

Fact Sheet
July 2003

LAND USE COVENANTS REGULATIONS



New Regulations – Recording Land Use Covenants in California

DTSC is one of six Boards and Departments within the California Environmental Protection Agency. The Department's mission is to restore, protect and enhance the environment, to ensure public health, environmental quality and economic vitality, by regulating hazardous waste, conducting and overseeing cleanups, and developing and promoting pollution prevention.

State of California



California
Environmental
Protection Agency



INTRODUCTION---NEW REGULATIONS

Utilizing land use covenants is one of the methods that the Department of Toxic Substances Control (DTSC) uses to protect the public from unsafe exposures to residual contamination that is left in place after site remediation activities have been completed. DTSC has adopted regulations to establish a clear and consistent standard for cleanups where hazardous wastes or constituents, or hazardous substances are left in place at levels not suitable for unrestricted use of the land. DTSC's Land Use Covenants Regulations, effective April 19, 2003, have added section 67391.1 to title 22, division 4.5, chapter 39, California Code of Regulations. These regulations apply only to DTSC and specify that a land use covenant (LUC) imposing appropriate limitations on land use shall be executed and recorded when hazardous materials, hazardous wastes or constituents, or hazardous substances will remain at the property at levels which are not suitable for unrestricted use of the land. These regulations clarify when it is appropriate to:

- 1) Establish LUCs;
- 2) Require that LUCs be recorded;
- 3) Sign and record LUCs for properties owned by the federal government; and
- 4) When it is not feasible to record LUCs for properties owned or controlled by the federal government, or for other properties, as applicable.

The regulations reflect DTSC's current policy (Official Policy and Procedure #87-14), and are based on the enforcement authority in chapters 6.5, 6.8, and 6.85 of division 20 of the Health and Safety Code, or at school sites where DTSC is overseeing the investigation and cleanup actions pursuant to the Education Code.

APPLICABILITY

The Land Use Covenants Regulations require DTSC to clearly set forth and define land use limitations or covenants in a remedy selection or response action decision document prior to approving or concurring with a facility

closure, corrective action, remedial or removal action, or other response actions undertaken pursuant to chapter 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 when contamination will remain at the property at levels which are unsuitable for unrestricted use (residential use) of the land. The regulations are not retroactive and therefore, apply to sites that have not yet been certified, including those that have ongoing operation and maintenance activities.

Consistent with current law, the regulations require all LUCs to be signed by DTSC and the landowner and to be recorded in the county where the land is located. All LUCs must run with the land and continue in perpetuity unless modified or terminated in accordance with applicable law.

DTSC RESPONSE ACTION DECISIONS

These regulations establish that DTSC will not approve a response action decision document which includes LUCs unless the covenants are clearly detailed and defined in that document. In addition, the regulations provide that any response action decision document must also include an implementation and enforcement plan. Consistent with current public participation requirements, the regulations require DTSC to provide public notice of the response action decision document in a manner that meets the requirements of Health and Safety Code section 25356.1(e)(2) or section 25398.6(i). These sections of the Health and Safety Code require DTSC to notify affected local and State agencies, as well as the affected community, of its response actions. DTSC must also consult with local agencies, including local reuse authorities, as appropriate.

The regulations establish that DTSC will not approve or acknowledge the final certification of closure of a hazardous waste disposal unit until such time that LUCs 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 clarify that DTSC may later modify or terminate LUCs if it determines such modification or termination is protective of public health and safety and the environment.

FEDERAL PROPERTY TRANSFERS AND EXEMPTIONS

The regulations clarify that DTSC will not determine property owned by the federal government (such as open or closed military bases) to be deemed suitable for transfer unless the property is suitable for unrestricted use or unless a LUC has been properly signed and recorded. The regulations provide for an exemption for federally-owned properties when DTSC determines that it is not feasible to record a LUC as a component of a remedy for a site. DTSC may use other mechanisms to ensure that future land use will be compatible with the levels of hazardous materials, hazardous

wastes or constituents, or 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 federal government facility master plan, installing physical monuments, or entering into agreements between the federal government facility and DTSC.

There are other types of property in California which do not have formal deeds in County Recorders offices. In these cases, DTSC will look at other institutional control mechanisms to ensure that future land use will remain compatible with the levels of residual contamination left on the property.

The regulations establish that if DTSC later determines that it is feasible to record LUCs for such sites, including sites owned by the federal government, DTSC must take certain measures to ensure that LUCs are properly recorded.

COST RECOVERY

These regulations reflect DTSC's statutory authority to recover its costs, and clarify that DTSC will recover any of its administrative oversight costs involved with recording LUCs. The regulations require responsible parties, facility owners or operators, or project proponents involved in LUCs to pay all costs associated with the administration of such controls. DTSC's costs should be denoted as part of the implementation and enforcement plan that is included in the response action decision document.

DEFINITIONS

The regulations include definitions of terms and activities that are applicable to requiring LUCs. These definitions include federal property, land use covenants, and response action decision documents.

AVAILABILITY

The text of the final regulations, as well as the regulatory background documents, such as the Final Statement of Reasons, can be accessed at DTSC's homepage at:

www.dtsc.ca.gov/LawsRegulationsPolicies/LUC/LUC_final_regs.html

For more information regarding DTSC's Land Use Covenants Regulations, please contact the office listed below.

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