

**HOUSE CS FOR SENATE BILL NO. 64(RLS)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE

Offered: 5/7/18

Referred: Today's Calendar

Sponsor(s): SENATOR MICCICHE

REPRESENTATIVE Kito

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act adopting the Uniform Environmental Covenants Act; relating to environmental**  
 2 **real property covenants and notices of activity and use limitation at contaminated sites**  
 3 **to ensure the protection of human health, safety, and welfare, and the environment; and**  
 4 **providing for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 \* **Section 1.** AS 46.04 is amended by adding new sections to read:

7 **Article 2A. Uniform Environmental Covenants Act.**

8 **Sec. 46.04.300. Environmental covenant.** (a) An environmental covenant is  
 9 required if the department makes a remedial decision as part of an environmental  
 10 response project and that environmental response project results in

11 (1) residual contamination remaining in the environment in  
 12 concentrations that are safe for some, but not all, uses; or

13 (2) an engineered feature or structure that requires monitoring,  
 14 maintenance, or operation, or that will not function as intended if disturbed.

15 (b) An environmental covenant may be held by one or more holders. A holder

1 may own an interest in the real property subject to an environmental covenant. The  
2 interest of a holder is an interest in real property.

3 (c) A right of the department under AS 46.04.300 - 46.04.390 or under an  
4 environmental covenant, other than a right as a holder, is not an interest in real  
5 property.

6 (d) The department is bound by any obligation it specifically assumes in an  
7 environmental covenant, but the department does not assume obligations merely by  
8 signing an environmental covenant. A person other than the department that signs an  
9 environmental covenant is bound by the obligations the person assumes in the  
10 environmental covenant, but signing the environmental covenant does not change  
11 obligations, rights, or protections granted or imposed under law other than under  
12 AS 46.04.300 - 46.04.390 unless otherwise provided in the environmental covenant.

13 (e) The following apply to interests in real property in existence at the time an  
14 environmental covenant is created or amended:

15 (1) an interest that has priority under other law is not affected by an  
16 environmental covenant unless the person that owns the interest subordinates that  
17 interest to the environmental covenant;

18 (2) AS 46.04.300 - 46.04.390 do not require a person that owns a prior  
19 interest to subordinate that interest to an environmental covenant or to agree to be  
20 bound by the environmental covenant;

21 (3) an environmental covenant may contain a subordination agreement,  
22 or a subordination agreement may be contained in a separate record;

23 (4) the department may decide not to sign an environmental covenant  
24 unless each person holding an interest in the land or any part of the land, including  
25 each mortgagee, lessee, lienor, and encumbrancer, irrevocably subordinates the  
26 interest to the environmental covenant; the department may waive the requirement in  
27 this paragraph;

28 (5) an agreement by a person to subordinate a prior interest to an  
29 environmental covenant affects the priority of that person's interest but does not by  
30 itself impose any affirmative obligation on the person with respect to the  
31 environmental covenant;

1 (6) if the environmental covenant covers commonly owned property in  
 2 a common interest community, the record may be signed by any person authorized by  
 3 the governing board of the owners' association.

4 **Sec. 46.04.305. Contents of environmental covenant.** (a) An environmental  
 5 covenant must

6 (1) state that the interest is an environmental covenant executed under  
 7 AS 46.04.300 - 46.04.390;

8 (2) contain a legally sufficient description of the real property subject  
 9 to the environmental covenant;

10 (3) describe the activity and use limitations on the real property;

11 (4) identify every holder;

12 (5) be signed by the commissioner of the department, every holder,  
 13 and, unless waived by the department, every owner of the fee simple of the real  
 14 property subject to the environmental covenant except that for an environmental  
 15 covenant affecting a land or mineral interest of the Department of Natural Resources,  
 16 the signature of the commissioner of natural resources may not be waived; and

17 (6) identify the name and location of any administrative record for the  
 18 environmental response project reflected in the environmental covenant.

19 (b) In addition to the information required under (a) of this section, an  
 20 environmental covenant may contain other information, restrictions, and requirements  
 21 agreed to by the persons who signed it or required by the department, including

22 (1) requirements for notice following transfer of a specified interest in,  
 23 or concerning proposed changes in use of, applications for building permits for, or  
 24 proposals for any site work affecting the contamination on, the property subject to the  
 25 environmental covenant;

26 (2) requirements for periodic reporting describing compliance with the  
 27 environmental covenant;

28 (3) rights of access to the property granted in connection with  
 29 implementation or enforcement of the environmental covenant;

30 (4) a brief narrative description of the contamination and remedy,  
 31 including the contaminants of concern, the pathways of exposure, limits on exposure,

1 and the location and extent of the contamination;

2 (5) a limitation on the amendment or termination of the environmental  
3 covenant that is in addition to the limitations contained in AS 46.04.300 - 46.04.390;  
4 and

5 (6) rights of the holder in addition to the right of the holder to enforce  
6 the environmental covenant under AS 46.04.335.

7 (c) In addition to other conditions for the department's approval of an  
8 environmental covenant, the department may require a specified person who has an  
9 interest in the real property that is the subject of the environmental covenant to sign  
10 the environmental covenant.

11 **Sec. 46.04.310. Validity of environmental covenant; effect on other**  
12 **instruments.** (a) An environmental covenant entered into in accordance with  
13 AS 46.04.300 - 46.04.390 runs with the land.

14 (b) An environmental covenant is valid and enforceable even if

15 (1) it is not appurtenant to an interest in real property;

16 (2) it can be or has been assigned to a person other than the original  
17 holder;

18 (3) it is not of a character that has been traditionally recognized at  
19 common law;

20 (4) it imposes a negative burden;

21 (5) it imposes an affirmative obligation on a person having an interest  
22 in the real property or on the holder;

23 (6) the benefit or burden does not touch or concern real property;

24 (7) there is no privity of estate or contract;

25 (8) the holder dies, ceases to exist, resigns, or is replaced; or

26 (9) the owner of an interest subject to the environmental covenant and  
27 the holder are the same person.

28 (c) An instrument that creates restrictions or obligations with respect to real  
29 property that would qualify as activity and use limitations except for the fact that the  
30 instrument was recorded before the effective date of AS 46.04.300 - 46.04.390 is not  
31 invalid or unenforceable because of any of the limitations on enforcement of interests

1 described in (b) of this section or because it was identified as an easement, servitude,  
 2 deed restriction, or other interest. Except as provided in this section, AS 46.04.300 -  
 3 46.04.390 do not apply to an instrument described in this subsection.

4 (d) AS 46.04.300 - 46.04.390 do not invalidate or render unenforceable any  
 5 interest, whether designated as an environmental covenant or other interest, that is  
 6 otherwise enforceable under the law of this state.

7 **Sec. 46.04.315. Notice of environmental covenant.** (a) A copy of the  
 8 environmental covenant shall be provided by the persons and in the manner required  
 9 by the department to

10 (1) each person that signed the environmental covenant;

11 (2) each person holding a recorded interest in the real property subject  
 12 to the environmental covenant;

13 (3) each person in possession of the real property subject to the  
 14 environmental covenant;

15 (4) each municipality or other unit of local government in which real  
 16 property subject to the environmental covenant is located; and

17 (5) any other person the department requires.

18 (b) The validity of an environmental covenant is not affected by failure to  
 19 provide a copy of the environmental covenant as required under this section.

20 **Sec. 46.04.320. Recording of environmental covenant.** (a) An environmental  
 21 covenant and an amendment or termination of the environmental covenant must be  
 22 recorded in every recording district in which any portion of the real property subject to  
 23 the environmental covenant is located. For purposes of indexing, a holder shall be  
 24 treated as a grantee.

25 (b) An owner of land may not record an environmental covenant unless the  
 26 owner simultaneously records any subordination documentation required under  
 27 AS 46.04.300(e).

28 (c) Except as otherwise provided in AS 46.04.325(f), an environmental  
 29 covenant is subject to state law governing recording and priority of interests in real  
 30 property.

31 (d) A holder shall provide a copy of the final recorded environmental

1 covenant, an amendment made to the environmental covenant, termination  
 2 documentation, and documentation of other matters related to the environmental  
 3 covenant to the department.

4 **Sec. 46.04.325. Duration; modification or termination of environmental**  
 5 **covenant by administrative or court action.** (a) An environmental covenant is  
 6 perpetual unless it is

7 (1) by its terms, limited to a specific duration or terminated by the  
 8 occurrence of a specific event;

9 (2) terminated by consent under AS 46.04.330;

10 (3) terminated under (b), (e), or (g) of this section;

11 (4) terminated by foreclosure of an interest that has priority over the  
 12 environmental covenant; or

13 (5) terminated or modified in an eminent domain proceeding, but only  
 14 if

15 (A) the department is a party to the proceeding;

16 (B) every person whose consent is required under  
 17 AS 46.04.330(a) is given notice of the pendency of the proceeding; and

18 (C) the court determines, after hearing, that the activity and use  
 19 limitations subject to termination or modification are no longer required to  
 20 protect human health, safety, or welfare, or the environment.

21 (b) The department may terminate or reduce the burden on the real property of  
 22 an environmental covenant if the department finds that some or all of the activity and  
 23 use limitations under the environmental covenant are no longer required to protect  
 24 human health, safety, or welfare, or the environment, or modify the environmental  
 25 covenant if the department determines that modification is required adequately to  
 26 protect human health, safety, or welfare, or the environment.

27 (c) The department shall provide notice of any proposed action under (b) of  
 28 this section to each person with a current recorded interest in the real property subject  
 29 to the environmental covenant, each holder, all other persons who originally signed  
 30 the environmental covenant, or their successors or assigns, and any other person with  
 31 rights or obligations under the environmental covenant. The department shall provide

1 60 days for comment on the proposed action by parties entitled to notice. A  
2 determination by the department under this subsection is a final agency decision. Any  
3 person entitled to notice under this subsection may request an adjudicatory hearing  
4 under the procedures established by the department under AS 46.04.890.

5 (d) A person entitled to notice under (c) of this section may apply in writing to  
6 the department for a determination under (b) of this section that an existing  
7 environmental covenant be terminated, that the burden of an environmental covenant  
8 be reduced, or that an environmental covenant be modified. The application must  
9 specify the determination sought by the applicant, the reasons why the department  
10 should make the determination, and the information that would support it. If the  
11 department fails to begin a proceeding under (b) of this section within 90 days after  
12 receiving the application, the applicant may bring a civil action in superior court for  
13 termination, reduction of burden, or modification of the environmental covenant under  
14 (e) of this section.

15 (e) The superior court for a recording district in which the real property  
16 subject to an environmental covenant is located may, in a de novo action, under the  
17 doctrine of changed circumstances, terminate an environmental covenant, reduce an  
18 environmental covenant's burden on the real property, or modify the terms of an  
19 environmental covenant if the department fails to begin a proceeding within 90 days as  
20 provided under (d) of this section. The applicant under (d) of this section, a holder of  
21 the environmental covenant, or another person identified in (c) of this section may  
22 begin an action under this subsection. The person beginning the action shall serve  
23 notice of the action on the department and any person entitled to notice under (c) of  
24 this section. The person bringing the action shall make the department a party to the  
25 action. The court shall terminate, reduce the burden of, or modify an environmental  
26 covenant if the court determines that the person bringing the action shows that some or  
27 all of the activity and use limitations under the environmental covenant do not or are  
28 no longer required to protect human health, safety, or welfare, or the environment.

29 (f) An environmental covenant may not be extinguished, limited, or impaired  
30 through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine  
31 of adverse possession, prescription, abandonment, waiver, lack of enforcement,

1 acquiescence, or a similar doctrine.

2 (g) The department shall terminate an environmental covenant if the  
3 environmental covenant was required under AS 46.04.300 solely because of the level  
4 or concentration of residual contamination on the property, and the department  
5 determines that level or concentration of residual contamination does not endanger  
6 human health, safety, or welfare, or the environment. The department shall provide  
7 notice of a termination under this subsection to each person with a current recorded  
8 interest in the real property subject to the environmental covenant, each holder, all  
9 other persons who originally signed the environmental covenant, or their successors or  
10 assigns, and any other person with rights or obligations under the environmental  
11 covenant.

12 **Sec. 46.04.330. Amendment or termination of environmental covenant by**  
13 **consent.** (a) An environmental covenant may be amended or terminated if the  
14 amendment or termination is consented to and signed

15 (1) by the department;

16 (2) unless waived by the department, by the current owner of the fee  
17 simple of the real property subject to the environmental covenant;

18 (3) by each person that originally signed the environmental covenant,  
19 unless the person

20 (A) waived the right to consent to termination or modification  
21 in the environmental covenant or in another signed and acknowledged  
22 instrument recorded with the recording district;

23 (B) fails to object to the amendment or termination within 60  
24 days after a party to the covenant mails, by certified mail, return receipt  
25 requested, to the person's last known address, a notice requesting the person's  
26 consent to amendment or termination and the return receipt is signed by the  
27 person; or

28 (C) cannot be found, as determined by a court, because the  
29 person no longer exists or cannot be located or identified with the exercise of  
30 reasonable diligence; and

31 (4) except as otherwise provided in (d)(2) of this section, by the holder.

1 (b) If an interest in real property is subject to an environmental covenant, the  
 2 interest is not affected by an amendment of the environmental covenant unless the  
 3 current owner of the interest consents to the amendment or has waived in a signed  
 4 record the right to consent to amendments.

5 (c) Except for an assignment undertaken under a governmental reorganization,  
 6 assignment of an environmental covenant to a new holder is an amendment.

7 (d) Except as otherwise provided in an environmental covenant,

8 (1) a holder may not assign its interest without consent of the other  
 9 parties specified in (a) of this section;

10 (2) a holder may be removed and replaced by agreement of the other  
 11 parties specified in (a) of this section; and

12 (3) a court of competent jurisdiction may fill a vacant holder position.

13 **Sec. 46.04.335. Enforcement of environmental covenant.** (a) The department  
 14 is the administrating agency for AS 46.04.300 - 46.04.390 and is empowered to  
 15 administer and enforce AS 46.04.300 - 46.04.390 using the civil or administrative  
 16 authority granted to it in AS 46.03. However, the department may, but is not required  
 17 to, assume any administration or enforcement functions other than those directly  
 18 related to the environmental covenant.

19 (b) A civil action for injunctive or other equitable relief for violation of an  
 20 environmental covenant may be maintained by

21 (1) a party to the environmental covenant;

22 (2) the department;

23 (3) a person that the environmental covenant expressly grants the  
 24 power to enforce the environmental covenant;

25 (4) a person whose interest in the real property or whose collateral or  
 26 liability may be affected by the alleged violation of the environmental covenant; or

27 (5) a municipality or other unit of government that governs the real  
 28 property subject to the environmental covenant.

29 (c) AS 46.04.300 - 46.04.390 do not limit the regulatory authority of the  
 30 department in an environmental response project.

31 (d) A person is not responsible for or subject to liability for environmental

1 remediation solely because the person has the right to enforce an environmental  
2 covenant.

3 **Sec. 46.04.340. Notice of activity and use limitation.** (a) If a legal  
4 impediment prevents an environmental covenant from being entered into, an owner of  
5 real property shall, after receiving authorization from the department, record a notice  
6 of an activity and use limitation into the appropriate public land records. Failure to  
7 record a notice of an activity and use limitation may result in disapproval of the  
8 environmental response project.

9 (b) Once the owner or other person assumes an obligation under a notice of  
10 activity and use limitation, that owner or person shall comply with those obligations in  
11 accordance with AS 46.04.300 - 46.04.390.

12 (c) The enactment, modification, or termination of a notice of activity and use  
13 limitation is not valid until it is approved by the department.

14 (d) A notice of activity and use limitation must remain in place for current and  
15 subsequent landowners unless it is terminated under (e) or (m) of this section.

16 (e) A person who proposes to create, modify, or terminate a notice of activity  
17 and use limitation shall provide written notice of the person's intention to the  
18 department, to all persons holding an interest of record in the real property that will be  
19 subject to the notice of activity and use limitation, to all persons known to the person  
20 to have an unrecorded interest in the property, and to all affected persons in possession  
21 of the property before the creation, modification, or termination, and shall provide the  
22 department with

23 (1) a copy of the notice provided;

24 (2) a list of the persons to whom notice was given and the address or  
25 other location to which the notice was directed; and

26 (3) title information required by the department.

27 (f) Before unilaterally issuing a notice of activity and use limitation, the  
28 department shall provide a copy of the proposed notice of activity and use limitation to  
29 all persons holding an interest of record in the real property subject to the notice of  
30 activity and use limitation, all persons known to the department to have an unrecorded  
31 interest in the property, and all affected persons in possession of the property, and

1 shall offer the persons a minimum of 30 days to comment on the proposed notice of  
2 activity and use limitation, unless notice has already been provided under (e) of this  
3 section. In determining whether to issue the notice of activity and use limitation  
4 unilaterally, the department shall consider any comments received. For a notice of  
5 activity and use limitation affecting a land or mineral interest of the Department of  
6 Natural Resources, concurrence from the Department of Natural Resources is  
7 required.

8 (g) The department shall review and make a determination regarding all  
9 requests to create, modify, or terminate a notice of activity and use limitation within  
10 90 days after receiving a request that includes all the information described in (a) of  
11 this section.

12 (h) Upon issuance or approval of a notice of activity and use limitation, the  
13 department shall record the notice in every recording district in which a portion of the  
14 real property that is subject to the activity and use limitation is located. For approved  
15 notices, the department may allow the owner of the property to record the notice. A  
16 person may not record a notice without the department's written approval.

17 (i) Unless there is a legal impediment that prevents entering into an  
18 environmental covenant, the department may authorize that any notice of activity and  
19 use limitation created in accordance with this section be replaced by an environmental  
20 covenant on the property that is subject to the notice of activity and use limitation. The  
21 department may condition its authorization and approval of the termination of the  
22 notice of activity and use limitation on the terms of the notice of activity and use  
23 limitation, department approval and acceptance, and the effective recording of the  
24 environmental covenant.

25 (j) Modification or termination of a notice of activity and use limitation shall  
26 be recorded as provided in (h) of this section. A person may not record a modification  
27 or termination of a notice of activity and use limitation without the department's  
28 written approval.

29 (k) A determination by the department to issue, approve, modify, or terminate  
30 a notice of activity and use limitation is subject to appeal under the procedures  
31 described in AS 46.04.890.

1 (l) A notice of activity and use limitation, whether recorded or unrecorded, is  
2 not

- 3 (1) a servitude arising from an environmental response project; or  
4 (2) an interest in real property.

5 (m) The department shall terminate a notice of activity and use limitation for  
6 real property if the notice of activity and use limitation was required solely because of  
7 the level or concentration of residual contamination on the property, and the  
8 department determines that level or concentration of residual contamination does not  
9 endanger human health, safety, or welfare, or the environment. The department shall  
10 provide notice of a termination under this subsection to all persons holding an interest  
11 of record in the real property subject to the notice of activity and use limitation, all  
12 persons known to the department to have an unrecorded interest in the property, and  
13 all affected persons in possession of the property.

14 **Sec. 46.04.345. Relationship to other land-use law.** AS 46.04.300 -  
15 46.04.390 do not authorize a use of real property that is otherwise prohibited under  
16 AS 29.40 or AS 38.05.037, by law other than AS 46.04.300 - 46.04.390 regulating use  
17 of real property, or by a recorded instrument that has priority over the environmental  
18 covenant or a notice of activity and use limitation. An environmental covenant or a  
19 notice of activity and use limitation may prohibit or restrict uses of real property that  
20 are authorized by zoning or by law other than AS 46.04.300 - 46.04.390.

21 **Sec. 46.04.350. Registry.** The department shall maintain a registry that  
22 contains all environmental covenants and notices of activity and use limitation and any  
23 amendment or termination of those instruments. The registry may also contain any  
24 other information concerning environmental covenants and notices of activity and use  
25 limitation and the real property subject to them that the department considers  
26 appropriate.

27 **Sec. 46.04.355. Uniformity of application and construction.** In applying and  
28 construing AS 46.04.300 - 46.04.390, consideration must be given to the need to  
29 promote uniformity of the law with respect to its subject matter among states that  
30 enact similar provisions.

31 **Sec. 46.04.390. Definitions.** In AS 46.04.300 - 46.04.390,

1 (1) "common interest community" means a condominium, cooperative,  
 2 or other real property with respect to which a person, by virtue of the person's  
 3 ownership of a parcel of real property, is obligated to pay property taxes or insurance  
 4 premiums, or pay for maintenance, or improvement of other real property described in  
 5 a recorded environmental covenant that creates the common interest community;

6 (2) "environmental covenant" means a servitude arising under an  
 7 environmental response project that imposes activity and use limitations;

8 (3) "environmental response project" means a plan or work performed  
 9 or maintenance of work performed under a federal or state program

10 (A) including this chapter, AS 46.03, AS 46.09, 42 U.S.C.  
 11 9601 - 9675 (Comprehensive Environmental Response, Compensation and  
 12 Liability Act), as amended, and 42 U.S.C. 6901 - 6992k (Resource  
 13 Conservation and Recovery Act), as amended, governing environmental  
 14 remediation and management of contaminated real property; or

15 (B) governing maintenance, closure, or corrective action of a  
 16 solid waste disposal facility or hazardous waste management unit;

17 (4) "holder" means the grantee of an environmental covenant as  
 18 specified in AS 46.04.300(b);

19 (5) "notice of activity and use limitation" means a notice of a  
 20 restriction on or obligation concerning an activity on or use of real property, in  
 21 accordance with AS 46.04.300 - 46.04.390;

22 (6) "record" has the meaning given in AS 40.17.900.

23 \* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to  
 24 read:

25 TRANSITION: REGULATIONS. The Department of Environmental Conservation  
 26 and the Department of Natural Resources may adopt regulations necessary to implement this  
 27 Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not  
 28 before the effective date of the law implemented by the regulation.

29 \* **Sec. 3.** Section 2 of this Act takes effect immediately under AS 01.10.070(c).