

**RESPONSES TO REGULATORY AGENCY REGULATORY COMMENTS ON ARARS  
DRAFT FEASIBILITY STUDY, SITE 27  
NAVAL STATION TREASURE ISLAND, SAN FRANCISCO, CALIFORNIA**

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This document presents the U.S. Department of the Navy's (Navy) responses to comments from the California Department of Toxic Substances Control (DTSC); the California Regional Water Quality Control Board (RWQCB); and California Department of Fish and Game (CDFG) regulatory comments on the Draft Feasibility Study, Site 17, Naval Station Treasure Island, San Francisco, California, dated January 27, 2004. The comments addressed below were received from DTSC on March 13, 2004, from the RWQCB on March 12, 2004, and from the CDFG on March 15, 2004.

**RESPONSES TO DTSC COMMENTS (Isabella Alasti – March 13, 2004)**

In general, I believe the ARAR section may not be complete – should ARARs for non-RCRA hazardous waste be included in case the lead levels in the sediment from dissolved lead is below RCRA hazardous waste criteria, yet above State non-RCRA hazardous waste criteria?

My comments focus specifically on section 2 of the Feasibility Study:

1. **Comment:** Executive Summary. On page ES-2, the paragraph beginning "Alternative 2," there needs to be discussion of the State required land use covenant (LUC). When "hazardous materials, hazardous wastes or constituents, or hazardous substances will remain at the property at levels which are not suitable for unrestricted use of the land," an LUC imposing appropriate limitations on the land use shall be executed and recorded. (CCR Title 22, section 67391.1.) The LUC is different from a deed notice, and I'm not sure what is envisioned under the discussion of "deed restriction." If the deed restriction is a different mechanism from the LUC, it should be noted that an LUC will also be required. If the deed restriction is meant to be the same instrument as the LUC, then the description under (1) in that paragraph would need to be modified to describe the LUC process (see #6 below). This is separate from section 404 permit requirements.

**Response:** The Navy intends to record a deed notice and a deed restriction. The deed notice will notify future landowners of the existence of lead shot in the sediment. The deed restriction will (1) require that the appropriate regulatory agencies, including the Army Corps of Engineers, be contacted and notified of the existence of the lead shot in sediment before the sediment may be dredged or disturbed, and (2) that any dredging or disturbance will comply with pertinent provisions of Section 404 of the Clean Water Act.

With respect to CCR Title 22, section 67391.1, many of the provisions of that section are procedural and therefore are not ARARs. The Navy does agree that the substantive provisions of section 67391.1(e)(1) is a potential ARAR for the FS. That section states that DTSC shall not consider property owned by the federal government suitable for transfer to non-federal entities pursuant to 42 USC section 9620(h)(3)-(4) where hazardous materials, wastes, constituents or substances remain at levels not suitable for unrestricted use, unless a land use covenant will be executed by DTSC and the federal government. The Navy agrees to execute a land use covenant in accordance with section 67391.1 and in accordance with the March 2000 Memorandum of Agreement between the Navy and DTSC. That covenant will allow DTSC to enforce the underlying deed restriction described above.

2. **Comment:** Section 2.2.2. This section should state that the Migratory Bird Treaty Act is an ARAR, or potential ARAR, like the immediate sections before and after it, for consistency.

**Response:** This section will be revised to state that the Migratory Bird Treaty Act is an ARAR.

3. **Comment:** Section 2.2.3. The last sentence of the first paragraph is incorrect. CCR Title 22, Section 67391.1 is a state action-specific ARAR that applies when land use covenants, a form of an institutional control, is being evaluated.

**Response:** The text will be changed to reflect that the Navy has identified the substantive provisions of Section 67391.1(e) are potential ARARs.

4. **Comment:** Section 2.2.3. The second paragraph of this section refers to the dredging of sediment and the potential applicability of RCRA requirements. Any statutory and regulatory reference to non-RCRA hazardous waste should be included as an ARAR since it appears the characteristics of the contaminated sediment is uncertain.

**Response:** The text will be amended to include the non-RCRA hazardous waste.

5. **Comment:** Section 2.2.3. Insert Health and Safety Code and Civil Code sections as specified in Table 1, below. These are state action-specific ARARs.

**Response:** It is the Navy's position that the Health & Safety Code and Civil Code sections specified in Table 1 are procedural and not substantive requirements and therefore they are not ARARs. If the record of decision for this site calls for institutional control, the Navy will enter into a land use covenant with DTSC pursuant to the March 2000 Memorandum of Understanding between the Navy and DTSC.

6. **Comment:** Section 2.3.2. The paragraph on Institutional Controls should include an explanation of what is meant by “agreements with regulatory agencies.” Specifically, before transfer of title of the property, the Navy will execute an LUC, if waste is left in place, with the State that includes specific use restrictions along with a legal description of the property and affected areas, and a description of the waste and its risks. The LUC will be recorded before the recording of the federal deed transferring ownership. The State and Navy will enter into the LUC pursuant to CCR Title 22, section 67391.1. The LUC will be based upon the model Covenant to Restrict Use of Property, developed by DTSC.

**Response:** See response to Comment 1. The Navy will enter into a LUC pursuant to Section 67391.1 and consistent with the March 2000 Memorandum of Agreement between the Navy and DTSC.

7. **Comment:** Section 2.4.2. The changes in this paragraph, Alternative 2 – Institutional, Controls needs to be consistent with the changes made in the identical paragraph in the Executive Summary (see #1 above).

**Response:** The text will be revised.

**Table 1**

Action/Requirement	Citation	ARAR Determination	Comments
<p><b>California Civil Code</b> Provides conditions under which land-use restrictions will apply to successive owners of land.</p>	<p>Cal. Civ. Code § 1471</p>	<p>Relevant and appropriate</p>	<p>Generally, Cal. Civ. Code §1471 allows an owner of land to make a covenant to restrict the use of land for the benefit of a covenantee. The covenant runs with the land to bind successive owners, and the restrictions must be 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 California Health and Safety Code. 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 of hazardous materials, as defined in Section 25260 of the California Health and Safety Code.” This narrative standard would be implemented through incorporation of restrictive covenants in the deed and Environmental Restriction and Covenant Agreement at the time of transfer.</p>
<p><b>California Health and Safety Code</b> Allows DTSC to enter into an agreement with the owner of a hazardous waste facility to restrict present and future land uses.</p>	<p>Cal. Health &amp; Safety Code § 25202.5</p>	<p>Relevant and appropriate</p>	<p>The substantive provisions of Cal. Health &amp; Safety Code § 25202.5 are the general narrative standards to restrict “present and future uses of all or part of the land on which the . . . facility . . . is located . . .”</p>

Action/Requirement	Citation	ARAR Determination	Comments
<b>California Health and Safety Code (Continued)</b>			
Provides a streamlined process to be used to enter into an agreement to restrict specific use of property.	Cal. Health & Safety Code §§ 25222.1 and 25355.5(a)(1)(C)	Relevant and appropriate	Generally, Cal. Health & Safety Code §§ 25222.1 and 25355.5(a)(1)(C) provides the authority for the Department of Toxic Substances Control to enter into voluntary agreements with land owners to restrict the use of property. The agreements run with the land restricting present and future uses of the land. The substantive requirements of the following Cal. Health & Safety Code § 25222.1 provisions are “relevant and appropriate”: (1) the general narrative standard: “restricting specified uses of the property...” and (2) “...the agreement is irrevocable, and shall be recorded by the owner, ...as a hazardous waste easement, covenant, restriction or servitude, or any combination thereof, as appropriate, upon the present and future uses of the land.” The substantive requirements of the following Cal. Health and Safety Code 25355.5(a)(1)(C) provisions are “relevant and appropriate”: “...execution and recording of a written instrument that imposes an easement, covenant, restriction, or servitude, or combination thereof, as appropriate, upon the present and future uses of the land.”
Provides processes and criteria for obtaining written variances from a land-use restriction and for removal of the land use restrictions.	Cal. Health & Safety Code §§ 25233(c) and 25234	Relevant and appropriate	Cal. Health & Safety Code § 25233(c) sets forth “relevant and appropriate” substantive criteria for granting variances based upon specified environmental and health criteria. Cal. Health & Safety Code § 25234 sets forth the following “relevant and appropriate” substantive criteria for the removal of a land use restriction on the grounds that “...the waste no longer creates a significant existing or potential hazard to present or future public health or safety.”
Requirements for land-use covenants.	Cal. Code Regs. tit. 22, § 67391.1	Relevant and appropriate	Cal. Code Regs. tit. 22 § 67391.1 provides for a land-use covenant to be executed and recorded when remedial actions are taken and hazardous substances will remain at the property at concentrations that are unsuitable for unrestricted use of the land. The substantive provisions of this regulation have been determined to be “relevant and appropriate” state ARARs by the DON.

## RESPONSES TO RWQCB COMMENTS

### SPECIFIC COMMENTS

20. **Comment:** Section 2.2 Applicable or Relevant and Appropriate Requirements (ARARs). Please clarify the purpose of the ARARs. Are these ARARs for lead shot contamination or for conducting remedial alternatives to address lead shot contamination?

**Response:** The Navy reviewed potential chemical-, location- and action-specific ARARs and determined that there are no chemical-specific ARARs for the lead shot. However, there are location- and action-specific ARARs associated with implementing the alternatives and those are identified and discussed in the FS.

21. **Comment:** Section 2.2 Applicable or Relevant and Appropriate Requirements (ARARs). Please clarify the status of the ARARs. Are these potential ARARs, proposed ARARs or just ARARs once the final FS is issued? Please be consistent throughout the document.

**Response:** ARARs become final in the record of decision.

22. **Comment:** Section 2.2.2 Location-Specific ARARs. Please add the Clean Water Act Section 401. Section 404 triggers Section 401. The Federal Clean Water Act, in Section 401, specifies that states must certify that any activity subject to a permit issued by a federal agency, such as the Corps, meets all state water quality standards. In California, the State Board and the regional boards are responsible for taking certification actions for activities subject to any permit issued by the Corps pursuant to Section 404 (or for any other Corps' permit, such as permits issued pursuant to Section 10 of the Rivers and Harbors Act of 1899).

**Response:** Section 404 permit requirements and Section 401 certification requirements are procedural in nature and are therefore not ARARs (CERCLA Section 121(e) 42 USC Section 9621(e)).

23. **Comment:** Section 2.2.3 Action-Specific ARARs. Please clarify the assumptions about the sediment waste disposal. As stated in the 2nd paragraph "The only potential ARARs for dredging of sediments are RCRA hazardous waste and land disposal restrictions". But later the Navy assumes the waste is not hazardous and will meet Class II disposal requirements. If it's not hazardous then it will meet Water Board Title 27 'designated waste' requirements. If the waste is hazardous and needs to be disposed of at a Class I landfill, then RCRA would apply.

**Response:** The assumptions regarding the sediment waste disposal will be clarified. Based on data collected for the RI, the Navy does not anticipate the waste will be hazardous; however, in the event that it is, it will be handled appropriately.

24. **Comment** Section 2.2.3 Action-Specific ARARs. In Section 2.4.2.3 Off-Site Disposal, the text states the sediment is not expected to contain contaminant concentrations exceeding RCRA levels. It's confusing why the RCRA hazardous waste ARARs are included if the disposal is assumed to be non-hazardous. Later in the report in Section 3.1.3.2, the text states: "Although the sediments do not exceed the RCRA criteria defining hazardous, these ARARs will be used as guidelines for on-site storage and dewatering activities." It seems the RCRA requirements either are or are not ARARs. Please clarify the text.

**Response:** See response to Comment 23.

**RESPONSES TO CALIFORNIA DEPARTMENT OF FISH & GAME (CDFG)  
COMMENTS – March 15, 2004**

1. **Comment:** The Section 2.2 does not identify all DFG ARARs and TBCs (to be considered) that apply to this site.

Currently, the following is a site-specific list of Fish and Game Code Sections which may apply as State ARARs at the subject site for the protection of fish and wildlife resources and their habitats:

- **Releasing substances deleterious to fish and wildlife into state waters is prohibited: Fish and Game Code 5650 (a) (b), f;**
- **Illegal take of birds and mammals: Fish and Game Code §3005;**
- **Fully protected bird species/habitat: Fish and Game Code 3511;**
- **Requirements for endangered or rare species: Fish and Game Code §1908; 2080**
- **Requirements for Tidal Invertebrates: Fish and Game Code §8500; and**
- **Requirements for Giant Black Sea Bass: Title 14 California Code of Regulations Section 28.10.**

**Response:**

The Navy has evaluated the above ARARs and has determined the following:

Fish and Game Code Section 5650(a), (b) and (f): The Navy has determined that the substantive provisions of Section 5650(a) and (b) are potential ARARs. Fish and Game Code Section 5650(f) is procedural and is not an ARAR.

Fish and Game Code Section 3005: The Navy has determined that the substantive provisions of Section 3005 are potential ARARs.

Fish and Game Code Section 3511: The Navy has determined that the substantive provisions of Section 3511 are potential ARARs.

Fish and Game Code Section 1908: The Navy has determined that this section is not an ARAR because there are no native plants at the site and therefore this section is not applicable or relevant and appropriate.

Fish and Game Code Section 2080: The Navy has determined that the substantive provisions of Section 2080 are potential ARARs.

Fish and Game Code Section 8500: The Navy has determined that this section is not an ARAR because it applies to commercial fishing and it is therefore not applicable or relevant and appropriate.

- Title 14 California Code of Regulations Section 28.10: The Navy has determined that this section is not an ARAR because it applies to fishing activities and is therefore not applicable or relevant and appropriate.