes, unless the covenant is removed by performing additional corrective action.

Roles and Responsibilities for Coordinating an Environmental Covenant

The Environmental Affairs Division (ENV) has primary responsibility for coordinating the execution of an environmental covenant. ENV also is responsible for coordinating all regulatory corrective actions, technical reviews, and regulatory coordination necessary to support an environmental covenant on TxDOT property. The applicable Regional Office will assist ENV in coordinating the execution of an environmental covenant.

General Overview

In order to successfully execute an environmental covenant, the following actions must occur:

1. Comply with all state and federal corrective action standards.
2. Receive corrective action approval from applicable state and/or federal agencies.
3. Receive TxDOT General Counsel and TxDOT Management approval.
4. Conduct required notices.
5. Receive TTC approval.
6. File the environmental covenant with the county real property records.

Note actions one through three may occur concurrently, and actions four through six occur sequentially.

Section 2

Federal and State Corrective Action Standards

Standards

All corrective action performed to support an environmental covenant must:

- ◆ Comply with state and federal standards for environmental corrective action.
- ◆ Receive approval from the Texas Commission on Environmental Quality (TCEQ) or a federal agency with approval authority under applicable law.

Section 3

Department Standards

Standards

The environmental covenant will provide a clear benefit to the department.

As a minimum, the following TxDOT management must approve the environmental covenant before it is presented to the TTC:

- ◆ Environmental Affairs Division Director
- ◆ Department General Counsel

ENV will coordinate an environmental covenant approval with other department management as each circumstance dictates.

Section 4

Department Documentation Requirements

Requirements

Before a proposed covenant is submitted to the TTC for consideration, documentation must demonstrate conformance with the requirements and standards listed in Sections 2 and 3.

Documentation must include the following:

- ◆ Correspondence from the TCEQ and/or a federal agency with approval authority clearly stating that the environmental corrective action meets all applicable state and federal standards.
- ◆ Correspondence from the Environmental Affairs Division Director stating approval of the proposed environmental corrective action standards.
- ◆ Correspondence from the General Counsel stating approval of the proposed environmental covenant.

Section 5

Notice Requirements

Notice Requirements

Not less than 30 days before the date the TTC considers a proposed environmental covenant, ENV will issue a public notice. Before the notice is mailed, ENV will obtain all documentation required in Section 4 and receive OGC approval of the notice language.

Notice Language Requirements

The notice must include:

- ◆ A clear and concise description of the proposal to enter into the environmental covenant,
- ◆ A statement of the manner in which written comments may be submitted,
- ◆ The date the TTC will consider the proposed environmental covenant, and
- ◆ The department contact name and address to which comments are submitted.

Notice Submission Requirements

ENV with the assistance of the applicable Regional Office will mail or coordinate the mailing of a third party's notice to:

- ◆ Each owner of a property interest in the applicable property,
- ◆ Each adjacent landowner, and
- ◆ Each applicable local government whose territorial jurisdiction includes the property. This includes the county, a municipality (within municipal or extra-territorial boundaries), or entity responsible for groundwater conservation or quality.

ENV is responsible for identifying the above parties and for sending the approved notice to the parties via United States Postal Service utilizing certified mail/ return receipt. This receipt will be preserved for documentation. The applicable Regional Office will assist ENV with these tasks.

For all third party environmental covenants requests, the third party is responsible for identifying the above parties and for sending a department approved notice to the parties via United States Postal Service utilizing certified mail/ return receipt. ENV and the OGC will review and approve the Third party notice language before the notice is sent.

Review of Public Comments

ENV will receive public comments and coordinate review of the public comments with OGC and applicable Regional Office.

Section 6

Environmental Covenant Information

Environmental Covenant Information

OGC must approve all environmental covenant language before it is submitted to the TTC for consideration.

Each environmental covenant must include:

- ◆ A legally sufficient description of the property subject to the covenant,
- ◆ A description of the nature of the contamination on or under the property, including the contaminants, the source, if known, and the location and extent of the contamination,
- ◆ A description of the activity and use limitations on the property, and
- ◆ Any information required by TCEQ and/or a federal agency with approval authority for the affected property corrective action.

Section 7

Texas Transportation Commission Review

TTC Review

ENV will prepare the TTC briefing package, including:

- ◆ A cover sheet briefly explaining the environmental covenant process, including the covenant's expected benefits to the department, a summary of public comments received and department staff recommendations,
- ◆ Minute order, and §
- ◆ Exhibits, including:
 - Proposed language for the environmental covenant.
 - List of property owners notified.
 - Correspondence from the TCEQ and/or a federal agency with approval authority clearly stating that the environmental corrective action meets all applicable state and federal standards.

The ENV Director will present the item at the Commission Agenda Meeting.

Section 8

Entering the Environmental Covenant

Entering the Environmental Covenant

For each property the TTC has elected to enter into an environmental covenant, the TTC by order may authorize the Executive Director to execute an environmental covenant on behalf of the Commission.

The Regional Office is responsible for filing the TTC approved environmental covenant with the applicable county property records. The Regional Office will furnish a recorded covenant to the ROW Division as the department's office of record for TxDOT's real property interests.

Section 9

Zoning or Land Use Controls by Local Governments

Local Government Controls

In order to execute the environmental covenant, SB 480 requires that the affected property be brought into compliance with zoning or land use controls imposed on the property by each applicable local government whose territorial jurisdiction includes the property. This includes the county, a municipality (within municipal or extra-territorial boundaries), or entity responsible for groundwater conservation or quality. However, Local Government Code § 211.013(c) provides that a municipality's zoning authority does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.

Consult with OGC for guidance on this issue.

Section 10

Cost Recovery for Third Party Environmental Covenants

Cost Recovery

The department will recover all department expenses associated with a third party request for entering into an environmental covenant, regardless if the TTC approves the environmental covenant or not. The department may also require reimbursement for any loss in value or use of department property entered into an environmental covenant. In such an event, the Region will coordinate with the ROW Division regarding the review and approval of the appraisal of the value loss to be reimbursed to the State.

Section 11

Tracking the Environmental Covenant for Future Reference

Tracking the Covenant

Environmental covenant information will be depicted on Department ROW maps for future reference. Environmental covenant information related to district facility property or maintenance section facility property will be filed with property record files at the applicable district office.

Chapter 3

Railroads

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- Section 1 — Terms Used in This Chapter
- Section 2 — Purpose
- Section 3 — Acquisition of Abandoned Railroad Interests
- Section 4 — Acquisition of Operating Railroad Interests
- Section 5 — Railroad Agreements
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Section 1

Terms Used in This Chapter

Terms

Double click on the following terms to see their definitions in the TxDOT Glossary:

- ◆ [Surface Transportation Board](#)
- ◆ [Joint Use Agreement](#)
- ◆ [Crossing Agreement](#)
- ◆ [Common Ditch Agreement](#)

Section 2

Purpose

Purpose of Chapter

The purpose of this chapter is to set forth the policies and procedures that apply when TxDOT needs ROW for a highway improvement project and the needed ROW is owned in fee or easement by a railroad company. This chapter applies to those instances where abandoned railroad property is to be acquired, property subject to an operating railroad is to be acquired, an agreement is needed for the joint use of railroad lands, and an adjustment of railroad facilities is required.

Section 3

Acquisition of Abandoned Railroad Interests

Definition of Abandonment

There are two methods by which an interest in property can be abandoned by a railroad company.

Common Law Abandonment. Common law abandonment of railroad ROW can be characterized as a cessation of a railroad company's right to use property for railroad purposes after official abandonment action by the STB. This type of abandonment occurs when a railroad company has an easement interest in land for railroad purposes. The easement document will usually state that upon the cessation of use of the property for railroad purposes, the use of the property reverts to the underlying fee title owner. Even if the easement document does not contain such verbiage, the cessation of use by the railroad company will operate to re-vest title in the fee title owner. This type of abandonment is a matter of intent. A railroad company is deemed to have abandoned their rights in the property if:

- ◆ A release of the interest is executed by the railroad company.
- ◆ A deed or other instrument of conveyance is executed in favor of the fee title owner.
- ◆ Tracks, ties and other improvements have been removed from the property by the railroad company.
- ◆ The railroad company has ceased to maintain the property for railroad purposes.

Quite often there is a dispute between a fee title owner and the railroad company as to the issue of intent. Unless it is expressly determined that abandonment has occurred, TxDOT must deal with both the fee title owner and the railroad company in acquiring the needed ROW.

Relinquishment of Jurisdiction. Abandonment, or relinquishment, of jurisdiction is the cessation of jurisdiction over a railroad company's operations by the STB. This form of abandonment occurs when the STB issues an order of abandonment. This determination is made when interstate commerce is no longer being served by the railroad company on the property and Federal oversight is no longer necessary. This type of abandonment can occur if the railroad company owns fee title to the property or has an easement interest in the property. If an easement interest only is owned, this abandonment does not terminate the easement or any other rights to use the property by the railroad company.

Basic Acquisition Procedures

In situations where TxDOT has determined the necessity of purchasing a real property interest for ROW purposes, the acquisition procedures set out in Volume 2 - [Right of Way Acquisition](#) should be followed. An order of abandonment must have been issued by the STB before TxDOT can

acquire needed ROW from a railroad company. Once the order has been issued, a railroad company is treated the same as any other property owner. If the railroad company owns fee title to the property, TxDOT is required to only negotiate with the company. If fee title is vested in a third party and the railroad company only has an easement interest, TxDOT must negotiate with the fee title owner and the railroad company. If it can be determined with certainty that the railroad company has effectuated a Common Law Abandonment of its interest in the property, TxDOT is required to only negotiate with the fee title owner.

A situation may occur when it is in the best interest of TxDOT to acquire an entire railroad corridor that is subject to abandonment by the STB or a railroad company desires to sell an entire abandoned corridor instead of just a portion. In those instances, TxDOT has developed a Corridor Preservation Policy for Abandoned Railroads. A **Corridor Preservation Task Force Report** has been developed for use in those situations. The policies and procedures set forth therein should be followed in those situations in addition to the basic procedures for ROW acquisition detailed in [Right of Way Acquisition](#).

Acquisition by Eminent Domain

Acquisition of the interest of a railroad company when an order of abandonment has been issued by the STB can be accomplished by the power of eminent domain. The authority of TxDOT to condemn railroad property in this instance is not limited by the fact that a railroad company has an ownership interest in the property. The policies and procedures set forth in [Eminent Domain](#) should be followed in the condemnation of railroad property when an order of abandonment has been issued.

Section 4

Acquisition of Operating Railroad Interests

Competing Public Interests

There are instances when TxDOT has determined the necessity to acquire ROW that is currently being used by an active or operating railroad. This is a situation where there has been no order of abandonment by the STB and the railroad company is using the property for railroad purposes. In this instance it is extremely difficult to acquire any interest in the property without cooperation from the railroad company. When TxDOT and a railroad company desire the same property for different purposes, a determination must be made as to the paramount public interest to which the property should be put. Without agreement between the agencies the matter must be resolved in court. Usually the current use of the property would be considered a paramount use. Thus, it is very difficult to change the use from railroad to ROW purposes without consent of the railroad company. In these instances TxDOT should pursue an appropriate Joint Use Agreement with the railroad company. The uses of such agreements are set forth in [Railroad Agreements](#).

STB Requirements

If it is imperative that TxDOT acquire ROW from an operating railroad, an order of abandonment must be issued by the STB. TxDOT cannot acquire a property interest from a railroad company if the company is still under the jurisdiction of the STB. If cooperation from the railroad company can be obtained, they may file a petition for abandonment and the section needed by TxDOT can be abandoned by the STB. If the railroad company refuses to cooperate, there is a procedure where TxDOT can file a petition for involuntary abandonment. This is a very complicated, expensive and lengthy procedure and should be avoided except in very rare circumstances. If this procedure must be used, the ROW Division should be contacted for assistance. Once an order of abandonment has been issued, acquisition can proceed in accordance with normal acquisition procedures.

Limitations on Use of Eminent Domain

The general rule is that the power of eminent domain cannot be used against an operating railroad. If a railroad company refuses to cooperate in the acquisition of property that is currently being used for railroad purposes, TxDOT cannot condemn the property until an order of abandonment had been issued by the STB. Any condemnation proceeding cannot be instituted until such order has been issued. Once the order has been issued and the railroad company refuses to accept the offered compensation, condemnation can proceed according to normal policies and procedures.

Section 5

Railroad Agreements

Overview

Railroad Agreements are joint use agreements (license agreements) entered into between TxDOT and a railroad company for the use of needed ROW. The agreements are customarily used when an active, operating railroad is involved as opposed to abandoned railroad property. These agreements are in the form of a license in that they are permissive and do not create a property interest. The agreements are used in scenarios where TxDOT needs use of ROW presently used by a railroad company and when a railroad company needs ROW presently used by TxDOT. The agreements allow for the joint use of property for a specific purpose at no cost to either party for the use. The two basic instances when a Railroad Agreement will be used are when a highway and railroad intersect and when a highway and railroad run parallel.

Crossing Agreements

A Crossing Agreement is used when highway and railroad ROW intersect. If for example, a current railroad is operating on property owned by a railroad company or on property over which a railroad company has an easement and a highway facility needs to cross the railroad property, then it would be appropriate to execute a crossing agreement by and between TxDOT and the railroad company. The agreement will give TxDOT permission to cross the railroad property at a specific location. The Railroad Section of the Traffic Operations Division is charged with the responsibility of negotiating for and preparation of these agreements. That Division coordinates the agreements with the Railroad Project Coordinator in each District. The Traffic Operations Division Director is the only person authorized to execute such agreements on behalf of TxDOT. A signed and sealed property description and parcel sketch detailing the common usage area must be attached to the agreement. A copy of the agreement should be transmitted by the District to the ROW Division for their records. At the option of TxDOT, the agreement may or may not be recorded in the deed records of the appropriate county. There is no compensation paid to the railroad company for the use of the railroad property in this instance. The area covered by these agreements should be shown on the ROW map for the project and should be designated with a parcel number followed by JUP (Joint Use Parcel). A Crossing Agreement will also be used if a railroad company desires to cross an existing highway.

If the interest owned in the property by the railroad company is only an easement and those rights are abandoned by the railroad, it will be necessary for TxDOT to acquire a property interest from the underlying fee owner. The reason for this is that TxDOT only has a license to use the property for so long as the railroad company has an interest. If the interest of the railroad company goes away, so does TxDOT's interest.

Longitudinal Agreements

Longitudinal or Common-Ditch Agreements are used when highway and railroad ROW run parallel. These agreements usually entail the use of the ditch area that exists between the railroad property and the highway ROW. As in Crossing Agreements, the negotiation and preparation of a Longitudinal Agreement is the responsibility of the Railroad Section of the Traffic Operations Division in coordination with the Railroad Project Coordinator in the District. The Director of the Traffic Operations Division is the only person authorized to execute these agreements on behalf of TxDOT. A signed and sealed property description and parcel sketch detailing the common usage area must be attached to the agreement. A copy of the agreement should be transmitted by the District to the ROW Division for their records. At the option of TxDOT, the agreement may or may not be recorded in the deed records of the appropriate county. The type of agreement entered into by and between TxDOT and the railroad company is similar to the Crossing Agreement and will only give TxDOT a license to use the property. As in the situation of a Crossing Agreement, if the interest owned in the property by the railroad company is only an easement and those rights are abandoned by the railroad, it will be necessary for TxDOT to acquire a property interest from the underlying fee owner. The area covered by these agreements should be shown on the ROW map for the project and should be designated by a parcel number followed by JUP (Joint Use Parcel).

Section 6

Railroad Relocation Procedures

Overview

There are instances where TxDOT needs ROW currently occupied by an operating railroad and the railroad company is agreeable to transferring the property to TxDOT if TxDOT will effectuate a relocation of the railroad facility to another location. Before any property interest can be conveyed to TxDOT and a railroad facility relocated, a proper order of abandonment and relocation must be issued by the STB.

If it is determined that a railroad is to be relocated, an agreement concerning all aspects of the relocation should be obtained. This agreement will be between TxDOT, the railroad company and the appropriate LPA. The LPA will be a party to the agreement due to their participation in the cost of the relocation. The agreement will detail the property needed by TxDOT and the property to which the railroad will be relocated. The agreement will also state if TxDOT or the LPA will be the acquiring agent for the replacement property. All information necessary to prepare the agreement should be transmitted by the District to the ROW Division. The ROW Division will prepare the agreement in collaboration with the District and the Railroad Section of the Traffic Operations Division. Duplicate originals of the agreement should be prepared for all parties.

Once the agreement has been executed, the relocation property will be acquired by TxDOT, by the appropriate LPA acting on behalf of TxDOT or by the railroad company. If TxDOT acts as the acquiring agency, the property should be obtained in the name of the railroad company. If the LPA acts as the acquiring agency, the property may be obtained in the name of the railroad company or in the name of the LPA. If the individual parcels are obtained in the name of the LPA, they should deed all parcels to the railroad company once acquisition has been completed. The railroad company will obtain the property in its own name. In no instance is the relocation property to be obtained in the name of the State of Texas.

The acquisition of the replacement property, whether by TxDOT, the LPA or the railroad company must be done in compliance with TxDOT rules and regulation governing the acquisition of ROW, including compliance with **The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended**. TxDOT shall be responsible for the costs of the acquisition of the replacement property. The appropriate LPA will participate in these costs in accordance with TxDOT policy. Once the replacement property is acquired, the railroad company will deed the property needed for the highway ROW to the State at no additional cost.

If the railroad is to be relocated to property already owned by the railroad company, then acquisition of the needed highway ROW will be acquired under normal TxDOT acquisition procedures. In this situation any agreement concerning the cost of construction for the new railroad facility will not be a ROW function.

Chapter 4

Contract Outsourcing

Contents:

Section 1 — Terms Used in This Chapter

Section 2 — Legal Aspects

Section 3 — Purpose

Section 4 — Types of Services

Section 5 — Specifications

Section 6 — Payment for Services

Section 7 — Dispute Resolution

Section 1

Terms Used in This Chapter

Definitions

Bidder - A bidder is any firm or company submitting a proposal to provide ROW services based on a qualifications/price method.

Provider - A provider is any firm or company performing ROW services under a professional services contract.

Outsourcing - Outsourcing means methods of providing ROW services to TxDOT through a third party agreement.

Professional Service - Professional services means services covered by the Professional Services Act (Texas Government Code Title 10, Subtitle D, Section 2254), including accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, and professional nursing, and services provided in connection with the professional employment or practice of a person who is licensed or registered as a state certified or state licensed real estate appraiser.

Purchase of Services - Purchase of services means the method of providing right of way services to TxDOT based on established ratios of qualifications and bid price.

Bid Evaluation Formula - A bid evaluation formula is the method used to award a purchase order in accordance with established ratios of qualifications and bid price.

Evaluation Matrix - An evaluation matrix is the form used to determine total points accumulated by a bidder based on qualifications.

Centralized Master Bidder List (CMBL) - The centralized master bidders list is a Texas bid subscription service listing registered bidders who have paid a maintenance fee to review bid opportunities.

Section 2

Legal Aspects

State Statutory Provisions

Professional Services - *Government Code*, Chapter 2254, Subchapter A, the Professional Services Procurement Act sets forth what services are deemed professional services. By acts of the 75th Legislature, Appraisal and Appraisal Review services were constituted as professional services. As a result, real estate services involving appraisal or appraisal review services must be procured as a professional service.

Purchase of Services - *Government Code*, Chapter 2156, Subchapters A and C authorizes the purchase of various services, which would include ROW services. These provisions do not authorize the procurement of real estate services when appraisal or appraisal review services are involved.

Administrative Rules

Professional Services - The administrative rules for procuring providers are set out in *Administrative Code*, Title 43, Chapter 9, Sections 9.80 to 9.88 inclusive.

Purchase of Services - The administrative rules for procuring providers are set out in *Administrative Code*, Title 1, Chapters 113 and 114.

Federal Regulations

The *Code of Federal Regulations* (CFR) provides that TxDOT can be reimbursed the cost of outsourcing on Federally approved projects. Reimbursement to a state agency for the costs of a Federally approved project, including the cost of contracting for private acquisition services, is provided in 23 *CFR* 710.203.

Section 3

Purpose

Purpose

The procedures allow TxDOT the flexibility of contracting with the private sector for the timely acquisition of needed ROW. This flexibility allows TxDOT to meet schedules for the construction of highway facilities. The policies set forth in this chapter are to provide TxDOT with a uniform system of procuring ROW services through the use of consulting firms. The policies afford TxDOT alternate methods of securing agreements/contracts for the purchase of ROW.

Section 4

Types of Services

Professional Services

ROW projects that include appraisal or appraisal review services must be procured pursuant to a professional services contract. Other ROW services, which may be procured by a professional services contract, include ROW surveying and mapping. These other services may also be procured by following the guidelines provided by the Contract Services Office. For additional information contact the Contract Services Office.

Purchase of Services (Bid)

Any ROW services to be obtained by an outsourcing agreement that does not include appraisal, appraisal review or surveying services must be procured under the bid procedure. Services procured could include but not be limited to negotiation, relocation, condemnation support, clearance of ROW, etc. These services may be procured either individually or in groups of functions. Any agreement awarded under this method shall be made by and under the auspices of the General Services Division. For additional information contact the General Services Division.

Local Purchase of Service

This type of purchasing of service should rarely be used. If a District needs to procure the services of one person for a specific type of process, i.e. negotiations, then this type of service procurement can be utilized. The District will need to work with the District purchaser for using this type of service procurement. Local purchasing cannot be used if the service to be procured is appraisal, appraisal review or surveying. For additional information contact the General Services Division.

Section 5

Specifications

Overview

The specifications become a part of any contractual agreement entered into between TxDOT and the provider. The specifications contain a full and complete list of the responsibilities and requirements of TxDOT and the provider. Any or all of the responsibilities and requirements set forth in the specifications cannot be varied, added to or deleted without the mutual consent of both parties evidenced by a proper written amendment to the agreement.

There are separate sets of specifications for outsourcing services. No changes can be made to these specifications without approval from either the Contract Services Office or the General Services Division, as appropriate. In addition, the ROW Division must also approve any changes to the specifications.

The specifications set forth the scope of work required for the project. The specifications also delineate the responsibilities of TxDOT and the provider. The specifications also include the milestones that must be completed in order for the provider to obtain payment from TxDOT.

Section 6

Payment for Services

Procedure

All payments through purchase of service contracts charged against the Right of Way Budget, Strategy, 102, are to be submitted to the Division for review.

Professional and bid services should follow the payment provisions outlined in the executed contract and payment submissions forwarded to the Division for payment processing. Local purchases of services, the District should notify the Division of the service. The must submit payment requests to the Division for review and verification prior to the District's purchaser generating payment.

Section 7

Dispute Resolution

Resolution

Pursuant to TxDOT policy (refer to 43TAC §9.2), any dispute between TxDOT and the provider, in a contract under the Professional Services Procurement Act, concerning the services performed, additional costs incurred, non-procurement issues or interpretation or application of the terms and conditions of the specifications or work authorization/purchase order should be resolved between the parties if possible. If such resolution is not possible, the provider may file a claim, pursuant to 43TAC §9.2 with the Director of the ROW Division who will then forward it to the Contract Claims Committee. If a decision rendered pursuant to that regulation is not satisfactory to the provider, an appeal may be filed with the Executive Director of TxDOT pursuant to 43TAC §§1.21 to 1.61 inclusive.

Contracts entered into under the Purchasing Act, 43TAC §9.1 however, require contractors to file their claims with the Director of the Contract Services Office, and such filing has strict deadline and other requirements involved.

Chapter 5

Utilities

Contents:

Section 1 — Overview

Section 1 Overview

Cross-reference

For all policies and procedures relating to utility adjustments please refer to TxDOT's [Utilities Manual](#).