

MEMORANDUM

State of Alaska

Department of Environmental Conservation
Division of Spill Prevention and Response

TO: Darwin Peterson
Director, Legislative Office
Office of the Governor

DATE: March 8, 2017

FROM: Kristin Ryan *KR*
Director

PHONE NO: 465-5065

SUBJECT: Analysis of US Air Force March 3, 2017
Letter to Senator Micciche re: SB 64
(Uniform Environmental Covenants Act)

In a March 3rd letter to Senator Micciche the US Department of Defense (DOD) Environmental Coordinator for Region 10 expressed concerns over Senate Bill 64 (SB 64) – Uniform Environmental Covenants Act (UECA).

The first of DOD's concerns occurs in the second paragraph where DOD states that it cannot comply with SB 64:

due to Federal real property law constraints that prohibit the Department from placing covenants or other use restrictions, including in the form of notices, on real property in its inventory except when disposing of the property.

First, while DOD asserts this claim, and has long expressed this position, DOD has provided no supporting legal opinion or analysis. Alaska and other states have long requested that DOD provide supporting documents for their position and have yet to receive a written reply.

Second, covenants and notices of activity and use limitation are not identical as implied by the letter. Covenants require the transfer of a property interest to a "holder" while a notice of activity and use limitation is just that – a notice in the land records. Colorado, with the help of DOD, modified their environmental covenant law to allow for notices of activity and use limitation to specifically address contamination left in place at DOD facilities.

In some cases, DOD has elected to leave residual contamination in place for over 100 years and in some rare cases beyond 100 years. While DEC understands that upon transfer of the property out of federal hands DOD will consent to the covenant, the restriction may be lost by the time the property is transferred from federal ownership. Especially when some restrictions need to be in place for more than 100 years. By not placing notice of these restrictions in the state land records they are saying, "trust us, we will keep track" which hasn't worked for hundreds of DOD Formerly Used Defense Sites in Alaska that have been transferred to private parties with no or little notification of contamination.

In order to address the concern cited above, DOD has proposed language that exempts DOD from both a covenant and a notice of activity and use limitation. This proposed language would establish DOD as an agency that is set apart and not subject to the same legal requirements as other federal and state agencies and the public. In fact, under their proposed language DOD would receive special treatment not offered to other potential responsible parties in the private realm. It is DEC's position that DOD should be subject to the same requirements as any other entity.

DOD also states that rather than requiring them to enter into a covenant or notice, the State and DOD should work “closely to achieve the substantive goals of the environmental covenant...” and that any efforts the State expends in working with DOD would be recoverable under the Defense State Memorandum of Agreement. But the substantive goals of the covenant or notice are to memorialize the residual contamination at sites and provide notice to subsequent purchasers or transferees of the property. This can only be achieved by placing a covenant or notice in the state land records where they will be available for the public and captured on title searches. With reference to reimbursement, DOD currently reimburses DEC for activities related to placing institutional controls on properties with residual contamination and there is no reason to believe that this practice will change with or without this bill.

Finally, DOD made three suggestions related to references contained in the bill. DEC would be amenable to changing the bill to reference the short titles of the two federal laws and to restricting 46.04.340(b) by changing page 10, line 2 to read “accordance with AS 36.04.340.”