

TOXIC SUBSTANCES CONTROL PROGRAM

OFFICIAL POLICY/PROCEDURE

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DESCRIPTION:

This document provides guidance for use in preparation of appropriate land use restrictions. Implementation of these procedures will help to ensure that land use on contaminated sites is appropriate and protective of public health and safety and the environment.

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DEVELOPMENT AND IMPLEMENTATION OF
LAND USE COVENANTS

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PURPOSE

Implementation of land use restrictions is one of the methods that the Department of Health Services (DHS or Department) can use to protect the public from unsafe exposures to hazardous wastes. This policy describes the procedures for implementing land use restrictions pursuant to several different statutes of the Health and Safety Code (H&SC).

The Department may either enter into agreements with property owners to restrict land use or unilaterally impose land use restrictions. The land use restriction process can be used in conjunction with the following actions:

- o granting interim status or permit to operate a facility;
- o short or long term stabilization (to prevent incompatible land use, ensure long term operation and maintenance, and ensure environmental monitoring);
- o remediation that includes residual hazardous waste remaining on-site (to prevent unrestricted land use which could result in unsafe exposures to that residual hazardous waste); and
- o sites for which no remediation has occurred (to prevent unrestricted land use which could result in unsafe exposures to the unremediated hazardous wastes).

Land use restrictions are provisions set forth in a document which can specify requirements on real property and affect the title to property. Usually they are found during a title search of county records. The document is generally referred to as a covenant or as a written instrument. Land use restrictions entered into or required by DHS under the authority of these H&SC sections "run with the land" i.e., are binding on current and subsequent property owners, and remain in effect until they are formally removed or modified.

This policy:

- A. Explains when it is appropriate to enter into or require a covenant which places restrictions on land use.
- B. Describes how to develop a covenant.
- C. Provides examples of the content of covenants.
- D. Provides a standard format for the covenants.

BACKGROUND

A. Purpose of Land Use Restrictions

The purpose of land use restrictions is to protect the public health and safety on contaminated land or the surrounding property. This can be done by using land use restrictions to:

1. Prevent inappropriate land use on
 - a. property containing residual contamination or
 - b. the surrounding property.
2. Guarantee that information about property containing residual contamination is available to local governments and the public.
3. Disclose to real estate transaction participants (buyers, sellers, lending institutions, brokers) that the property in question contains residual contamination.
4. Ensure that long-term mitigation measures or monitoring requirements are carried out and maintained.
5. Ensure that subsequent property owners or lessees have a duty to assume responsibility for any requirements or restrictions pertaining to residual contamination when they take over the property.

Land use restrictions may be appropriate when there is residual contamination on a property. The contamination could be hazardous waste that is left in place upon closure of a hazardous waste disposal facility, or it could be contamination that is left in place as part of either a short or long term stabilization action, a corrective action, or a planned remedial action.

For example, soil contamination may be:

1. Immobile and no threat to ground water, and
2. Contained to prevent inhalation, ingestion, or direct contact exposure to nearby populations.

In these situations, leaving the contamination in place and restricting the land use may be the preferred mitigation strategy.

In the case of hazardous waste landfills, control of off-site migration of waste constituents is needed for many years. Land use restrictions may be used to ensure that control technologies and monitoring systems are properly maintained and operated, and that land use is restricted to prevent exposure.

B. Statutory Authority for Land Use Restrictions

The Department has the authority to place land use restrictions on property based on four statutes and/or regulations. These are:

1. Remediated Sites -- H&SC Section 25355.5, requires preparation of remedial action orders or enforceable agreements for site mitigation. Enforceable agreements for remediated sites may include provisions for land use restrictions prior to or as part of the development of a remedial action plan.
2. Hazardous Waste Property/Border Zone Property -- If property is designated hazardous waste property or border zone property through a formal process including a public hearing, the owner is required to execute a written instrument (i.e., covenant) which imposes land use restrictions on the property (Section 25229, H&SC).

As an alternative to this formal process, DHS and a property owner may enter into a mutually agreed upon covenant regarding appropriate land use restrictions (Section 25222.1, H&SC). In this case, public notice of the proposed covenant is required (Section 25223, H&SC). (See OPP # 87-5, Public Notice Requirements.)

3. Permitted and Interim Status Hazardous Waste Disposal Facilities (Post-Closure) and Waste Piles and Surface Impoundments Under Certain Conditions -- Title 22, Section 67220 California Code of Regulations (CCR), requires the owner or operator of a hazardous waste disposal facility which has undergone closure, to place a notice on the property deed that the land has been used to manage hazardous waste. The notice refers to the use restrictions of Section 67217(d) and the security requirements of Section 67103, CCR, if wastes remain after closure or if access by the public or domestic livestock may pose a hazard to human health. Section 67220 in itself allows DHS to require the landowner to record only a brief notice. A covenant to place land use restrictions must be authorized by one of the other statutes identified in this policy.

4. Operating Permitted or under Grant of Interim Status Hazardous Waste Facilities -- DHS may require the owner to execute and record covenants or written instruments which impose land use restrictions as a condition of the permit or grant of interim status for hazardous waste facilities (Section 25202.5(a), H&SC). Additionally, Section 25202.5(c), H&SC, authorizes DHS to impose land use restrictions on a minimum buffer zone of 2,000 feet surrounding a new hazardous waste disposal facility.

Note: for any removal actions (i.e. short or long term stabilization) that include land use restrictions to be legally binding on present and future property owners, either an enforceable agreement, under H&SC Section 25355.5, or a mutually agreed upon covenant, under H&SC Section 25222.1, is required.

LAND USE COVENANT DEVELOPMENT

A. Types of Land Use Restrictions

The H&SC allows DHS to require various types of land use restrictions in the covenant, as appropriate. The covenant may include a combination of easements, covenants, restrictions, and servitudes. Easements allow access to property; for example, so operation and maintenance requirements can be performed. Note the term "covenant" refers to provisions in the written instrument which are agreed upon as well as the written instrument itself. Restrictions are specific provisions which apply to the use of the property; for example, prohibiting use as hospitals, schools, or day care facilities. Servitudes are specific provisions which apply to the property owner and either oblige or restrict the property owner; i.e., restraining the property owner from certain uses of his or her property which would impair an established easement. (See Glossary at the end of the document, for definition of these terms.)

The land use restrictions, or provisions, in the covenant must be site-specific and applicable to particular site conditions. Provisions may either require the property owner to follow particular criteria or prohibit the property owner from certain actions.

For example, provisions could be used to require the performance of certain activities, such as:

1. Ground water monitoring.
2. Surface water monitoring.

3. Monitoring of ambient air, subsurface gas, or indoor air.
4. Periodic soil sampling and analysis.
5. Contingency plans in the event that monitoring detects contamination at levels of concern.
6. Inspection, maintenance, and repair of monitoring systems.
7. Construction and maintenance of gas extraction or gas collection systems.
8. Maintenance of vegetative ground cover.
9. Maintenance of soil caps, liners, or other site specific containment systems.
10. Construction and maintenance of fencing, gates, or walls.
11. Posting and maintenance of warning signs.
12. Proper handling of excavated materials.
13. Other site-specific activities which are needed to protect public health or safety.

Also, provisions could be included to restrict use, such as:

1. Any new use on the site.
2. Any use other than the expansion or modification of an existing industrial facility.
3. Residential, agricultural, commercial, or industrial use.
4. Hospitals, day-care centers, schools, or other permanently occupied nonindustrial human habitation.
5. Any use of the site which would disturb the integrity of any hazardous waste containment or monitoring system.
6. Any disturbance of the soil, such as excavation, grading, removal, trenching, filling, mining or drilling of gas, oil, or water wells.
7. Any activities which would cause a potential threat to public health and safety.

In addition to site-specific provisions, a covenant should spell out general restrictions or requirements. These may include:

1. Granting of an easement to DHS for inspection, surveillance, monitoring, maintenance, or other purposes necessary to protect public health or safety.
2. Prohibiting of property subdividing except as allowed under conditions specified in Sections 25232(a)(2) and 25232(b)(2), H&SC.
3. A requirement for notification sent by the owner of nonresidential property to purchasers, lessees, and tenants stating that there is residual contamination as specified in Section 25359.7(a), H&SC.
4. A requirement that the owner give notice in all leases, subleases, and rental agreements that there is residual contamination.
5. A requirement for advance notice to DHS of any sale, lease, or other conveyance of the property.
6. Requirement for a deed notice notifying potential purchasers that the property has been used to manage hazardous waste and that use of the property is restricted in accordance with Section 67217 CCR (For hazardous waste disposal facilities undergoing closure or post-closure).
7. Provisions for enforcement, variance, and termination.
8. A requirement that the provisions set forth in the covenant "run with the land", must be recorded in the county where the property is located, and are for the benefit of and enforceable by DHS.

B. Selection of Appropriate Land Use Restrictions

Recommendation of specific provisions for covenants should be made by regional office project managers or permit writers. A legal description of the property and/or contaminated areas, parcel maps, and detailed site maps which show contaminated areas are necessary to define the restricted areas. Specific provisions should be chosen based on the project manager's or permit writer's assessment of available site-specific information.

After reviewing the available information, the project manager or permit writer should consider the following questions:

1. Which of the four types of sites is under consideration?
2. Should the land use restrictions, or provisions, be applied to specific areas only or to the property as a whole?
3. What specific restrictions or requirements are necessary to protect public health or safety, taking into consideration the nature and extent of residual contamination, potential exposure pathways, and possible future land use?

Based on consideration of these questions and the conditions on the site, land use restrictions appropriate to the property should be selected and incorporated into the covenant. Attachment A gives some examples of how project managers and permit writers might choose appropriate land use restrictions to meet site conditions.

C. Modification, Variance, or Removal of a Covenant

Under covenants imposed pursuant to Section 25202.5, H&SC, owners of hazardous waste facilities may request modification or removal of covenant provisions. DHS could approve modification or removal of specific provisions following a public hearing (Section 25202.6, H&SC).

Similarly, for covenants imposed pursuant to Sections 25222.1, 25229, or 25355.5, H&SC, aggrieved persons may also apply to DHS for a variance or removal of land use restrictions (Sections 25233 and 25234, H&SC). In the case of a variance, the applicant has the burden of proving that the variance will not lead to any of the following:

1. The creation or increase of significant present or future hazard to public health.
2. Any substantial decrease of the ability to mitigate a significant potential or actual hazard to public health.
3. Any long-term increase in the number of humans or animals exposed to significant hazards which affect the health, well-being or safety of the public.

In addition, DHS could remove land use restrictions if there is sufficient evidence for a finding that:

1. The hazardous waste which caused the land to be restricted has since been removed or altered in a manner which precludes any significant existing or potential hazard to present or future public health, or
2. New scientific evidence is available since the land use restrictions were placed concerning the nature of the hazardous waste or concerning the geology or other physical environmental characteristics of the land that would remove the existing or potential hazard to present or future public health.

D. Format of a Covenant

The recommended format for land use restrictions is a written instrument called a covenant. This is a signed, separate legal instrument attached to an existing property deed. The covenant affects the title to real property only if it is signed by both DHS and all the owners of title and has been recorded.

Parties to a covenant may select an appropriate format suitable to their needs. Attachment B is an outline of a standardized format which has been developed specifically for use by the Toxic Substances Control Program staff. It may be used by the regional office project manager or permit writer. An example of a recommended covenant for remediated sites is included as Attachment C. A list of variations for the other types of sites is included as Attachment E.

ROLES AND RESPONSIBILITIES

Development and implementation of a covenant placing land use restrictions for specific sites is primarily a regional office function. As directed by their supervisor, a project manager or permit writer may: recommend appropriate land use restriction provisions; negotiate agreements with the site owner; prepare the covenant; obtain the necessary signatures; and ensure that the covenant is recorded. Line approval is necessary. Only Regional Administrator/Division Chief and above can be a signatory of the covenant or agreement for the Department.

Headquarters units provide technical and procedural assistance to the project manager or permit writer, review the covenant, recommend revisions as appropriate, and maintain a program-wide tracking system.

The specific roles and responsibilities of the regional offices and the Headquarters units are as follows:

A. Regional Offices

1. Identify sites for which land use restrictions are appropriate.
2. Assess the available site information in order to determine the site-specific requirements and restrictions which are necessary.
3. Negotiate covenants with property owners.
4. Prepare draft covenants and send to Headquarters units for review.
5. Prepare final covenant.
6. Serve public notice of covenant and conduct public hearing as necessary.
7. Obtain signatures of owner and Department representative (Regional Administrator/Division Chief above to Director only).
8. Make sure that the owner records the covenant with the County Recorder within ten days.
9. Maintain a regional file and tracking system for covenants.
10. Respond to applications for modification, variance, and removal of covenants.

B. Headquarters Units

1. Provide technical and procedural assistance to the regional office project managers and permit writers on land use restriction development and implementation (Technical Services and Toxics Legal Office).
2. Review draft covenants on request from the regional offices (Technical Services and Toxics Legal Office).
3. Assist as necessary in negotiations and advise Division staff on legal issues relating to land use restrictions (Toxics Legal Office).

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4. Provide training on land use restrictions to project managers, permit writers, and other Division staff (Technical Services and Toxics Legal Office).
5. Maintain a program-wide file and tracking system for all draft and final covenants.
6. Notify the planning and building departments of each city, county, or regional council of governments of any covenant within the jurisdiction of the local agency.

GLOSSARY

1. Border Zone Property (Section 25117.4, H&SC). Border zone property is property which is located within 2,000 feet of a significant disposal of hazardous waste which has been formally designated as border zone property through a process specified in Sections 25229 and 25230, H&SC.
2. Consent Order (Enforceable Agreement). A consent order is a legally enforceable, corrective order issued by DHS for remedial action on a contaminated site. A consent order is issued when DHS is working with a potentially responsible party. The DHS and the responsible party reach agreement on the conditions specified in the order (Section 25355.5 (a)(1)(C), H&SC).
3. Covenant. A legal, written instrument which sets out land use restrictions on a specific property. A covenant can also refer to a specific agreed upon provision in the written instrument.
4. Deed. A written document that conveys title to real property and that is recorded with the County Recorder.
5. Land Use Restriction (Section 25117.13, HS&C). A provision in a written instrument (covenant) limiting the use of the land or requiring that certain conditions be met. Easements, covenants, restrictions, and servitudes are the four different types of provisions.
6. Easement. The right, privilege, or interest one party has in the land of another; often used to allow access to property for certain purposes (e.g., monitoring).
7. Hazardous Waste Property (Section 25117.3, H&SC). Hazardous waste property is either 1) property on which there is a significant disposal of hazardous waste and which has been formally designated by DHS as hazardous waste property through a process specified in Sections 25229 and 25230, H&SC, or 2) a hazardous waste facility which has a permit for disposal or has submitted an application for such a permit.
8. Notice in Deed. A statement in the deed that the property is the site of hazardous waste contamination. Treatment, storage, and disposal facilities must meet the hazardous waste Notice in Deed requirements of Title 22, Section 67220, of the California Code of Regulations.

Glossary, cont.

9. Recording a Covenant. After the covenant is signed by all parties, it must be recorded by the County Clerk of the county in which the property is located. A recorded covenant is enforceable and legally binding; an unrecorded one generally is not.
10. Real Property. Real property is defined in law to be land and generally whatever is erected on or growing upon or affixed to land.
11. Remedial Action Order. A Remedial Action Order is a legally enforceable corrective order issued by the Department for remedial action on a contaminated site.
12. Restriction. Provision in a covenant imposing a limitation on the use of the real property.
13. Run with the Land. An expression which indicates that a right or restriction on the deed affects all current and future owners of a property.
14. Servitudes, Mutually Equitable Servitude. A type of land use restriction used by DHS in covenants. A positive servitude obliges the owner of an estate to permit another person to do something on the property, i.e., perform monitoring. A negative servitude restrains the owner from making a certain use of the property which would impair an easement enjoyed by another.
14. Title. Evidence of ownership.

ATTACHMENT A

EXAMPLES OF SITE CONDITIONS AND APPROPRIATE DEED RESTRICTIONS

<u>SITE CONDITIONS</u>	<u>APPROPRIATE DEED RESTRICTION</u>
Hazardous waste containment systems need maintenance, inspection, record-keeping, or monitoring.	Specify those containment systems in the covenant.
Residual wastes are localized in specified portions of a property and there is little potential for future migration of residual wastes.	Apply the restriction to only those portions of the property. Identify an appropriate safety zone if necessary.
The nature and extent of residual contamination is certain.	Restrict inappropriate use as determined by site-specific evaluation. For example, restrict residential but not commercial or industrial development as appropriate.
The nature and extent of residual contamination is uncertain.	Restrict all new uses of the property until the nature and extent of the residual contamination has been defined.
A potential for significant exposure to hazardous waste exists.	Describe the potential for exposure and specify protection measures.
A potential for migration of residual wastes exists.	Describe the potential hazard and specify whatever containment or monitoring systems need to be installed or maintained. Identify an appropriate safety zone if necessary.

GENERAL RECOMMENDED COVENANT OUTLINE ¹

Introductory Statement and Description of Facts ²

Article I: General Provisions

- 1.01 Provisions to Run With the Land
- 1.02 Concurrence of Owners Presumed
- 1.03 Incorporation into Deeds and Leases

Article II: Definitions

- 2.01 Department
- 2.02 Improvements
- 2.03 Occupants
- 2.04 Owner

Article III: Development, Use, and Conveyance of the Property

- 3.01 Restrictions on Use ^{2, 3}
- 3.02 Conveyance of Property
- 3.03 Enforcement
- 3.04 Notice in Lease

Article IV: Variance and Termination

- 4.01 Variance
- 4.02 Termination
- 4.03 Term

Article V: Miscellaneous

- 5.01 No Dedication Intended
- 5.02 Notices ²
- 5.03 Partial Invalidity
- 5.04 Article Headings
- 5.05 Recordation
- 5.06 References

Signature Page

Exhibits

-
- ¹
 - ² Additional sections can be added to each article as needed.
 - ³ To be completed by the regional office project manager.
 - Include specific land use restrictions; project managers may refer to "Types of Land Use Restrictions" and "Selection of Appropriate Land Use Restrictions" in drafting this section.

MODEL SMP DEED RESTRICTION (AUGUST 7, 1998)
REMOVE THE TITLE ABOVE AND THIS SENTENCE BEFORE USING THIS MODEL

RECORDING REQUESTED BY: |
[Covenantor's name] |
[street address] |
[City], California [zip code] |

WHEN RECORDED, MAIL TO: |

Department of Toxic Substances Control |
Region ___ |
[street address] |
[City], California [zip code] |
Attention: [name of Branch Chief], Chief |
[branch designation] |

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

COVENANT TO RESTRICT USE OF PROPERTY

ENVIRONMENTAL RESTRICTION

(Re: *[Insert parcel number(s) and name of site property to be restricted.]*)

This Covenant and Agreement ("Covenant") is made by and between *[name of Covenantor]* *[Note: "Covenantor" must include all parties who are owners of record of the real property. Verify ownership in the records at the County Recorder's Office.]*¹ (the "Covenantor"), the current owner of property situated in *[city]*, County of [], State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471(c), the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a

¹In this model deed restriction language in parentheses should be included in the deed restriction. Language in brackets is given either as guidance *[bold italics]* or as optional language that may have to be adapted to comport with the particular facts of the property to be restricted.

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result of the presence on the land of hazardous materials as defined in Health and Safety Code ("H&SC") section 25260. The Covenantor and the Department, collectively referred to as the "Parties", hereby agree that the use of the Property be restricted as set forth in this Covenant.

ARTICLE I
STATEMENT OF FACTS

1.01. The Property, totaling approximately [] acres [] square yards] is more particularly described and depicted in Exhibit "A", attached hereto and incorporated herein by this reference. *[Exhibit "A" must include the legal description of the property used by the county recorder. If the property does not already have a legal description (it generally will not if it is a portion of a larger piece of property) a survey will be required.]*

The Property is located in the area now generally bounded by *[include narrative description of the area; this will typically be street names: e.g., Main Street on the north, Maple Street on the east, etc.]* County of [], State of California. This property is more specifically described as [] County Assessor's Parcel No.(s): [] *[list exact Assessor's Parcel number(s)]*

1.02. *[Use this paragraph if imposing additional restrictions on a portion of the Property, for example on a capped portion, or if for any other reason it is necessary to precisely identify any portion of the property, such as an area with groundwater monitoring wells. The purpose of this paragraph is to give the precise location of such areas. Renumber following paragraphs accordingly.]* A limited portion of the Property is more particularly described in Exhibit "B" which is attached and incorporated by this reference ("Capped Property") as defined below *[or "(other identified) Property"]*. *[Exhibit B must include a legal description of the exact area(s) being restricted and any necessary diagram(s). This will generally require a legal survey*

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and engineering drawing for the Cap or other area to be further restricted.] The [Capped (or other description)] Property is located in the area now generally bounded by []. *[Include language that generally describes the Capped or other identified Property.]* The [Capped (or other identified) Property] is also more specifically described as encompassing [] County Assessor's Parcel No.(s) [].

1.03. *[Briefly describe the remedial measures implemented at the Property, including, if applicable, installation of a cap and construction and ongoing operation and maintenance of a groundwater treatment system, in order to identify the remaining contaminants and physical remedial measures on the Property that necessitate this deed restriction. This paragraph should refer to, and give the approval date for, the RAP, ROD, RAW or other decision document that selected the remedial measures at the Property and required this Covenant.]*

SAMPLE [For a property with remaining contamination, but no cap, O&M, or other ongoing response activities]: The Property is [a portion of a site] being remediated pursuant to a Remedial Action Plan pursuant to Chapter 6.8 of Division 20 of the H&SC, under the oversight of the Department. The Remedial Action Plan provides that a deed restriction be required as part of the site remediation, because lead, which is a hazardous substance, as defined in H&SC section 25316, and a hazardous material as defined in H&SC section 25260 remains at depths of 10 feet or more below the surface of the Property. The Department circulated the Remedial Action Plan, which contains a Final Health Risk Assessment, together with a draft [negative declaration] [environmental impact report] pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. for public review and comment. The Remedial Action Plan and the [negative declaration] [environmental impact report], were approved by the Department

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on [date], pursuant to which the Property was excavated to a depth of 10 feet, graded, then backfilled with clean soil.

SAMPLE [For a property with ongoing operation and maintenance of a monitoring or treatment system and/or cap. The exact provisions of this paragraph will vary depending upon the facts of the particular site or facility. The paragraph below is illustrative of the kind of information that should be included. Note specifically there is reference to a signed Operation and Maintenance Agreement.]: [Covenantor] [or party responsible for the activity, if different from Covenantor] is remediating the Property under the supervision and authority of the Department. The Property is [a portion of a site] being remediated pursuant to a Remedial Action Plan pursuant to Chapter 6.8 of Division 20 of the H&SC. Because hazardous substances, as defined in H&SC section 25316, which are also hazardous materials as defined in H&SC section 25260, including volatile organic compounds, total petroleum hydrocarbons, chlorinated benzenes and polychlorinated biphenyls, remain in the soil and groundwater in and under portions of the Property, the Remedial Action Plan provides that a deed restriction be required as part of the site remediation. The Department circulated the Remedial Action Plan, which contains a Final Health Risk Assessment, together with a draft [negative declaration] [environmental impact report] pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. for public review and comment. The Remedial Action Plan and the [negative declaration] [environmental impact report], were approved by the Department on [date]. Remediation includes installing and maintaining a synthetic membrane cover ("Cap") over the Capped Property. The Cap consists of a low permeability synthetic membrane and other associated layers, as more particularly described in the engineering drawing attached as Exhibit "B" hereto. The response action also includes the installation and

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operation of: (1) a passive gas collection system on the Capped Property which removes volatile organic compounds migrating upward from under the Cap, (2) a vapor extraction system, which remediates certain volatile organic compound-impacted soils, and (3) groundwater monitoring wells ("Monitoring Wells"). The location of the gas collection system, vapor extraction system, and Monitoring Wells are shown on Exhibit "B". ***[This exhibit will have been identified in paragraph 1.02.]*** The operation and maintenance of the Cap, gas collection system, vapor extraction system, and Monitoring Wells is pursuant to an Operation and Maintenance Manual incorporated into the Operation and Maintenance Agreement between [Covenantor] ***[or name of other entity]*** and the Department dated []. ***[If an O&M Agreement has not been signed, the approval date for the O&M Manual or Plan should be referenced.]***

1.04. ***[This paragraph should set out specific information about the risk assessment findings relevant to the contaminants of concern remaining at the property, essentially the basis for the restrictions imposed by this covenant. The Restrictions in Paragraphs 4.01, and any requirement for Soil Management Activity and any Prohibited Activity must be linked to the contaminants and risk assessment as discussed in this paragraph. The following paragraph is given for purposes of illustration. Each site will have different facts; those should be developed in a manner similar to the sample paragraph given here. Land use must be consistent with the approved RAW, RAP or ROD and the health risk assessment.]***

SAMPLE: As detailed in the Final Health Risk Assessment ***[or other appropriate document]*** as approved by the Department on [date], all or a portion of the surface and subsurface soils within 10 feet of the surface of the Property contain hazardous substances, as defined in H&SC section 25316, which

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include the following metal contaminants of concern in the ranges set forth below: arsenic (0.3 to 38.1 parts per million ("ppm")), beryllium (2.6 ppm), copper (4.6 to 756 ppm, and nickel (7.3-105 ppm). In addition, there are low pH soils. Based on the Final Risk Assessment the Department concluded that use of the Property as a residence, hospital, school for persons under the age of 21 or day care center would entail an unacceptable cancer risk. The Department further concluded that the Property, as remediated, and subject to the restrictions of this Covenant, does not present an unacceptable threat to human safety or the environment, if limited to *[as applicable: commercial and industrial, parks, open space, [or other appropriate]]* use.

SAMPLE: [Note: Groundwater restrictions in Paragraph 3.04 must be based on a discussion of what contaminants are found in groundwater at the site, and what the drinking water standards are.]

Groundwater at the Property is found 15 to 20 feet below ground surface. Contaminants in the groundwater include benzene (50- 123 ppm), chromium (75- 213 ppm) and TCE (350-780 ppm). California drinking water standards are benzene at 0.08 ppm, chromium at 30 ppm and TCE at 5 ppm. The Department concludes that the groundwater presents an unacceptable threat to human health and safety.

ARTICLE II
DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and

assigns, who at any time hold title to all or any portion of the Property.

2.03. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

ARTICLE III
GENERAL PROVISIONS

3.01. Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to H&SC section 25355.5(a)(1)(C) and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property, (c) is for the benefit of, and is enforceable by the Department, and (d) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to H&SC section 25355.5(a)(1)(C), this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471(b), all successive owners of the Property are expressly bound hereby for the benefit of the Department.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease or sublease of the Property, or any portion thereof, the owner, lessor, or sublessor shall give the buyer, lessee, or sublessee notice that hazardous substances are located on or beneath the Property, as required by H&SC section 25359.7.

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3.04. Incorporation into Deeds and Leases. The Restrictions set forth herein shall be incorporated by reference in each and all deeds and leases for any portion of the Property.

3.05. Conveyance of Property. The Owner shall provide notice to the Department not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessory encumbrances). The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE IV
RESTRICTIONS

[The following examples are intended to be illustrative. Not all of them will be applicable. The restrictions for a particular property should have a direct relationship to what the Health Risk Assessment said was appropriate for use at the site. The restrictions must also protect the integrity and physical accessibility of, and legal rights of access to, any ongoing remediation facilities at the site.]

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes: *[Note: These prohibitions must be based on the appropriate decision documents as set forth in Paragraphs 1.03 and 1.04]*

[Sample provisions:]

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.

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- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.

4.02. Soil Management [Note: The basis for the soil restrictions must be in Paragraphs 1.03 and 1.04]

[Sample provisions]

- (a) No activities that will disturb the soil [at or below [] feet below grade] (e.g., excavation, grading, removal, trenching, filling, earth movement or mining) shall be allowed on the Property without a Soil Management Plan and a Health and Safety Plan approved by the Department.
- (b) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.
- (c) The Owner shall provide the Department written notice at least fourteen (14) days prior to any building, filling, grading, mining or excavating in the Property [more than [] feet below the soil surface] [which will remove more than [] cubic yards of soil].

4.03. Prohibited Activities. [This paragraph will not be applicable to all sites. If not used, renumber accordingly. If there are groundwater restrictions, the basis must be in Paragraphs 1.03 and 1.04] The following activities shall not be conducted at the Property:

[Sample provisions]

- (a) Raising of food (cattle, food crops).;
 - (b) Drilling for [drinking] water, oil, or gas [without prior written approval by the Department].
- [or] (b) Extraction of groundwater for purposes other than

site remediation or construction dewatering.

[The following paragraphs are samples of restrictions that may be applicable when there is a cap, vapor and/or gas collection system, and/or groundwater monitoring system.]

4.04. Non-Interference with Cap [and Vapor Extraction System (VES)] and [Groundwater Capture System (GCS)]. Covenantor agrees:

[Sample provisions:]

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the Capped Property without prior review and approval by the Department. ***[Similar restrictions may be appropriate for other ongoing remediation systems.]***
- (b) All uses and development of the Capped Property shall preserve the integrity [***(if appropriate:)*** and physical accessibility] of the Cap. ***[Extend to other systems as appropriate.]***
- (c) The Cap shall not be altered without written approval by the Department.
- (d) Covenantor shall notify the Department of each of the following: (i) the type, cause, location and date of any damage to the Cap and (ii) the type and date of repair of such damage. Notification to the Department shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Timely and accurate notification by any Owner or Occupant shall satisfy this requirement on behalf of all other Owners and Occupants. ***[Extend to other systems as appropriate.]***

4.05. Access for Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities

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consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment.

4.06. Access for Implementing Operation and Maintenance. *[To be used at all sites with ongoing O&M activities]* The entity or person responsible for implementing the Operation and Maintenance [Agreement] *[or Manual or Plan or Activities, as appropriate, if there is no O&M Agreement]* shall have reasonable right of entry and access to the Property for the purpose of implementing the Operation and Maintenance [Agreement or Manual or Plan or Activities] until the Department determines that no further Operation and Maintenance is required.

ARTICLE V
ENFORCEMENT

5.01. Enforcement. Failure of the Covenantor, Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department to require that the Covenantor or Owner modify or remove any improvements ("Improvements" herein shall mean all buildings, roads, driveways, and paved parking areas); constructed or placed upon any portion of the Property in violation of the Restrictions. Violation of this Covenant shall be grounds for the Department to file civil or criminal actions as provided by law.

ARTICLE VI
VARIANCE, TERMINATION, AND TERM

6.01. Variance. Covenantor, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with H&SC section 25233.

6.02 Termination. Covenantor, or any other aggrieved person,

may apply to the Department for a termination of the Restrictions or other terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with H&SC section 25234.

6.03 Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

ARTICLE VII
MISCELLANEOUS

7.01. No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever.

7.02. Department References. All references to the Department include successor agencies/departments or other successor entity.

7.03. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of [name of county] within ten (10) days of the Covenantor's receipt of a fully executed original.

7.04. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

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To Owner: [include name and address of Owner and name of person to receive service]

To Department: [title and address of Regional Branch Chief.]

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. Partial Invalidity. If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06 Statutory References. All statutory references include successor provisions.

IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor: [name of Covenantor]

By: _____

Title: [signatory's name and title]

Date: _____

Department of Toxic Substances Control

By: _____

Title: [signatory's name and title]

Date: _____

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STATE OF CALIFORNIA)

)

COUNTY OF _____)

On this _____ day of _____, in the year _____,

before me _____, personally appeared

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

DOCUMENT VARIATIONS FOR OTHER SITES

I. Hazardous Waste Property/Border Zone Property

A. Section 1.01 Substitute:

~~25222.1~~ and ~~25222.1~~ with 25222.1
if the Owner is entering into the deed restriction
voluntarily or

~~25229.~~ and ~~25229.~~ with 25229.
if the Owner is entering into the deed restriction as a
result of a decision by the Director after a public
hearing.

B. Section 3.04 Substitute and add the following:

"The land described herein contains hazardous waste or
is within 2,000 feet of land that contains hazardous
waste. Such condition renders the land and the owner,
lessee, or other possessor of the land subject to
requirements, restrictions, provisions, and liabilities
contained in Chapter 6.5 and Chapter 6.8 of Division 20
of the Health and Safety Code. This statement is not a
declaration that a hazard exists".

II. Permitted and Interim Status Hazardous Waste Disposal
Facilities (Post-Closure) and Waste Piles and Surface
Impoundments Under Certain Conditions (Closure)

A. Section 1.01 Substitute:

~~25202.5~~ with 25202.5
~~25202.6~~ with 25202.6

B. Section 3.01 Add the following (22 CCR 67220):

(1) The land has been used to manage hazardous
waste.

(2) Its use is restricted under 22 CCR
Section 67217(c).

C. Section 4.01 Substitute the following:

Modification or Removal. Any Owner or, with the
Owner's consent, any Occupant of the Property or any

portion thereof may apply to the Department for modification or removal of the provisions of this Covenant. Such application shall be made in accordance with Section 25202.6, H&SC.

D. Section 4.02 Substitute:

~~TERMINATION//ANY/OWNER/OF//WHICH/THE/OWNER/IS/COBSENY/
AN/OCCUPANT/OF/THE/PROPERTY/OF/A/PORTION/THEREOF/MAY
APPLY/TO/THE/DEPARTMENT/FOR/A/TERMINATION/OF/THE
RESTRICTIONS/AS/THEY/APPLY/TO/ALL/OF/ANY/PORTION/OF/THE
PROPERTY//SUCH/APPLICATION/SHALL/BE/MADE/IN/ACCORDANCE
WITH/SECTION/25224/H&SC/ with~~

Term. Unless terminated in accordance with paragraph 4.02 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

E. Section 4.03 Delete completely.

~~A/OF//TERM//UNLESS//TERMINATED//IN//ACCORDANCE//WITH
PARAGRAPH//4/02//ABOVE//BY//LAW//OR//OTHERWISE//THIS
COVENANT/SHALL/CONTINUE/IN/EFFECT/IN/PERPETUITY/~~

III. Operating Permitted Hazardous Waste Facilities

Change A. of first paragraph of model to read:

A. (Choose one): This property has been, or will be, the site of a hazardous waste facility; or is adjacent to the site of a hazardous waste facility.

A. Section 1.01 Substitute:
25255/X with 25202.5
25255/X with 25202.6

B. Section 3.01 For new disposal facilities include a deed restriction which applies to a 2,000 foot buffer zone around the facility.

C. Section 3.04 Substitute:

"The land described herein contains hazardous waste has been the site of a hazardous waste facility or is adjacent to a hazardous waste facility. Such condition renders the land and the owner, lessee, or other possessor of the land subject to requirements, restrictions, provisions, and liabilities contained in

Chapter 6.5 and Chapter 6.8 of Division 20 of the Health and Safety Code. This statement is not a declaration that a hazard exists".

D. Section 4.01 Substitute:

Modification or Removal. Any Owner or, with the Owner's consent, any Occupant of the Property or any portion thereof may apply to the Department for modification or removal of the provisions of this Covenant. Such application shall be made in accordance with Section 25202.6 of the California Health and Safety Code.

E. Section 4.02 Substitute:

TERMINATION // ANY OWNER OR, WITH THE OWNER'S CONSENT, AN OCCUPANT OF THE PROPERTY OR A PORTION THEREOF MAY APPLY TO THE DEPARTMENT FOR A TERMINATION OF THE RESTRICTIONS AS THEY APPLY TO ALL OR ANY PORTION OF THE PROPERTY // SUCH APPLICATION SHALL BE MADE IN ACCORDANCE WITH SECTION 25202.6 // HSC, with Term. Unless terminated in accordance with paragraph 4.02 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

F. Section 4.03 Delete completely.

A/DZ // Term // UNLESS TERMINATED IN ACCORDANCE WITH PARAGRAPH // A/DZ // ABOVE, // BY // LAW // OR // OTHERWISE, // THIS COVENANT SHALL CONTINUE IN EFFECT IN PERPETUITY.