



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

5090  
Ser 06CC.DG/219  
March 29, 2000

Ms. Triss Chesney  
California Environmental Protection Agency  
Department of Toxic Substances Control  
5796 Corporate Avenue  
Cypress, CA 90630-4700

Subject: REVISIONS TO RESPONSE TO DTSC LETTER DATED FEBRUARY  
22, 2000, CONCERNING RECORD OF DECISION LANGUAGE FOR  
SITES 2 AND 17, MARINE CORPS AIR STATION EL TORO

Dear Ms. Chesney:

On March 7, 2000 SWDIV BRAC transmitted responses to the subject letter. The changes noted in the responses have now been incorporated into the final interim ROD with minor modifications. These modifications impact SWDIV responses to Comments 5, 6, and 10 and are discussed below. The comment numbers refer to the subject letter.

For ease of review, pages showing the text as it will appear in the final interim ROD are included in this transmittal:

Comment No. 5: Section 10.2.3 – Action-Specific ARARs, paragraph 8: In the paragraph that begins with the substantive provisions of Civil Code Section 1471 are the following general narrative standard ....”, the word “deed” has been deleted and the words “Environmental Restriction Covenant and Agreement” have been added.

Comment No. 6: Section 10.2.3 – Action-Specific ARARs, paragraph 9: In the paragraph that begins with “The substantive provisions of HSC Section 25202.5...”, the word “deed” has been deleted and the words “Environmental Restriction Covenant and Agreement” have been added.

Comment No. 10: DON has reworded this discussion as follows:

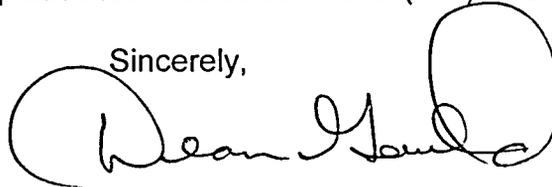
“In addition to being implemented through the Environmental Restriction Covenant and Agreement between the DON and DTSC, the appropriate and relevant portions of the California HSC Sections 25202.5, 25221.1, 25230, 25232, and 25233, and Civil Code Section 1471 shall also be implemented through the deed between the DON and the transferee.”

In addition to the items mentioned in DTSC's letter dated February 22, 2000, the following minor modifications have also been made to the Record of Decision since the "Working Draft" Final version was issued:

- The document has been revised in numerous places to indicate that this is now an "interim" Record of Decision. Revised pages are not included with this letter.
- In the last sentence of the first paragraph of Section 1.7 the words "is negotiating an agreement..." have been changed to "has signed a memorandum of understanding (MOU)..." This sentence was revised to indicate that the Federal Aviation Authority and U.S. Fish and Wildlife Service have now signed a memorandum of understanding.
- The last sentence in the third paragraph in Section 7.2.1.4, under the heading Environmental Restrictive Covenants (California Civil Code Section 1471) has been modified to delete the word "following" and to add "set forth in Section 10.2.3." This is consistent with moving the ARARs discussion to Section 10.
- The next paragraph in Section 7.2.1.4 addressing Civil Code Section 1471 has been deleted to be consistent with moving the ARARs discussion to Section 10.

For easy reference, the changed pages are provided as an enclosure, with the changes incorporated. Thank you again for your input and assistance in helping to develop model language that can be used in future Records of Decision. Should you have any questions, please feel free to call me at (619) 532-0784.

Sincerely,

A handwritten signature in black ink, appearing to read "Dean Gould". The signature is written in a cursive style with a large, prominent loop at the end.

DEAN GOULD  
Base Realignment and Closure  
Environmental Coordinator  
By direction of the Commander

Copy to: (w/encl)  
Mr. Glenn Kistner, U.S. EPA  
Ms. Patricia Hannon, Cal RWQCB, Santa Ana Region  
Carole Wiemert, USMC BRAC

Historically, land use around MCAS El Toro has been largely agricultural. However, the land to the south, southeast, and southwest has been developed over the past 10 years for commercial, light-industrial, and residential uses. Currently, expanding commercial areas are located adjacent to the Station. Additional residential areas are located to the northwest and west of the Station. Adjacent land to the northeast and northwest is used for agriculture.

## 1.7 FUTURE LAND USE

MCAS El Toro was closed in July 1999. A Community Reuse Plan has been prepared (MCAS El Toro Local Redevelopment Authority 1996). This plan is a conceptual, policy-level reuse plan. A more detailed master plan will be developed as a second phase of reuse planning and will identify more site-specific land uses. The preferred reuse alternative for the Station was selected in the December 1996 Community Reuse Plan and consists of a major airport with a variety of potential future uses for MCAS El Toro property. According to this plan, Sites 2 and 17 are in an area designated as a 998-acre habitat reserve. DON intends to transfer the portions of the habitat area containing Sites 2 and 17 to the Federal Aviation Administration in a federal agency to federal agency transfer and is the final stages of negotiating the details of that transfer. In addition, the Federal Aviation Administration has signed a memorandum of understanding (MOU) with the Fish and Wildlife Service regarding the management of the habitat area.

Property located in the immediate vicinity (within 1,000 feet) of Site 2 is intended to be used for the construction of an extension to Alton Parkway. In addition, the Borrego Canyon Wash is located immediately adjacent to Site 2 and the proposed location of the Alton Parkway extension. The DON recognizes and understands that the County of Orange has developed preliminary plans to construct the Alton Parkway extension and improvements to the Borrego Canyon Wash and plans to move forward into the planning, design, and environmental review process required by the California Environmental Quality Act (CEQA). This extension of the parkway and improvements may be constructed within 1,000 feet of Site 2 but outside of the boundary of the property to be transferred to another federal agency by a federal agency to federal agency transfer. This adjacent property will be transferred by deed to the County of Orange. In preparing detailed design plans and implementing the remedy for Site 2, the DON will cooperate with FFA signatories and the County of Orange to ensure that all proposed projects (the remedy for Site 2, the construction of Alton Parkway, and improvements to Borrego Canyon Wash) are mutually compatible and are designed, constructed, and maintained in a prompt and reasonable manner.

- the required frequency for periodic inspection of the sites;
- identification of the entities responsible for carrying out the monitoring and inspection;
- the methods for periodically certifying compliance with institutional controls upon completion of inspections; and
- procedures for notifying the DON and the FFA signatories in the event of a failure to comply with land-use restrictions.

The draft LUCICP will be provided to the FFA signatories for approval and to, the LRA, LEA, and the transferee for review.

#### **7.2.1.4 ENVIRONMENTAL RESTRICTIONS IN THE COVENANT AND AGREEMENT WITH DTSC AND IN THE DEED**

The following provisions of this Section 7.2.1.4 shall apply to the property adjacent to Site 2 that is subject to use restrictions and that DON intends to transfer by deed to a non-federal agency as set forth in Subsections 1.7 and 7.2.1.1.

##### ***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 7.2.1.2 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. HSC Section 25234 applies to the removal of land-use restrictions imposed through an Environment Restriction Covenant and Agreement between DON and DTSC by “aggrieved persons” as provided by that statute.

##### ***Environmental Restrictive Covenants (California Civil Code Section 1471).***

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 7.2.1.2 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 statutory provisions pertaining to Operable Unit 2B Site 2 set forth in Section 10.2.3.

## Section 7 Description of Alternatives

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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 (RWQCB), (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 monitoring equipment, including but not limited to groundwater wells and soil gas migration equipment, 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) or finding of suitability of early transfer (FOSET) documents, as appropriate. The scope of DTSC's review of the deed shall be to evaluate whether or not the use restrictions set forth in Section 7.2.1.2 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."

### 7.2.2 Groundwater Remediation at Site 2

As discussed in Section 5.2.2.5 and shown on Figure 5-6, two small VOC plumes are present in groundwater at Site 2. The plumes are located outside the boundary of the operational landfill and contain TCE and PCE at concentrations exceeding MCLs. Remedial action to address the VOC contamination at Site 2 will be addressed in the final ROD.

### 7.2.3 Monitoring and Inspections

Environmental monitoring for Alternative 2 would employ monitoring equipment that is currently installed at each site. At Site 2, only groundwater would be monitored. At Site 17, deep landfill gas, leachate, and groundwater would be monitored. Security measures (fences, signs, locks on gates and monitoring equipment) would be inspected and repaired as required.

## Section 10 Statutory Determinations

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hazardous, they will be regulated as hazardous waste under RCRA (42 USC 9601) and California's hazardous waste regulations (Title 22 CCR, Division 4.5 [Hazardous Waste Control Act]), and hazardous waste generator requirements, including those for accumulation and container storage, and disposal requirements may apply.

Although local rules are not ARARs, monitoring wells will be constructed in a manner consistent with Orange County Code, Article 2 (Construction and Abandonment of Water Wells). Nonhazardous wastes will be disposed of appropriately.

Grading and excavation activities for consolidation and cap installation at all landfill sites have the potential to create discharges of fugitive dust that must be managed to comply with the SCAQMD rules. Substantive portions of SCAQMD Rules 401, 403, and 1150 are action-specific ARARs for remedial action at the landfill sites. Rules 401 and 403 require that fugitive dust emissions be controlled during grading, excavation, and earth-moving activities. SCAQMD Rule 1150 requires that an Excavation Management Plan be developed prior to excavation of landfill materials. While the plan itself is considered administrative in nature, the DON will address substantive provisions of this regulation during the remedial design/remedial action phase.

State statutes that have been accepted by DON as ARARs for implementing institutional controls and entering into an Environmental Restriction Covenant and Agreement with DTSC include substantive provisions of the California Civil Code Section 1471 and the Health and Safety Code (HSC) Sections 25202.5, 25222.1, 25232(b)(1)(A) through (E), and 25233(c).

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 Environmental Restriction Covenant and Agreement and run with the land.

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 will be implemented by incorporation of restrictive environmental covenants in the Environmental Restriction Covenant and Agreement at the time of transfer for purposes of protecting present and future public health and safety.

Actual land-use restriction requirements are set forth in HSC subparagraphs 25232(b)(1)(A) through (E). These include prohibitions on construction of residences, hospitals for humans, schools for persons under 21 years of age, day care centers, or any permanently occupied human habitation on hazardous waste property. HSC paragraph 25233(c) sets forth substantive criteria for granting variances from the uses prohibited in

HSC subparagraphs 25232(b)(1)(A) through (E) based upon specified environmental and health criteria.

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 will 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) through (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.

In addition to being implemented through the Environmental Restriction Covenant and Agreement between the DON and DTSC, the appropriate and relevant portions of the California HSC Sections 25202.5, 25221.1, 25230, 25232, and 25233, and Civil Code Section 1471 shall also be implemented through the deed between the DON and the transferee.

U.S. EPA does not agree with the DON and DTSC that the sections of the California Civil Code and HSC cited above are ARARs. These state regulations fail to meet the criteria for ARARs pursuant to U.S. EPA guidance, i.e., they are administrative, not substantive, requirements that establish a discretionary way to implement land-use restrictions. However, while U.S. EPA does not agree that these state regulations require the DON to enter into a land-use covenant with DTSC, U.S. EPA believes that, if necessary for the protection of human health and the environment, it may be appropriate for the facility to elect to enter into an enforceable written agreement with DTSC to enforce land-use restrictions at a site.

### 10.3 COST-EFFECTIVENESS

Alternative 3, the selected remedy, has been determined to provide overall effectiveness proportional to its costs; it is therefore considered cost-effective. The order-of-magnitude net present worth is estimated as follows.

- \$13 million for Site 2. This includes capital costs of \$10.1 million and O&M and monitoring costs of \$2.8 million.
- \$5.9 million for Site 17. This includes capital costs of \$3.0 million and O&M and monitoring costs of \$3.0 million.

The estimated costs of the selected remedy are less than the costs associated with the other alternatives that involve more complex landfill cap designs. As discussed in the summary of the comparative analysis of alternatives, Alternative 3 effectively provides

“WORKING DRAFT” FINAL  
INTERIM RECORD OF DECISION  
OPERABLE UNIT 2B LANDFILL SITES 2 AND 17

DATED 31 MARCH 2000

THIS DOCUMENT WAS NOT SUBMITTED TO THE  
RESTORATION RECORD FILE.

FOR ADDITIONAL INFORMATION, CONTACT:

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