



**DEPARTMENT OF THE NAVY**  
SOUTHWEST DIVISION  
NAVAL FACILITIES ENGINEERING COMMAND  
1220 PACIFIC HIGHWAY  
SAN DIEGO, CA 92132-5190

5090  
Ser 06CC.KF/0780  
December 21, 1999

Mr. John Scandura  
Chief, Southern California Operations Branch  
Office of Military Facilities  
Department of Toxic Substances Control  
5796 Corporate Avenue  
Cypress, CA 90630

**RE: Land Use Covenant Agreements And Records of Decision (RODs)  
for Marine Corps Air Station (MCAS) El Toro and Marine Corps Air  
Facility (MCAF) Tustin**

Dear Mr. Scandura:

The California Department of Toxic Substances Control (DTSC) and the Department of Navy (DON) have now considered their respective positions on the California Health and Safety Code (HSC) Section 25222.1 "Land Use Covenant Agreement" issue as it pertains to Base Realignment and Closure (BRAC) installations. This issue currently affects the MCAS El Toro Operable Unit (OU) 2B and 2C and MCAF Tustin OU3 RODs (Enclosures 1 and 2). We believe that it is in the best interests of both DON and DTSC to make an intensive effort to negotiate a mutually satisfactory resolution of the Land Use Covenant Agreement issue.

In that spirit, as you may be aware, legal representatives of both our agencies met in Sacramento last week to find just such a resolution. We have made clear that the Navy is interested in entering into an "Environmental Restriction Covenant and Agreement" at our transferring installations when the transferee is unwilling to enter into such an agreement with DTSC directly. Our respective attorneys are now trying to adjust your model agreement to reflect the realities the Navy faces at its transferring property.

It appears that agreement between DON and DTSC has already been largely reached on the specific use restrictions that are appropriate for the remedial actions at both MCAS El Toro and MCAF Tustin. With these common interests and technical consensus already largely achieved, we believe it is realistic to believe

that the purely legal issue of how to convey to you the power to enforce these restrictions can be resolved.

If DON and DTSC can agree in advance to “boilerplate” Environmental Restriction Covenant and Agreement provisions that are mutually acceptable, doing so will help ensure that remedial action-specific Environmental Restriction Covenants and Agreements are, in fact, executed prior to BRAC conveyances. In any event, DON will name DTSC as a covenantee (beneficiary) of restrictive covenants included in BRAC deeds of transfer pursuant to California Civil Code 1471 as a matter of course to ensure that the State is empowered to enforce those covenants. This approach to resolving the issue should accommodate each of our underlying concerns.

As the model agreement negotiations move forward, we must also continue to move ahead with our delayed RODs. We have developed and enclosed model ROD language which we are incorporating into the RODs addressing this issue (Enclosure 3). We also owe DTSC a response on the potential State ARARs relating to “Land Use Covenant Agreements” that were identified by DTSC in its March 1999 correspondence regarding the MCAS El Toro OU2C and MCAF Tustin OU3 RODs (Enclosures 1 and 2). Enclosure 4 sets forth our response including the rationale for our determinations regarding those potential State ARARs as required by CERCLA and the National Contingency Plan and as reflected in the ROD language in Enclosure 3.

DTSC’s continued participation and concurrence in our CERCLA response actions is important to us. It is because of the importance of your role in our response actions that we are more than willing to find a way to ensure that you have the necessary authority to enforce, along with the Navy, the environmental restrictions we agree are necessary at these sites. If you have any questions regarding this letter, please contact me at (619) 532-2454 to discuss management issues. Please contact Mr. Keith Forman, the BRAC Environmental Coordinator, for technical issues and Mr. Rex Callaway at (619) 532-1662 to discuss legal issues.

Sincerely,



Dana Sakamoto

Environmental Business Line Manager

By direction of the Commander

- Enclosure:
1. Request for Land Use Covenant for Landfill Sites 3 & 5  
Record of Decision, Marine Corps Air Station (MCAS) El Toro
  2. Request for Land Use Covenant for Property included in Record of  
Decision/Remedial Action Plan at Operable Unit 3, Moffett  
Trenches, Marine Corps Air Facility (MCAF) Tustin
  3. Proposed Draft ROD Language for Land Use Covenant
  4. Evaluation of Environmental Restriction and Covenant-related  
DTSC Authorities as Potential CERCLA State "ARARs"

Copy to:

Wayne Lee, COMCABWEST

Thelma Estrada, U.S. EPA Region IX

Glenn Kistner, U.S. EPA Region IX

Nicole Moutoux, U.S. EPA Region IX

John Adams, SWRCB

Sharon Fair, DTSC

Garry Brown, DTSC

Patricia Hannon, Santa Ana RWQCB



# Department of Toxic Substances Control

Jesse R. Huff, Director  
5796 Corporate Avenue  
Cypress, California 90630



Gray Davis  
Governor

Winston H. Hickox  
Secretary for  
Environmental  
Protection

March 12, 1999

Mr. Joseph Joyce  
BRAC Environmental Coordinator  
U.S. Marine Corps Air Station - El Toro  
AC/S, Environmental (1AU), BRAC Building #899  
P. O. Box 95001  
Santa Ana, California 92709-5001

Dear Mr. Joyce:

## REQUEST FOR LAND USE COVENANT FOR LANDFILL SITES 3 & 5 RECORD OF DECISION, MARINE CORPS AIR STATION (MCAS) EI TORO

As was discussed during a recent conference call between you, Tayseer Mahmoud, Aaron Yue, and others, the Department of Toxic Substances Control (DTSC) requests that the Department of Navy (DoN) enter with the State into a Land Use Covenant (LUC) for Environmental Restrictions. Whenever there is hazardous waste left in place at concentrations greater than would be allowable for unrestricted land use, institutional controls must be put in place to protect the remedy, restrict public access and protect public health, restrict digging or drilling of drinking water wells, allow access to the site for monitoring, etc. At MCAS El Toro, the DoN has determined that institutional controls are required for the landfill sites to protect public health and the environment and to protect the remedy, i.e., landfill cap.

As referenced in California Civil Code Section 1471, DTSC customarily utilizes the LUC for all sites with residual contamination as an instrument to document institutional controls and use restrictions. As authorized by California Health and Safety Code Sections 25202.5, 25221, and 25230, and by California Code of Regulations sections 66264.94 and 68500.35(c), DTSC may enter into an agreement with a landowner to impose an easement, covenant, restriction, servitude or any other combination thereof on land. The LUC would ensure that the institutional controls are maintained by future owners, would run with the land, and would enable DTSC and/or the Regional Water Quality Control Board (RWQCB) to have immediate ability to enforce violations of the institutional controls in state court.

Mr. Joseph Joyce  
March 12, 1999  
Page 2

Prior to DTSC's approval of a Remedial Action Plan or Record of Decision (RAP/ROD) or concurrence on associated property transfers, DTSC must have assurance that the current property owner will enter into a LUC with DTSC. At closing federal facilities where the Department of Defense and/or the designated service branch declines to enter into a LUC with DTSC, DTSC requires that there also be a formal agreement, such as a Consent Agreement, between the future landowner and DTSC prior to DTSC's approval of the RAP/ROD. In such an agreement, the future landowner promises to enter into an LUC with the state at the time of property transfer, prepared in accordance with the provisions of California Civil Code, section 1471.

In the event that the future landowner is not willing to enter into a consent agreement with DTSC, and the DoN is unwilling to enter into a land use covenant with DTSC, then DTSC will be unable to approve the respective RAP/ROD or land transfer. In such case, the remedy would need to be changed so as to permit unrestricted future land use.

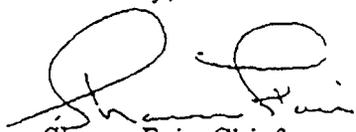
Therefore, DTSC requests that language similar to the following be added to Sections 7.2.1 and 7.3.2, Institutional Controls, Draft Final Record of Decision for Sites 3 & 5:

"A Land Use Covenant between the DoN and the Department of Toxic Substances Control and the Regional Water Quality Control Board will be the mechanism to implement the above-mentioned institutional controls, in accordance with state policy. The covenant is a legally-binding agreement, which will include a combination of easements, covenants, restrictions, and servitudes. The easements will allow state representatives to enforce the institutional controls, have access to the property in order to ensure that the remedy is protected and to evaluate the monitoring system via site inspection. The Land Use Covenant will include a legal description of the property and/or contaminated areas, parcel maps, and detailed site maps which show restricted areas. In addition, the Land Use Covenant will include information summarizing the remedial actions completed at the specific sites, and provisions for terminating the restrictions in the event that they may no longer apply. The provisions in the Land Use Covenant will be binding upon all future owners until legally terminated; that is, they will "run with the land." The Land Use Covenant will be recorded with the deed of transfer of real property by the County of Orange in accordance with state law. The DoN shall provide the departments with a copy of the land use controls which have been appropriately recorded."

Mr. Joseph Joyce  
March 12, 1999  
Page 3

We will appreciate your review of this request. If requested, we will be available to meet with you and/or the Local Redevelopment Authority to discuss the policy, procedure, and format for the LUC. DTSC staff look forward to working with you to expedite cleanup and reuse of MCAS - El Toro. If you have questions or need further information in this matter, please call me at (714) 484-5433 or Tayseer Mahmoud at (714) 484-5418. Thank you.

Sincerely,



Sharon Fair, Chief  
Base Closure and Reuse Unit  
Office of Military Facilities

cc: Mr. Glenn Kistner  
Remedial Project Manager  
U. S. Environmental Protection Agency  
Region IX  
Superfund Division (SFD-8-2)  
75 Hawthorne Street  
San Francisco, California 94105-3901

Ms. Patricia Hannon  
Remedial Project Manager  
California Regional Water Quality Control Board  
Santa Ana Region  
3737 Main Street, Suite 500  
Riverside, California 92501-3339

Mr. Peter Janicki  
California Integrated Waste Management Board  
8800 Cal Center Drive  
Sacramento, California 95826

Enclosure (1)



# Department of Toxic Substances Control

Jesse R. Huff, Director  
5796 Corporate Avenue  
Cypress, California 90630



Gray Davis  
Governor

Winston H. Hickox  
Secretary for  
Environmental  
Protection

March 16, 1999

Mr. Jose Payne  
BRAC Environmental Coordinator  
Naval Facilities Engineering Command  
SWDIV, 56MC.JP  
1220 Pacific Highway  
San Diego, California 92132-5190

Dear Mr. Payne:

## REQUEST FOR LAND USE COVENANT FOR PROPERTY INCLUDED IN RECORD OF DECISION/REMEDIAL ACTION PLAN AT OPERABLE UNIT 3, MOFFETT TRENCHES, MARINE CORPS AIR FACILITY (MCAF) TUSTIN

As has been discussed at several other closing Navy bases, the Department of Toxic Substances Control (DTSC) requests that the Department of Navy (DoN) enter with the State into a Land Use Covenant (LUC) for Environmental Restrictions. Whenever there is hazardous waste left in place at concentrations greater than would be allowable for unrestricted land use, institutional controls must be put in place to protect the remedy, restrict public access and protect public health, restrict digging or drilling of drinking water wells, allow access to the site for monitoring, etc. At MCAF Tustin, the DoN has determined that institutional controls are required for the Operable Unit (OU) 3 sites, Moffett Trenches, to protect public health and the environment and to protect the remedy, i.e., landfill cap.

As referenced in California Civil Code Section 1471, DTSC customarily utilizes the LUC for all sites with residual contamination as an instrument to document institutional controls and use restrictions. As authorized by California Health and Safety Code Sections 25202.5, 25221, and 25230, and by California Code of Regulations sections 66264.94 and 68500.35(c), DTSC may enter into an agreement with a landowner to impose an easement, covenant, restriction, servitude or any other combination thereof on land. The LUC would ensure that the institutional controls are maintained by future owners, would run with the land, and would enable DTSC and/or the Regional Water Quality Control Board (RWQCB) to have immediate ability to enforce violations of the institutional controls in state court.

Prior to DTSC's approval of a Remedial Action Plan or Record of Decision (RAP/ROD) or concurrence on associated property transfers, DTSC must have assurance that

Mr. Jose Payne  
March 16, 1999  
Page 2

the current property owner will enter into a LUC with DTSC. At closing federal facilities where the Department of Defense and/or the designated service branch declines to enter into a LUC with DTSC, DTSC requires that there also be a formal agreement, such as a Consent Agreement, between the future landowner and DTSC prior to DTSC's approval of the RAP/ROD. In such an agreement, the future landowner would promise to enter into a LUC with the state at the time of property transfer, prepared in accordance with the provisions of California Civil Code, section 1471. In circumstances where future land transfers to the same entity are anticipated, e.g., the Local Redevelopment Authority, the formal agreement may also be written so as to extend to those future land transfers of property with residual contamination. This would prevent delays in DTSC's signing of future RAPs/RODs.

In the event that the future landowner is not willing to enter into a consent agreement with DTSC, and the DoN is unwilling to enter into a land use covenant with DTSC, then DTSC will be unable to approve the respective RAP/ROD or land transfer. In such case, the selected remedy may need to be changed to a remedy that would permit unrestricted future land use.

Therefore, DTSC requests that language similar to the following be added to the Draft Final ROD for OU 3 re: institutional controls:

"A Land Use Covenant between the DoN and the Department of Toxic Substances Control and the Regional Water Quality Control Board will be the mechanism to implement the above-mentioned institutional controls, in accordance with state policy. The covenant is a legally-binding agreement, which will include a combination of easements, covenants, restrictions, and servitudes. The easements will allow state representatives to enforce the institutional controls, have access to the property in order to ensure that the remedy is protected and to evaluate the monitoring system via site inspection. The Land Use Covenant will include a legal description of the property and/or contaminated areas, parcel maps, and detailed site maps which show restricted areas. In addition, the Land Use Covenant will include information summarizing the remedial actions completed at the specific sites, and provisions for terminating the restrictions in the event that they may no longer apply. The provisions in the Land Use Covenant will be binding upon all future owners until legally terminated; that is, they will "run with the land." The Land Use Covenant will be recorded with the deed of transfer of real property by the County of Orange in accordance with state law. The DoN shall provide the departments with a copy of the land use controls which have been appropriately recorded."

We will appreciate your review of this request. DTSC staff will be available to meet with you and/or the Local Redevelopment Authority to discuss the policy, procedure, and format for the LUC, or to discuss the format for a Consent Agreement re: Institutional Controls with the Local Redevelopment Authority. We look forward to working with you to

Enclosure (2)

Mr. Jose Payne  
March 16, 1999  
Page 3

expedite cleanup and reuse of MCAF - Tustin. If you have questions or need further information in this matter, please call me at (714) 484-5433 or Mr. Juan Jimenez at (714) 484-5428. Thank you.

Sincerely,



Sharon Fair, Chief  
Base Closure and Reuse Unit  
Office of Military Facilities

cc: Ms. Nicole Moutoux  
Remedial Project Manager  
U. S. Environmental Protection Agency  
Region IX  
Superfund Division (SFD-8-2)  
75 Hawthorne Street  
San Francisco, California 94105-3901

Ms. Patricia Hannon  
Remedial Project Manager  
California Regional Water Quality Control Board  
Santa Ana Region  
3737 Main Street, Suite 500  
Riverside, California 92501-3339

Mr. Peter Janicki  
California Integrated Waste Management Board  
8800 Cal Center Drive  
Sacramento, California 95826

Mr. Steven Sharp  
County of Orange  
Environmental Health Division  
Solid Waste Local Enforcement Agency  
2009 East Edinger Avenue  
Santa Ana, California 92705

Enclosure (2)

Mr. Jose Payne  
March 16, 1999  
Page 4

cc: Mr. Dana Ogden  
Senior Planner  
City of Tustin  
300 Centennial Way  
Tustin, California 92780

Mr. Gregory F. Hurley  
Restoration Advisory Board Co-chair  
620 Newport Center Drive, Suite 450  
Newport Beach, California 92660-8019

Ms. Susan Reynolds  
Restoration Advisory Board Co-Chairperson  
12331 Alexander Land  
Santa Ana, California 92705

Dr. Dante Tedaldi  
Bechtel National, Inc.  
1230 Columbia Street, Suite 400  
San Diego, California 92101-8502

Mr. Jose Payne  
March 16, 1999  
Page 5

bcc: Ms. Sharon Fair  
Unit Chief  
Base Closure and Reuse Unit  
Office of Military Facilities

Mr. Juan Jimenez  
Project Manager  
Base Closure and Reuse Unit  
Office of Military Facilities

Mr. Aaron Yue  
Reuse Specialist  
Base Closure and Reuse Unit  
Office of Military Facilities

Mr. Garry Brown, Attorney  
Department of Toxic Substances Control  
1011 North Grandview Avenue  
Glendale, California 91202

**PROPOSED DRAFT ROD LANGUAGE FOR**  
**Land Use Covenant**

This language would be inserted into the ROD following the language addressing the institutional control objectives, the use restrictions, and the Land Use Control and Implementation Plan:

“Environmental Restrictions in the Covenant and Agreement with DTSC and in the Deed:

1. Environmental Restriction Covenant and Agreement (Chapters 6.5 and 6.8 of Division 20 of the California Health and Safety Code Chapters (HSC) and California Civil Code Section 1471).

DON and DTSC shall enter into good faith negotiations to enter into an Environmental Restriction Covenant and Agreement pursuant to the substantive requirements of these authorities regarding environmental use restrictions and restrictive covenants. This agreement will serve as a mechanism to implement the institutional control use restrictions set forth in Section \_\_\_ of the ROD in accordance with DON policy. Once the agreement is finalized, it will be executed contemporaneously with the negotiation and execution of the conveyance of the property to the transferee(s) by deed pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. Section 2687 note.

In addition, DON shall include the same environmental restrictions in the deed between the United States and the transferee(s) pursuant to the Civil Code Section 1471. These restrictive covenants shall be consistent with and incorporate by reference the use restrictions set forth in Section \_\_\_ of the ROD and any Environmental Restriction Covenant and Agreement entered into between DON and DTSC for the relevant site(s). In addition, the Civil Code Section 1471 restrictive covenants will be consistent with the “relevant and appropriate” substantive provisions of the following statutory provisions pertaining to (name of OU and specific IR sites):

a. Civil Code Section 1471.

The “relevant and appropriate” substantive provisions are the following general narrative standard: “...to do or refrain from doing some act on his or her own land...where...: (c) Each such act relates to the use of land and each such act is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code.”.

b. HSC Section 25202.5:

The specific “relevant and appropriate” substantive provisions are the general narrative standard to restrict: “present and future uses of all or part of the land on which the...facility...is located...”

c. HSC Section 25222.1:

The specific “relevant and appropriate” substantive provisions are the general narrative standard: "restricting specified uses of the property".

d. HSC Subparagraphs 25232(b)(1)(A)-(E).

The “relevant and appropriate” substantive provisions of these provisions.

e. HSC Paragraph 25233(c).

The “relevant and appropriate” substantive provisions of the variance criteria in HSC Paragraph 25233(c).

The Civil Code Section 1471 restrictive covenants will be executed by the transferee and will serve as a legally binding agreement between the transferee, its successor and assigns (the covenantor), and the United States, the State of California Department of Toxic Substances Control (DTSC), and the Santa Ana Regional Water Quality Control Board (who shall be identified in the deed as the covenantees (beneficiaries)) pursuant to Civil Code 1471. The covenants will grant the covenantees, their contractors, and representatives access to the property in order to ensure the continued

effectiveness of the response action and to evaluate groundwater wells via site inspection. The deed will include a legal description of the property and/or contaminated areas. In addition, the deed will include information summarizing the remedial actions at the specific sites, and provisions for terminating or modifying the Land Use Covenant in the event it is no longer necessary to protect human health and the environment. The Land Use Covenant will be binding upon all future owners until legally terminated; that is, it will run with the land. The deed will be recorded in the Office of the County Recorder for the County of Orange.

The DON will provide DTSC with a copy of the relevant language for the proposed deed for DTSC's review and comment in connection with DTSC's review of the finding of suitability to transfer (FOST) and finding of suitability of early transfer (FOSET) documents. The scope of DTSC's review of the deed shall be to evaluate whether or not the use restrictions set forth in Section \_\_ of this ROD have been incorporated into the deed language in accordance with DON's commitments in the ROD. A copy of the recorded deed will be provided to DTSC following recordation."

**EVALUATION OF  
ENVIRONMENTAL RESTRICTION AND COVENANT-RELATED  
DTSC AUTHORITIES AS POTENTIAL CERCLA STATE “ARARS”**

Ms. Sharon Fair cited the following authorities as potential State ARARs for Land Use Covenant agreements in her May 12, 1999 letter: California Civil Code Section 1471 and Health and Safety Code (HSC) Sections 25202.5, 25221, and 25230, and Title 22 CCR Sections 66264.94 and 68500.35(c). Ms. Fair’s letters were clarified by comments on the draft MCAF Tustin OU3 RAP/ROD submitted by DTSC RPM Juan Jimenez on June 7, 1999, stating that DTSC considers California Civil Code 1471 and HSC Sections 25202.5, 25222.1, 25223, and 25232 to constitute State “applicable or relevant and appropriate” requirements (ARARs) requiring the Land Use Covenant agreement. We could find no express provisions in State law, either in the cited authorities or any other provisions, which require execution of a formal agreement regarding a Land Use Covenant agreement prior to RAP/ROD signature. In addition, DTSC personnel have verbally identified Health and Safety Code Division 20, Article 11 as a State ARAR.

DON concurs with DTSC that the correct legal framework for analyzing the above Land Use Covenant-related requirements in the context of CERCLA remedial action are the CERCLA ARARs provisions set forth in Section 121(d) of CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) at 40 CFR Part 300. Although it is arguable that DTSC did not identify these potential State ARARs in a timely manner as required by law (40 CFR Sections 300.400(g)(2) and 300.515(h)(2)), DON has evaluated each of the requirements identified by DTSC in the above correspondence as potential State ARARs.

DON has determined that there are some very important substantive technical standards included within the State requirements that DON may accept as “relevant and appropriate” State ARARs for the specific circumstances of the landfills included in MCAS El Toro OU2C (IR Sites 3, 5) and MCAF Tustin OU3. However, many of the requirements identified by DTSC are administrative (procedural) in nature and, hence, do not constitute State ARARs (see NCP at 40 CFR Section 300.5 and NCP preamble at 55 Fed. Reg. 8756 (March 8, 1990)).

1. Civil Code Section 1471 (Fair Letter of March 12, 1999, Jimenez Letter of June 7, 1999)

DON may accept the substantive provisions of statutory provisions as a “relevant and appropriate” State ARAR for the institutional controls component of the CERCLA remedial actions. The substantive provisions of Civil Code Section 1471 are the following general narrative standard: “...to do or refrain from doing some act on his or her own land...where...: (c) Each such act relates to the use of land and each such act is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code.” This narrative standard would be implemented through incorporation of restrictive environmental covenants in the deed at the time of transfer. These covenants would be recorded with the deed and run with the land.

The administrative (procedural) requirements of this statutory provision do not constitute State ARARs (see NCP at 40 CFR Section 300.5 and NCP preamble at 55 Fed. Reg. 8756, March 8, 1990). To accommodate DTSC's concern for enforceability, DON would name DTSC as a covenantee (beneficiary) of the restrictive covenants pursuant to Civil Code Section 1471 so that DTSC is empowered to enforce the covenants. This would satisfy DTSC's concern that the covenants be enforceable against future landowners.

## 2. HSC Section 25202.5 (Fair Letter of March 12, 1999)

The substantive provisions of HSC Section 25202.5 are the general narrative standard to restrict “present and future uses of all or part of the land on which the...facility...is located...” These substantive provisions may be a “relevant and appropriate” State ARAR for institutional controls components of the CERCLA remedial actions. They could be implemented by incorporation of restrictive environmental covenants in the deed at the time of transfer for purposes of protecting present and future public health and safety. These substantive provisions may be interpreted in a manner that is consistent with the substantive provisions of Civil Code Section 1471. The covenants would be recorded with the deed and run with the land. The administrative requirements of this statute do not constitute State ARARs.

## 3. HSC Division 20, Article 11.

### a. In General.

The HSC Sections 25221, 25222.1, 25223, 25230, and 25232 authorities specifically identified in Ms. Fair's and Mr. Jimenez' correspondence are found in

Article 11 of Division 20 of the Health and Safety Code. Article 11 is titled “Hazardous Waste Disposal Land Use”. It contains both substantive and procedural requirements for the creation of legally enforceable environmental land use restrictions. In addition to the correspondence referenced above, DTSC has verbally opined that the entire Article 11 constitutes an ARAR. As we have discussed with DTSC counsel, we believe that it is appropriate to review the provisions of Article 11 cited in Ms. Fair’s and Mr. Jimenez’ correspondence within the overall context of Article 11.

Most of the provisions of Article 11 describe procedures for the designation of “hazardous waste property” or “border zone property” by DTSC and the issuance of orders by DTSC requiring a landowner, occupant, etc. to execute a written instrument which imposes an easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, upon the present and future uses of land designated as hazardous waste or border zone property “as provided by Section 25232” (HSC Subparagraphs 25229(b)(1) and 25230(a)(1)). The procedures set forth in HSC Sections 25221, 25222, and 25223-252231 include procedures for notice, service of process, hearings, and decisions and findings of fact relating to such orders.

The actual substantive land use restriction requirements that are implemented through orders issued pursuant to Sections 25229 and 25230 and associated procedures are the general narrative standards set forth in HSC Subparagraphs 25232(b)(1)(A)-(E). HSC Paragraph 25233(c) sets forth substantive criteria for granting variances from the uses prohibited in HSC Subparagraphs 25232(b)(1)(A)-(E) based upon specified environmental and health criteria.

HSC Section 25222.1 provides a streamlined, alternative procedure for implementing the substantive use restrictions of HSC Subparagraphs 25232(b)(1)(A)-(E) and variance criteria of HSC Paragraph 25233(c) based upon consent of the parties, i.e. through Agreements. HSC Section 25222.1 provides the authority and discretion for DTSC to enter into agreements creating enforceable restrictive covenants, etc., eliminating the need to go through the hearing and order procedures set forth in the other sections of Article 11.

The alternative HSC 25222.1 discretionary procedural form (i.e., an Agreement) for implementing the substantive requirements of HSC Subparagraphs 25232(b)(1)(A)-(E) and Paragraph 25233(c) does not qualify as a legally binding “applicable or relevant and appropriate” requirement under CERCLA because it is administrative (procedural) in nature. The key “substantive requirements” for

HSC, Division 20, Article 11 are the specific substantive use restrictions set forth in HSC Subparagraph 25232(b)(1)(A)-(E) and the substantive variance criteria in HSC Paragraph 25233(c).

A brief discussion of the authorities specifically cited by Ms. Fair and Mr. Jimenez follows.

b. HSC Section 25221 (Fair Letter of March 12, 1999)

This provision sets forth administrative requirements for applications for designation of property as hazardous waste property or border zone property. These administrative requirements do not constitute State ARARs.

c. HSC Section 25222.1 (Jimenez Letter of June 7, 1999)

HSC 25222.1 provides the authority for the State to enter into voluntary agreements to establish Land Use Covenants with the owner of property. The HSC Section 25222.1 Land Use Covenant Agreement itself is in the form of an agreement and this procedural form does not qualify as a legally binding "applicable or relevant and appropriate" requirement under CERCLA because it is administrative (procedural) in nature. The substantive provision of HSC 25222.1 is the general narrative standard: "restricting specified uses of the property".

DON may accept these substantive provisions as a "relevant and appropriate" State ARAR for the institutional controls component of the CERCLA remedial actions. DON may comply with the substantive requirements of HSC 25222.1 by incorporating CERCLA use restrictions which are also consistent with the substantive requirements of HSC Subparagraph 25232(b)(1)(A)-(E) and HSC Paragraph 25233(c) into DON's deed of conveyance in the form of restrictive covenants under the authority of Civil Code 1471. The substantive provisions of HSC 25222.1 may be interpreted in a manner that is consistent with the substantive provisions of Civil Code Section 1471. The covenants would be recorded with the deed and run with the land.

d. HSC Section 25223 (Jimenez Letter of June 7, 1999)

The provisions of HSC Section 25223 are administrative requirements concerning public notice and do not constitute State ARARs.

e. HSC Section 25230 (Fair Letter of March 12, 1999)

The provisions of HSC 25230 set forth procedures for the issuance of DTSC orders to record restrictive covenants. These provisions are administrative requirements and do not constitute State ARARs. Nonetheless, DON does intend to record restrictive covenants established under the authority of Civil Code 1471.

f. HSC Section 25232 (Jimenez Letter of June 7, 1999)

DON may accept the substantive provisions of HSC Subparagraphs 25232(b)(1)(A)-(E) as well as the substantive variance criteria in HSC Paragraph 25233(c) as “relevant and appropriate” State ARARs for institutional control components of this CERCLA remedial action to be implemented by incorporation of restrictive environmental covenants in the deed at the time of transfer pursuant to Civil Code 1471. See discussion above.

The substantive provisions of these statutes shall be addressed by ROD provisions requiring that deeds for the transfer of title to a new owner shall include prohibitions on any new land uses (change in land use) or any construction or placement of buildings or structures for purposes identified in HSC Sections 25232(b)(1)(A)-(E) unless the substantive variance criteria in HSC Paragraph 25233(c) are satisfied and the new land use is approved in advance by DON and DTSC.

The administrative requirements of HSC Subparagraph 25232(b)(1)(A)-(E) and HSC Paragraph 25233(c) do not constitute ARARs.

4. California Code of Regulations Section 66264.94 (Fair Letter of March 12, 1999).

This appears to be a reference to Title 22 CCR Section 66264.94. That regulation sets forth requirements for concentration limits and water quality standards; it does not address land use restrictions requirements and is, therefore, not a State ARAR for land use restrictions (although DON does accept it as a State ARAR for groundwater remediation).

5. California Code of Regulations Section 68500.35(c).

DON was unable to find any regulations at this citation. Was this a citation error?

## TRANSMITTAL

Date: 10 January 2000

From: Lynn Marie Hornecker  
MCAS El Toro



To: Diane Silva  
Code 01LS.DS

Subj: **CERCLA Administrative Record Materials  
Marine Corps Air Station, El Toro**

**Installation:** Marine Corps Air Station, El Toro

**UIC Number:** M60050

**Document Title/Subject:** Land Use Covenant Agreements and Records of Decision (RODs)  
For Marine Corps Air Station (MCAS) El Toro and Marine Corps Air Facility  
(MCAF) Tustin

**Author/Affiliation:** ~~Dear-Gould~~ Dana Sakamoto  
Southwest Division, Naval Facilities Engineering Command

**Recipient:** John Scandura, California Environmental Protection Agency, Department of  
Toxic Substances Control

**Record Date:** 21 December 1999

**Approximate Number of Pages:** 20

**EPA Category:** 01.1

**Sites:** Landfill Sites 2, 3, 5, and 17

**Key Words:** Land Use Covenant, LUC, Landfill, ROD

**Contract:** N/A

**CTO Number:** N/A