

California Environmental Protection Agency
Department of Toxic Substances Control

PROSPECTIVE PURCHASER POLICY

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6/25/96

PROSPECTIVE PURCHASER POLICY

1. PURPOSE

This document establishes policy and procedures, and provides guidance to Department of Toxic Substances Control (DTSC) staff for evaluating the eligibility of proponents for DTSC Prospective Purchaser Agreements (PPAs) and for the preparation of these agreements. It provides a discussion of alternative mechanisms which can be used alone or in combination with PPAs to address potentially contaminated

properties. The document also discusses legal authority for PPAs, including Division 20 of Chapter 6.8 of the Health and Safety Code (H&SC), and identifies DTSC organizational roles and responsibilities. A list of Acronyms and Definitions of Terms are provided in Appendix I and II, respectively. Appendix III (Process Flow Chart) provides a step-by-step outline of the PPA process. (All statutory references in this policy are to the Health and Safety Code unless otherwise stated.)

2. BACKGROUND AND OVERVIEW

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 and habitat. Redevelopment of Brownfields properties represents an optimal alternative.

One option for addressing the Brownfields problem is through the use of the Voluntary Cleanup Program (VCP). In late 1993, DTSC formally developed the VCP, using existing statutory authority under H&SC Chapter 6.8. The VCP is a streamlined program which provides mutually agreed-upon DTSC oversight in assessing and/or remediating lower priority or lower risk properties. When remediation or assessment is complete, DTSC provides a formal "sign-off." By use of the VCP, properties can be returned to productive use while ensuring that assessment and remediation is conducted in an environmentally sound manner. Some project proponents, specifically prospective purchasers, would like more assurance regarding liability beyond DTSC's sign-off. This assurance may be provided through the use of PPAs, which provide for mutual covenants not to sue.

Candidate sites for PPAs can be either from the VCP or, under some circumstances, the DTSC Annual Workplan (AWP). AWP sites, also known as "State Superfund" sites, are higher priority sites which pose significant health or environmental risk.

3. LEGAL AUTHORITY

The Hazardous Substance Account Act ("HSAA," Health & Safety Code [H&SC], section 25300 et seq.) gives DTSC the statutory

authority to order or enter into an enforceable agreement with responsible parties to take or pay for appropriate removal or remedial actions at hazardous substance release sites (H&SC, sections 25355.5, 25358.3 and 25187). A prospective purchaser or lessee of a hazardous substance release site would become a responsible party liable for response costs under the HSAA, unless a defense to such liability can be demonstrated (H&SC, section 25323.5). Under H&SC sections 58009 and 58010, DTSC also has the authority to "commence and maintain all proper and necessary actions . . . [o]n matters within its jurisdiction, to protect and preserve the public health."

DTSC has the authority to settle claims which arise from the laws and regulations which DTSC administers. California case law has held that state agencies have inherent authority to settle disputed claims. Similarly, DTSC has inherent authority to settle state and federal law claims which it may have against a responsible party. Any settlement of a claim may include a covenant not to sue.

Thus, under its inherent settlement authority, DTSC may enter into an agreement with a prospective purchaser (or a future responsible party) which provides that the prospective purchaser would remediate or pay for remediation of a hazardous substance release site in exchange for a covenant not to sue for claims arising from the remediation of the site. Such an agreement would be contingent on the prospective purchaser actually purchasing the hazardous substance release site. However, under certain limited circumstances, such as when ownership of a site is not feasible, DTSC's inherent settlement authority would also allow DTSC to provide covenants not to sue to prospective tenants. [1]

4. POLICY STATEMENT

This policy is in response to concerns raised by prospective purchasers of Brownfields properties. DTSC recognizes that California's long history of industrialization has contributed to the State's economic growth. However, past disposal practices, when coupled with downturns in economic conditions, social change, natural disasters and changing land use patterns, are a few of the factors which have contributed to increasing the State's Brownfields expanse. Brownfields are properties with an active potential for redevelopment or reuse that lie fallow due to actual or perceived contamination. Recycling of Brownfields is a critical factor in ensuring renewed prosperity in California.

To address some of the major Brownfields issues and remove or lessen the liability that prospective purchasers face, DTSC has developed this policy and procedure which includes an application form (Appendix IV) and a model Prospective

Purchaser Agreement and Covenant Not to Sue (Appendix V). This document is designed to streamline the process which will reduce negotiation time and DTSC review, lower transaction costs, ensure statewide consistency and promote compliance with current settlement practices and procedures.

Due to the clear liability which attaches to landowners who acquire property with knowledge of contamination, DTSC has received numerous requests for covenants not to sue from prospective purchasers of Brownfields properties. 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 the following conditions are met:

- o they do not exacerbate or contribute to the existing contamination;
- o their operation will not result in health risks to persons on the site;
- o they are not a responsible party (or affiliate of) with respect to the existing contamination;
- o if they allow access for, and do not interfere with, remediation activities;
- o unauthorized disposal is not occurring on the site; and
- o if 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 a PPA 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 other criteria stated herein.

DTSC acknowledges that entering into a PPA with a 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. This policy and procedure outlines the circumstances under which PPAs may be considered (Section 5.2, Eligibility Criteria). Given its legislative

mandates and its limited resources, DTSC cannot proceed with PPAs in "pure" real estate transactions (properties without significant environmental contamination concerns) or offer them in all prospective purchaser situations. Since not all Brownfields properties are eligible for a PPA, this policy also outlines several options that prospective purchasers may pursue to limit their potential liability (see Section 5.1, Current Mechanisms for Prospective Purchasers). DTSC's objective is to strike a balance between providing assurance to PPs to foster redevelopment and treating Responsible Parties (RPs) in a reasonable manner, which serves to ensure that RPs will not "warehouse" (keep properties off the real estate market) Brownfields properties; such "warehousing" would clearly inhibit such redevelopment and reuse.

A PPA may involve time-consuming negotiations and would ultimately limit DTSC's enforcement authority. Therefore, DTSC must determine whether such an agreement is appropriate under the circumstances. Entering into a PPA must be sufficiently in the public interest to warrant the expenditure of public resources necessary to reach such an agreement. The model PPA is intended to lower the costs and resources necessary to reach a settlement. To this end, a sixty-day negotiation period should be adhered to unless good cause to extend is demonstrated. Additional discussion regarding the covenant not to sue is provided below.

The advantages and disadvantages of entering into a PPA with DTSC will vary depending upon the circumstances of an individual site. The covenant not to sue provides that DTSC will not sue the prospective purchaser (PP) under State and federal law for contamination that existed at the site prior to the date of purchase as long as certain conditions are met, e.g., allowing access for remediation. On the other hand, the PP remains potentially liable for both new contamination at the site and for the exacerbation of existing contamination. If, at some later time, the State asserts that the buyer either contributed to or exacerbated contamination at the site, it will be the PP's responsibility to establish that neither circumstance applies.

An obvious advantage to receiving the extraordinary shield of a covenant not to sue is that it resolves the uncertain liability that may stem from purchasing a contaminated site while easing the burden of raising capital and providing for longterm planning. Consequently, DTSC's model agreement also provides for "contribution protection" to reduce the threat of any private cost recovery suit against a prospective purchaser (see CERCLA section 113 [f] [2] [42 U.S.C. section 9613 (f) (2)]). However, a covenant not to sue and the associated contribution protection may actually have the effect of increasing third party litigation at a site. This may include situations where a prospective purchaser seeks contribution or where other potentially responsible parties oppose the

agreement. Finally, a PP is not required to admit to legal liability for the remediation of a site when entering into a PPA with DTSC.

DTSC only has authority to negotiate a PPA on behalf of DTSC and no other State agency. A PP must evaluate how important it is to resolve its liability not only with DTSC, but also with the federal government and other agencies. Moreover, DTSC is unable to guarantee that another State agency, such as the State Water Resources Control Board (State Water Board) or a Regional Water Quality Control Board (Regional Water Board), will not have additional requirements for the site. However, the State and Regional Water Boards are in the process of also adopting a PP policy. DTSC is working closely with the State and Regional Boards as they draft their policy to ensure maximum consistency between the two programs. It is envisioned that, in the event that DTSC is the lead agency and enters into a PPA, the appropriate Regional Water Board may upon review of the final PPA, issue a "comfort letter" (a comfort letter serves as written assurance of the agency's intention to not pursue specific enforcement against parties under limited circumstances) which will serve as a recital to abide by such PPA (and vice versa in the case of a Water Board lead [see Appendix VI, Model Comfort Letter]). Also, in limited cases, where DTSC and the Regional Water Board are co-lead agencies, they may jointly enter into a PPA. A memorandum of understanding may be developed in the future between the two agencies to serve this purpose on a broad, rather than site-specific, basis.

Once a PPA is completed, a new buyer will have a continuing relationship with DTSC. Such involvement may include, but is not limited to: the need to ensure DTSC access to the site to assess and/or monitor the extent of contamination; DTSC's oversight of the performance of response activities; and monitoring of any ongoing operation and maintenance obligations.

A critical factor for determining eligibility for a PPA is that the PP 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. A PP will be required to closely evaluate whether its proposal meets this criterion.

Finally, negotiation of a PPA can be a labor-intensive process. From a business perspective, the time needed to apply for and negotiate a PPA, including dedication of significant resources, in addition to providing notice prior to final execution of a PPA, may ultimately be too long or too costly for the PP. In these situations, or when the PP does not meet the policy criteria, there are other mechanisms which may serve to provide sufficient comfort.

5. PROCEDURES AND GUIDELINES

5.1 CURRENT MECHANISMS FOR PROSPECTIVE PURCHASERS

Prospective purchasers have several mechanisms available by which they can seek to reduce the potential liability related to the acquisition and redevelopment of Brownfields. These may include, but are not limited to: lease-options; insurance; indemnifications; cleanup certifications; prospective purchaser agreements and/or covenants not to sue. Legislative mechanisms have been established, and DTSC has developed and implemented a number of administrative initiatives. The availability and applicability of these various alternatives are highly dependant upon the specifics of each individual site.

PRIVATE MECHANISMS

Lease with Option to Purchase

One route available to a prospective purchaser to reduce financial risk is to postpone any immediate purchase, by entering instead into a lease with an option to purchase at a future date. The prospective purchaser can remain a tenant of the responsible party (RP) until cleanup is complete, and then exercise the option to purchase. In cases where the owner is already working on cleanup under the oversight of a state agency, the lease-option approach might be reinforced by a comfort letter from the agency to the tenant indicating that, as long as the owner is cooperating with the cleanup, the agency will not consider the tenant as an RP.

Indemnification

Indemnification of the purchaser by the seller is the traditional method of liability reduction. The seller will sometimes indemnify the purchaser for all costs that may be incurred as the result of the past contamination. However, the value of the indemnification depends entirely upon the financial viability of the seller.

Insurance

A sophisticated insurance market is developing which addresses the liability associated with properties with both known and unknown contamination. While most standard pollution policies exclude pre-existing or known contamination, insurance products are being developed which consider risk management of Brownfields exposure by assessing the cost of cleanup, remediation and future potential risks.

The most common insurance policy to address existing contamination is the Pollution and Remediation Legal Liability Policy. This policy provides an insurable interest and a stop-loss provision to limit onsite cleanup costs. It also provides protection of the insured against third-party property damage and bodily injury claims. After the remediation is complete, this protection is transferrable to a new owner.

DTSC INITIATIVES

DTSC has several innovative measures available to provide assurances to property owners to encourage Brownfields development. DTSC Management Memo #90-11, "RP - Ownership of Property Over Contaminated Ground Water," dated December 7, 1990, provided assurances to owners of property onto which a plume of contaminated groundwater has migrated that they will not become the target of enforcement or cost recovery action solely on the basis of land ownership. This assurance does not apply to owners who cause or contribute to the contamination. U.S. EPA adopted a similar policy in 1995.

In some cases, DTSC may issue a "clean parcel letter" for a site where a designated portion of a property with contaminated soil has been remediated, or where the soil cleanup has been completed and groundwater contamination will be addressed separately. In order to facilitate the redevelopment of land under these circumstances, DTSC issued Management Memo #92-4, "Approval of a Partial Site Cleanup," dated April 23, 1992. This guidance includes a model letter for Approval of Partial Remediation.

Voluntary Cleanup Program

The Voluntary Cleanup Program (VCP) is the primary vehicle driving DTSC's Brownfields efforts. DTSC formally established the VCP administratively, using existing statutory authority (Division 20, Chapter 6.8, H&SC) in late 1993. The Official Policy and Procedure, EO-95-006-PP, "Managing Voluntary Site Mitigation Projects (The Voluntary Cleanup Program)," was issued September 25, 1995. Under the VCP, "volunteers" (they may or may not be RPs) initiate projects to undertake site investigation or other response actions under DTSC oversight. Most sites are eligible, except sites already on DTSC's annual workplan (also known as "State Superfund" sites), sites on the National Priority List, federal facilities or those not within DTSC's jurisdiction (e.g., some petroleum-contaminated sites). Project proponents enter into Voluntary Cleanup Agreements, which include: provisions for payment of DTSC oversight costs and advance funds by the proponent;

a detailed scope of work; a project schedule; and a description of services to be provided by DTSC.

Under the VCP, DTSC is committed to a team approach to achieve successful project completion. Projects are subject to the same cleanup standards and DTSC approvals as sites in DTSC's annual workplan program. Through the VCP, motivated project proponents fund their own site cleanup, with DTSC's oversight, and proceed at their own pace on site assessment, investigation and remediation. However, one major benefit of the VCP is that project proponents may choose to conduct projects in a phased manner and establish a schedule and, most often, the length of time for project completion is compressed. Project proponents do not admit legal liability for site remediation upon entering into a VCP agreement and either side may terminate the project, for any reason, with a 30-day written notice.

The VCP emphasizes the use of presumptive remedies and innovative technologies to expedite remediation. Additionally, site-specific risk analysis and land use restrictions can be used as a basis for establishing remediation standards that are geared to the planned use of the property. Using land use controls to limit future exposure to contaminants is authorized in Chapter 6.8 and is used extensively in the VCP. These land use restrictions run with the land and bind future successors, assigns, etc.

When the site assessment/remediation is complete, DTSC issues either a "No Further Action" (NFA) or certification of completion, depending on the project circumstances. Either signifies that DTSC has determined that the site does not pose a significant risk to public health or the environment. While neither constitutes a release or covenant not to sue, both significantly minimize future liability concerns.

In large part, the VCP projects have been initiated to foster redevelopment, provide opportunities for disadvantaged groups or otherwise provide substantial benefits to local economies and to California as a whole.

LEGISLATIVE INITIATIVES

California legislation (AB 3193, Polanco, 1990) provides a qualified immunity from state or local laws to local redevelopment agencies, provided that cleanup actions are conducted in accordance with a remedial action plan approved by DTSC or a Regional Water Quality Control Board. This liability immunity extends to, among others, certain persons entering into development agreements for a Brownfields site, their successors in title and persons

providing them financing (refer to H&SC section 33459.3).

Similarly, in 1990, the Mello-Roos Community Facilities Act (AB 2610) was amended to create the first long-term financing option for the purpose of hazardous substance cleanup on both public and private property. Under this law, Community Facilities Districts are empowered to levy special taxes and issue bonds to establish and operate revolving funds to conduct site cleanups. Parties liable for the cleanup are liable to the Community Facilities District for cleanup costs.

Under the Unified Agency Review Statutes (AB 2061), a Site Designation Committee designates an "administering agency" (AA) or "lead agency" to oversee the response actions for a site if petitioned by the responsible party (RP). This process requires coordination of all State and local agencies with jurisdiction. The AA issues a certification of completion upon satisfactory completion of all remedial actions. This certificate represents a conclusive determination that the RP has complied with all State and local laws, ordinances, regulations and standards and is, in effect, a statutory release of the RP subject to certain reopeners. The release is not applicable to liability under CERCLA or other federal laws. The AB 2061 process can and has been used with DTSC's VCP and State "Superfund" sites.

SB 923 (Calderon), the Expedited Remedial Action Reform Act of 1994 (effective January 1, 1995) created a separate pilot voluntary cleanup program limited to thirty sites which meet specified criteria. The bill created Chapter 6.85 in the H&SC and offers a number of incentives to RPs as well as establishing a cleanup process which differs from the more traditional Chapter 6.8 program. All potential SB 923 sites must go through the Site Designation Process in order to participate in the pilot program. As such, all SB 923 sites would receive the AB 2061 certification of completion. This program will foster Brownfields redevelopment in that it requires that cleanup standards are developed based on the planned use of the property, and authorizes land use controls to limit future exposure.

The SB 923 Program is designed to expedite cleanups by offering a number of incentives. These include: 1) requiring DTSC to review and evaluate submissions within set timeframes; 2) requiring extensive RP search and notice by DTSC; 3) allowing more flexibility in remedy selection by using site-specific cleanup goals based on the proposed property use, and, with the exception of "hot spots," there is no preference for treatment; 4) providing extensive rights to dispute DTSC technical decisions; 5) providing for liability allocation,

including state funding for "orphan shares" (limited to 10 sites and to the extent monies are available); 6) providing qualified future protection by the AB 2061 certificate of completion; 7) providing a cleanup process independent of the National Contingency Plan; and 8) requiring that DTSC and the RP enter into mutual covenants not to sue under CERCLA.

SUMMARY

Several public and private mechanisms, individually or in combination, are available to significantly reduce the potential liability associated with Brownfields redevelopment. Liability reduction should provide added incentive for the reuse of abandoned land, while creating new jobs and increased tax revenues.

5.2 ELIGIBILITY CRITERIA

All the following criteria should 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. [2]
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) [3] or equivalent has been performed and provided to DTSC identifying 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: 1) the PP has sufficient funds to complete the agreed upon investigation and remedial action; 2) any existing site condition is not exacerbated due to lack of action; and 3) 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.

5.3 NOTICE

If a PPA provides contribution protection, any statutory right of contribution is a property interest that cannot be extinguished without procedural due process. Due process requires that any potentially responsible party receive notice and an opportunity to comment before it can be barred by a settlement agreement from seeking contribution. Therefore, PPs are required to prepare a notice to be provided to all known potentially responsible parties for a thirty-day notice period. In

addition, constructive notice of the settlement will be achieved by placing a notice of the proposed settlement in the California Regulatory Notice Register, an official publication of the State of California informing the general public of any proposed state regulatory action. The notice shall require that all comments be forwarded simultaneously to the PP and DTSC. DTSC will evaluate any comments to determine if the PPA is appropriate, proper and adequate.

5.4 ROUTING PROCEDURES

All final PPAs must be accompanied by and routed for sign-off in accordance with a PPA Sign-Off Sheet (see Appendix VII). Agreement signature authority has been delegated to Branch

Chiefs; however, on a site-specific basis, either the Division Chief or the Deputy Director may elect to sign the PPA.

6. ROLES AND RESPONSIBILITIES

6.1 SITE MITIGATION PROGRAM - REGIONAL OPERATIONS

The Site Mitigation Program's Regional Operations staff are responsible for reviewing Prospective Purchaser (PP) applications and preparing a recommendation to the Division Chief. Regional Branch Chiefs must have Division Chief approval of the Prospective Purchaser Settlement Memo (see Appendix VIII) before initiating a PPA.

Regional Operations Branch Chiefs are responsible for assigning a tracking number and Project Manager for each PP application (see Appendix IV). The tracking number shall be designated as follows: Region number - Fiscal Year - Sequential number. The Regional Project Manager is responsible for obtaining a CALSTARS site code number and ensuring that the project is entered into DTSC's CalSites database. The Regional Project Manager will then evaluate the completed PP application and contact other affected agencies, if applicable.

Regional Operations Branch Chiefs will determine if the application should be recommended for approval or denial. If denial is recommended, the Regional Project Manager/Unit Supervisor will prepare a letter to the applicant (for Regional Branch Chief signature) documenting the reasons for denial. If approval is recommended, Regional Operations staff will work with the Office of Legal Counsel (OLC) to prepare a confidential

Settlement Memo (Appendix VIII). The Settlement Memo and recommendation for negotiating a Prospective Purchaser Agreement must be approved by the Regional Branch Chief and then forwarded to the Division Chief for final approval prior to initiating negotiations.

During negotiation of the PPA, Regional Operations staff will meet with the PP representative to discuss the site remediation strategy. The objective of these meetings is to develop an overall site strategy that reflects program goals, objectives and requirements. The discussion will include site risks and priorities; project planning, public participation, phasing and scheduling; remedial action objectives; remedial technologies; data quality objectives; and the RI/FS workplan (if applicable). Current knowledge of the site contamination sources, exposure pathways and receptors shall be used in developing this strategy. The PP and DTSC's Regional Operations staff shall then develop the Scope of Work, based on the site strategy, for incorporation into the PPA. Public Participation staff should be consulted to assess the appropriateness of any public participation activities or requirements and projected costs.

After agreement negotiations have concluded, but prior to execution of the PPA, the Regional Project Manager will be responsible for ensuring that a notice is prepared by the PP. The notice must be sent to all known potentially responsible parties. The Regional Project Manager is also responsible for reviewing the draft notice and distribution list and routing the notice to OLC for review. Regional Operations staff are also responsible for ensuring that the notice is provided to the Environmental Analysis and Regulation Section of the Office of Program Audits and Environmental Analysis at least two weeks prior to the planned start of the notice period in the California Regulatory Notice Register. Regional Operations staff are responsible for review of all comments received.

Regional Branch Chiefs have been delegated signature authority for all PPAs; however, on a site-specific basis, the Division Chief or Deputy Director may elect to sign.

Regional Offices are responsible for concurrently routing copies of the signed PPA to DTSC's OLC, Site Mitigation Program's Planning and Management Branch, Cost Recovery Unit, Regional Water Quality Control Board and local County Health Director.

6.2 OFFICE OF LEGAL COUNSEL

The approved standard language is to be used as the basis for PPAs (see Appendix V). All PPAs must be reviewed and approved by OLC (see Sign-Off Sheet, Appendix VII). In coordination with Regional Operations, OLC will prepare and route the Prospective Purchaser Settlement Memo (see Appendix VIII) for approval. OLC will review the draft notice and distribution list and provide recommendations to Regional Operations staff. OLC will review comments received in conjunction with Regional Operations staff.

6.3 SITE MITIGATION PLANNING AND MANAGEMENT BRANCH

The Site Mitigation Planning and Management Branch is responsible for maintaining copies of all final PPAs and Sign-Off Sheets.

6.4 COST RECOVERY UNIT

The Cost Recovery Unit (CRU) is responsible for the preparation of the billing package and shall send a copy of the billing package to the Regional Branch Chief. In accordance with standard billing procedures, the CRU will compile DTSC's costs, prepare a Summary by Activity report and invoice the PP on a quarterly basis. As payments are received, the CRU will post and credit the account. CRU will be responsible for retaining a copy of each final PPA until project completion.

6.5 ENVIRONMENTAL ANALYSIS AND REGULATION SECTION

The Environmental Analysis and Regulation Section of the Office of Program Audits and Environmental Analysis is responsible for forwarding the notice for publication in the California Regulation Notice Register.

NOTES:

1. Under certain circumstances, this policy and procedure may also be applicable to persons prospectively seeking to operate or lease contaminated property when ownership is not feasible. For example, in the case of a historic land trust whereby property can be leased longterm but not sold, DTSC would consider a PPA with the lessee if the criteria herein are satisfied. PPAs with prospective lessees/operators will require the current owner's preapproval.

2. In the event that an RP (a party independent of the prospective purchaser) is currently cooperatively remediating the subject site under DTSC oversight under Chapter 6.8 and agrees to complete all remediation, provide sufficient financial assurance AND sign the PPA to that extent, criteria 2 (b) could be waived for the prospective purchaser. In this case, the model PPA (Appendix

V) would be modified to reflect a three-party agreement between DTSC, the PP and the RP (with the conditions noted above).

3. Preliminary Endangerment Assessment Guidance Manual, Department of Toxic Substances Control, January 1994.

LIST OF ACRONYMS

AA	Administering Agency
AB	Assembly Bill
AWP	Annual Workplan
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CEQA	California Environmental Quality Act
CFR	Code of Federal Regulations
CRU	Cost Recovery Unit
DTSC	Department of Toxic Substances Control
H&SC	Health and Safety Code
HSAA	Hazardous Substances Account Act
I/SE	Imminent and/or Substantial Endangerment Policy, Procedure and Guidelines
NFA	No further action
OLC	Office of Legal Counsel
O&M	Operation and Maintenance
PEA	Preliminary endangerment assessment
PP	Prospective Purchaser
PPA	Prospective Purchaser Agreement
QA/QC	Quality Assurance/Quality Control
RAP	Remedial Action Plan
RAW	Removal Action Workplan
RCRA	Resource Conservation and Recovery Act
RDIP	Remedial Design and Implementation Plan

RI/FS Remedial Investigation/Feasibility Study
RP Responsible Party
SARA Superfund Amendment and Reauthorization Act
SB Senate Bill
U.S.C. United States Code
U.S. EPA United States Environmental Protection Agency
VCP Voluntary Cleanup Program

DEFINITIONS OF TERMS

ANNUAL WORKPLAN (SITE): High priority sites which pose a significant health or environmental risk, also known as "State Superfund" sites.

BONA FIDE PROSPECTIVE PURCHASER: A person or entity that is purchasing or has purchased all or part interest in real property, but is not affiliated with any person potentially liable for response actions at a site.

BROWNFIELDS: Properties that have actual or perceived contamination and an active potential for redevelopment or reuse.

CALSITES: CalSites is an automated database maintained by DTSC which contains information on properties in California where hazardous substances have been released, or where the potential for such a release exists.

CERTIFICATION: A certification (aka: certificate of completion) is granted when a removal or remedial action was performed under DTSC oversight. Either a Removal Action Workplan or a Remedial Action Plan, with public participation, has been completed and verification has been provided to DTSC showing that the site or operable unit has been cleaned up to the standards specified in the plan. If applicable, deed restrictions must be recorded prior to certification.

HAZARDOUS SUBSTANCE ACCOUNT ACT: The Carpenter-Presley-Tanner Hazardous Substance Account Act commencing at Health and Safety Code, section 25300 et seq.

HAZARDOUS SUBSTANCES RELEASE SITE: A site where a "release," as defined in Health and Safety Code, sections 25320 and 25321, has occurred of a "hazardous substance" as defined in Health and Safety Code, section 25316.

HAZARDOUS WASTE SITE: A site where "hazardous waste," as defined

in title 22, California Code of Regulations, section 66261.3, is placed.

INSTRUMENT OF FINANCIAL ASSURANCE: A trust fund as described in title 22, California Code of Regulations (CCR), section 66265.143(a); a surety bond as described in title 22, CCR, section 66265.143(b); a letter of credit as described in title 22, CCR, section 66265.143(c); insurance as described in title 22, CCR, section 66265.143(d); a financial test and corporate guarantee as described in title 22, CCR, section 66265.143(e); or any other form of financial assurance deemed acceptable by DTSC.

NO FURTHER ACTION: A Preliminary Endangerment Assessment (PEA) or equivalent study has been completed which resulted in a determination that there is no evidence of significant contamination and no further action (NFA) is required.

PRELIMINARY ENDANGERMENT ASSESSMENT: An activity defined in Health and Safety Code, section 25319.5.

REMEDIAL ACTION: A "remedy" or "remedial action" as defined in Health and Safety Code, section 25322.

REMOVAL ACTION: "Remove" or "removal" as defined in Health and Safety Code, section 25323.

RESPONSIBLE PARTY: A "liable person" or "responsible party" as defined in Health and Safety Code, section 25323.5

APPENDIX III: DEVELOPMENT OF PROSPECTIVE PURCHASER (PP) AGREEMENT WITH THE DEPARTMENT OF TOXIC SUBSTANCES CONTROL

```
PP initiates contact with DTSC
  v
Ap from PP --> v
  v
DTSC reviews application
  v
  v
Meets criteria? --> NO --> Return application for
  v                modification and/or
  v                identify other options
  YES
  v
  v
DTSC drafts PP agreement
  v
  v
DTSC/PP negotiate PP agreement (60-day time period)
  v
  v
DTSC/PP reach agreement on PPA terms? --> NO --> STOP
  v
```

V
Yes
v
V
Finalize PP agreement
v
V
Site work begins

APPENDIX IV: PROSPECTIVE PURCHASER APPLICATION

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
SITE MITIGATION STATEWIDE CLEANUP OPERATIONS

PROSPECTIVE PURCHASER APPLICATION

PP Application No. (Region #__-FY__-_____)

The purpose of this application is to obtain information necessary to evaluate the eligibility of applicants for the Prospective Purchaser Agreement Program. Please use additional pages, as necessary, to complete your responses.

SECTION 1 APPLICANT INFORMATION

APPLICANT NAME:
Mailing Address:
City, State, ZIP:
Phone Number:

CONTACT FOR PROJECT:
Name:
Mailing Address:
City, State, ZIP:
Phone Number:

CURRENT SITE OWNER:
(If owner is a corporation or business, provide name of person representing owner for this site.)
Mailing Address:
City, State, ZIP:
Phone Number:

PURCHASER INFORMATION:
Is current owner aware of your plans to seek a Prospective Purchaser Agreement with DTSC? Yes___ No___?

Are you planning to purchase the property? Yes___ No___?

If yes, when do you expect to take title to the property?

If no, what is your proposed interest in the property and what vehicle will be used to consummate the transaction?

Please describe, if known, the timing of the proposed property transaction in sufficient detail to give DTSC a sense of your needs and timetable.

SECTION 2 SITE INFORMATION

SITE NAME:

DTSC CalSites Name and Number (if applicable):

Street Address/Physical Location:

City, County, State:

Assessor's Parcel Number:

Zoning Designation and Permitted Uses:

Surrounding Land Uses (within 1/4-mile):

LEGAL DESCRIPTION AND TITLE REPORT:

Attach copy of map of site and legal boundary description.

Attach copy of Title Report.

NATURE OF THE HAZARDOUS SUBSTANCE RELEASE:

Briefly describe the nature of the hazardous substance release at the property.

Have chemicals of concern been found in the soil?_____,
groundwater?_____, surface water?_____.

Is hazardous waste treatment, storage or disposal occurring at the site? Yes___ No___?

ATTACH A COPY OF THE PRELIMINARY ENDANGERMENT ASSESSMENT OR PHASE I/II ENVIRONMENTAL ASSESSMENT REPORTS.

PRESENT LAND USES:

Is the site currently being used? Yes___ No___?

If yes, describe the nature of the current use.

SECTION 3 SCOPE OF WORK FOR REUSE AND REMOVAL OR REMEDIAL ACTIVITIES

Describe the proposed development or reuse of the property. If available, you may attach site maps and supplemental information describing the intended development or reuse.

Provide a summary of removal or remedial activities which have been undertaken or completed at the property already, if any.

Briefly describe, in general terms, the removal or remedial activities to be performed in the future.

If the applicant or current owner has been or is subject to an order or agreement with DTSC, provide the name of the DTSC project manager(s) and phone numbers(s).

DTSC Project Manager(s)	Phone Number(s)
-------------------------	-----------------

RESPONSIBLE PARTIES:

Attach a list of names and addresses of potentially responsible parties. Describe all efforts to identify the potentially responsible parties.

OTHER AGENCY INVOLVEMENT:

List names, addresses and phone numbers of people/agencies contacted to determine if other agencies have taken actions at this site.

Agency	Contact	Phone
--------	---------	-------

Are other agencies currently taking actions concerning the site?
Yes ___ No ___

If YES, name the agency, and describe the action, timing and result.

Agency	Action	Timing	Result
--------	--------	--------	--------

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of:) Docket No. [Insert Docket]
)
[Site Name and Address]) AGREEMENT AND COVENANT
) NOT TO SUE
)
[Settling Respondent]) Health & Safety Code,
) Sections 25300 et seq.,
) 58009 & 58010
_____)

I. INTRODUCTION

1.1. Parties. This Agreement and Covenant Not to Sue (Agreement) is made and entered into by and between the State of California, California Environmental Protection Agency, Department of Toxic Substances Control (DTSC) and _____ [insert name of Settling Respondent] (collectively the "Parties").

1.2. Site. This Agreement applies to the site located at [Location of the Site, including County. A legal description or map is required, and the following language should be inserted in this section:]

"A legal description of the Site is attached as Exhibit _____."

"A map showing the Site is attached as Exhibit _____."

1.3. Jurisdiction. DTSC enters into this Agreement pursuant to Health and Safety Code Sections 25300 et seq. (the Hazardous Substance Account Act), 58009 and 58010. DTSC has authority to enter into agreements whereby DTSC covenants not to sue or assert claims for environmental remediation against prospective purchasers of environmentally impacted properties, if such agreements are sufficiently in the public interest.

1.4. Purpose. The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections V Covenants Not to Sue and VIII Certification, the potential liability of the Settling Respondent for the Existing Contamination (hereinafter defined) at the Site which would otherwise result from Settling Respondent becoming the owner of the Site.

The Parties intend and believe that, based upon competent

engineering and other data previously considered, the intended uses (and all activities anticipated to be undertaken in connection therewith) will not exacerbate or contribute to the Existing Contamination (hereinafter defined) or pose health risks to persons present at the Site.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with this Agreement, do not constitute an admission of any liability by the Settling Respondent.

DTSC has determined that the Settling Respondent has established, and Settling Respondent agrees to maintain, adequate financial assurances to ensure completion of actions undertaken by the Settling Respondent in accordance with this Agreement.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to DTSC of a substantial benefit, is in the public interest. DTSC has determined that this Agreement is fair, reasonable and in the public interest. [Add any additional site specific language regarding public interest, including number of jobs, any increased tax base and plans for site.]

This Agreement shall be subject to the Settling Respondent's acquisition of title to the Site. If Settling Respondent fails to acquire title to the Site, the Agreement shall be null and void and DTSC reserves all rights it may otherwise have against Settling Respondent.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in the Health and Safety Code or in regulations promulgated under the Health and Safety Code shall have the meaning assigned to them in the Health and Safety Code or in such regulations, including any amendments thereto.

2.1. "DTSC" shall mean the State of California, Environmental Protection Agency, Department of Toxic Substances Control and any successor departments or agents of the State of California that may have responsibility for and jurisdiction over the subject matter of this Agreement.

2.2. "Existing Contamination" shall mean any contamination caused by any hazardous substances, pollutants or contaminants, present or existing at, on, or under (including within the groundwater beneath) the Site as of the Effective Date of this Agreement [including without limitation, that contamination identified in the orders, plans, reports and other documents listed in Exhibit ___ hereto].

2.3. "Land Use Controls" shall mean recorded instruments restricting the present and future uses of the Site, including but

not limited, recorded easements, covenants, restrictions or servitudes, or any combination thereof, as appropriate. Land use controls shall run with the land from the date of recordation, pursuant to Health and Safety Code section 25355.5, shall bind all of the owners of the land, and their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees, and shall be enforceable by DTSC pursuant to Health and Safety Code, sections 25355.5 and 25356.1.

2.4. "Notice" shall refer to that notice, in the form of Exhibit ___ hereto, to be executed by each successor and/or transferee of the Site owner and Occupant pursuant to Section 9.27 Notices hereof.

2.5. "Parties" shall mean the State of California, California Environmental Protection Agency, Department of Toxic Substances Control, and the Settling Respondent.

2.6. "Settling Respondent" shall mean .

2.7. "Site" shall mean the Site which is described in Exhibit 1 of this Agreement.

III. FINDINGS OF FACT

DTSC hereby finds:

3.1. Ownership. The Site is owned by [Property Owner]. [If Site consists of more than one parcel, identify the owners of each parcel.]

3.2. Site History. [Briefly describe the historical uses of the Site, including any hazardous materials/waste handling, storage or disposal areas, if known.]

3.3. Substances Found at the Site. [Include, if known, reports containing the results of environmental media sampling conducted at the Site, indicate that the (list media) is contaminated with hazardous substances, including (list contaminants).]

3.4. The Settling Respondent represents, and for the purposes of this Agreement DTSC relies on those representations, that Settling Respondent's involvement with the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.]

IV. AGREEMENT

4.1. IT IS HEREBY AGREED THAT DTSC will provide review and

oversight of the response activities conducted by the Settling Respondent in accordance with the Scope of Work contained in Exhibit _____. Settling Respondent shall conduct the activities in the manner specified herein and in accordance with the schedule specified in Exhibit _____. All work shall be performed consistent with H&SC section 25300 et seq., as amended; the National Contingency Plan (40 Code of Federal Regulations (CFR) Part 300), as amended; U.S. EPA and DTSC Superfund guidance documents regarding site investigation and remediation.

4.2. Scope of Work and DTSC Oversight. DTSC shall review and provide Settling Respondent with written comments on all Settling Respondent's deliverables as described in Exhibit ____ (Scope of Work) and, other documents applicable to the scope of the project. DTSC shall provide oversight of field activities, including sampling and remedial activities, as appropriate. DTSC's completion of activities described above shall constitute DTSC's complete performance under this Agreement.

V. COVENANTS NOT TO SUE

5.1. DTSC's Covenant Not to Sue. Subject to Sections 5.2. Reservation of Rights and 5.3 Reservation of Rights as to Unknown conditions or New Information of this Agreement, and upon completion of the work described in Exhibit ____ (Scope of Work) to the satisfaction of DTSC, DTSC covenants not to sue or take any civil, judicial or administrative action, to pursue any claim, enter any order or make any demand against Settling Respondent for claims pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607; section 7003 of RCRA; 42 U.S.C. § 6973; or chapters 6.5 (commencing with Section 25100) and 6.8 (commencing with section 25301), division 20 of the Health and Safety Code, or pursuant to other applicable laws, regulations or civil, judicial or administrative authorities, solely with respect to the Existing Contamination at the Site and arising solely from the ownership, operation or possession of the Site, or any portion thereof. This Covenant shall inure to the benefit of, and pass with each and every portion of the Site and shall benefit any respective successors and assignees thereof.

5.2. DTSC's Reservation of Rights. The covenant not to sue set forth in Section 5.1. above does not pertain to any matters other than those expressly specified in Section 5.1 DTSC Covenant Not to Sue. DTSC reserves and this Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent and its successors or assignees to meet a requirement of this Agreement;

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent and its successors or assignees;

(c) any liability resulting from exacerbation by Settling Respondent and its successors or assignees of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the Effective Date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by agencies other than DTSC;

(g) liability for transportation and disposal after the Effective Date of this Agreement by Settling Respondent and its successors or assignees; and

(h) liability for violations of local, state or federal law or regulations.

5.2.1. With respect to any claim or cause of action asserted by DTSC, the Settling Respondent and/or its successors and assignees shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

5.2.2. If Settling Respondent and/or any successor or assignee is determined, through adjudication or the administrative or the regulatory processes, to have committed an act or omission after the Effective Date for which DTSC has specifically reserved its rights in (a) through (i) above, Settling Respondent (if it was so determined to have committed the act or omission), or the particular successor or assignee that was determined to have committed the act or omission, shall be liable for all enforcement costs including, but not limited to, litigation costs, incurred by DTSC in conjunction with that act or omission.

5.2.3. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which DTSC may have against any person, firm, corporation or other entity not a party to this Agreement.

5.2.4. Nothing in this Agreement is intended to limit the right of DTSC to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent and/or any successor and assignee to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by DTSC in exercising its authority under federal and state law. Settling Respondent acknowledges that it is purchasing property where response actions may be required.

5.3. DTSC' Reservation of Rights as to Unknown Conditions or New Information. The covenant not to sue set forth in Section 5.1. does not apply (and DTSC reserves the right to seek modification of this Agreement or to institute an action under federal or state law, or to take administrative action against any person), if previously unknown conditions are discovered or information is received, in whole or in part, after the Effective Date, and these

previously unknown conditions or this new information demonstrate that Settling Respondent or a particular successor or assignee is liable for the Existing Contamination for reasons other than that liability that may be incurred solely by virtue of holding or acquiring an interest in the Site (as is expressly contemplated in Section 5.1 above). This reservation shall apply only to that successor or assignee with respect to whom such unknown conditions discovered hereunder pertain.

5.4. Settling Respondent's Covenant Not to Sue. In consideration of DTSC's Covenant Not To Sue in Section 5.1. of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against DTSC, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to: (i) any direct or indirect claim for reimbursement from the Hazardous Waste Control Account, Hazardous Substance Account, or Hazardous Substance Cleanup Fund through Health and Safety Code section 25375 or any other provision of law; (ii) any claim against the State of California under sections 107 or 113 of CERCLA or section 7003 of RCRA; (iii) any other claims arising out of response activities at the Site, including but not limited to nuisance, trespass, takings, equitable indemnity and indemnity under California law, or strict liability under California law, based on DTSC's oversight activities or approval of plans for such activities. This Covenant is made and given, effective upon execution by Settling Respondent of this Agreement and of a Notice by each successor and assignee, and does not extend to or bind any other persons.

5.5. Settling Respondent's Reservation of Rights. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against DTSC based on gross negligence or wilful misconduct taken directly by DTSC, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to the Hazardous Waste Control Account, Hazardous Substance Account, or Hazardous Substance Cleanup Fund through Health and Safety Code section 25375, CERCLA, or RCRA.

VI. CONTRIBUTION PROTECTION

6.1. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by DTSC or any other person for the Site with respect to the Existing Contamination].

6.2. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify DTSC in writing no later than sixty (60) days prior to the initiation of any such suit or claim.

6.3. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing DTSC within ten (10) days of service of the complaint on them.

VII. DUE CARE/COOPERATION

7. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, state, and federal laws and regulations. The Settling Respondent shall also comply with all obligations needed to maintain the final remedy, including land use controls. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Site, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with DTSC in the implementation of response actions at the Site and further agree not to interfere with such response actions. DTSC agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under the Health and Safety Code, or any other law, immediately notify DTSC of such release or threatened release.

VIII. CERTIFICATION

8. By entering into this Agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to DTSC all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If DTSC determines, within its sole discretion, that information provided by the Settling Respondent is not materially accurate and complete, the Covenant Not to Sue in Section V of the Agreement shall be null and void and DTSC reserves all rights it may otherwise have against Settling Respondent.

IX. GENERAL PROVISIONS

9.1. Site Access. Commencing upon the date that it acquires title to the Site, and thereafter, Settling Respondent, agrees to provide access to the Site and laboratories used for analyses of samples under this Agreement at all reasonable times to employees, contractors, and consultants of DTSC. Nothing in this section is intended or shall be construed to limit in any way the right of entry or inspection that DTSC or any other agency may otherwise have by operation of any law. DTSC and its authorized representatives shall have the authority to enter and move freely about all property at the Site at all reasonable times for purposes including, but not limited to: inspecting records, operating logs, sampling and analytic data, and contracts relating to this Site; reviewing the progress of Settling Respondent in carrying out the terms of this Agreement; conducting such tests as DTSC may deem necessary; and verifying the data submitted to DTSC by Settling Respondent.

9.2. Site Access for Respondents Conducting Response Activities. The Settling Respondent shall grant access to parties conducting response activities pursuant to this Agreement or for activities deemed necessary by DTSC to complete required response activities. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the property as of the Effective Date of this Agreement and shall ensure that any subsequent leases or subleases in the Site are consistent with this Section, and Section 9.25 Parties Bound, of this Agreement [and where appropriate, Section ____ (Work to be Performed)].

9.3. Cost Recovery. Subject to Section 5.1 DTSC's Covenant Not to Sue, the Settling Respondent is liable for all of DTSC's costs incurred in responding to the contamination at the Site including costs of overseeing response work performed by the Settling Respondent for matters addressed by this Agreement, including costs incurred by DTSC in association with preparation of this Agreement, and costs to be incurred in the future. Cost recovery may be pursued by DTSC under CERCLA, Health and Safety Code Section 25360, or any other applicable state or federal statute or common law. The State of California reserves the right to bring an action against Settling Respondent under CERCLA, Health and Safety Code Section 25360, or any other applicable state or federal statute or common law, for recovery of all response and oversight costs incurred by the State of California related to this Agreement and not reimbursed by Settling Respondent, as well as any other unreimbursed past and future costs incurred by the State of California in connection with response activities at the Site.

9.4. Future Costs. With respect to DTSC's review of response activities performed by the Settling Respondent pursuant to this Agreement, the Respondent shall pay all costs of DTSC's review of activities by Settling Respondent or Respondents' agents under this Agreement and/or related to this Agreement, as such costs are incurred. Costs of DTSC's review of Settling Respondents'

activities include all direct and indirect costs. Under all circumstances, Settling Respondent shall remain liable for all costs incurred by DTSC for matters addressed by this Agreement as specified by Health and Safety Code section 25360, including interest thereon as provided by law. DTSC shall bill Settling Respondent on a quarterly basis for response and oversight costs incurred during the previous quarter. DTSC shall provide Settling Respondent with a summary description of DTSC's oversight activities for which it seeks oversight costs. Settling Respondent shall maintain the right to review and make copies of documentation supporting the costs claimed by DTSC. Settling Respondent shall remit payment as specified in the billing within sixty (60) days of the date of the billing.

9.5. Payment. All payments made by the Settling Respondent pursuant to this Agreement shall be by a cashier's or certified check made payable to the "Department of Toxic Substances Control", and bearing on its face the project code for the site (site # [Calstars Site Code] and the docket number of this Agreement. Payments shall be sent to:

Department of Toxic Substances Control
Accounting/Cashier
400 P Street, 4th Floor
P.O. Box 806
Sacramento, California 95812-0806

A photocopy of the check shall be sent concurrently to DTSC's Project Manager/Regional Branch Chief.

9.5.1. If any bill is not paid by the Settling Respondent within sixty (60) days after it is sent by DTSC, the Settling Respondent may be deemed to be in material default of this Agreement.

9.6. Project Coordinator. The work performed pursuant to this Agreement shall be under the direction and supervision of a qualified project coordinator, with expertise in hazardous substance site cleanup. The Settling Respondent shall submit: a) the name and address of the project coordinator; and b) in order to demonstrate expertise in hazardous substance site cleanup, the resume of the coordinator. The Settling Respondent shall promptly notify DTSC of any change in the identity of the Project Coordinator. All engineering and geological work shall be conducted in conformance with applicable state law, including but not limited to, Business and Professions Code sections 6735 and 7835.

9.7. Submittals. All notices, documents and communications required to be given under this Agreement, unless otherwise specified herein, shall be sent to the respective parties at the following addresses in a manner that produces a record of the sending of the notice, document or communication such as certified mail, overnight delivery service, facsimile transmission or courier

hand delivery service:

[Name]
Regional Branch Chief
Attention: Project Manager [two copies]
Site Mitigation Branch
Department of Toxic Substances Control
[Address]

U.S. EPA, Region IX [Only for NPL or candidate NPL Sites]
Attn: Superfund Program Manager
75 Hawthorne Street
San Francisco, CA 94105

Settling Respondent
[Name, Title]
[Company]
[Address]

9.8. Communications. All approvals and decisions of DTSC made regarding submittals and notifications will be communicated to Settling Respondent in writing by the Site Mitigation Branch Chief, Department of Toxic Substances Control, or his/her designee. No informal advice, guidance, suggestions or comments by DTSC regarding reports, plans, specifications, schedules or any other writings by Settling Respondent shall be construed to relieve Settling Respondent of the obligation to obtain such formal approvals as may be required.

9.9. DTSC Review and Approval. (a) If DTSC determines that any report, plan, schedule or other document submitted for approval pursuant to this Agreement fails to comply with this Agreement or fails to protect public health or safety or the environment, DTSC may:

- (1) Modify the document as deemed necessary and approve the document as modified; or
- (2) Return comments to Settling Respondent with recommended changes and a date by which Settling Respondent(s) must submit to DTSC a revised document incorporating the recommended changes.

(b) Any modifications, comments or other directive issued pursuant to (a) above, are incorporated into this Agreement. Any noncompliance with these modifications or directives shall be deemed a failure or refusal to comply with this Agreement.

9.10. Compliance with Applicable Laws. Settling Respondent shall carry out this Agreement in compliance with all applicable state, local, and federal laws, regulations and requirements including, but not limited to, requirements to obtain permits and to assure worker safety.

9.11. Sampling, Data and Document Availability. Settling Respondent shall permit DTSC and its authorized representatives to inspect and copy all sampling, testing, monitoring or other data generated by Settling Respondent or on Settling Respondent's behalf in any way pertaining to work undertaken pursuant to this Agreement. Settling Respondent shall submit all such data upon the request of DTSC. Copies shall be provided within seven (7) days of receipt of DTSC's written request. Settling Respondent shall inform DTSC at least seven (7) days in advance of all field sampling under this Agreement, and shall allow DTSC and its authorized representatives to take duplicates of any samples collected by Settling Respondent pursuant to this Agreement. Settling Respondent shall maintain a central depository of the data, reports, and other documents prepared pursuant to this Agreement.

9.12. Record Retention. All such data, reports and other documents shall be preserved by Settling Respondent for a minimum of ten (10) years after the conclusion of all activities under this Agreement. If DTSC requests that some or all of these documents be preserved for a longer period of time, Settling Respondent shall either comply with that request or deliver the documents to DTSC, or permit DTSC to copy the documents prior to destruction. Settling Respondent shall notify DTSC in writing, at least six (6) months prior to destroying any documents prepared pursuant to this Agreement and shall provide DTSC with an opportunity to copy any documents at the expense of DTSC.

9.13. Government Liabilities. The State of California shall not be liable for any injuries or damages to persons or property resulting from acts or omissions by Settling Respondent, or related parties specified in Section 9.5, Parties Bound, in carrying out activities pursuant to this Agreement, nor shall the State of California be held as party to any contract entered into by Settling Respondent or its agents in carrying out activities pursuant to this Agreement.

9.14. Additional Actions. By entering into this Agreement, DTSC does not waive the right to take any further actions authorized by law.

9.15. Extension Requests. If Settling Respondent is unable to perform any activity or submit any document within the time required under this Agreement, Settling Respondent may, prior to expiration of the time, request an extension of the time in writing. The extension request shall include a justification for the delay. All such requests shall be in advance of the date on which the activity or document is due.

9.16. Extension Approvals. If DTSC determines that good cause exists for an extension, it will grant the request and specify a new schedule in writing. Settling Respondent shall comply with the new schedule incorporated in this Agreement.

9.17. Severability. The requirements of this Agreement are severable, and Settling Respondent shall comply with each and every provision hereof, notwithstanding the effectiveness of any other provision.

9.18. Incorporation of Plans, Schedules and Reports. All plans, schedules, reports, specifications and other documents that are submitted by Settling Respondent pursuant to this Agreement are incorporated in this Agreement upon DTSC's approval or as modified pursuant to Section 9.9, DTSC Review and Approval, and shall be implemented by Settling Respondent. Any noncompliance with the documents incorporated in this Agreement, shall be deemed a failure or refusal to comply with this Agreement.

9.19. Modifications. This Agreement may be amended in writing by mutual agreement of DTSC and Settling Respondent. Any amendment to this Agreement shall be effective upon the date the modification is signed by DTSC and shall be deemed incorporated in this Agreement.

9.20. Time Periods. Unless otherwise specified, time periods begin from the Effective Date of this Agreement and "days" means calendar days.

9.21. Effective Date. The Effective Date of this Agreement is the date when this Agreement is fully executed.

9.22. Counterparts. This Agreement may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one and the same document.

9.23. Third Party Actions. In the event that the Settling Respondent is a party to any suit or claim for damages or contribution relating to the Site to which DTSC is not a party, the Settling Respondent shall notify DTSC in writing within ten (10) days after service of the complaint in the third-party action. Settling Respondent shall pay all costs incurred by DTSC relating to such third-party actions, including but not limited to responding to subpoenas.

9.24. Governing Law. This Agreement shall be construed and governed by the laws of the State of California.

9.25. Parties Bound. This Agreement shall apply to and be binding upon DTSC, and shall apply to and be binding on the Settling Respondent and its officers, directors, agents, employees, contractors, consultants, receivers, trustees, successors and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations, and upon any successor agency of the State of California that may have responsibility for and jurisdiction over the subject matter of this Agreement. Each signatory of a party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this

EXHIBIT ____

NOTICE OF PROPERTY TRANSFER AND
COVENANT NOT TO SUE

_____ [Name of Owner] (the "Undersigned") became an Owner [Holder of a Property Interest] of _____ [Address], California (the "Site") on _____, 19___. Capitalized terms not defined herein shall have the meaning ascribed in the Agreement (hereinafter defined).

1. The Undersigned, by signing below, verifies that it has read the Agreement and Covenant Not to Sue (the "Agreement"), DTSC Docket No. _____.
2. The Undersigned understands and agrees that Section 5.1 of the Agreement contains a DTSC Covenant not to pursue enforcement actions against the Owner of the Site (the "DTSC Covenant").
3. The Undersigned also understands and agrees that it may enjoy the benefits of the DTSC Covenant only if the Undersigned covenants not to sue the DTSC pursuant to the covenant set forth in Section 5.4 of the Agreement