



California Department of Public Health
MEMORANDUM

DATE: February 11, 2011

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SUBJECT: Review of the Response to Comments from the Navy from Comments provided the CDPH on the *Draft Final Radiological Addendum (RA) to the Remedial Investigation/Feasibility Study (RI/FS) Report for Parcel E-2 Hunters Point Shipyard (HPS) March 2010*

Upon the request of the Department of Toxic Substance Control, the California Department of Public Health (CDPH) reviewed documents associated with radiological issues regarding the Draft Final Radiological Addendum (RA) to the Remedial Investigation/ Feasibility Study (RI/FS) Report for Parcel E-2 Hunters Point Shipyard (HPS), March 2010.

If you need further assistance please contact Tracy Jue of my staff at (916) 324-4804.

California Department of Public Health (CDPH) Review

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Specific Comments

Response to comment 2 on page 26 of 40

- 1 Please clarify statements as to whether the remedial alternative has been selected, as the Responses to Comments are inconsistent on this point. First, the Responses to Comments state: "a preferred remedial alternative will not be identified until the next step in the CERCLA ... process" (page 26). Then, on page 30, the Responses refer to "the selected remedial action for Parcel E-2." Finally, also on page 30, the Responses imply that the Navy has already determined that it will not be selecting an alternative that provided for unrestricted use with regard to radiological contamination at Hunters Point Parcel E-2, when it states: "More specifically, the license termination process described in the regulations appears to be intended to reach the conclusion that the facility is suitable for unrestricted use."

Response to Comments

2. It continues to be CDPH's position that Title 17, California Code of Regulations, Section 30256 (Section 30256) meets the requirements of an applicable or relevant and appropriate requirement (ARAR) for the clean up of Hunters Point.

Federal regulations detail the requirements for an ARAR (40 CFR section 300.400.) The overriding aim of the evaluation is "to determine whether a requirement addresses problems or situations sufficiently similar to the circumstances of the release or remedial action contemplated, and whether the requirement is well-suited to the site, and therefore is both relevant and appropriate." The Navy apparently finds CDPH's focus on the "purpose" of the regulation to be misplaced. However, Section 30256 governs the clean up of a site contaminated by radiological contaminants, which is the point of the clean up of Hunters Point, and thus Section 30256 addresses a similar problem. Subdivision (g) of 40 CFR section 300.400 states that an evaluation as to whether a regulation is relevant and appropriate should consider eight separate comparisons, "where pertinent, to determine relevance and appropriateness." Apparently, the Navy has determined that three of the eight comparisons identified in the regulation, 40 CFR section 300.400 (g), namely those listed in (ii), (iv) and (vi), are "pertinent" to determining whether Section 30256 is a relevant and appropriate standard. However, the Navy does not explain why it believes that Section 30256 fails to qualify as an ARAR based on those three comparisons. The Navy states

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instead: "More specifically, the license termination process described in the regulations appears to be intended to reach the conclusion that the facility is suitable for unrestricted use." (Page 30) CDPH is unable to determine why the fact that the Navy seems not to be agreeing to unrestricted use means that Section 30256 should not be an ARAR. The Navy states: "The Navy and EPA determinations under those three factors are sufficient in and of themselves" to show that Section 30256 should not be an ARAR and that the Navy and EPA are not required "to make specific findings for each of the eight factors listed in Subsection 300.400(g)(2)(i) through (vii)." Thus, CDPH is in the position of having limited information as to what it must show to demonstrate that Section 30256 is an ARAR. Nonetheless, it believes that Section 30256 scores highly on the three comparisons listed by the Navy.

First, however, CDPH would point out that the Navy agreed that 10 CFR section 20.1402 is a relevant and appropriate ARAR for certain portions of Parcel E-2. That federal regulation is quite similar to Section 30256. The chief difference is that the state regulation is more stringent than the federal standard. CDPH had, at one time, adopted the federal standard but that regulation was invalidated in by a superior court judge who held that "the standard in California for decommissioning and termination of licenses for radioactive sites is found in ... Section 30256." (Committee to Bridge the Gap v. Bonta et.al., Sacramento County Superior Court, Case No. 01CS01445, "Order Requiring Supplemental Return to Amended Peremptory Writ", August 17, 2002). CDPH was ordered by the Court to use only Section 30256 and, thus, it is the only standard applicable in the State of California for evaluating the clean up of radiologically contaminated sites.

CDPH would also note its disagreement with the Navy's conclusion that 10 CFR section is not an ARAR for areas that will require engineering and institutional controls. Remedial actions are required to adhere to ARARs; ARARs are not selected after the fact to conform to a selected remedial action. CERCLA provides that "the remedial action selected ... shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such ... relevant and appropriate standard, requirement, criteria, or limitation." (42 U.S.C. section 9621(d)(2)(A).)

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Regarding the three specific criteria that the Navy addressed, first among those is the "medium regulated or affected by the requirement and the medium contaminated or affected at the CERCLA site." The medium addressed by Section 30256 is identical to the medium contaminated at Hunters Point, namely radionuclides in soil and buildings. The Navy apparently agreed that 10 CFR section 20.1402, which also addresses radiological contamination in soil, meets that criterion. Thus, there can be no doubt that Section 30256 regulates the same medium as the medium that is contaminated at Hunters Point Parcel E-2.

The second specific test identified by the Navy in its response is: "The actions or activities regulated by the requirement and the remedial action contemplated at the CERCLA site." Section 30256 establishes a standard for the clean up of radiologically contaminated sites in California and thus regulates the same activities as the remedy at Parcel E-2 is intended to address. The Navy agreed that 10 CFR section 20.1402 is a relevant and appropriate ARAR for certain portions of Parcel E-2. The subject of Section 30256 is the same as that of the federal regulation, namely license termination. Therefore, Section 30256 satisfies this ARARs criterion. The Navy's statements regarding the fact that Hunters Point is not now subject to CDPH's jurisdiction, while relevant to a determination as to whether a standard if applicable, miss the mark when determining whether the standard is relevant and appropriate.

The third of the eight comparisons listed in the regulation that the Navy implies that Section 30256 fails to meet is: "The type of place regulated and the type of place affected by the release or CERCLA action." CDPH is proposing that Section 30256 be a chemical-specific ARAR so it is difficult to determine the relevance of the type of place but, in any event, both Section 30256 and the remediation proposed at Hunters Point refer to sites with soil, and buildings, contaminated by radiological contamination. Thus, Section 30256 regulates the same type of place as is affected by the CERCLA action.

Elsewhere in its response to CDPH's proposal of Section 30256, the Navy addresses the fact that the radionuclides at Parcel E-2 have not been subject to certain regulatory controls in the past and "thus the CERLCA response must address very different issues (e.g. very high volume of potentially impacted soil, low concentrations of radionuclides in soil, high cost of removal, etc.)" It is not clear to CDPH which of the prescribed steps for evaluating a possible ARAR is addressed by that statement. The Navy

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seems to suggest that Hunters Point Parcel E2 is more contaminated than sites that are regulated by Section 30256, but, the fact that a site is particularly contaminated does not mean that the state standard does not apply.

As for whether the standard is substantive, various EPA guidance documents make the point that one can distinguish an administrative standard from a substantive standard by the fact that the administrative standard is one that sets out the procedure for making substantive requirements effective. As CDPH has consistently acknowledged, Section 30256 contains some administrative requirements, but it also contains within it the substantive requirement. For example, subdivision (g) of Section 30256 sets out the standard the Department is to use in approving a decommissioning plan -- "that the health and safety of workers and the public will be adequately protected." Section 30256, subdivision (k), requires a "reasonable effort ... to eliminate residual radioactive contamination." Section 30256 contains no numerical levels because of the inherent variability of background radiation. Nonetheless, Section 30256 is a substantive requirement, at least in part.

CDPH continues to believe that Section 30256 is more stringent than any federal ARAR for radionuclides that has been identified by the Navy. Section 30256 requires that a site be cleaned to a level that approximates background or at least that a reasonable effort to eliminate residual contamination has been made. None of the potential ARARs identified by the Navy for radiological contamination include background or near background as a standard. If CDPH is wrong, and the Navy is adopting background as a standard, then it would be appropriate for the Navy to conclude that Section 30256 is not as stringent as the proposed standard. However, in the absence of evidence that the standard to be adopted is at or near background, it must be concluded that Section 30256 is more stringent.

Finally, the Navy asserts that Section 30256 is not more stringent than risk-based cleanup levels. Even if that were so, that would not be a basis for rejecting Section 30256 as an ARAR. Rather, the appropriate response by the Navy would be the one that it provided in Table C-1 with regard to 10 CFR section 20.1402, namely to determine that it is a relevant and appropriate ARAR but note that "EPA ... believes the proposed RGs are more protective." In fact, CDPH believes that Section 30256 is more stringent than the proposed RGs. Section 30256 sets the level of cleanup as approximately

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background while the RG for radium-226, for example, is set at one picocurie per gram above background.