

**INITIAL STATEMENT OF REASONS
LAND USE COVENANTS AND DEED RESTRICTIONS
Department Reference Number: R-99-17**

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

At this time, there is no equivalent federal program that this regulation would conflict with or duplicate.

STUDIES RELIED ON

The Department of Toxic Substances Control (DTSC) did not rely on any studies in the preparation of these regulations. A draft Notice of Exemption under the California Environmental Quality Act is available for review with the rulemaking and will be filed with the State Clearinghouse when the regulations are adopted.

ALTERNATIVES CONSIDERED

To solicit comments on DTSC's proposed regulations, DTSC conducted a public workshop on December 5, 2000, posted the proposed regulations on DTSC's Internet site, and made copies available upon request. DTSC will also post the rulemaking package (notices/public comment period) on its Internet site.

DTSC considered several alternatives.

Recommended Alternative 1: Draft regulations that clarify when it is appropriate to establish land use covenants; when it is appropriate to require that land use covenants be recorded; when to execute and record land use restrictions for properties owned by the federal government; and when it is not feasible to record land use covenants for properties owned or controlled by the federal government.

Alternative 2: Take no action. DTSC would continue to depend on its statutory authorities and Official Policy and Procedure #87-14 for requiring land use covenants to be recorded when contamination is being left at a site to ensure that public health and safety and the environment is adequately protected. Various federal military facilities have complained that DTSC does not apply this policy consistently, and have argued that they do not have to comply with it. Therefore, in order to avoid inconsistencies and ensure that land use covenants are properly recorded, this alternative is not recommended.

Alternative 3: Require all property to be cleaned up to unrestricted use before a site can be certified as being satisfactorily complete. This alternative is not recommended because there are legitimate reasons for imposing land use restrictions that "run with the land" and limit the use of property to industrial, commercial or other nonresidential purposes. For some property, cleanup to unrestricted uses may not be the best option due to the extent and nature of contamination, high costs of cleanup, or technical

infeasibility. Although these types of properties would need institutional controls to protect against future exposures, the properties may still be used productively. For example, it may not be possible to cleanup a large landfill to unrestricted future land use. Although not suitable for housing, schools, or hospitals, some landfill properties have been redeveloped as golf courses, botanical gardens, parks, ecological reserves, or have been capped by roadways or industrial/commercial centers.

DETAILED STATEMENT OF REASONS

A detailed statement of reasons for each subsection of section 67391.1, chapter 39, division 4.5, title 22, California Code of Regulations follows. Overall, this section provides specific details regarding the application of appropriate land use covenants and includes definitions of terms and activities that are applicable to requiring land use covenants. The proposed regulations are based on DTSC's statutory authorities and reflect policy and procedures that have been in existence for several years.

Section 67391.1 (a):

Land use covenants (or restrictions) are provisions set forth in a document which can specify requirements on real property and affect the title, which is the evidence of ownership, to property. Usually they are found during a title search of county records. The recommended format for land use restrictions is a written instrument called a covenant which 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 DTSC and all owners of title and has been recorded in the county where the property is located. Land use covenants entered into or required by DTSC under the authority of the Health and Safety Code "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 section establishes when it is appropriate to require a land use covenant imposing appropriate limitations on land to be signed by the land owner and DTSC and recorded. Land use covenants are required when a hazardous waste facility closes (facility closure) and residual hazardous materials, hazardous wastes or constituents, or hazardous substances remain at the property and/or in the groundwater at levels which are not suitable for unrestricted use of the land. Limiting the use of the property under these conditions is necessary to prevent unsafe exposures to residual contaminants. Land use covenants are also required when corrective actions and/or removal or remedial actions (also known as "response actions") are undertaken pursuant to the enforcement authorities of chapters 6.5, 6.8, or 6.85 of division 20 of the Health and Safety Code, or article 1 of chapter 1, part 10.5 of the Education Code. These "response actions" encompass all actions which may be taken to address a release or threatened release of hazardous

materials, wastes, substances, and waste constituents. Land use covenants are required to guarantee that information about property containing residual contamination is available to local governments and the public; to disclose to real estate transaction participants (buyers, sellers, lending institutions, brokers, title and escrow companies); to ensure that long-term mitigation measures or monitoring requirements are carried out and maintained; and to 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.

67391.1 (b):

Land use covenants are required where contamination is left in place. This section is necessary to clearly establish that DTSC will not approve a response action decision document which includes land use covenants unless the covenants are clearly detailed and defined in that document. Recommendation of specific provisions for covenants are made by DTSC's regional office project managers or permit writers based on the site conditions and planned uses of the property. A legal description of the property is necessary along with parcel maps and detailed site maps which show contaminated areas. Specific provisions are chosen based on the project manager's or permit writer's assessment of available site-specific information.

This section also references an exemption in subsection (f) to the proposed regulations which allows DTSC to determine that it is not feasible to record a land use covenant for sites owned or under the control of the United States of America (federal government). DTSC may use other mechanisms to ensure that future land use will be compatible with the levels of hazardous substances which remain on the property. In these cases, DTSC will look at other options such as recording the restriction as part of the facility master plan. The facility master plan is a formal federal document, similar to a zoning plan that a city would use to define various land uses at an active military base.

67391.1 (c):

This regulation applies to those sites that have been certified, including those that have ongoing operation and maintenance activities. Operation and maintenance means those activities initiated or continued at a hazardous substance release site following the completion of a removal or remedial action (or response action) that DTSC or a Regional Water Quality Control Board has determined to be necessary to protect the public health or safety or the environment; or to maintain the effectiveness of a response action at the site; or to achieve or maintain response action standards and objectives established by the final remedial action plan or final removal action workplan for the site. Examples of operation and maintenance includes but are not limited to: maintaining an asphalt cap over

contaminated soil, maintaining and monitoring a groundwater pump and treatment system, monitoring air quality, etc. DTSC will enter into an enforceable agreement or issue an order to ensure that appropriate operation and maintenance actions are maintained as long as necessary for the site conditions. This section states that, except as provided in subsection (f) of the proposed regulations, DTSC cannot certify that a response action has been satisfactorily completed until any required land use covenant has been signed and recorded in the county where the land is located.

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. This section also establishes that DTSC will not approve or acknowledge the final certification of closure of a hazardous waste disposal until such land use covenants required by this section also meet the requirements of the California Code of Regulations, title 22, division 4.5 (Environmental Health Standards for the Management of Hazardous Waste), sections 66264.119 or 66265.119 as applicable. These regulations (sections 66264.119 or 66265.119) require the owner or operator to submit to the local zoning authority, or the authority with jurisdiction over local land use, and to DTSC a record of the type, location, and quantity of hazardous wastes disposed of within each cell or area (not limited to only hazardous waste disposal unit) of the facility. This record is to be submitted no later than 60 days after certification of closure has been issued.

67391.1 (d):

This section would require all land use covenants to be signed by DTSC and the landowner and to be recorded in the county where the land is located. All land use covenants must run with the land and continue in perpetuity unless modified or terminated in accordance with applicable law. It is important for the protection of public health and safety and the environment that land use covenants which may impose an easement, covenant, restriction or servitude or combination thereof, must run with the land and must apply to all current and future uses of the land when land is designated as hazardous waste property or border zone property pursuant to Health and Safety Code section 25232. Current law provides that land use covenants may be terminated if the conditions at the site have been improved as specified by the Health and Safety Code section 25234, and the property is suitable for unrestricted land use.

In any case where DTSC has made reasonable efforts to obtain execution of the easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, and the owner or owners have failed or refused to execute it, DTSC may take other actions such as applying to the court for an order imposing the easement, covenant, restriction, or servitude, or any combination thereof, as appropriate. The order will be recorded in the same manner as an executed instrument. The purpose of the recorded written instrument

is to protect public health and safety and it does not convey an interest in real or other property to the State.

67391.1 (e):

DTSC has experienced problems when contamination is left in place at federally-owned lands and the federal agency has requested that the property be determined as “suitable for transfer,” so that redevelopment can commence. This section clarifies that DTSC will not determine property to be deemed “suitable for transfer” unless the property is suitable for unrestricted use or unless a land covenant has been properly executed and recorded.

This section also provides an exception for federally-owned properties when DTSC determines that it is not feasible to record a land use covenant. In these cases, DTSC will look at other mechanisms to ensure compatible future use of federal properties, such as amending the facility master plan, installing physical monuments, or entering into agreements between the facility and DTSC.

67391.1 (f):

When DTSC determines that it is not feasible to record a land use covenant as a component of a remedy for sites, it may use other institutional controls mechanisms to ensure that future land use will remain compatible with the levels of hazardous materials, hazardous wastes or constituents, or hazardous substances left on the property. In addition to federally owned properties discussed in section 67391.1, subsection (e), there are other types of property in California which do not have formal deeds in County Records offices. For example, some current or former tidelands or submerged properties owned generally by the State of California. In these cases, DTSC will look at other mechanisms such as installing physical monuments or entering into a memorandum or consent agreement with the entity controlling the property.

This section also establishes that if DTSC later determines that it is feasible to record land use covenants for such sites, DTSC must take certain measures to ensure that land use covenants are properly recorded, as specified in section 67391.1, subsection (d) of these regulations.

67391.1 (g):

This section would clarify that DTSC may later modify or terminate land use covenants if it determines such modification or termination is protective of public health and safety and the environment. This section is needed to provide leeway for DTSC in those situations when new facts or scientific findings are established that the contamination left in place no

longer poses as great a risk (or no risk) to public health and safety and the environment.

67391.1 (h):

DTSC has statutory authority to pursue cost recovery for its oversight costs. This section clarifies that DTSC will recover any of its administrative oversight costs involved with recording land use covenants. This section also clearly requires responsible parties, facility owners or operators, or project proponents involved in land use covenants to pay all costs associated with the administration of such controls.

67391.1 (i):

This section provides definitions for terms applicable to the land use covenant regulations. For purposes of clarity, these definitions are necessary for assuring that property owners, responsible parties, and the general public understand the terms as used in these proposed regulations.

- (1) "Department" means the Department of Toxic Substances Control.
- (2) "Federal property" means that property found in the Federal Property and Administrative Services Act of 1949, as amended, United States Code, title 40, sections 471 et seq..
- (3) "Land use covenants" include easements, servitudes, covenants and restrictions which run with the land and restrict uses to protect public health and safety and the environment. DTSC may either enter into agreements with property owners to restrict land use or unilaterally impose land use covenants. The land use covenant process can be used in conjunction with the following actions: granting interim status or permit to operate a facility; short or long-term stabilization (to prevent incompatible land use, ensure long-term operation and maintenance, and ensure environmental monitoring); remediation that includes residual hazardous waste remaining onsite (to prevent unrestricted land use which could result in unsafe exposures to that residual hazardous waste); and sites for which no remediation has occurred (to prevent unrestricted land use) which could result in unsafe exposures. Land use covenants entered into or required by DTSC "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.
- (4) "Response action decision document" refers to a variety of remedy selection documents that are approved by DTSC. This term would include all of the following documents: a remedial action plan, removal action workplan, record of decision,

closure plan, documents written pursuant to a corrective action order or corrective action consent agreement, or other similar document.

- (5) “Unrestricted use of the land” means that the land may be used for any purpose. DTSC encourages the cleanup of contaminated sites to unrestricted levels of use, except where that would be unreasonable, and/or technically or financially infeasible. Cleanup levels are geared to the current or reasonably foreseeable future use of the land as determined by the cognizant local planning agency. This means that sites located on lands that are or will be zoned for commercial or industrial use need not always be cleaned up to unrestricted use levels, while sites located on lands zoned or planned for residential usage generally would have to be cleaned to “unrestricted use” levels.