

**INITIAL STATEMENT OF REASONS
AMENDMENT TO LAND USE COVENANTS**
Department of Toxic Substances Control Reference Number: R-2006-04
Office of Administrative Law Notice File Number: Z-07-0417-04

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

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

STUDIES RELIED ON

The Department of Toxic Substances Control (DTSC) did not rely on any studies in preparing these regulations. DTSC has found this rulemaking to be exempt under the California Environmental Quality Act (tit. 14, § 15061, subd. (b) (3)). A draft Notice of Exemption (NOE) is available for review with the rulemaking file and will be filed with the State Clearinghouse when the regulations are adopted.

ALTERNATIVES CONSIDERED

To solicit comments on DTSC's proposed regulations, DTSC will post the proposed regulations on its Internet website, and make copies available upon request. DTSC will also post the rulemaking package (notices/public comment period) on its Internet website.

DTSC considered several alternatives:

- 1. Recommended Alternative 1:** Amend the existing regulation that clarifies when it is appropriate to establish land use covenants; where to include the implementation and enforcement provisions; ensure that these provisions also apply to site cleanup activities being conducted under the new authorities of the California Land Reuse and Revitalization Act of 2004; and for federally-owned property, permits land use covenants to be executed by DTSC and the federal government, or the successor-in-interest to the federal government, during the initial property transfer process, and to be properly recorded.
- 2. Alternative 2:** Take no action. DTSC would continue to depend on its statutory authority, existing land use covenants regulation, and Official Policy and Procedure #87-14 for requiring land use covenants to be recorded when contamination is being left at a site to ensure that public health and safety, and the environment is adequately protected. This alternative is not recommended, since it would not ensure that land use covenants are properly recorded under all of DTSC's cleanup authorities, and would make it more difficult for DTSC to obtain recorded land use covenants when contamination is left in place at federally-owned property.

3. **Alternative 3:** Require all property to be cleaned up to unrestricted use before a site remediation can be certified as being satisfactorily complete. This alternative is not recommended because there are legitimate reasons for imposing land use restrictions that “run with the land” and limit the use of property to industrial, commercial, or other nonresidential purposes. For some property, cleanup to unrestricted uses may not be the best option due to the extent and nature of contamination, high costs of cleanup, or technical infeasibility. Although these types of properties would need institutional controls to protect against future exposures, the properties may still be used productively. For example, it may not be possible to cleanup a large landfill to unrestricted future land use. Although not suitable for housing, schools, or hospitals, some landfill properties have been redeveloped as golf courses, botanical gardens, parks, ecological reserves, or have been capped by roadways or industrial/commercial centers.

DETAILED STATEMENT OF REASONS

A detailed statement of reasons for each subsection of section 67391.1, chapter 39, division 4.5, title 22, California Code of Regulations follows. Overall, this section provides specific details regarding the proposed clarifying and conforming amendments to the existing regulations for requiring land use covenants.

Section 67391.1, subsection (a):

This section of the existing regulation establishes when it is appropriate to require a land use covenant imposing appropriate limitations on land to be signed by the land owner and DTSC and recorded in the county where the property is located. The existing regulation clarifies that, except as provided in subsection (f), a land use covenant imposing appropriate limitations on land must be executed and recorded when contamination is left in place. The proposed amendment clarifies that this exception is also applicable to subsection (e)(2), which applies to federally-owned property. It does not create an additional exception. This non-substantive change is for clarification purposes.

DTSC’s proposed amendment also clarifies that land use covenants are required when response actions are undertaken pursuant to all of DTSC’s enforcement authorities under division 20 of the Health and Safety Code. These response actions encompass all actions that may be taken to address a release or threatened release of hazardous materials, hazardous wastes or constituents, or hazardous substances. Further, the existing regulation references school sites where DTSC is overseeing the investigation and cleanup actions pursuant to the Education Code. Specific sections of the Education Code give DTSC oversight authority to conduct, among other things, phase I, preliminary site assessments, and site remediation at certain school sites. The applicable Education Code sections do not lay out the process for remediation. Rather, the Education Code directs DTSC to follow the remediation process pursuant to chapter 6.8 of division 20 of the Health and Safety Code. Once the Health and Safety Code process is followed, this regulation is applicable. Therefore, the Education Code reference need not be included in these regulations.

67391.1, subsection (b):

The existing regulation requires DTSC to set forth and define land use restrictions in the form of covenants in a remedy selection or response action decision document prior to approving or concurring with a facility closure, corrective action, Removal Action Workplan (RAW), Remedial Action Plan (RAP), or other similar document when contamination will remain on the land at levels which are not suitable for unrestricted use of the land. The proposed regulation is needed to clarify and give more flexibility for drafting the implementation and enforcement provisions. In other words, the proposed regulation will allow the implementation and enforcement provisions, including but not limited to frequency of inspections and reporting requirements, to be efficiently inserted into any document, including the decision document, any supporting enforceable document, the land use covenant, or operation and maintenance agreement. In addition, the existing language could be misinterpreted to require the submission of a separate enforcement and implementation plan. The amendment will clarify that a separate enforcement and implementation plan is not required. This change will clear up confusion and unnecessary delays in the overall process.

The existing regulation clarifies that, except as provided in subsection (f), any response action decision document must specify that the limitations or controls will be incorporated into an appropriate land use covenant and include an implementation and enforcement plan. Consistent with the amendment in section (a), the proposed amendment clarifies that this exception is also applicable to subsection (e)(2), which applies to federally-owned property. It does not create an additional exception. This non-substantive change is for clarification purposes. The regulation also makes a non-substantive change by deleting "DTSC" and inserting "the Department" to make the reference to DTSC consistent with the remainder of the regulations.

67391.1, subsection (c):

The existing regulation applies to those sites that have been certified, including those that have ongoing operation and maintenance activities. DTSC will not certify that a response action has been satisfactorily completed, with the exception of any necessary long-term operation and maintenance activities, until land use covenants have been recorded. The proposed amendment clarifies that the land use covenant must be recorded in the county where the property is located. This provision is consistent with existing law. The existing regulation clarifies that, except as provided in subsection (f), DTSC cannot certify that a response action has been satisfactorily completed until any required land use covenant has been signed and recorded. The proposed amendment clarifies that this exception is also applicable to subsection (e)(2), which applies to federally-owned property. It does not create an additional exception. This non-substantive change is for clarification purposes.

67391.1, subsection (d):

The existing regulation specifies that DTSC will not certify that a site cleanup has been satisfactorily completed (except for any necessary long-term operation and

maintenance activities) until any required land use covenant has been signed by DTSC and the property owner and recorded in the county recorder's office where the land is located. The regulation applies to site cleanup activities being conducted under DTSC site cleanup and enforcement authorities of chapters 6.5, 6.8, or 6.85 of the Health and Safety Code. Assembly Bill 389 (Stats. 2004, ch. 705) enacts the California Land Reuse and Revitalization Act of 2004 (Act), effective January 1, 2005, that provides liability protections to brownfield developers, innocent landowners and contiguous property owners which are intended to promote the cleanup and redevelopment of blighted or contaminated properties. The bill establishes a process for eligible property owners to obtain the immunities, conduct a site assessment and implement a response action, if necessary, to ensure that the property is ready for reuse. The Act authorizes a response plan to require the use of a land use control that imposes appropriate conditions, restrictions, and obligations, on land use or activities, if contamination will remain at the site at a level that is not suitable for unrestricted use of the property (Health & Saf. Code § 25395.99). The Act further specifies that if an agency approves a response plan that requires the use of a land use control, the land use control must be executed by the landowner and recorded in the county recorder's office where the property is located. The proposed regulation is needed to additionally apply to site cleanup activities being conducted under the authorities of the Act (ch. 6.82 of the Health & Saf. Code). The proposed regulation will also ensure that DTSC is reimbursed for its costs associated with the administration of such controls at these sites.

67391.1, subsection (e):

The existing regulation addresses situations requiring land use covenants for land owned by the federal government. The regulation requires appropriate land use covenants to be executed by DTSC and the federal agency (property owner) and to be properly recorded before the property can be determined as "suitable for transfer." The existing regulation did not allow land use covenants to be recorded by a successor-in-interest for federally-owned property. This regulation has proven to be too restrictive and limiting. The United States Department of Defense (DoD) has a policy that limits its ability to enter into land use covenants on federally-owned property. The proposed regulation would permit appropriate land use covenants to be executed by DTSC and the federal government, or the successor-in-interest to the federal government, during the initial property transfer process, and to be properly recorded. This provision is equally protective of public health and safety, and the environment, and will assist DTSC in its ability to obtain recorded land use covenants when contamination is left in place at federally-owned properties. It will also ensure that federal property transfers are executed quickly so these properties can be redeveloped.

The existing regulation clarifies that whenever DTSC determines that it is not feasible to record a land use covenant for property owned by the federal government, DTSC and the federal government "may" use other mechanisms to ensure that future land use will be compatible with the levels of contamination which remain on the property. The proposed amendment will change "may" to "shall" to require DTSC and the federal

government to establish other mechanisms to protect public health and safety, and the environment when contamination is left in place.

67391.1, subsection (f):

The existing regulation contains an exception for properties when DTSC determines that it is not feasible to record a land use covenant. This exception applies to, among other things, current or former tidelands that are generally owned by the State. The proposed amendment to subsection (f)(1) is a non-substantive, grammatical change for the purpose of clarity. There is no other proposed amendment to this section.

67391.1, subsection (g):

The existing regulation clarifies that DTSC may later modify or terminate land use covenants if it determines such modification or termination is protective of public health and safety and the environment. This section provides DTSC with flexibility in those situations when new facts or scientific findings are established that the contamination left in place no longer poses as great a risk (or no risk) to public health, safety and the environment. There is no proposed amendment to this section.

67391.1, subsection (h):

DTSC has statutory authority to pursue cost recovery for its oversight costs. The existing regulation clarifies that DTSC will recover any of its administrative oversight costs involved with recording land use covenants. This section clearly requires responsible parties, facility owners or operators, or project proponents involved in land use covenants to pay all costs associated with the administration of such controls. There is no proposed amendment to this section.

67391.1, subsection (i):

This section provides definitions for terms applicable to the land use covenants regulation. There is no proposed amendment to this section.

Note:

The proposed amendment adds a reference to Health and Safety Code section 25395.99 to reflect DTSC's new brownfields authority under the Act.