

**Final Statement of Reasons
Including Summary of
Comments and Agency Responses**

LAND USE COVENANTS REGULATIONS

I. GENERAL

Local Mandate Determination:

The Department of Toxic Substances Control (DTSC) has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the State pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

DTSC has determined that this regulatory action will not have a significant adverse economic impact on business.

Alternatives Considered:

DTSC has further determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by DTSC.

II. UPDATE OF INFORMATION CONTAINED IN THE INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons released as part of the 45-day hearing process concerning the Land Use Covenants regulations is incorporated by reference herein with a correction as follows:

In DTSC's Initial Statement of Reasons, DTSC used the term "residual contamination" to abbreviate the phrase: "hazardous materials, hazardous wastes or constituents, or hazardous substances" left in place that are incompatible with unrestricted use of the land. The Final Statement of Reasons will delete the term "residual contamination" and add the phrase: "hazardous materials, hazardous wastes or constituents, or hazardous substances that remain at the property at levels which are not suitable for unrestricted use of the land."

III. SUMMARY OF COMMENTS AND AGENCY RESPONSES (45-DAY COMMENT PERIOD)

Comments were received in the form of seven written letters during the 45-day comment period. Representatives for Terradex and the Inland Valley Development Agency presented testimony at the public hearing held on July 30, 2002, as well as submitting it in writing. Following is DTSC's response to the testimony and written comments. These comments and responses are grouped by subject matter.

COMMENTS CONCERNING DTSC'S STATUTORY AUTHORITY

Comment #1: The California Manufacturers and Technology Association (CMTA) stated that the proposed regulations exceed DTSC's statutory and regulatory authority to mandate land use covenants (LUCs).

Response #1: DTSC has the statutory authority to enter into LUCs based on the following statutes:

- Chapter 6.8 of the Health and Safety Code section 25355.5(a)(1)(C) explicitly authorizes DTSC to enter into LUCs which run with the land and affect present and future uses of the land. Health and Safety Code 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. This section (25355.5(a)(1)(C)) specifically provides: Any enforceable agreement entered into pursuant to this section may provide for the execution and recording of a written instrument that imposes an easement, covenant, restriction, or servitude, or combination thereof, as appropriate, upon the present and future uses of the site. The instrument shall provide that the easement, covenant, restriction, or servitude, or combination thereof, as appropriate, is subject to the variance or removal procedures specified in sections 25233 and 25234. Notwithstanding any other provision of law, an easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, executed pursuant to this section and recorded so as to provide constructive notice runs with the land from the date of recordation, is binding upon all of the owners of the land, their heirs, successors, and assignees, and the agents, employees, or lessees of the owners, heirs, successors, and assignees, and is enforceable by the department pursuant to Article 8 (commencing with section 25180) of Chapter 6.5.

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- California statutes specifically provide the authority to impose land use controls at hazardous waste facilities. Health and Safety Code division 20, chapter 6.5, section 25202.5 authorizes DTSC to 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. These restrictions may restrict present or future uses of the land, run with the land and are binding upon all future land owners. Health and Safety Code section 25202.5 specifically provides with respect to any hazardous waste facility permitted pursuant to section 25200 or granted interim status pursuant to section 25200.5, that the department may do either of the following:
 1. Enter into an agreement with the owner of the hazardous waste facility that requires the execution and recording of a written instrument which imposes an easement, covenant, restriction, or servitude upon the present and future uses of all or part of the land on which the hazardous waste facility subject to the permit or grant of interim status is located and on all or part of any adjacent land held by, or for the beneficial use of the owners of the land on which the hazardous waste facility subject to the permit or grant of interim status is located.
 2. Impose a requirement upon the owner of the hazardous waste facility, by permit modification, permit condition, or otherwise, that requires the execution and recording of a written instrument which imposes an easement, covenant, restriction, or servitude upon the present and future uses of all or part of the land on which the hazardous waste facility subject to the permit or grant of interim status is located and on all or part of any adjacent land held by, or for the beneficial use of, the owners of the land on which the hazardous waste facility subject to the permit or grant of interim status is located.
- Pertaining to hazardous waste property or border zone property, chapter 6.5 of the Health and Safety Code sets forth two additional bases for LUCs in article 11 (section 25220 et seq.). Article 11 sets forth a process whereby property may be designated as hazardous waste property or border zone property through a formal process including a public hearing. Health and Safety Code section 25221 requires that any person as owner, lessor, or lessee who: 1) knows that a significant disposal of hazardous waste may have occurred on land which he or she owns, or that the land is within 2000 feet of a significant disposal of hazardous waste, and 2) intends to construct or allow construction of a building to be used as residence, hospital, school or day care center (as set forth in Health and Safety Code section 25232(b)) apply to the department for a determination if the land should be designated hazardous waste property or border zone property. Pursuant to Health and Safety Code section 25229, if property is

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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 which imposes land use restrictions on the property.

As an alternative to this formal process, DTSC and a property owner may enter into a mutually agreed upon covenant regarding appropriate land use restrictions. Health and Safety Code section 25222.1(a) specifically provides: Notwithstanding sections 25222, 25229, 25232, and 25233, any person may enter into an agreement with DTSC regarding that person's property, or a portion thereof, which provides for restricting specified uses of the property, as determined by all parties to the agreement. Except as otherwise provided in this article, the agreement is irrevocable and shall be recorded by the owner, pursuant to paragraph (1) of subdivision (a) of section 25230, as a hazardous waste easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, upon the present and future uses of the land. That person shall bear all costs incurred in determining the specific land use restrictions for that person's property, or a portion thereof pursuant to this subdivision.

- Chapter 6.85 of division 20 of the Health and Safety Code (section 25396.5 et. seq) is known as the California Expedited Remedial Action Reform Act of 1994 (ERAP). Health and Safety Code section 25398.7 provides DTSC explicit authority to utilize land use controls to limit or restrict land use where appropriate. Health and Safety Code section 25398.7(a) specifically provides: A remedial action plan may utilize land use controls to limit or restrict land use where appropriate. All land use controls shall be recorded by the site owner in the county in which the site is located. The site owner shall provide the department with a copy of the land use controls which have been appropriately recorded.

DTSC has not made changes to the regulations based on this comment.

Comment #2: The CMTA stated that there does not appear to be any statutory authority for use of LUCs as a prerequisite to a hazardous waste disposal facility closure. The CMTA stated the deed notifications required under sections 66264.119 and 66265.119 must be recorded within 60 days after a facility has received its certification of closure, not prior to issuance of the certificate of closure. The CMTA further stated that DTSC's proposed requirement making LUCs a mandatory part of the closure process not only lacks legislative authority, but also conflicts with the current post-closure deed notification.

Response #2: Sections 66264.119 and 66265.119 refer only to four types of hazardous waste management units: hazardous waste surface impoundment, waste pile, land treatment and landfill unit.

Sections 66264.119 and 66265.119 refer to actions which must be taken within certain time frames after “certificate of closure.” “Certificate of closure” is described in sections 66265.115 and 66264.113 as the document which must be submitted to DTSC by the owner or operator of each hazardous waste surface impoundment, waste pile, land treatment and landfill unit. “Certificate of closure” does not mean what DTSC issues. The regulation states that DTSC shall not certify the response action has been satisfactorily completed until such LUCs as may be required have been signed and recorded. The “certification” pursuant to section 67391.1 is not the same as the “certificate of closure” in sections 66264.119 and 66265.119. Therefore we see no conflict. DTSC has not made changes to the regulation based on this comment.

Comment #3: Stanford Management Company (Stanford) suggested that DTSC discuss these proposed changes with other agencies in the State that supervise cleanups and come up with a comprehensive approach that applies to all cleanups, regardless of which agency is directing the cleanup.

Response #3: DTSC appreciates the comment. However, DTSC can only promulgate regulations pursuant to its specific statutory authority. As part of the California Environmental Protection Agency (Cal/EPA), DTSC strives to be consistent with the policies and procedures of other Cal/EPA boards, departments and offices. In addition, Cal/EPA and its boards, departments and offices have had the opportunity to review and comment on the proposed regulations. DTSC has not made changes based on this comment.

COMMENTS CONCERNING LUC AS PART OF A REMEDY SELECTION

Comments #4: Stanford stated that placing LUCs on property will, in many cases, impose unnecessary costs and burdens on property that is the subject of a long-term cleanup and may undermine negotiated settlements for achieving the State ordered cleanup goals.

Stanford stated that it is unclear whether DTSC is suggesting that the deed restriction would impose affirmative remedial duties on future tenants (or future buyers) of real property.

Response #4: DTSC appreciates Stanford's concerns regarding the potential imposition of additional costs involved with recording LUCs on property that is subject to long-term cleanup and the possibility of undermining negotiated settlements. However, this regulation is part of a general rule of applicability that is intended to be very broad and not tailored to specific concerns regarding negotiated settlements. The property owner and responsible party have the option to cleanup to unrestricted use levels and therefore would not need to record a LUC. LUCs under these proposed regulations are only required when facility closure, corrective action, remedial or removal action, or other response actions are undertaken pursuant to chapter 6.5, 6.8, and 6.85 of division 20 of the Health and Safety Code, and when hazardous materials, hazardous wastes or constituents, or hazardous substances are left in place that are not consistent with unrestricted use of the land. Under current law, DTSC does not automatically and unilaterally require LUCs as part of any cleanup or closure process. LUCs are individually negotiated with the property owner and responsible party as part of a remedy selection. The use of recorded LUCs is one of the methods that DTSC uses to protect the public from unsafe exposures to hazardous substances, wastes, and materials. The options provided by this rulemaking include the cleanup of property to unrestricted use levels and therefore, negating the need to record a LUC; or placing restrictions on the property that "run with the land." In most cases, the cost of cleaning up a site to unrestricted use is greater than the cost of entering into a LUC.

LUCs are a component of the selected remedy. Since ownership and management can change over time, LUCs are critical to ensuring that any restrictions concerning the future use of the property are maintained, run with the land and exist in perpetuity. Whether a LUC would impose an affirmative duty on a future landowner depends upon the site specific situation. There are circumstances where a recorded LUC would impose affirmative responsibility on owners of real property, such as the maintenance of an asphalt cap to prevent contact with contaminated soils or maintenance of groundwater monitoring wells for several years to ensure long-term effectiveness of the selected remedy. In other cases, the LUC may simply prohibit residential uses. The LUC itself does not impose duties on a tenant. Landowners may choose to enter into private arrangements with tenants to perform remedial duties.

In order to provide protection at land which is not suitable for unrestricted use, DTSC is requiring that land use covenants be recorded which will specifically address the problems posed by the site specific levels of hazardous wastes or constituents or hazardous substances. DTSC has received comments asking for "flexibility" on the requirement of a land use covenant. DTSC believes that flexibility exists in terms of the alternative of cleaning up the property to unrestricted use. However, DTSC does not

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believe it is appropriate to provide flexibility on whether to record a land use covenant at a site not suitable for unrestricted use. DTSC wishes to promulgate 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. "Flexibility" can lead to inconsistent cleanup standards, with the potential for different treatment for similarly situated landowners. DTSC believes that land use covenants are integral to an effective cleanup. Land use covenants provide the maximum long term public notice of the existence of hazardous wastes or constituents or hazardous substances left in place, and provide for long term effectiveness and implementation of land use restrictions specifically tailored to the property. DTSC believes that land use covenants are the best available mechanism to provide long term protection of public health and safety and the environment.

The selected remedy must also consider local land use plans and zoning. The intent of LUCs is to provide long-term effectiveness to protect public health and safety and the environment when hazardous wastes or constituents, or hazardous substances are left in place that are not consistent with unrestricted use of the land. The alternative to recording LUCs is the clean up the property to unrestricted use.

DTSC has not made changes to the regulations based on these comments.

Comments #5: The CMTA stated the proposed regulation does not state how DTSC will determine what levels of hazardous materials or waste will render a property unsuitable for unrestricted use, or what information or authorities it will consult in making such decisions. The CMTA requested that DTSC indicate what processes and information it will use to make this determination, and what recourse a landowner will have if it disagrees with DTSC's decision.

Raytheon stated that the proposed regulations do not clearly define a process by which "residual" contamination is deemed safe under current, planned or reasonably foreseeable land uses.

Response #5: (See Response #4 above.) These proposed regulations pertain to LUCs as part of a remedy for a site. The remedy decision is based on the health risk assessment for the particular contamination at the site and the proposed future use of the property. The health risk assessment must ensure protection of public health and safety and the environment. Chapter 6.5, 6.8 and 6.85 of the Health Safety Code provide the procedures for remedy decisions which include public participation. Landowners and responsible parties have the option to clean up a site to unrestricted

use and therefore, not need to enter a LUC. DTSC has not made changes to the regulations based on these comments.

Comment #6: The Inland Valley Development Agency (IVDA) stated that the proposed regulations must include safeguards to ensure that a local reuse authority is not required under a LUC to do something in conflict with applicable federal land transfer documents or the rights and environmental indemnity protections conferred upon a local reuse authority under Section 330 of the Defense Appropriation Act. The IVDA stated that the use of a LUC in any form should be discretionary based upon the unique circumstances of each parcel of land and not mandatory after due consideration is given to the various levels of layered regulatory controls.

Response #6: (See Response #4 above.) A LUC restricting the uses of property may be an integral component of the remedy in order to assure that public health and safety and the environment is protected. LUCs are a component of the selected remedy and anticipated and foreseeable future use of the property and are recognized as such by DOD and the military components. As such, conflicts are not anticipated. The remedy must consider local land use plans and zoning. The alternative to recording LUCs is to clean up the property to unrestricted use. It is important to note that these regulations require LUCs, not particular uses of land. The land use decisions are made by other appropriate entities. DTSC has not made changes to the regulations based on this comment.

Comment #7: The IVDA stated that the proposed regulation must strive to minimize the land area of the affected parcel to the minimum parcel size that is practicable under the circumstances.

Response #7: These proposed regulations pertain to LUCs as part of a remedy for a site. The remedy decision is based on the health risk assessment for the particular contamination at the site and the proposed future use of the property. The health risk assessment must ensure protection of public health and safety and the environment. LUCs as part of a remedy for the site apply to the hazardous materials, hazardous wastes or constituents, or hazardous substances left in place that are not consistent with unrestricted use of the land. Depending on the extent of the hazardous materials, hazardous wastes or constituents, or hazardous substances left in place, a LUC may extend beyond "a parcel size" or affect a specific area within "a parcel." Chapter 6.5 of the Health and Safety Code section 25202.5 states that a LUC must be no more restrictive than necessary. DTSC has not made changes to the regulations based on this comment.

Comment #8: The IVDA stated that the proposed regulation must include procedural safeguards that after the date of the approval and execution of a LUC, DTSC must be bound by the levels of risk assessment and permissible levels of remaining contaminants found in the soils or other structures on the site.

Response #8: (See Response #4 above.) In addition, consistent with federal and State law, DTSC has the authority for remedy review, approval, and can reconsider health effects if new information becomes available. Although DTSC has rarely reopened a remedy, the authority to do so is necessary under State and federal law in order to protect public health and the environment. DTSC has not made changes to the regulations based on this comment.

Comment #9: Raytheon stated that the regulation would unnecessarily and inappropriately grant DTSC project managers unfettered discretion, with no reference to clearly defined standards, in determining what specific covenant provisions are necessary.

Response #9: (See Response #1 above.) Health and Safety Code section 25356.1.5 provides the specific response action criteria and applied health risk assessment that is part of a remedy selection. The remedy selection is based on the health risk assessment for the particular contamination at the site and the proposed future uses of the property. The health risk assessment must ensure protection of public health and safety and the environment. Proposed remedies, including LUCs, are subject to a 30 day public comment period. Public participation is a key component of DTSC's cleanup process, specifically in remedy selection decisionmaking. DTSC has not made changes to the regulations based on this comment.

Comment #10: Raytheon stated that DTSC should not be involved in LUCs other than to ensure that they are adequate if incorporated into a proposed environmental remedy.

Response #10: (See Response #1 and #4 above.) A LUC restricting the uses of the real property is an integral component of the remedy in order to assure that public health and safety and the environment is protected. DTSC must be a signatory to such LUCs since any future modifications would effectively modify a remedy DTSC had approved. The alternative to recording LUCs is to clean up the property to unrestricted use. DTSC has not made changes to the regulations based on this comment.

Comment #11: Stanford stated that the proposed regulations do not take into consideration that engineering controls can be used as an alternative when sites are redeveloped, thereby eliminating the need for such a deed restriction or LUC.

Response #11: (See Response #4 above.) The existence of engineering controls does not necessarily eliminate the need for a LUC. In fact, LUCs may be necessary to protect and maintain engineering controls. For example, when contamination is left in place and the remedy involves a physical structure, such as an engineered cap, a covenant may be required to assure maintenance of the integrity of the cap. In other cases, under so-called risk based closures, a certain amount of contamination may remain in the soil if the property is used only for commercial or industrial uses. A LUC restricting the uses of the real property is an integral component of the remedy in order to assure that public health and safety and the environment is protected. The alternative to recording LUCs is to clean up the property to unrestricted use. DTSC has not made changes to the regulations based on this comment.

Comment #12: Stanford requested clarification regarding whether these requirements apply to sites that already have existing cleanup orders, and if DTSC proposes to re-visit every cleanup order already issued in the State.

Response #12: (See responses above.) These proposed regulations are a reflection of DTSC's existing practice and apply to future facility closures, corrective actions, remedial or removal actions, 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. These regulations are not retroactive and therefore, only apply to sites that have not yet been certified. DTSC has not made changes to the regulations based on this comment.

Comment #13: Stanford stated that by maintaining access agreements and recording them, they serve the same purpose as the LUC that DTSC wants to implement by providing notice of a site's environmental condition. Stanford further stated that DTSC should build flexibility into the regulations to waive the requirement for a LUC where the landowner has alternative mechanisms in place to alert future users of the site and local land use authorities of any residual contamination on its property.

Response #13: (See responses above.) LUCs run with the land and exist in perpetuity. LUCs are necessary to ensure that future property owners and the public are aware of restricted uses of the land. Access agreements are between private parties and do not provide that same long-term effectiveness as recorded LUCs.

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Covenants need to be continually accessible in County Recorder offices, in a DTSC computer data base, posting a list of recorded deed restrictions on DTSC's website, and available in local planning offices. DTSC has not made changes to the regulations based on this comment.

Comment #14: Stanford claimed that DTSC stated that a new property owner or tenant may become responsible for future remediation of a site, identifying health risks, performing maintenance on caps, etc. Stanford stated that this could create uncertainty in real estate transactions where parties have often already entered into private agreements to allocate responsibility, and that it is inconsistent with the United States Environmental Protection Agency's (U.S. EPA's) new policy to provide legal protection from liability for bona fide prospective purchasers of property.

Response #14: (See Response #4.) A major function of a recorded land use covenant is to provide notice of particular restrictions on land. In the example used by Stanford, DTSC believes the existence of a land use covenant would minimize uncertainty, as the restrictions would be clearly set forth in a publicly available document. Land use covenants are typically used as part of a cleanup remedy. If the remedy included an engineered cap constructed over hazardous waste which was left in place, any new landowner would have to be responsible for assuring that the cap remained viable. The existence of a land use covenant assures that any potential new owner is aware of the cap and the hazardous waste. The land use covenant would not alter any private agreements which may exist. DTSC does not believe these regulations are inconsistent with U.S. EPA's new policy which relates to liability for cleanup, and does not focus on land use covenants as part of a cleanup remedy.

DTSC has not made changes to the regulations based on these comments.

Comment #15: Stanford requested that the regulations be made flexible so as to exempt landowners like Stanford who are already managing these issues, without the need for recorded deed restrictions and the costs and burdens associated with such restrictions.

Response #15: (See Response #4.) DTSC has not made changes to the regulations based on this comment.

Comment #16: Stanford requested clarification on whether DTSC will still require a LUC if a health risk assessment shows that residual contamination poses no unacceptable risks.

Response #16: (See responses above.) If a health risk assessment demonstrates that there are no hazardous materials, hazardous wastes or constituents, or hazardous substances that will remain at a site at levels which are not suitable for unrestricted use of the land, then a LUC would not be required. DTSC has not made changes to the regulations based on this comment.

Comment #17: Terradex's oral testimony stated that the regulations do not adequately address residual contamination that can lie outside the property boundaries of a responsible party. The commenter used the example of plumes. To address this concern, Terradex's oral testimony suggested that DTSC should consider mechanisms that can provide an institutional control structure that may not be a covenant, such as newer technologies for institutional control management, when contamination runs beyond the boundaries of real property.

Response #17: (See responses above.) These proposed regulations pertain to LUCs as part of a remedy for a site. The remedy decision is based on the health risk assessment for the particular contamination at the site and the proposed future use of the property. The health risk assessment must ensure protection of public health and safety and the environment. LUCs as part of a remedy for the site apply to the hazardous materials, hazardous wastes or constituents, or hazardous substances left in place that are not consistent with unrestricted use of the land. In reference to the complexities of groundwater plumes, DTSC must determine if it is feasible to establish LUCs. DTSC has made the following change to section 67391.1(f) based on this comment:

(f) Whenever the Department determines that it is not feasible to ~~record~~ establish a land use covenant as a component of a remedy....on the property.

COMMENTS CONCERNING PROPERTY OWNER'S RIGHTS

Comments #18: The CMTA stated that it appears that DTSC no longer intends to make LUCs part of negotiated agreements, but will automatically impose them on landowners. The CMTA further stated that DTSC's Initial Statement of Reasons for section 67391.1(b) does not mention input from a landowner and that the proposed regulation appears to conflict with statutory language and intent to allow landowners to take part in this process.

Raytheon suggested that DTSC reconsider the proposed regulations to ensure that property owner's rights and uses are not expropriated.

Stanford suggested that DTSC should clarify the details of what a LUC would entail and when it would apply before any landowner or responsible party is forced to accept conditions that may or may not be acceptable to them.

Response #18: (See Response #1 and #4 above.) Under current law, DTSC does not automatically and unilaterally require LUCs as part of any cleanup or closure process. LUCs are individually negotiated with the property owner and responsible party as part of a remedy selection. Property owners and responsible parties have the option to cleanup to unrestricted use levels and therefore, would not need to record a LUC. DTSC has not made changes to the regulations based on these comments.

Comment #19: The CMTA stated that the regulations conflict with legislative intent to balance the rights of landowners against agency authority in that the regulations lack any reference to negotiation, implying that DTSC automatically and unilaterally will require LUCs as part of any cleanup or closure approval process when DTSC deems it necessary. The CMTA further stated that section 67391.1(a) provides a broad application of LUCs that could include activities not currently within DTSC's statutory authorities, such as voluntary cleanups in which a Potential Responsible Party (PRP) seeks DTSC approval of a Remedial Action Plan (RAP), or facility closures, which do not currently require any deed notifications.

Response #19: (See Response #4 above.) Under current law, DTSC does not automatically and unilaterally require LUCs as part of any cleanup or closure process. LUCs are individually negotiated with the property owner and responsible party as part of a remedy selection. LUCs are entered into jointly. Under chapter 6.5, 6.8 and 6.85 of the Health and Safety Code, if hazardous materials, hazardous wastes or constituents, or hazardous substances are left in place that are not consistent with unrestricted use of the land, DTSC has the authority to enter into LUCs for facility closures, corrective action, remedial or removal action, or other response actions. DTSC has not made changes to the regulations based on this comment.

Comment #20: Stanford stated that covenants could hamper or prevent landowners' rights to change a property's use from commercial to residential.

Response #20: LUCs are intended to protect the future use of property. The purpose of LUCs is to protect the public health and safety and the environment from risks that may be posed by property where hazardous materials, hazardous wastes or constituents, or hazardous substances are left in place that are not consistent with unrestricted use of the land. Property owners and responsible parties have the option

to cleanup to unrestricted use levels. The Health and Safety Code contains provisions for modifying and terminating LUCs (See Response #39 below). DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING DEFINITIONS AND STATEMENTS IN THE ISOR

Comments #21: Raytheon stated that the Initial Statement of Reasons section 67391.1(a) does not define the term “residual” and it is too vague, making the proposed assertion of DTSC authority overly broad and unacceptable.

Raytheon also stated that the term “contamination” as used in the Initial Statement of Reasons section 67391.1(b) is undefined and vague.

Stanford requested clarification regarding the definition of residual contamination.

Response #21: (See responses above.) Consistent with DTSC’s statutory authority and the definitions used in chapter 6.5, 6.8, and 6.85 of the Health and Safety Code, the text of the regulations currently require LUCs to be in place if “hazardous materials, hazardous wastes or constituents, or hazardous substances” remain at the property at levels which are not suitable for unrestricted use of the land. The term “residual contamination” is not used in the text of the regulations. In DTSC’s Initial Statement of Reasons, DTSC used the term “residual contamination” to abbreviate the phrase: “hazardous materials, hazardous wastes or constituents, or hazardous substances” left in place that are incompatible with unrestricted use of the land. The Final Statement of Reasons will delete the term “residual contamination” and add the phrase: “hazardous materials, hazardous wastes or constituents, or hazardous substances that remain at the property at levels which are not suitable for unrestricted use of the land.”

Not all levels of hazardous materials, hazardous wastes or constituents, or hazardous substances create conditions which are incompatible with unrestricted uses of the property. If a health risk assessment concludes that there is no unacceptable risk and the levels of hazardous materials, hazardous wastes or constituents, or hazardous substances left at a site are below those that require restricted use of the property, then a LUC would not be required. DTSC has not made changes to the regulations based on these comments.

Comment #22: Raytheon stated that the Initial Statement of Reasons section 67391.1(a) is not an accurate description of California law regarding existing covenants. Raytheon further stated it does not believe it is necessary for DTSC to define or be a

signatory on covenants because the transacting parties and local authorities are able to ensure that such recordings are adequate.

Response #22: (See Response #1 above.) The Initial Statement of Reasons section 67391.1(a) is an accurate description of California law regarding existing covenants. These proposed regulations provide a process for the execution and recording of LUCs in a manner that is consistent with DTSC's statutory authority under chapter 6.5, 6.8, and 6.85 of the Health and Safety Code. The statutory language explicitly provides that DTSC may enter into LUCs. DTSC has not made changes to the regulations based on this comment.

Comment #23: The CMTA stated that DTSC's comments in its Initial Statement of Reasons section 67391.1(c) appears to intend to impose these regulations to sites at which the Regional Water Quality Control Board is the lead agency. The CMTA recommends that DTSC clarify that these proposed regulations will apply only to sites over which DTSC has lead-agency authority.

Response #23: (See responses above.) Comment noted. The text of the regulations clearly state that these regulations apply only to 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. Consistent with DTSC's statutory authority, the regulations only apply to sites where DTSC is taking an action. DTSC has not made changes to the regulations based on this comment.

Comment #24: The CMTA stated DTSC's comments in its Initial Statement of Reasons section 67391.1(c) reveal an intent to impose these regulations retroactively to certified sites, which raises a legal issue, and also conflicts with the proposed rule section 67391.1(c)(1). The CMTA suggested that DTSC should clarify that sites that have been certified are not subject to these regulations.

Response #24: (See Response #12 above.) These regulations are not retroactive and therefore, only apply to sites that have not yet been certified. DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING DTSC'S ENFORCEMENT AUTHORITY

Comment #25: Terradex stated that the regulations should speak to enforceability and effectiveness. Terradex suggested that the regulations would be improved if, as part of

the conditions for approving LUCs, there was a requirement imposed on the responsible party to demonstrate, to the satisfaction of the Department, that such covenants will be reasonably enforced for as long as those covenants run with the land. To address this concern, Terradex suggested that the following language be added to the proposed regulations (section 67391.1(b)):

- (b) The Department shall not approve or concur in a response action decision document which includes limitations on land use or other institutional controls, unless: (1) the limitations or controls are clearly set forth and defined in the response action decision document; and (2) the response action decision document clearly sets forth the means by which such limitations on land use or other institutional controls shall be enforced during the period of time such limitations or controls are imposed and relied upon. Except as provided in subsection (f) of this section,.....or section 25398.63 (i).

Response #25: In addition to the terms of any particular covenant itself, under current law, DTSC has a variety of means to enforce the LUCs it enters into. The Health and Safety Code specifically authorizes DTSC not only to enter into LUCs, but also sets up particular enforcement mechanisms. For example, covenants pursuant to chapter 6.8 (section 25355.5) and covenants for hazardous waste facilities pursuant to section 25202.5, are explicitly “enforceable by DTSC pursuant to article 8 (commencing with section 25180) of chapter 6.5.” Division 20, chapter 6.5, article 8 of the Health and Safety Code sets forth an array of enforcement options, including injunctive relief (Health and Safety Code sections 25181 and 25184), administrative or civil penalties of up to \$25,000 per day for each violation (Health and Safety sections 25187 and 25189) and provides for the possibility of criminal penalties (Health and Safety Code section 25190). Health and Safety Code section 25190 provides that any person who is convicted of violating any provision of chapter 6.5, may be punished by a specified fine and/or imprisonment.

LUCs adopted pursuant to article 11 of division 20, chapter 6.5 of the Health and Safety Code are also subject to Health and Safety Code section 25236 which generally provides that “the department shall diligently pursue feasible civil and criminal actions against any operator or other responsible party who violates any provision of this chapter [6.5] or chapter 6.8....or regulations promulgated under those chapters.”

Chapter 6.85 of division 20 of the Health and Safety Code section 25398.7(b) states that: “Any person who violates the terms of a land use control which that person knew,

or reasonably should have known, applied to the property, shall be subject to a civil penalty not to exceed twenty-five thousand (\$25,000) per day for each day of violation.”

DTSC agrees that assurance that the LUCs will have long term effectiveness is an important implementation element. To clarify DTSC’s existing authority and practice, DTSC proposes the following clarification to section 67391.1(b):

(b) The Department shall not approve or concur...decision document. Except as provided in subsection (f) of this section, any response action decision document shall (1) specify that the limitations or controls will be incorporated into an appropriate land use covenant as required by this section and (2) include an implementation and enforcement plan. The Department...as appropriate.

Comment #26: Terradex expressed concern that the exception provided by section 67391.1(f) may prove to become the rule, where reasonable LUCs can and should be imposed for a given site, but may not be acceptable for recordation by a county recorder’s office. Terradex stated that the proposed regulations fail to adequately indicate what is required of the responsible party wishing to rely on “other institutional controls.” Terradex stated that the regulations should require the responsible party to demonstrate how such “other institutional control mechanisms” will be enforced. To address this concern, Terradex suggested that the following language be added to the proposed regulations (section 67391.1(f)):

(f) Whenever the Department determines that it is not feasible to record a land use covenant.....or hazardous substances which remain on the property, provided however, that if such other institutional control mechanisms are imposed in lieu of a recorded land use covenant, the Department shall not approve such other institutional control mechanisms until and unless the Department finds that there is reasonable means by which such other institutional control mechanisms will be enforced during the period of time such other institutional control mechanisms are imposed and relied upon.

Response #26: (See Responses #17 and #25 above.) In addition to the penalties and injunctive relief specifically available under the Health and Safety Code, DTSC may enforce covenants under general provisions of contract and real property law. DTSC has not made changes to the regulations based on this comment.

Comment #27: The IVDA stated that the proposed regulation enforcement rights afforded to DTSC under a LUC must be limited to be deemed constitutional, and must

be clarified so that these enforcement rights are “private contract” rights and relate solely to the presence of “hazardous materials” on the affected parcel and not to any other environmental issues that may arise.

Response #27: (See Response #25 and #32.) In addition to the enforcement rights, including penalties and injunctive relief specifically available under the Health and Safety Code, DTSC may enforce covenants under general provisions of California law. DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING NOTIFICATION AND PUBLIC PARTICIPATION

Comments #28: The IVDA stated that the proposed regulations should ensure that local reuse authorities are included when DTSC and the military negotiate and approve a LUC.

Stanford stated its commitment to public participation is a part of the normal development planning.

Response #28: (See Response #4 and #9 above.) DTSC’s practice has been to work closely with local reuse authorities and other local agencies in developing response actions. This is especially important when response actions may involve land use controls. DTSC will continue this approach. Additionally, public participation is a key component of DTSC’s cleanup process, specifically in remedy selection decisionmaking. Additionally, Health and Safety Code section 25220(d) requires DTSC to send a specific notice and copy of the covenant to the planning and building departments of each city, county or regional government. The planning and building departments are then in turn required to include the restrictions in the property files and require that any person requesting a conflicting land use, apply to DTSC for a variance or removal.

Health and Safety Code section 25358.7 specifically requires DTSC to provide the public with the opportunity to participate in DTSC’s decisionmaking process regarding a response action.

Chapter 6.8 of the Health and Safety Code requires that the cleanup process is conducted consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The NCP applies to all federal military sites and includes community acceptance and involvement.

Chapter 6.85 of the Health and Safety Code section 25397.2 provides that DTSC must ensure that the public is given the opportunity to participate in response actions taken pursuant to this chapter.

As part of a facility's authorization process, and included in DTSC's oversight of facility operations, DTSC is required to comply with specified public participation requirements of chapter 6.5 of the Health and Safety Code, the California Code of Regulations, title 22, as well as DTSC's Public Participation Policy Guidelines.

Article 1 of chapter 1, part 10.5 of the Education Code requires that DTSC oversee the environmental assessment, remedial investigation and cleanup of proposed and expanding school properties. Pursuant to the Education Code section 17213.1, all investigation and response actions must be conducted pursuant to chapter 6.8, division 20, of the Health and Safety Code. This includes requirements for public participation and compliance with the California Environmental Quality Act (CEQA).

Section 67391.1(b) of the proposed regulations specify that DTSC must provide public notice of a 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 has made the following change to section 67391.1(b) of the regulations based on these comments: "DTSC will consult with local agencies, including local reuse authorities, as appropriate."

Comment #29: The IVDA stated that the proposed regulations fail to impose a contractual duty on DTSC to respond to operational questions posed by the local reuse authority relating to the LUC. The IVDA stated that the regulations must impose a duty on DTSC to provide responsible oversight of each LUC. In order to assure that DTSC responds in a timely manner to oversight requests from a local reuse authority, the IVDA further suggested that the proposed regulations include provisions for either (i) granting an automatic approval for failure of DTSC to act in a timely manner or (ii) imposing financial penalties on DTSC for failing to act in a timely manner unless specific reasons are given, and, in any case, the proposed regulation and the LUC must specify an expedited appeal process for local reuse authorities to seek review of a DTSC response to a request for oversight directly to the local Superior Court.

Response #29: (See responses above.) Consistent with DTSC's statutory authority and responsibilities, DTSC provides oversight of LUCs. DTSC is committed to responding to any site related operational inquiries in a prompt and timely manner. There is always the option of the public or local agencies to seek a writ of mandate if DTSC does not respond to public inquiries. DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING FEDERAL PROPERTY TRANSFERS

Comments #30: The IVDA made a general comment questioning whether the proposed regulation that mandates a LUC in every case of a former military base transfer, regardless of the facts on-the-ground is a sound administrative policy. The IVDA further stated that the goal of the proposed regulation should be clarified so as to not adversely affect closed military base redevelopment efforts but rather allow such properties to be competitive with privately owned properties in the surrounding areas.

The IVDA stated that if environmental conditions so adversely impact a property as to prevent any civilian reuse, rather than giving the pretense that reuse is permitted but with a LUC that effectively prevents civilian reuse because it is unacceptable to the private development community, DTSC should not approve such property for transfer to the local reuse authority.

Response #30: (See Responses #4 and #28 above.) Cleanup of hazardous substances at federal facilities is governed primarily by the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), with the federal Resource Conservation and Recovery Act (RCRA) and state laws playing an important role. CERCLA 120(h) requires that prior to transfer, the federal government warrants that the property is suitable for transfer (finding of suitability to transfer, FOST). Recognizing that complete cleanup may be a lengthy process, CERCLA 120(h)(C) also provides a mechanism for a so called "early transfer," (or a finding of suitability of early transfer, also known as a FOSET) which is a transfer of property before the cleanup is completed. In addition, early private use of former military property can happen through a lease and a process of a finding of suitability to lease (FOSL).

DTSC requires that any property which will not be cleaned up so that it is suitable for unrestricted use, be subject to a LUC or other appropriate institutional control. When the federal government transfers property where contamination remains in place, DTSC requires a LUC to appropriately restrict the use. Thus, just as at private sites, if a landfill exists on a base, perhaps with a cap, DTSC will require a LUC in order to restrict the

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use and assure protection of the cap. The alternative to recording LUCs is to clean up property to unrestricted use.

For sites where there is no “early transfer,” DTSC works with the particular service and the U.S. EPA in reviewing and commenting on assessment documents, including remedial investigations and feasibility studies, and any Record of Decision (or analogous state remedy selection document for non-NPL bases) which is prepared. These documents must identify, early in the process, whether contamination will remain in place, and thus whether a LUC with DTSC will be needed prior to transfer. Property transfers involve decisions between the federal government and the transferees. The State does not ‘approve’ transfers, except in the case of “early transfers,” and then only when the local reuse authorities support the transfer. In the case of an “early transfer,” DTSC enters into LUCs which recognize the existence of hazardous substances on the property and require appropriate protection measures. DTSC considers such LUCs as a prerequisite to making the state “finding of suitability” which is necessary before an early transfer can occur. In some cases the contamination will remain in place, and the new owner of the property may intend to do additional cleanup. If additional cleanup occurs, the covenants can be appropriately modified. The LUCs themselves are typically entered into between DTSC and the appropriate military service immediately prior to transfer.

DTSC is committed to working closely with the local reuse authorities when negotiating LUCs as part of the “early transfer” process.

DTSC has not made changes to the regulations based on these comments.

Comment #31: The IVDA stated that it is questionable whether DTSC efforts to impose a LUC on isolated sites at the Norton Air Force Base are warranted given the physical conditions and the existing layers of regulatory controls already designed to restrict land uses at Norton Air Force Base.

Response #31: The remediation at Norton Air Force Base is currently under negotiation and is being conducted pursuant to the processes discussed in Responses #4 and #28 above. DTSC believes it would be inappropriate to discuss the specifics of the site as part of this proposed rulemaking. DTSC has not made changes to the regulations based on this comment.

Comment #32: The IVDA stated that the proposed regulation needs to be clarified to state that a subsequent release of other “hazardous materials” resulting from the civilian reuse activities are not covered by the LUC.

Response #32: A subsequent release of hazardous materials resulting from civilian reuse activities at a former military facility could occur as a result of a breach of the terms of the covenant. As such, the release would be a violation of the LUC and may or may not be an independent violation of State or federal laws pertaining to releases of hazardous substances. Alternatively, a subsequent release could be factually unrelated to the covenant or to the remedy of which the covenant was a component. In such a case, the release may not be a violation of the LUC. These situations need to be evaluated on a case-by-case basis. DTSC has not made changes to the regulations based on this comment.

Comment #33: The Department of Defense (DOD) suggested the following amendments to clarify which subsections apply to federal property (section 67391.1(b) and (c)):

(b) Except as provided in subsections (e) of this section, the Department shall not approve or concur in a response action decision document which includes limitations on land use...or section 25398.6(i).

(c) Except as provided in subsections (e) and (f) of this section,

Response #33: Subsection (f) is the subsection which sets forth the exception to the requirement of a LUC based on infeasibility. Subsection (e)(2) already contains a provision whereby DTSC may determine a LUC is infeasible for certain types of federal property. As such, it is unnecessary to reference it in section 67391.1(b) or (c). DTSC has not made changes to the regulations based on this comment.

Comment #34: DOD suggested that the regulations should clarify which subsections apply to federal property recognizing the myriad of unique federal legal issues, whether it be real property or site remediation law. To address this concern, DOD suggested that the following language be amended concerning the proposed regulations (section 67391.1(d)):

(d) All land use covenants pursuant to this section shall be executed by the Department...in accordance with applicable law. The land use covenants will set

forth all applicable protective restrictions and conditions to which the property is subject.

Response #34: (See Responses #1 and #3 above.) DTSC believes this suggested amendment is too broad. LUCs under these proposed regulations only deal with DTSC's statutory authority under the provisions of Health and Safety Code chapter 6.5, 6.8, and 6.85. The LUC itself may not be the only document that governs the safe use of the property. DTSC has not made changes to the regulations based on this comment.

Comment #35: DOD stated that the regulations need to address timing issues relative to executing deed restrictions and conveyance of federal property. To address this concern, DOD suggested that the following language be amended concerning the proposed regulations (section 67391.1(e)):

- (e) Federal Property.
 - ~~(1) The Department shall not consider property owned by the federal government.....accordance with this section.~~
 - (1) Land use covenants pursuant to this section may be executed and recorded upon property owned by the federal government only when they are executed contemporaneously with and immediately before conveyance of that property by deed or other instrument.

Response #35: Subsection (e)(2) already provides a mechanism for DTSC to determine that it is not feasible to record a LUC. This language provides sufficient flexibility to deal with applicable federal requirements relating to encumbrances and transfers of federal property. DTSC believes that there is no need to place limitations on timing. This proposed language is unnecessary. DTSC has not made changes to the regulations based on this comment.

Comment #36: DOD suggested the following change to section 67391.1(e) of the proposed regulations:

- (2) The Department may consider property owned by the federal government to be protective of human health orin accordance with this section.

Response #36: The DOD's suggested amendment language is very similar to DTSC's current proposed regulations text. DTSC considered this comment, but believes that the language in the regulations is more clear and appropriate. DTSC does not believe it

is necessary for the text of the regulations to specify how the transaction will occur. DTSC has not made changes to the regulations based on this comment.

Comment #37: DOD suggested the following change to section 67391.1(e) of the proposed regulations: *(Note: The reference to (e)(3) in this comment is only correct in the context of DOD's proposed changes. There is no (e)(3) in the proposed regulations.)*

- (3) When it is not feasible or legal to convey or record a land use covenant
~~Whenever the Department determines that it is not feasible to record a land use covenant~~ for property owned by the federal government, such as transfers from one federal agency to another, ~~it~~ the Department and federal government may use other mechanisms....on the property. Examples include: Amendments to the federal government facility master plan, physical monuments, or agreements between the federal government facility and the Department.

Response #37: (See Response #36 above.) The DOD's suggested amendment language for the first sentence ("When it is not feasible or legal to convey or record a land use covenant"), is very similar to DTSC's proposed regulations text. DTSC needs to determine whether a LUC is feasible. DTSC will do so on a case-by-case basis. DTSC believes that the language in the regulations is more clear and appropriate.

DTSC will accept the other suggested amendments to this subsection, specifically: "...~~it~~ the Department and federal government may use other mechanisms....on the property. Examples include: Amendments to the federal government facility master plan, physical monuments, or agreements between the federal government facility and the Department." These suggested amendments add clarification without changing the meaning of the regulations.

Comment #38: The DOD stated that the proposed regulations should be modified to address timing issues relative to executing deed restrictions and conveyance of federal property. To address this concern, DOD suggested that the following language be amended concerning the proposed regulations (section 67391.1(f)):

- (4) When it is not feasible or legal to convey or record a land use covenant
~~Whenever the Department determines that it is not feasible to record a land use covenant~~ as a component of a remedy for property not owned by the federal government, the Department ~~a site,~~ it may use other

institutional control mechanisms to ensure that future land use....remain on the property.

Response #38: The DOD's suggested amendment language is very similar to DTSC's proposed regulations text. However, DTSC believes that the language in the regulations is more clear and appropriate. The DOD's suggested language is in the passive voice which is inconsistent with the text of the regulations. Subsection (e)(2) already provides a mechanism for DTSC to determine when it is not feasible to record a LUC. This language provides sufficient flexibility to deal with applicable federal requirements relating to encumbrances and transfers of federal property. DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING MODIFICATION AND TERMINATION OF LUCs

Comments #39: Raytheon stated that the Initial Statement of Reasons section 67391.1(g) provides for leeway to DTSC to review new facts or findings to modify or terminate a covenant. Raytheon stated that this "leeway" is far too vague to be useful.

The IVDA stated that the proposed regulation fails to provide a delineated procedure for DTSC to consider and act upon specific requests for a modification or termination of a LUC. The IVDA further stated that enforceable remedies must be provided to the local reuse authorities and each subsequent landowner for failure of DTSC to act responsibly or in a timely manner.

The CMTA stated that the proposed regulations leave vague the circumstances under which a deed restriction can be modified or terminated. The CMTA stated that DTSC must indicate what information and process it will use to determine whether a termination or modification will or will not be protective of human health and safety and the environment.

The CMTA stated that the regulation must provide a procedure by which a landowner may request or initiate a modification or termination of a deed restriction. Specifically, the procedure must allow a landowner to petition for modification or termination of a deed restriction or covenant, and set out a process for such petition to be heard and appealed, otherwise the regulation could violate a landowner's due process rights.

The CMTA stated that it is unclear what standards and procedures will be used to review, and where warranted to remove, land use restrictions in cases where all feasible

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soil and groundwater cleanup has been completed, and chemicals remain at the site below established cleanup standards.

Stanford requested clarification on what is the formal process for removing a deed restriction. Stanford also suggested that there should be an affirmative obligation on DTSC to respond promptly to requests to modify or remove deed restrictions and to do so when the requesting party presents technically supportable information.

Response #39: (See Responses #1, #4, and #13.) LUCs are intended to extend in perpetuity. At the same time, the California Legislature recognized changes may be necessary. In some cases, the LUC may be intended as an interim measure, to be in effect before a final cleanup is achieved. In addition, variances may be appropriate under certain circumstances. Under current law, all covenants entered into by DTSC have provisions for termination and modification.

Chapter 6.8 of the Health and Safety Code sections 25233 and 25234 set forth procedures to be followed when someone wishes to apply for a modification or a termination of a LUC. These sections provide that for covenants imposed pursuant to sections 25222.1, 25229, or 25355.5, any aggrieved person can apply to the department for a written variance or a removal of a land use restriction. Any application must contain sufficient evidence for the department to issue a notice for a hearing.

Chapter 6.5 of the Health and Safety Code section 25202.6 sets forth a procedure by which LUCs imposed under the authority of section 25202.5 may be modified or removed. Under Health and Safety Code section 25202.6, owners of hazardous waste facilities may request modification or removal of covenant provisions. DTSC could approve modification or removal of specific provisions following a public hearing.

Chapter 6.85 of the Health and Safety Code section 25398.7(c) provides that the terms and conditions of a LUC may be modified only with the express written consent of the department, based on a determination that the response actions implemented at the site provide sufficient protection of human health and the environment, and are sufficient to permit the planned use of the site. If an additional response action is required to provide that protection, the department must not approve the request for modification of the restriction or control until completion of the additional response action.

Since current law already provides procedures for modifying and terminating LUCs, DTSC has not made changes to the regulations based on these comments.

Comment #40: DOD stated that DTSC should incorporate LUC stakeholders into DTSC's proposal to modify or terminate LUCs. To address this concern, DOD suggested that the following language be added to the proposed regulations (section 67391.1(g)):

- (g) Modification and Termination. The Department, with the consent of the parties to the Covenant, may modify, release, or terminate a land use covenants-if it determines such modification or termination is protective of public health and safety and the environment.

Response #40: (See Responses #1, #4, #13 and #39 above.) Current law already provides procedures for modifying and terminating LUCs that include providing notice to interested parties and conducting a public hearing. In addition, the original landowner(s) ("parties to the covenant") may no longer own the land, thereby making it unnecessary and possibly impossible for the original landowner to consent to modifying or terminating the LUC. These agreements are between the current landowner and DTSC.

DTSC will not accept the DOD's suggested amendment for adding the term "release" because this term is not used in existing statute. In addition, DTSC does not want to go beyond the scope of the regulations.

DTSC has not made changes to the regulations based on these comments.

Comment #41: Stanford requested clarification on whether landowners would have to put a deed restriction on their property for sites where an order is in place requiring long term cleanup to specified standards. Stanford requested clarification on if any deed restrictions apply while dischargers are working to achieve cleanup to these standards.

Response #41: (See Response #39 above.) In order to protect public health and safety and the environment, a LUC may be necessary as an interim measure, to be in effect before a final cleanup is achieved. Depending on what restrictions are necessary to protect public health and safety and the environment, when the cleanup goals have been achieved, the LUC can be terminated. DTSC has not made changes to the regulations based on this comment.

COMMENTS CONCERNING COST RECOVERY

Comments #42: Raytheon stated opposition to DTSC's cost recovery provisions in section 67391.1(h).

The IVDA stated that, pertaining to the cost recovery provisions, the proposed regulation contains no limit about what such administrative costs could include, nor does it contain any safeguards to protect against unnecessary or unreasonable administration costs. The IVDA further stated that recovery of costs by DTSC must be limited to enforcement actions for an alleged violation of the LUC which is thereafter proven to be true, and that both parties must have the right of recovery against the other party.

Response #42: Chapter 6.66 of the Health and Safety Code section 25269.2 provides DTSC the authority to recover its oversight costs for corrective action pursuant to chapter 6.5 (commencing with section 25100), removal or remedial action pursuant to chapter 6.8 (commencing with section 25300), and response actions pursuant to chapter 6.85 (commencing with section 25396).

Chapter 6.5 of the Health and Safety Code section 25222.1(a) provides: "...That person shall bear all costs incurred in determining the specific land use restrictions for that person's property, or a portion thereof pursuant to this subdivision."

Chapter 6.8 of the Health and Safety Code section 25355(C) provides that: "Agreements entered into pursuant to this paragraph shall provide that the party will reimburse the department for all costs incurred including, but not limited to, oversight costs pursuant to the enforceable agreement associated with the performance of the removal or remedial actions and chapter 6.66 (commencing with section 25269)." Pursuant to chapter 6.8 of the Health and Safety Code section 25355.2, responsible parties must provide financial assurance for funding for institutional controls over the long term.

Chapter 6.85 of the Health and Safety Code section 25399 provides that a responsible party is liable to the department for the response costs as provided in the agreement entered into pursuant to section 25398.2.

Since the proposed regulations reflect DTSC's statutory authority to recover its costs, DTSC has not made changes to the regulations based on these comments. Furthermore, consistent with Response #25, DTSC's costs should be denoted as part of the implementation and enforcement plan.

Comment #43: DOD stated that the regulations should be modified to coordinate cost reimbursement to existing payment mechanism in Cooperative Agreements between DTSC and DOD. To address this concern, DOD suggested that the following language be added to the proposed regulations (section 67391.1(h)):

- (h) The Department shall require responsible parties...to pay all negotiated costs associated with the administration of such controls. Department requests for payment by the federal government shall also be in accordance with existing payment mechanisms set forth in applicable cooperative agreements.

Response #43: (See Response #42 above.) DTSC believes that adding the word “negotiated” to this cost recovery provision is not consistent with DTSC’s existing statutory authority to seek cost recovery. In addition, DTSC does not accept the second amendment because DTSC must maintain its ability to pursue cost recovery. Furthermore, not all negotiated LUCs for federal property transfers will go through a cooperative agreement. By adding this sentence, the language would become too restrictive. Therefore, DTSC has not made changes to the regulations based on this comment.

Comment #44: Paul, Hastings, Janofsky & Walker (Peter Weiner) would like to see the option of contracting with a third party for administration of LUCs is available to project proponents, either at the request of the project proponent, or at the request of DTSC. To address this concern, Peter Weiner suggested that the following language be added to the proposed regulations (section 67391.1(h)):

- (h) The Department shall require responsible parties, facility owners or operators, or....administration of such controls. The project proponent may contract with a third party, with the consent of the department, or the department may require the project proponent to contract with a third party, for the administration of or to ensure compliance with such controls. In no case shall a contract with a third party relieve the project proponent from any liability it has for compliance with such controls.

Response #44: DTSC believes that adding a provision to allow the project proponent to contract with a third party may go beyond the scope of DTSC’s statutory authority and in any case is not necessary for these regulations. DTSC has not made changes to the regulations based on this comment.

Comment #45: Stanford requested clarification on how much in oversight fees does DTSC estimate to collect for the State to review past and current Orders that may require these restrictions.

Response #45: (See Responses #12 and #42 above.) Current law allows DTSC to recover all of its oversight costs. These regulations do not apply to past orders. Pursuant to these regulations, LUCs are triggered at the time of certification, not at the time DTSC issues enforcement orders. DTSC has not made changes to the regulations based on this comment.

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSES (15-DAY COMMENT PERIOD)

Following the 45-day comment period and review of all comments, DTSC did make some changes to the proposed regulations. DTSC determined that due to the amount of interest shown during the 45-day comment period that a 15-day comment period should be allowed to provide notice to those who expressed an interest in these regulations. The 15-day comment period began 11/27/02 and ended on 12/11/02. No comments were received during the 15-day comment period.

V. COMMENTS SUBMITTED BY THE OFFICE OF SMALL BUSINESS ADVOCATE AND THE TRADE AND COMMERCE AGENCY

No comments were submitted by the Office of Small Business Advocate or the Trade and Commerce Agency.