

FINAL STATEMENT OF REASONS

Amendment to Land Use Covenants (R-2006-04) OFFICE OF ADMINISTRATIVE LAW REGULATORY ACTION NUMBER:

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9, subsection (d), the Department of Toxic Substances Control (DTSC) incorporates by reference the Initial Statement of Reasons prepared for this rulemaking.

No changes were made to the proposed regulations nor are any changes necessary to the Initial Statement of Reasons following the public hearing and 45-day comment period.

LOCAL MANDATE DETERMINATION

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.

ALTERNATIVES DETERMINATION

DTSC has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective as and less burdensome to affected private persons than the proposed regulation.

ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No comments or proposed alternatives were submitted by the Office of Small Business Advocate. DTSC has determined that this regulatory action will not have a significant adverse economic impact on business.

ECONOMIC IMPACT ON BUSINESS DETERMINATION

DTSC has determined that the regulatory action will not have a significant adverse economic impact on business based upon facts, evidence, documents, and testimony.

BUSINESS REPORT DETERMINATION

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3(c).

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE NOTICE PERIOD OF APRIL 27, 2007 THROUGH JUNE 11, 2007

- **Comment from Ms. Caroline G. Rudolph, dated May 9, 2007**

Comment #1: I would recommend title 22, division 4.5, chapter 39, section 67391.1 (b) be further modified to require as part of the proposed "description of the implementation and enforcement provisions" inclusion of a reference list of all documents used in preparing said description. Inclusion of such a reference list would ensure and facilitate development of an accurate description and allow future readers, whether potential purchasers, local reuse authorities, state regulators, or policy makers, source information related to the implementation and enforcement provisions.

Response #1: The existing regulatory language relating to the implementation and enforcement provisions could be misinterpreted to require the submission of a separate enforcement and implementation plan for each land use covenant. The purpose of the amendment is to clarify and give flexibility for more efficient drafting of the implementation and enforcement provisions. In other words, the proposed regulation will allow the implementation and enforcement provisions to be inserted into any remedy decision document, the land use covenants, operation and maintenance agreement, or other enforceable document. Institutional controls, in the form of land use covenants, are individually negotiated with the property owner and responsible party as part of the remedy. These amendments are intended to be broad and not prescriptive. DTSC acknowledges that some parties would prefer a specific reference list of documents in the regulation; however, due to varying site-specific conditions, DTSC believes that more flexibility is beneficial to a broader audience.

All documents pursuant to DTSC's remediation authority are used to develop implementation and enforcement provisions. Although not specifically required by statute, all decision documents contain a reference list.

- **Comments from Mr. William E. Hvidsten, Senior Counsel, Environmental Law, AEROJET-General Corporation, dated June 11, 2007**

Comment #2: Aerojet applauds the increased utilization by DTSC of land use covenants as a means to bring property back into productive use while being protective of human health and the environment. The stated purpose of the proposed revision is "to clarify and give flexibility for more efficient drafting of the implementation and enforcement provisions." It is Aerojet's concern that the rigid inclusion of the implementation and enforcement provisions in the land use covenants, if drafted in a manner that is overly broad, may have the unintended effect of providing a disincentive to sales and/or reuse of the subject property and significantly increasing the administrative burden and costs on DTSC. We also

believe that DTSC should be flexible in the language utilized in the land use covenants to adequately reflect the fact that many properties are unique and often do not lend themselves to standardized provisions. The purpose of our comments is to bring to DTSC's attention the practical effect that all-inclusive and standardized implementation and enforcement provisions may have on residential sales and development.

Response #2: (See Response #1 above). In addition, it is not DTSC's intent to in any way affect the sale or reuse of the property, or increase the administrative burden or cost on DTSC. Unfortunately, the sales, reuse, and administrative burden and cost are affected when the responsible party leaves waste in place. The land use covenant is frequently chosen as part of the remedy in a decision document at a property. Too often, the costs to leave waste in place are not evaluated realistically, making it appear more cost effective to have an institutional control rather than remediate the property to unrestricted use. The remedy decision process is open to the public and made based upon review of specific site criteria, data, and information. Although the preference is to remediate a property to unrestricted use, because of cost or various factors, this is not always a possible or desirable outcome for the responsible party. Therefore, DTSC has made an effort to have a protective alternative to remediation to unrestricted use in the form of a land use covenant. The land use covenant, as an integral part of the chosen remedy, restricts the property based upon the risk left from the remaining contamination. The implementation and administrative costs are needed to insure that the restrictions are being maintained. Without this oversight the land use covenant, and therefore the remedy, would have failed, and there would be a risk to human health and the environment. DTSC would welcome, at any time, remediation to unrestricted use to be able to remove the land use covenant.

Comment #3: Aerojet has concerns with three specific provisions that pertain to the implementation and enforcement provisions on residential development. *Notification to DTSC upon transfer of ownership interests in residential properties.* Recently proposed land use covenants have generally required that DTSC be given notice upon any sale of property encumbered by a land use covenant. While notice to DTSC of property sales serves a valuable purpose, the notice requirement for sales of property in perpetuity creates an unintended burden on landowners and DTSC itself. For example, large residential developments, once completed, may have several thousands of residential lots or units. The notification obligation may serve as a disincentive to a prospective purchaser. In addition, the sheer number of notices will be extraordinary as the properties are sold and re-sold over time. DTSC's receipt of thousands of notices will be burdensome and costly and because of the volume, each notice may not even be reviewed. In effect, the likely volume of notices could render the notice ineffective.

The better approach may be to terminate the notice obligation for residential sales when the property becomes fully entitled. Part of that entitlement includes the recording of a Specific Plan. The Specific Plan would provide DTSC information about the specific uses of the property as authorized by the local governing body. Once a property becomes entitled for residential use, the practical need for notice is eliminated.

Response #3: DTSC's Official Policy and Procedure (OPP) #87-14, "Development and Implementation of Land Use Covenants (1990)" includes a revised model deed restriction (land use covenant) document dated August 7, 1998. Aerojet's comment is referring to an existing provision in this model land use covenant that has to do with notice of the transfer of an ownership interest. The amendments proposed in this regulation do not apply to the notice provisions and have not changed DTSC's model land use covenant language. As such, this comment is beyond the scope of the proposed regulations as noticed and written. DTSC appreciates the comment and will consider it when the land use covenant model is revised.

Comment #4: Aerojet's comments concerning costs of administering the covenant to be paid by residential property owners. Recently proposed land use covenants provisions have imposed the requirement that the original covenantor reimburse DTSC's cost of administering the covenants. In the event the covenantor fails to reimburse those costs to DTSC, the burden is imposed on the landowner.

Imposition of the reimbursement obligation on a landowner becomes unrealistic for residential properties once they are ready for sale. The costs of administering the land use covenant are not likely to be known by DTSC until they are actually incurred. Moreover, the costs associated with a large property ultimately subdivided into multiple lots would have to be apportioned to each lot owner. The prospect of an unknown potential cost imposed on an individual homeowner is likely to have a chilling effect on property sales and getting that property back into productive use. The administrative burden and resulting costs to DTSC are also likely to be significant.

The better approach is to terminate the landowner's contingent obligation to reimburse the cost of administering the covenant once the property has become entitled for residential use.

Response #4: (See Response #2 above). In addition, Aerojet's comment is referring to an existing provision in the model land use covenant that has to do with payment of the costs associated with the administration of the land use covenant. The amendments proposed in this regulation do not apply to cost and have not changed DTSC's model land use covenant language. DTSC does recognize the potential difficulties collecting costs from subdivided properties and

is willing to be creative in terms of payment of its costs. If the costs can be paid another way (i.e., through a trust, separate enforceable agreement with one entity, etc.) they may not have to be in the land use covenant. Since this rulemaking is not amending the existing cost recovery provisions contained in section 67391.1 (h), this comment is beyond the scope of the proposed regulations as noticed and written.

Comment #5: Aerojet's comments concerning inspection and reporting requirement on residential properties. Recently proposed land use covenants have sought to impose inspection and reporting requirements in perpetuity. Thus, if the original covenantor fails to conduct the inspection and submit reports to DTSC, the burden is imposed on the individual landowner.

The imposition of an inspection and reporting obligation to ensure compliance with deed restrictions on residential developments is unnecessary and is unlikely to have any real effect. Once a property is developed as a residence, there is little likelihood that its use will significantly vary in the future.

The prospect of a potential self-inspection and reporting obligation on a residential homeowner would no doubt have a chilling effect on property sales. The added burden would stigmatize a property and serve as a disincentive to purchase a particular residential property. In addition, the adherence to a self-inspection and reporting obligation on a residential property owner is counter-intuitive. What is the likelihood that an individual homeowner would conduct the inspection and report the results on a regular basis? DTSC would also incur significant expense in its review of thousands of reports required by such a provision.

Building permits, local land use restrictions, Covenants, Conditions, and Restrictions (CC&Rs), well ordinances and similar requirements pertaining to groundwater are likely to be more effective to ensure compliance with the land use covenants and less burdensome on individual homeowners.

Aerojet urges DTSC to consider the practical effect of the proposed regulations. Regulations that provide specific limitations on the scope and duration of land use covenants on residential properties would make the land use covenants more effective and less burdensome and costly on property owners and DTSC.

Response #5: (See Response #2 above). In this comment, Aerojet is referring to an existing provision in the model land use covenant that has to do with inspection and reporting. The amendments proposed in this regulation do not require a change to DTSC's model land use covenant language, nor do they affect the specific details that Aerojet is commenting on. The regulations are written broadly enough to allow for various site-specific arrangements and provide for flexibility when negotiating land use covenants. This comment is

beyond the scope of the proposed regulations as noticed and written. However, DTSC appreciates the comment and will consider it when the land use covenant model is revised.

- **Comments from Mr. Baha Y. Zarah, United States Air Force, Western Regional Environmental Office, dated June 11, 2007**

Comment #6: Air Force's comments concerning proposed changes to section 67391.1 (b).

The proposed language changes, in particular, the addition of "reporting requirements" ensures that this provision cannot be considered an Applicable or Relevant and Appropriate Requirement (ARAR) under the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA). There is no basis in CERCLA for a procedural reporting requirement, nor does the Air Force view such a requirement as either "necessary to ensure the integrity and long-term protectiveness of the land use covenant" or as constituting an ARAR. The Air Force has as a policy decision agreed to provide for periodic reporting on land use restrictions and whether they remain effective, in accordance with California Land Use Control Policy issued by the Secretary of the Air Force Installations, Environment, and Logistics (SAF/IEE) after extensive negotiations and agreement with DTSC. The Air Force does not anticipate any change in that policy position. However, there is a difference in choosing to provide periodic reports as a policy matter and acknowledging DTSC authority to require such reports as an ARAR under CERCLA or that such reporting is a necessary element of ensuring remedy protectiveness.

In contrast, the Air Force views the obligation to ensure maintenance of use restrictions or institutional controls as a substantive one. Thus, it does not object to the concept of identifying some frequency of monitoring or inspection to verify that controls remain in place and effective as long as the appropriate frequency is reasonably related to the risk presented by the site and the nature of controls imposed. The Air Force does encourage the use of the term "monitoring" rather than "inspections," which tends to imply visual inspections. Certain types of controls are better verified through, for example, a call to a local government entity regarding permit applications, or a review of documents. These types of verification activities would appear to fall within the broader category of "monitoring" but perhaps not within an "inspection" category.

Subsection (b) (2) currently refers to provisions necessary to ensure the integrity and long-term protectiveness of the land use covenant. The "land use covenant" is assumed to refer to the document filed in the real property records. However, the provisions are not in place to ensure the integrity and long-term protectiveness of the covenant, but rather the "limitations on land use or other institutional controls" referenced at the beginning of subsection (b) (2). That would seem the more appropriate reference. Therefore, the Air Force would

urge the following changes so that subsection (b) (2) of the proposed regulations states:

“(2) include a description of the implementation and enforcement provisions, including but not limited to frequency of monitoring necessary to ensure the integrity and long-term protectiveness of the limitations on land use or other institutional controls.”

Response #6: As a general response to the Air Force, DTSC notes that although the comments from the Air Force are marked as “DRAFT,” no final version was received, so DTSC is responding to this draft version dated June 8, 2007.

(See Response #1 above). The Air Force has misunderstood the change in language in section 67391.1(b)(2). There are no “additional” reporting requirements. The mention of “reporting requirements” is included solely as an example of what may be part of the implementation and enforcement provisions. The focus of the change in this section is to remove confusion and provide clarification as to the wording of “plan.” DTSC did not mean to imply that a separate “plan” had to be written for each land use covenant, nor was the existing regulation implemented that way. However, it did cause some confusion and this change clarifies and better reflects current and past practices.

Implementation and enforcement provisions are required to make sure that the land use covenant is effective and restricting property as the remedy contemplated. If there are no implementation and enforcement provisions, there is no way of knowing whether the restrictions have been breached or are not effective, and no way of knowing if the remedy failed. Since the land use covenant is an integral part of the remedy, it must be maintained. DTSC believes that the language in the regulation is more clear and appropriate, and that the term inspection includes monitoring. The specific implementation and enforcement provisions will vary depending on site conditions and the specific restrictions. This could include anything from inspections to monitoring to reporting, or combinations thereof. An ARAR is a federal or state law that must be considered in choosing a remedial action. Remedial actions must be designed, constructed, and operated to comply with all ARARs. The Air Force has considered this section as an ARAR in the past and since nothing substantive has changed in this section, it is still considered an ARAR by DTSC.

The land use covenant is the mechanism that is recorded against the property that will contain the appropriate restrictions, based upon the decision document, needed to protect human health and the environment. The implementation and enforcement provisions are in place precisely to ensure the integrity and long-term protectiveness of the land use covenant, which in turn ensures the integrity

and long-term protectiveness of the limitations on land use and other institutional controls.

Comment #7: Air Force's comments concerning proposed changes to section 67391.1(e) (1).

The Air Force appreciates the addition of language recognizing the option of entering into a land use covenant for a successor-in-interest in accordance with the policy negotiated between the Air Force and DTSC. However, the Air Force believes that restricting the time to "during the initial property transfer process" is unduly limiting. For example, often the Air Force is addressing multiple parcels being transferred in multiple events to a single transferee over time. It may be administratively less burdensome on the transferee to be able to execute a single covenant over a larger area even if it is not during the initial property transfer process (or perhaps during the initial transfer for some parcels but not for others). Also, your regulations refer to multiple trigger points for the state land use covenant requirement (for example, closure plan). While the Air Force doesn't necessarily agree that the identified documents necessarily represent decision points or trigger the state land use covenant obligation, DTSC clearly views the overall requirement as potentially applying at many points in time. It doesn't make sense, given that view, for DTSC to limit the successor-in-interest option only to the initial property transfer process.

The Air Force urges additional flexibility to be inserted in subsection (e) (1) to allow for arrangements other than a State land use covenant that would still be acceptable to DTSC. For example, on a piece of property scheduled for transfer but without an identified time table or transferee, the Air Force anticipates that the eventual transferee will likely demolish a number of buildings on the property. All of the identified remaining contamination is within 1 foot or under these buildings. The decision document currently identifies land use restrictions near those buildings. However, the most rational course of action for a transferee is to submit a demolition plan that would address the contaminated soils at the same time. Because the decision document would require DTSC and Air Force approval for any change in restrictions, such a change/plan would require DTSC approval. That is an example of an arrangement that ought to be acceptable to DTSC (assuming that DTSC through its cleanup authorities could enforce the demolition and soil removal plan) but would not likely be completed by the initial property transfer. While a state land use covenant would be feasible in such circumstances (thus not falling within (e) (2)), it wouldn't make a lot of sense to have a state land use covenant or for either side to negotiate one for a short term when there is knowledge that the remaining contamination will be cleaned up under DTSC oversight. It would be helpful if the regulations built in such flexibility. The Air Force would thus propose that 67391.1(e) (1) be revised to read:

“The Department shall not consider property owned by the federal government . . . unless an appropriate land use covenant or other arrangement acceptable to the Department, except as provided in subsection (e) (2), will be executed or entered into by the Department and the federal government or a successor-in-interest to the federal government. If an appropriate land use covenant is executed, it will be recorded in the county where the land is located in accordance with this section.”

Response #7: The requirement for a land use covenant is based on the fact that waste is left in place and institutional controls are required to protect human health and the environment. The land use covenant, as an integral part of the remedy, needs to be executed and recorded at the time the decision document is approved. In the case of the federal government, DTSC is accepting that during the initial property transfer from the federal government to the private party, the land use covenant may be executed by the successor. To permit any more flexibility than that, DTSC would be significantly increasing its administrative burden trying to keep track of what land use covenants would be needed, where, and when. DTSC’s goal is to ensure the protection of human health and the environment by, among other things, making sure all the components of the remedy are in place. DTSC suggests the responsible party, in this case the federal government, work with the future owner to develop a process to most efficiently transfer the property while at the same time making sure that all the requirements of the remedy are in place.

The Air Force is requesting that “arrangements other than a state land use covenant” be acceptable through reliance on the decision document. DTSC does rely on the decision document as one layer of protection, but a land use covenant that runs with the land adds a layer of protection to ensure that the use restrictions are not violated. This regulation and the model land use covenant allow for whatever site-specific flexibility may be needed to support the remedy and still allow for development of the property. DTSC has often permitted demolition and development within the language in the land use covenant and with regulatory oversight. As noted in Response # 6 above, the Air Force has considered this section as an ARAR in the past and since nothing substantive has changed in this section, it is still considered an ARAR by DTSC. DTSC will seek flexibility to the extent DTSC can within the land use covenant, but the regulatory structure as addressed in these regulations must be specific to satisfy the requirements for ARARs.

DTSC appreciates the comments received. However, DTSC has not made changes to the regulations based on these comments.