

State of California

MemorandumM60050.003145
MCAS EL TORO
SSIC NO. 5090.3

To: Mr. Tayseer Mahmoud
Senior Hazardous Substances Engineer
Office of Military Facilities
Department of Toxic Substances Control
5796 Corporate Avenue
Cypress, CA 90630

Date: June 16, 2004

From: Regina Donohoe, Ph.D.
Staff Toxicologist
Office of Spill Prevention and Response
Department of Fish and Game



Subject: **Applicable or Relevant and Appropriate Requirements (ARARs) for Sites 8 and 12 – Former Marine Corps Air Station (MCAS) El Toro, California**

This memo is in response to your June 2, 2004, memorandum requesting potential State Applicable or Relevant and Appropriate Requirements (ARARs), to-be-considered (TBC) criteria, advisories, guidance or proposed standards that may apply in the preparation of an Action Memorandum for Site 8 and Site 12 at the Former MCAS El Toro. The Department of Fish and Game, Office of Spill Prevention and Response (DFG-OSPR) appreciates this opportunity to provide State laws and regulations to guide the planned remediation at these sites.

DFG-OSPR is providing the following analysis pursuant to Section 121(d)(2)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act and under the National Contingency Plan (NCP), 40 Code of Federal Regulations section 300.400(g) and 300.515(d) and (h).

Sites 8 and 12 are located in the southwest portion of the former MCAS, El Toro in Orange County, California. Site 8 was formerly a Defense Reutilization and Marketing Office and was used as a storage area for containerized liquids and salvage materials. Site 12, designated as the Sludge Drying Beds, consists of sludge-drying beds, a drainage ditch and former wastewater treatment plants. According to Frank Cheng, DTSC (personal communication on June 8, 2004), the remedial investigations noted the absence of significant plant and wildlife habitat, negating the need to conduct ecological risk assessments at Sites 8 and 12. However, the May 20, 2004 letter from the Department of Navy, attached to your June 2, 2004 memorandum, did not provide a description of the habitats at and around these sites. Therefore, in the absence of this site-specific information, we are including an inclusive list of potential ARARs. This list may be further refined as additional information on the habitat at and around these sites is provided.

Listed on the enclosed table is a site-specific list of Fish and Game Code Sections which may apply as State ARARs or TBCs with the date of enactment or

Mr. Tayseer Mahmoud
June 16, 2004
Page 2

promulgation. The specific citation and explanation for each listed ARAR and TBC are also enclosed, in addition to applicable statutes and regulations.

We would like to reiterate our interest in coordinating any natural resource issues should there be a release(s) of any hazardous/deleterious materials at the MCAS El Toro that could affect the State's natural resources. The staff of the DFG-OSPR appreciates the opportunity to provide our ARARs. If you have any questions or need further information, please contact me at (831) 649-7150 or by e-mail at rdonohoe@ospr.dfg.ca.gov.

Reviewer: Julie Yamamoto, Ph.D., Senior Toxicologist
Wendy Johnson, Staff Counsel

Enclosure

cc:

Department of Fish and Game
Office of Spill Prevention and Response
Julie Yamamoto, CDFG/OSPR-Scientific
Wendy Johnson, CDFG/OSPR-Legal

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Aquatic habitat/species	Action must be taken if toxic materials are placed where they can enter waters of the State. There can be no release that would have a deleterious effect on species or habitat.	Fish and Game Code section 5650 (a), (b) & (f)	This code section prohibits depositing or placing where it can pass into waters of the state any petroleum products (Section 5650(a)(1)), factory refuse (section 5650(a)(4)), sawdust, shavings, slabs or edgings (section 5650(a)(3)), and any substance deleterious to fish, plant life or bird life (section 5650(a)(6)). These are substantive, promulgated environmental protection requirements. These requirements impose strict criminal liability on violators. (<i>People v. Chevron Chemical Company (1983) 143 Cal. App. 3d 50</i>). This imposition of strict criminal liability imposes a standard that is more stringent than federal law. The extent to which each subdivision of section 5650 is relevant and appropriate depends on the site characterization.
Wildlife Species	Action must be taken to prohibit the taking of birds and mammals, including the taking by poison	Fish and Game Code section 3005 (Stats. 1957, c. 456, p. 1353 section 3005)	This code section prohibits the taking of birds and mammals, including taking by poison. "Take" is defined by Fish and Game Code section 86 to include killing. "Poison" is not defined in the code. Although there is no state authority on this point, federal law recognizes that poison, such as Strychnine, may affect incidental taking. (<i>Defenders of Wildlife v. Administrator, Environmental Protection Agency (1989) 882 F. 2d. 1295</i>). This code section imposes a substantive, promulgated environmental protection requirement.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Rare native plants	Action must be taken to conserve native plants, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 1908 (Added by Stats. 1977, c. 1181, p. 3869, section 8)	<p>These code sections make provisions concerning native plants protection, including: criteria for determining endangered plant species; designation of endangered plants by the Fish and Game Commission; research by the Department; takings by the Department for scientific or propagation purposes; other prohibitions on takings; exercise of enforcement authority; arrests and confiscation; carrying out of plant conservation programs by other state departments and agencies; and unauthorized public agency regulations pertaining to agriculture.</p> <p>Section 1908 imposes a substantive requirement by forbidding any "person" to take rare or endangered native plants. Fish and Game Code section 67 provides the definition of "person" as any natural person or any partnership, corporation, limited liability company, trust, or other type of association. Whether the federal government or contractors acting on behalf of the federal government would fall within that definition is a potential issue. To the extent that there are rare or endangered plants on site, section 1908 would be an ARAR.</p>

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Endangered Species	Action must be taken to conserve endangered species, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 2080 (Added by Stats. 1984, c. 1240, section 2).	<p>This section prohibits the take, possession, purchase or sell within the state, any species (including rare native plant species), or any product thereof, that the commission determines to be an endangered or threatened species, or the attempt of any of these acts. This section is applicable and relevant to the extent that there are endangered or threatened species in the area which have the potential of being affected if actions are not taken to conserve the species. This section prohibits releases and/or actions that would have a deleterious effect on species or their habitat. This section and applicable Title 14 regulations should be considered as ARARs.</p> <p><i>California Code of Regulations Title 14 sections 670.2</i> provides a listing the plants of California declared to be Endangered, Threatened or Rare.</p> <p><i>California Code of Regulations Title 14 section 670.5</i> provides a listing of Animals of California declared to be endangered or threatened.</p> <p><i>California Code of Regulations Title 14 section 783 et. seq.</i>, provides the implementation regulations for the California Endangered Species Act.</p>

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Wildlife/ domestic species	Action must be taken to prohibit the use of steel-jawed leghold traps	Fish and Game Code section 3003.1 (Prop. 4 section 1 approved Nov. 3, 1998, eff. Nov. 4, 1998)	This section prohibits the use of any body gripping trap and provides that it is unlawful for any person, including an employee of the federal government, to use or authorize the use of such device to capture any game mammal, fur bearing mammal, nongame mammal, protected mammal, or any dog or cat. This prohibition will not apply in the extraordinary case where the use of such a device is the only method available to protect human health and safety.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully protected bird species/habitat	Action must be taken to prevent the taking of fully protected birds	Fish and Game Code section 3511 (Added by Stats.1970, c. 1036, p. 1848 section 4)	<p>This section provides that it is unlawful to take or possess any of the following fully protected birds:</p> <ul style="list-style-type: none"> (a). American peregrine falcon (b). Brown Pelican (c). California black rail (d). California clapper rail (e). California condor (f). California least tern (g). Golden eagle (h). Greater sandhill crane (i). Light-footed clapper rail (j). Southern bald eagle (k). Trumpeter swan (l). White-tailed kite (m). Yuma clapper rail <p>This should be considered Applicable and Relevant to the extent that such fully protected birds or their habitat are detected on or near the site.</p>

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Wetlands	Actions must be taken to assure that there is "no net loss" of wetlands acreage or habitat value. Action must be taken to preserve, protect, restore and enhance California's wetland acreage and habitat values.	Fish and Game Commission Wetlands Policy (adopted 1987) included in Fish and Game Code Addenda	This policy seeks to provide for the protection, preservation, restoration, enhancement and expansion of wetland habitat in California. Further, it opposes any development or conversion of wetland that would result in a reduction of wetland acreage or habitat value. It adopts the USFWS definition of a wetland which utilizes hydric soils, saturation or inundation, and vegetable criteria, and requires the presence of at least one of these criteria (rather than all three) in order to classify an area as a wetland. This policy is not a regulatory program and should be included as a TBC.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully Protected Mammals	Actions must be taken to assure that no fully protected mammals are taken or possessed at any time.	Fish and Game Code section 4700 (Added by Stats. 1970, c. 1036, p. 1848 section 6)	<p>This section prohibits the take or possession of any of the fully protected mammals or their parts. The following are fully protected mammals:</p> <ul style="list-style-type: none"> (a) Morro Bay kangaroo rat (b) Bighorn sheep except Nelson bighorn sheep (c) Northern elephant seal (d) Guadalupe fur seal (e) Ring-tailed cat (f) Pacific right whale (g) Salt-marsh harvest mouse (h) Southern sea otter (i) Wolverine <p>This section is applicable, relevant, and appropriate to the extent that such mammals and/or their habitat are located on or near the site.</p>

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EL TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully Protected Reptiles and Amphibians	Actions must be taken to prevent the take or possession of any fully protected reptile or amphibian.	Fish and Game Code section 5050 (Added by Stats. 1970, c. 1036, p. 1849, section 7)	<p>This section prohibits the take or possession of fully protected reptiles and amphibians or parts thereof. The following are fully protected reptiles and amphibians:</p> <ul style="list-style-type: none"> (1) Blunt-nosed leopard lizard (2) San Francisco garter snake (3) Santa Cruz long-toed salamander (4) Limestone salamander (5) Black toad <p>This section is applicable, relevant and appropriate to the extent that these amphibians or reptiles and/or their habitat are located on or near the site.</p>
Birds	Action must be taken to avoid the take or destruction of the nest or eggs of any bird	Fish and Game Code section 3503	This section prohibits the take, possession, or needless destruction of the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EL TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Birds of Prey	Action must be taken to prevent the take, possession, or destruction of any birds-of prey or their eggs	Fish and Game Code section 3503.5 (Added by Stats. 1985, c. 1334, section 6)	This section prohibits the take, possession, or destruction of any birds in the orders of Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto. This section will be applicable and relevant to the extent that such species or their eggs are located on or near the site.
Nongame birds	Actions must be taken to prevent the take of nongame birds.	Fish and Game Code section 3800 (Added by Stats. 1971, c. 1470, p. 2906, section 13)	This section prohibits the take of nongame birds, except in accordance with regulations of the commission, or when related to mining operations with a mitigation plan approved by the department. This section further provides requirements concerning mitigation plans related to mining. This section is applicable and relevant to the extent that nongame birds or their eggs are located on or near the site and such species have not been included in the fish and wildlife conservation plan filed pursuant to the Federal Fish and Wildlife Conservation Act. Species included in the plan will be protected at the federal standard making this section an ARAR to the extent that it is more stringent than the federal standard of protection.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fur-bearing mammals	Provides manners under which fur-bearing mammals may be taken	Fish and Game Code section 4000, et. Seq. (Stats. 1957, c. 456, p. 1380, section 4000)	This section provides that a fur-bearing mammal may be taken only with a trap, a firearm, bow and arrow, poison under a proper permit, or with the use of dogs.
Nongame mammals	Action must be taken to avoid the take or possession of nongame mammals	Fish and Game Code section 4150 (Added by Stats. 1971, c. 1470, p. 2907, section 21)	Nongame mammals are those occurring naturally in California which are not game mammals, fully protected mammals, or fur-bearing mammals. These mammals, or their parts, may not be taken or possessed except as provided in this code or in accordance with regulations adopted by the commission.

June 16, 2004

**CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12**

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Nongame Animals	Action must be taken to avoid the take of nongame mammals except as provided in applicable regulations	Title 14 California Code of Regulations (hereinafter referred as C.C.R.) section 472 (effective 07/01/74)	<p>This Regulation provides that nongame birds and mammals may not be taken except as provided in subsections (a) through (d) below and in Sections 478 and 485.</p> <p>a). The following nongame birds and mammals may be taken except as provided in Chapter 6: English Sparrow, starling, coyote, weasels, skunks, opossum, moles and rodents (excludes tree and flying squirrels, and those listed as furbearers, endangered or threatened species);</p> <p>b). Fallow, sambar, sika, and axis deer may be taken concurrently with the general deer season.</p> <p>c). Aoudad, mouflon, tahr, and feral goats may be taken all year.</p> <p>d). American crows may be taken only under provisions of section 485 and by landowners or tenants, or person authorized by landowners or tenants, when American crows are committing or about to commit depredations upon ornamental shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner as to constitute a health hazard or other nuisance. If required by Federal regulations, landowners or tenants shall obtain a Federal migratory bird depredation permit before taking any American crows or authorizing any other person to take them.</p>

June 16, 2004

CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EL TORO SITES 8 AND 12

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Nongame Birds and NonGame Mammals	Methods of Take	Title 14 C.C.R. section 475 (effective 07/05/72)	This regulation provides that birds and nongame mammals may be taken in any manner except as follows: a). Poison may not be used, b). Recorded or electrically amplified bird or mammal calls or sounds or recorded or electrically amplified imitations of bird or mammal calls or sounds may not be used to take any nongame bird or nongame mammal except coyotes, bobcats, American crows and starlings, c). Traps may be used in very limited situations, and d). No feed, bait or other substance capable of attracting a nongame mammal may be used in conjunction with dogs.
Bear	License requirements to take bear	Fish and Game Code section 4750 (Added by Stats. 1957, c. 1916, p. 3349, section 2)	This section makes it unlawful to take any bear with firearm, trap, or bow and arrow without first procuring a license tag authorizing the take of the bear, this section further provides that no iron or steel-jawed or any type of metal-jawed trap shall be used to take any bear.
Specially Protected Mountain Lion	Action must be taken to avoid injuring, taking, possessing or transporting any mountain lion.	Fish and Game Code sections 4800 et.seq. (Prop. 117 approved June 5, 1990)	Mountain lions are specially protected mammals in California. It is unlawful to take, injure, possess, transport, or sell any mountain lion or any part or product thereof. Violation of this section is a misdemeanor.

June 16, 2004

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CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EI TORO SITES 8 AND 12

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Protected Amphibians	Action must be taken to avoid the take or possession of protected amphibians.	Title 14 C.C.R. sections 40 (Section 40 designated effective 03/01/74)	This regulation makes it unlawful to capture, collect, intentionally kill or injure, possess, purchase, propagate, sell, transport, import, or export any native reptile or amphibian, or parts thereof unless under special permit from the department issued pursuant to Title 14 C.C.R. sections 650, 670.7, or 783 of these regulations, or as otherwise provided in the Fish and Game Code or these regulations.
Furbearing Mammals	Action must be taken to avoid take	Title 14 C.C.R. section 460 (effective 07/01/59)	Regulation makes it unlawful to take Fisher, marten, river otter, desert kit fox, and red fox.
Furbearing Mammals	Provides methods of take for other furbearing mammals not listed in Title 14 C.C.R. section 460	Title 14 C.C.R. section 465 (effective 07/01/69)	Furbearing mammals may be taken only with a firearm, bow and arrow, or with the use of dogs, or traps in accordance with the provisions of Section 465.5 of Title 14 and section 3003.1 of the Fish and Game Code.

June 16, 2004

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 PAGE 38
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CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs AND TBCs FOR MCAS EL TORO SITES 8 AND 12

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully Protected Fish	Actions must be taken to prevent the take or possession of any fully protected fish species.	Fish and Game Code section 5515 (Added by Stats. 1970, c. 1036, p. 1849, section 8)	<p>This section prohibits the take or possession of fully protected fish or parts thereof. The following are fully protected fish:</p> <ul style="list-style-type: none"> (a) Colorado River squawfish (b) Thicketail chub (c) Mohave chub (d) Lost River sucker (e) Modoc sucker (f) Shortnose sucker (g) Humpback sucker (h) Owens River pupfish (i) Unarmored threespine stickleback (j) Rough sculpin <p>This section is applicable, relevant and appropriate to the extent that such fish species or their habitat are located on or near the Site.</p>

June 16, 2004

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