DEPARTMENT OF THE AIR FORCE
REGIONAL ENVIRONMENTAL COORDINATOR, REGION 10
510 Hickam Ave., Bldg 250 Bay A,
Travis AFB, CA 94535

April 6, 2017

Representatives Zach Fansler and Justin Parish
Co-Chairs, House Community & Regional Affairs
Alaska State Legislature
State Capitol Rooms 416 and 432
Juneau, AK 99801

Subject: Department of Defense Supplemental Comments on Alaska Senate Bill 64

Dear Representatives Fansler and Parish:

As the U.S. Department of Defense (DoD) Regional Environmental Coordinator for Region 10, which includes the State of Alaska, I would like to respond to some of the testimony and other inputs that have been presented during the Alaska Senate's Committee Hearings discussing Senate Bill 64 and clarify some of the previously expressed positions.

The purpose of the DoD comments on Alaska Senate Bill 64 submitted on March 3, 2017, was not to avoid DoD's cleanup responsibilities under the various applicable environmental statutes. The DoD's intent was to request reconsideration of language in the bill that attempts to require the transfer of real property interests that DoD is not authorized to convey. The DoD remains committed to the responsible and effective cleanup standards identified in the governing administrative documents that would be identified under draft Section 46.04.340's provision entitled "Notice of activity and use limitation." We recognize the importance of the legislature's desire to ensure these clean-up standards are clearly conveyed to future potential property owners in an easily accessible manner. In furtherance of this intent, the DoD would be supportive of a "pure" notice standard similar to the "Notices of Environmental Contamination (Deed Notice)" that are currently voluntarily made under Attachment 1's guidance document from the Alaska Department of Environmental Conservation (ADEC) entitled "*Guidance On Using Institutional Controls in Oil and Other Hazardous Substance Cleanups*."

The applicable federal government memorandum that describes the legal prohibition we previously referred to in our March 3, 2017, letter is from the General Services Administration (GSA) and is entitled "*Restrictive Covenants on Non-excess Property*." It is included as Attachment 2. In this memo, GSA's Director of Redeployment Services stated that landholding agencies, such as the DoD, do not have the authority to place "use restrictions" or other "restrictive covenants" on property in their inventory, as under the Federal Property and Administrative Services Act of 1949, "GSA was given the exclusive authority to manage the utilization and disposal of real property. (40 U.S.C. §§ 471, et seq.)." The memo goes on to state

that "property" is defined under the act to "include 'any interest in property' (40 U.S.C. § 472(d))" and identifies that "GSA's regulations (41 C.F.R. § 101-47, 103-12(a)) define 'real property' to include 'any interest in land'."[1]

While there have been some minor changes to the applicable regulations, the general prohibition contained within the statutes and regulations mentioned in the GSA memorandum remain the same- the DoD and its components lack the legal authority to grant the interests in land contemplated by SB 64, which includes notices of activity and use limitations because the bill does not clearly distinguish activity and use limitations from environmental covenants. This is a U.S. Coast Guard concern as well. This concern is particularly relevant to Alaska, as the vast majority of lands under the control of the Armed Forces of the United States in the state are public lands that have been temporarily withdrawn and reserved for military use by statute, by the U.S. Department of the Interior, or by Executive Order. Some of the lands have overlapping withdrawals involving more than one Federal agency, such as Womens Bay on Kodiak Island. Much of the public land inventory in Alaska is public domain land under Federal jurisdiction, title to which has been held solely and continuously by the United States since 1867 based on the original Treaty of Cession rather than a Deed or Patent and may pose legal and practical difficulties with the recordation requirements specified in Alaska Senate Bill 64. We suggest that the State Legislature and Governor's Office confer with the Department of the Interior to obtain its views on Alaska Senate Bill 64 before the bill progresses further in the legislative process.

We believe SB 64 could be edited to be consistent with the previously mentioned laws and DoD's policy implementing them. Specifically, the Defense Environmental Restoration Program (DERP) Manual (DoD Manual 4715.20), Enclosure 3, paragraph 4.b(17) states: "The DoD has no authority to grant a real property interest for an environmental land use control (e.g., an environmental covenant) on an installation, but may record an environmental notice provided for under State law if the notice does not constitute a real property interest."

If the proposed language of SB 64 is amended to similarly reflect language from the aforementioned voluntary "Notices of Environmental Contamination (Deed Notice)" that are currently recorded, such that it is consistent with the DERP Manual's land use control limitation, our concerns with SB 64 would be largely resolved. However, for the reasons stated above, we would still need to ensure the Department of the Interior has no objections to the recording of an environmental notice on public lands that have been withdrawn and reserved for military use.

In furtherance of the effort to implement legally acceptable language from both the DoD and the State of Alaska's standpoint, we recommend you consider the following edits:

Sec 46.04.390(5) "notice of activity and use limitation" means notice of a restriction or obligation with respect to real property that was created in an environmental response project

[1] I note that the Federal Property and Administrative Services Act of 1949 citations in the GSA memorandum to 40 U.S.C. 471, et.seq., and 40 USC 472(d) are now out of date. 40 USC 471, et seq. is now 40 USC 101, et seq. and 40 USC 472(d) is now 40 USC 102(9). Similarly, GSA changed its regulations after the memo was published from the Federal Property Management Regulations to the Federal Management Regulations and 41 CFR 101-47.103 was re-codified during this transition in the CFRs as 41 CFR 102-71.20.

decision document and filed in accordance with AS 46.04.300-46.04.390. A notice of activity and use limitation does not constitute a servitude arising under an environmental response project and a recorded notice of activity and use limitation does not constitute a real property interest.

Sec. 46.04.340(d) A notice of activity and use limitation must remain in place for current or future landowners until otherwise addressed pursuant to AK 46.04.340(e).

Sec. 46.04.340(i) In response to a petition from the owner of the real property with any notice of activity and use limitation recorded in accordance with this section, the department may authorize the notice of activity and use limitation to be replaced by an environmental covenant for that property. The department may condition its authorization and approval of the termination of the notice of activity and use limitation on the terms of the notice of activity and use limitation, department approval and acceptance, and the effective recording of the environmental covenant.

The DoD is committed to working with the State of Alaska and its agencies on environmental clean-up and other issues. With respect to this issue in particular, we understand that the language presented above may not be acceptable and that the short legislative season in Alaska does not allow for much further time to coordinate. However, if the State of Alaska would like to continue its dialogue with the DoD in order to craft mutually acceptable language, we would be happy to work together towards this goal in the hopes that it could then be presented during the next legislative season. Please feel free to contact my office if you have any questions, need any additional information, or would like to establish any further coordination. I can be reached at (707) 424-8290, or by email at robert.shirley.2@us.af.mil.

Sincerely,

ROBERT SHIRLEY
DoD Regional Environmental Coordinator
Region 10

Attachments
1. ADEC Guidance Document, *Guidance On Using Institutional Controls in Oil and Other Hazardous Substance Cleanups*, 32 pages, dated February 2011.
2. GSA Memorandum, *Restrictive Covenants on Non-excess Property*, 2 pages, dated October 16, 1998.

Attachment 2

GSA

OCT 16 1998

GSA Public Building Service

MEMORANDUM FOR REGIONAL DIRECTOS – 1PR, 4PR, 7PR, 9PR

FROM: JOHN Q. MARTIN
DIRECTOR
REDEPLOYMENT SERVICES DIVISION

SUBJECT: Restrictive Covenants on Non-excess Property

This memorandum clarifies the General Services Administration's (GSA) policy regarding restrictive covenants on real property by landholding agencies.

This issue has caused confusion and has created obstacles to the efficient and effective disposal of excess and surplus real property. Therefore it is essential that this issue be clarified and a consistent approach taken to these actions. This letter applies to GSA regional officials involved in the disposal of Federal real property and to all landholding executive agencies. This memorandum is effective immediately.

Recently, GSA has been approached by several military services requesting assistance with State environmental regulators. In the course of continuing military operations at specific installations, the Department of Defense (DOD) has been required to perform certain environmental remediation. These remediation actions require the final approval of the State regulators. In some states, the State regulators have demanded that DOD place use restrictions or other covenants on the property. These restrictions are intended to run with the land and restrict future owners of the property to specific uses. At this time, the installations in question are in continual use and are not being evaluated as potentially excess property.

At the same time, GSA is aware that other agencies have agreed to restrictive covenants on property in their inventory. These include historic preservation restrictions which have been agreed to by the landholding agency during negotiation of the National Environmental Policy Act (NEPA) or National Historic Preservation Act (NHPA) as these acts apply to the decision to excess the property.

GSA does not believe landholding agencies have the authority to place such restrictions on property in their inventory. GSA views such restrictive covenants as disposals of real property. Under the Federal Property and Administrative Services Act of 1949, as amended (Property Act) GSA was given the exclusive authority to manage the utilization and disposal of real property (40 U.S.C. §§ 471, et seq). The Property Act defines "property" to include "any interest in

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property" (40 U.S.C. § 472(d)). GSA's regulations (41 C.F.R. § 101-47.103-12(a)) define "real property" to include "any interest in land". Therefore, unless the landholding agency has specific authority to dispose of such property rights, the landholding agency must request GSA to dispose of these real property rights or request a delegation of disposal authority from GSA.

Generally, covenants restricting the future use of property are evaluated during the disposal process carried out by GSA. Therefore, where property is expected to be reported excess, GSA will usually deny the request from the landholding agency and evaluate any necessary restrictions during the disposal process. If there are special circumstances that demand agreement on use restrictions prior to being evaluated in the disposal process, GSA will review the request on a case-by-case basis. GSA's evaluation will consider the impact any restrictions may have on the future disposition of the property, the ability to use the property for its highest and best use (as determined by GSA), the economic impact of the requested restrictions, the legal requirement to place such a restriction on the property, and/or the enforceability of the requested restriction.

GSA is particularly concerned about requests to restrict the future use of property when the landholding agency does not contemplate declaring the property excess in the near future. GSA is doubtful as to the necessity, desirability or legal enforceability of placing restrictions on property that will remain in the Government's inventory. Questions as to how such restrictions will be enforced, and by whom, while the property is still an active Government facility are raised by these requests. Further, it would be difficult, if not impossible, for GSA to accurately determine the impact such restrictions may have on the future disposal of the property when immediate disposal of the property is not being contemplated. Therefore, GSA will deny all requests for land use restrictions on fully utilized property unless the requesting landholding agency can demonstrate the unique and extreme circumstances which would overcome GSA's objections to the placing of such restrictions on the property.

Official File – PRD
Readers – PR, PRD, PRP, PRA, Brooks, Chase, Flowers, Kelly, Mandell, Martin, Shoats, Butterworth LR

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