SB

64

<TARGET><BILL>SB 64</BILL><SUBJECT>SB
64</SUBJECT><COMM>HL&C30</COMM></TARGET>

Senator Peter A. Micciche

Alaska State Legislature

Session Address:
Alaska State Capitol, Rm. 508
Juneau, Alaska 99801-1182
Phone: (907) 465-2828
Toll Free: (800) 964-5733

Interim Address:
145 Main Street Loop, Ste. 226
Kenai, Alaska 99611-7771
Phone: (907) 283-7996
Fax: (907) 283-8127

MEMORANDUM

To: Representative Sam Kito
Chair of the House Labor and Commerce Committee

From: Senator Peter Micciche
Date: April 11, 2017
Re: Hearing Request SB64 Pending Referral

I respectfully request SB64 be scheduled for a hearing, pending referral, in your committee at your earliest convenience. If you have questions please feel free to contact Rachel Hanke at 465-4899.

Thank you for your consideration of this request.

Warm Regards,

P.A. Micciche

Peter A. Micciche

Senator.Peter.Micciche@akleg.gov

Senator Peter A. Micciche

Alaska State Legislature

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Fax: (907) 283-8127

MEMORANDUM

To: Representative Sam Kito
Chair of the Senate Community and Regional Affairs Committee

From: Senator Peter Micciche
Date: January 19, 2018
Re: Hearing Request for SB64

I respectfully request SB64 be scheduled for a hearing in your committee at your earliest convenience. If you have questions please feel free to contact Rachel Hanke at 465-4899.

Thank you for your consideration of this request.

Warm Regards,

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SB 64: Uniform Environmental Covenants Act (UECA)

A primary interest of this office is to streamline and remove obstacles that inhibit business, commerce or the transfer of property without reducing expectations for public health, safety and a healthy environment. SB 64 achieves that.

In 2003, the Uniform Law Commissioners created a Uniform Environmental Covenants Act to overcome inadequate common law rules. An environmental covenant allows for the sale of property with use limitations to mitigate risk. Alaska is one of only seven states that does not have an environmental covenant law.

SB 64 protects the buyer and seller of contaminated property while allowing the fullest and best use of the property until the contamination reaches safe levels. The bill creates a legal mechanism to safely transfer contaminated property through an environmental covenant.

An environmental covenant is a specific recordable interest in real estate that will be tracked through a Department of Environmental Conservation (DEC) database. The covenant is specific to the risks at a particular site and restricts activities that could result in exposure while allowing other uses to occur. Such a process is often all that is necessary to make property transferable, as well as economically and functionally viable.

Use restrictions imposed by the covenant are developed by the responsible party and DEC - exactly as they are now for Institutional Controls - utilizing risk assessments and scientific principles.

A covenant provides transparency throughout the life of the property and provides assurances to buyers and sellers that risks will be safely managed. Other states have found that covenants help communities transform blighted property into marketable assets.

A simple process for amending or removing covenants is included in the legislation. A covenant would not supplant or impose current contamination removal standards, which will continue to be managed as they are currently. The act would not affect the liability of the principally-responsible parties, but would provide a method for minimizing exposure to third parties.

Staff Contact: Rachel Hanke 465-4899

Senator.Peter.Micciche@akleg.gov

Senator Peter A. Micciche

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SB 64: Uniform Environmental Covenants Act

Sectional Analysis

Section 1

Adds a new article to AS 46.04 that

- AS 46.04.300 – establishes when an environmental covenant is necessary, who is a holder, who is bound by the covenant, subordination, rules for commonly held property, and states that the covenant has no interest in the land;
- AS 46.04.305 – provides which documents are required for the record and additional documents that may be requested;
- AS 46.04.310 – provides situations in which the covenant is still valid and enforceable and is priority over common law;
- AS 46.04.315 – outlines procedure for notice;
- AS 46.04.320 – establishes guidelines for recording the covenant in property records;
- AS 46.04.325 – defines terms for termination of a covenant and amendment by court action i.e., consent, foreclosure with another interest as priority, or eminent domain;
- AS 46.04.330 – defines procedure for termination of a covenant and amendment by consent;
- AS 46.04.335 – states the department has the power to enforce and bring civil action if there is failure to comply;
- AS 46.04.340 – creates the ability to enforce an environmental covenant on federal lands;
- AS 46.04.345 – places covenant restrictions above other land-use laws;
- AS 46.04.350 – provides that the department shall maintain a registry for covenants;
- AS 46.04.355 – states that this Act is uniform law;
- AS 46.04.390 – provides definitions used in the Act.

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Section 2

Uncodified law – provides that the Department of Environmental Conservation and the Department of Natural Resources may adopt necessary regulations to implement this Act.

Sections 3

Provides an immediate effective date for Section 2 of this Act.

Senator.Peter.Micciche@akleg.gov

Fiscal Note

State of Alaska
2017 Legislative Session

Bill Version: SB 64
Fiscal Note Number:
() Publish Date:

Identifier: SB064-DEC-SPAR-2-24-17
Title: UNIFORM ENVIROMENTAL COVENANTS ACT
Sponsor: MICCICHE
Requester: (S) Community and Regional Affairs

Department: Department of Environmental Conservation
Appropriation: Spill Prevention and Response
Allocation: Spill Prevention and Response
OMB Component Number: 3094

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2018 Appropriation Requested	Included in Governor's FY2018 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2018**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**	**FY 2022**	**FY 2023**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Fund Source (Operating Only)

None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY2017) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2018) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 06/30/18

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: Kristin Ryan, Director — Phone: (907)269-7604
Division: Spill Prevention and Response — Date: 02/24/2017 09:00 AM
Approved By: Alice Edwards, Deputy Commissioner — Date: 02/24/17
Agency: Department of Environmental Conservation

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2017 LEGISLATIVE SESSION

BILL NO. SB064

Analysis

The proposed legislation establishes the ability to create environmental covenants for property with contamination remaining above cleanup levels. A covenant would restrict some activities from occurring on the property to avoid releasing the contamination but allow other uses to occur. It allows for transparency in real estate transactions and assurance to sellers that remaining contamination will be effectively managed. The Division currently maintains the contaminated sites database which contains deed notices. Environmental covenants will replace deed notices since they are sometimes lost as ownership turns over. The Division will modify this database to track environmental covenants with existing personnel resources. The database already has a public access webpage so there is no additional cost for adding a searchable element for environmental covenants. Staff already spend time creating and maintaining deed notices, and this effort will be replaced by similar effort to create and maintain environmental covenants. Increased personnel costs are not expected. Therefore, the department submits a zero fiscal note.

(Revised 8/12/16 OMB/LFD)

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2017 LEGISLATIVE SESSION

BILL NO. SB064

Analysis

The proposed legislation establishes the ability to create environmental covenants for property with contamination remaining above cleanup levels. A covenant would restrict some activities from occurring on the property to avoid releasing the contamination but allow other uses to occur. It allows for transparency in real estate transactions and assurance to sellers that remaining contamination will be effectively managed. The Division currently maintains the contaminated sites database which contains deed notices. Environmental covenants will replace deed notices since they are sometimes lost as ownership turns over. The Division will modify this database to track environmental covenants with existing personnel resources. The database already has a public access webpage so there is no additional cost for adding a searchable element for environmental covenants. Staff already spend time creating and maintaining deed notices, and this effort will be replaced by similar effort to create and maintain environmental covenants. Increased personnel costs are not expected. Therefore, the department submits a zero fiscal note.

(Revised 8/12/16 OMB/LFD)

Fiscal Note

State of Alaska
2017 Legislative Session

Bill Version: SB 64
Fiscal Note Number:
() Publish Date:

Identifier: SB064-DNR-MLW-2-24-17
Title: UNIFORM ENVIROMENTAL COVENANTS ACT
Sponsor: MICCICHE
Requester: Senate Community & Regional Affairs

Department: Department of Natural Resources
Appropriation: Fire Suppression, Land & Water Resources
Allocation: Mining, Land & Water
OMB Component Number: 3002

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2018 Appropriation Requested	Included in Governor's FY2018 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2018**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**	**FY 2022**	**FY 2023**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Fund Source (Operating Only)

None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY2017) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2018) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable; initial version.

Prepared By: Brent Goodrum, Director — Phone: (907)269-8625
Division: Division of Mining, Land & Water — Date: 02/24/2017 01:00 PM
Approved By: Andrew T. Mack, Commissioner — Date: 02/24/17
Agency: Department of Natural Resources

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2017 LEGISLATIVE SESSION

BILL NO. SB 64

Analysis

The bill may result in the Department of Natural Resources (DNR) being a holder of an Environmental Covenant (EC) on DNR managed state public domain lands in order to allow Department of Environmental Conservation (DEC) to close environmentally contaminated sites on these lands. If and when ECs are placed on DNR-managed state public domain lands, they will have to be monitored and enforced.

Ultimately these costs for review and coordination will be based on how many ECs are initiated, the scope and complexity of each EC, the time or resources that these ECs may require, and the degree to which this cost can be recovered from responsible third parties. While these costs are unknown, it is expected that they can be absorbed in the Department's operating budget without fiscal impact. Therefore a zero fiscal note is submitted.

Senate Bill 64

Alaska
Uniform Environmental Covenants Act

What is UECA?

A tool to ensure buyers and sellers are fully aware of restrictions placed on contaminated land. These restrictions are only utilized when contamination is at levels that are not protective for unrestricted land use. An environmental covenant ensures the risks posed by the contamination and land use limitations are clearly communicated to future buyers.

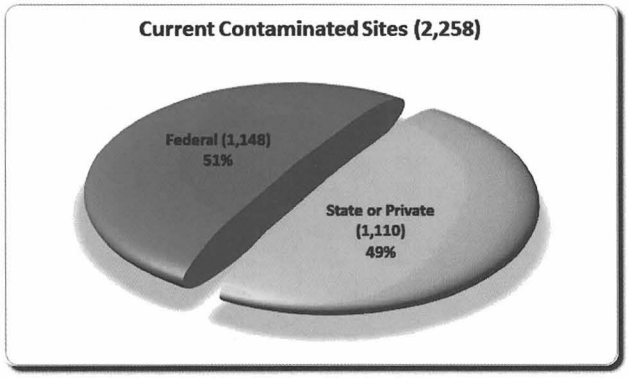
UECA helps:
- Transparent Transfers
- Promote Land Reuse
- Protect Human Health
- Protect the Environment

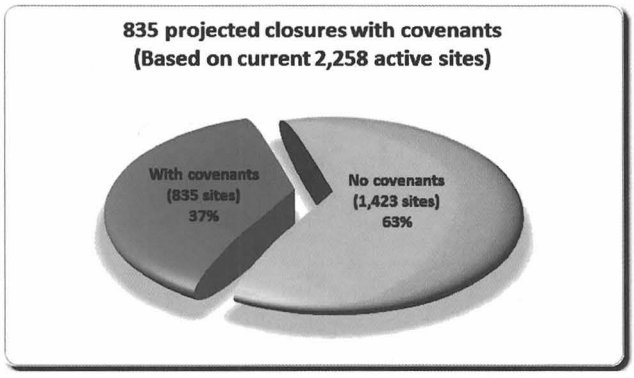
Why do we need it?

UECA provides a better method to communicate land use restrictions then is currently in place. In other states, covenants have aided in the transfer and reuse of blighted and contaminated real property. It will help provide transparency, ensure cleanups remain protective, and manage liability for current and future owners.

Scope of the issue

There are 7,480 total contaminated sites in the state. Seventy percent (5,222) of those sites are closed. Out of the 5,222 closed sites there are currently 1,203 sites that are closed with institutional controls—503 federally owned and 700 state or privately owned. There are currently 2,258 active contaminated sites in Alaska—1,148 are federally owned and 1,110 are state or privately owned. Based on current trends DEC projects approximately 835 of the current sites would be impacted and likely have the new environmental covenant(s).





The graphics show the breakdown of open sites between federal and state or private (left) and the projected sites that would likely be closed with and without environmental covenants (right).

What would the covenants look like?

Like any other residential or commercial protective covenant but it would address areas like land, soil, groundwater, and building construction. Some examples include possible land use restrictions such as: *No Residential Land Use, Restricted Residential Land Use.* Soil restriction such as: *No Disturbance of Soil, Construction Worker Notice, Engineered Controls for Soil.* Groundwater restriction such as: *No Drilling or Use of Groundwater, Engineered Controls for Groundwater, Construction Worker Notice.* Or other restrictions such as construction of buildings in a manner that prevents vapor intrusion risk. DEC is working on standard format and wording for the covenants.

Current as of February 2017

Alaska is 1 of 7 states that have not adopted covenants

Who supports or objects to UECA?

DEC has met with realtor boards and associations, banking and mortgage associations, builders associations, title and appraisal associations, native village and ANCSA land managers, Alaska Municipal League and local governments, all state agencies who own property, federal agencies including DOD, other public/private agencies like Alaska Railroad and Cook Inlet Housing, oil/gas and other industry representatives, and nongovernmental and environmental organizations. Many concerns were explained and addressed. No objections are anticipated and many support UECA.

How much will UECA cost?

Nothing extra—there are no additional costs for state agencies or owners/potential purchasers of contaminated property outside DEC's current cleanup and cost recovery process.

Examples where UECA would have helped

Here are some examples where UECA would have saved time and money in the reuse and redevelopment of contaminated and blighted property:

Eielson Pipeline

A portion of the fuel pipeline for Eielson Air Force Base runs through the residential community of Moose Creek. In 2003 a historical spill from this pipeline was discovered. The ensuing investigation found that gasoline and diesel contamination extended off the pipeline right-of-way onto eight adjoining parcels, some of which have houses with drinking water wells. At least one of these houses was subsequently sold to a buyer who had no knowledge of the contamination or the risk to their drinking water well. Had a covenant been in place on this property, the buyer could have made a more informed decision concerning the purchase.

A monitoring well in Moose Creek

Former Courtney's Service Station

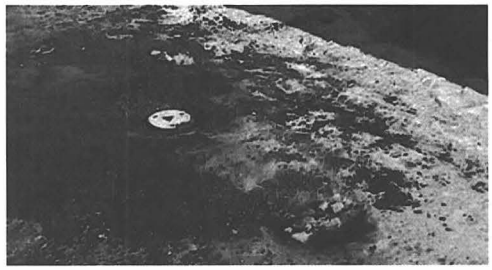
This site was a former gas station in Anchorage that was closed with institutional controls. The new owner did not abide by the ICs and incurred significant cost when additional contamination was discovered. Had a covenant been in place, this party would have had a better understanding of the liability they incurred when purchasing this property and the issues that arose would have been more easily dealt with.

ANCSA Land Transfers

Contaminated lands conveyed to Alaska Native Corporations under the Alaska Native Claims Settlement Act (ANCSA). If the current proposed version of UECA had been in place, activity use limitations may have been in place on the federal lands, which would have identified the contaminant concerns and associated impacts on future land use.

Institutional controls

Institutional controls can be obvious like the sign and fencing above or out of sight like the monitoring well below. UECA would use covenants to help make sure future property owners are aware of these controls.



Prepared by: Department of Environmental Conservation

Contact Us: **312.450.6600**

Legislative Fact Sheet - Environmental Covenants Act

Act	Environmental Covenants Act
Origin	Completed by the Uniform Law Commissioners in 2003.
Description	This act provides clear rules for a perpetual real estate interest – an environmental covenant – to regulate the use of brownfields when real estate is transferred from one owner to another.
Endorsements	
Enactments	Alabama, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, U.S. Virgin Islands, Utah, Virginia, Washington, West Virginia
2017 Introductions	New Mexico
Staff Liaison(s)	Benjamin Orzeske

111 N. Wabash Avenue Suite 1010 Chicago, Illinois 60602

Uniform Law Commission
The National Conference of Commissioners on Uniform State Laws

Contact Us: **312.450.6600**

Environmental Covenants Act Summary

Virtually everywhere in America, state and local governments are struggling with the problem of brownfields – vacant, abandoned and underused sites with various forms and degrees of environmental contamination. Reclaiming many of these sites for beneficial uses is very difficult and very expensive. Total cleanup, if possible, would often cost much more than the market value of the property. However, if a legal mechanism can be developed for long term control of use and clean-up or remediation (the current term of art), some properties may be safely returned to use and may be bought and sold. Current real property law is inadequate. Various common-law doctrines and other legal rules often work against such long-term controls, a situation which undermines the use and marketability of contaminated property.

In 2003, the Uniform Law Commissioners have promulgated the Uniform Environmental Covenants Act to overcome the inadequate common law rules. The statutory legal mechanism it creates is called an "environmental covenant." Covenants are generally recognized in the common law as a means of conveying restrictions on use of land. The environmental covenant relies on the common law base, but re-creates it for the specific purpose of controlling the use of contaminated real estate, perpetually if necessary, while allowing that real estate to be conveyed from one person to another subject to those controls.

An environmental covenant is a specific recordable interest in the real estate. It arises from an environmental response project that imposes activity and use limitations. Such a project must arise under an appropriate federal or state program or approval for clean up of the property or closure of a waste management site. No environmental covenant is effective without the relevant agency signature. The interest is created in a specific instrument for the purpose. The instrument recites the controls and remediation requirements imposed upon the property. The rights under the covenant must be granted to a party or parties called the holders. The covenant is perpetual unless limited in time within the instrument. It runs with the land and does not have to be "appurtenant." This means it cannot be extinguished when one owner transfers rights or interests in the property to another, no matter who the holders are.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be recorded in the land records and effectively enforced over time as a valid real property servitude. This Act reverses the variety of common law doctrines that cast doubt on such enforceability.

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use. Large numbers of contaminated sites, often known as brownfields, are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these instruments which will appear in any title abstract for the property in question.

At the time this Act was promulgated, approximately half the states had laws providing for land use restrictions in some real estate form pertaining to environmental contamination. Those existing laws

vary greatly in scope – some simply note the need for land use restrictions, while others create tools similar to many of the legal structures envisioned by this Act. Most such acts apply only to cleanups under a state program. In contrast, this Act includes a number of provisions absent from most existing state laws, including the Act's applicability to both federal and state-led cleanups. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. The Act also provides detailed provisions regarding termination and amendment of covenants, and includes important provisions on dealing with recorded interests that have priority over the new covenant. There is broad enforcement authority to make sure a covenant does govern the property. Holders are expected to enforce, but any party to the covenant and appropriate agencies may enforce as well. Further, the Act offers guidance to courts confronted with a proceeding that seeks to terminate such a covenant through eminent domain or the doctrine of changed circumstances.

Under the Uniform Act, the governmental regulators who sign an environmental covenant will serve to ensure that the risk assessments and control mechanisms are based on sound science and that affected third parties have notice of the covenant and associated controls. The act specifies that persons with a recorded interest in the property or who are in possession of the property, together with local governments in which the property is located and any other person the agencies require, must be given notice of the covenant. Environmental covenants, and any associated amendments or terminations, must be recorded in the local land records.

It is important to note that Act does not supplant or impose substantive clean-up standards, either generally or in a particular case. The Act assumes those standards will be developed in the prior regulatory process. Rather, the Act validates site-specific, environmental use restrictions that result from the environmental response project which an environmental covenant helps implement. Implicit in use controls is the fact that, despite best efforts, total cleanups of many contaminated sites are not possible, but property may be put to limited uses without risk to others, nonetheless. The Act also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination – rather it provides a method for minimizing the exposure of third parties to such risks and for owners and responsible parties to engage in long-term cleanup mechanisms.

The Uniform Environmental Covenants Act is an important tool in revitalizing inner cities and other areas where vacant and underused properties are preventing vital redevelopment and economic expansion. It was drafted with the active participation of federal and state environmental regulators, public and private land holders, banking interests, environmentalists, and land use experts. Its uniform enactment nationwide will provide owners, especially owners with properties in multiple states, with the confidence to engage in long-term remediation strategies and use controls, and bring economic growth back to blighted sites and areas.

111 N. Wabash Avenue Suite 1010 Chicago, Illinois 60602

Contact Us: **312.450.6600**

Why States Should Adopt UECA

The **Uniform Environmental Covenants Act (UECA)**, drafted and approved by the National Conference of Commissioners on Uniform State Laws in 2003, allows for the long-term enforcement of clean-up controls (restrictions on certain uses, prohibitions on using wells, protection of concrete "caps", maintenance of monitoring equipment, etc.) to be contained in a statutorily-defined agreement known as an "environmental covenant" which will be binding on subsequent purchasers of the property and be listed in the local land records. The fundamental purpose of this act is to remove various legal impediments to the use of such restrictions and to thereby lessen liability concerns of sellers and lenders associated with the redevelopment and sale of "brownfields" while at the same time requiring state approval of the remediation and control plan as well as notice to surrounding landowners, local governments, and other parties in interest. By ensuring such "institutional controls" are maintained and enforced, UECA helps fulfill the dual purposes of such restrictions – the protection of human health and the economically viable reuse of the property in question.

There are many reasons why every state should adopt the **Uniform Environmental Covenants Act.**

- UECA helps to return previously contaminated property to the stream of commerce, by allowing the owners of that property to engage in responsible risk-based cleanups and then transfer or sell the property subject to state-approved controls on its use.
- UECA gives a broad array of interested parties the ability to enforce the use and activity restrictions contained in an environmental covenant, thereby helping to ensure those controls will remain in place and prevent secondary harms.
- UECA protects valid environmental covenants from being inadvertently extinguished by application of various common law doctrines, adverse possession, tax lien foreclosures, less-restrictive zoning changes, and marketable title statutes.
- UECA requires the state environmental agency to be a signatory to the covenant, thereby ensuring that risk assessments and control mechanisms are based on sound science, adequately protect human health and surrounding properties, and that notice of the covenant and associated controls is provided to affected third parties.
- UECA does not supplant or impose substantive cleanup standards or liability; rather it validates approved site-specific controls resulting from an environmental response project, and makes sure those controls are maintained as long as necessary to meet the objective for which they were approved.

The **Uniform Environmental Covenants Act** is an important tool in revitalizing inner cities and other areas where vacant and underused properties are preventing vital redevelopment. It was drafted with the participation of state and federal regulators, public and private land owners, banking interests, environmentalists, and land use experts. Its uniform national enactment will provide the owners of contaminated land the confidence to invest in long-term remediation strategies and use controls, while at the same time protecting human health and allowing those properties to be developed and thus bring economic revitalization to blighted areas and sites.

Cook Inlet Housing Authority

Promoting Independence Through Housing

March 2, 2017

Honorable Members of the Alaska Legislature
Alaska State Capitol Building
P.O. Box 110001
Juneau, AK 99801-0001

SUBJECT: SB 64 – UNIFORM ENVIRONMENTAL COVENANTS ACT

Dear Members of the Alaska Legislature:

I write today on behalf of Cook Inlet Housing Authority (CIHA) to express its support for SB 64, which would encourage the development of previously contaminated sites by providing clarity to prospective purchasers while ensuring the enforceability of applicable land use restrictions, monitoring requirements, and continuing controls for these properties.

As an Alaska Regional Housing Authority, CIHA believes that the development or redevelopment of unproductive and blighted properties is good for communities. As part of our efforts in this arena, we have worked to develop contaminated sites on a fairly regular basis, and we understand that the process of purchasing and developing such properties can be extraordinarily complicated and expensive. Documentation of cleanup efforts and land use restrictions can be difficult to compile, and the full implications of prior and ongoing remediation efforts to a prospective purchaser are often uncertain. This makes private sector development of such sites not only unattractive, but often virtually impossible. The result is that otherwise desirable properties are often not successfully returned to productive use, remaining vacant and contributing to urban blight.

The creation of a recordable interest in land subject to a remediation project would provide needed clarity to prospective purchasers which will help contaminated properties to be returned to beneficial use. The Act sets forth the legal characteristics of the covenant and lays out a specific process for its termination or modification under appropriate circumstances. Purchasers will have express notice of the type of environmental restrictions and controls that apply to a contaminated property and may therefore be far more willing to undertake an otherwise infeasible development or redevelopment project.

3510 Spenard Road, Suite 100 • Anchorage, AK 99503 • Tel 907-793-3000 • Fax 907-793-3070

At the same time, the legislation affirms the validity of properly created agreements respecting the use and treatment of applicable contaminated sites, so that prescribed remediation controls and use limitations may be effectively enforced over time. The recorded covenant can clearly identify applicable property restrictions and ongoing obligations to ensure that contaminated properties are monitored and used in a manner that is environmentally sound and safe for the community, while providing holders an express legal basis for enforcement of the obligations provided therein.

For these reasons, CIHA fully supports the passage of SB 64. Thank you for your time and attention to this legislation.

Respectfully,

Carol Gore
President/CEO

3510 Spenard Road, Suite 100 • Anchorage, AK 99503 • Tel 907-793-3000 • Fax 907-793-3070

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Statement of Benjamin Orzeske, Chief Counsel from the Uniform Law Commission, to the Alaska Senate Community and Regional Affairs Committee in support of SB 64, the Uniform Environmental Covenants Act, February 28, 2017.

Chairman Bishop and Members of the Committee:

Thank you for considering SB 64, which would enact the Uniform Environmental Covenants Act (UECA) in Alaska. This bill is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. Alaska has a long and successful history of enacting uniform acts including the Uniform Commercial Code, the Uniform Anatomical Gift Act, the Uniform Transfers to Minors Act, and dozens of others.

UECA will allow the owners of hazardous or contaminated Alaskan real estate to enter into environmental covenants with the consent of the Department of Environmental Conservation. An environmental covenant is an enforceable restriction on the use of the land. For example, a former landfill site might have a restriction stating that the landowner cannot excavate and must maintain structures built to contain the waste. A site with soil contaminated by petroleum products might have a restriction stating that groundwater cannot be pumped to the surface.

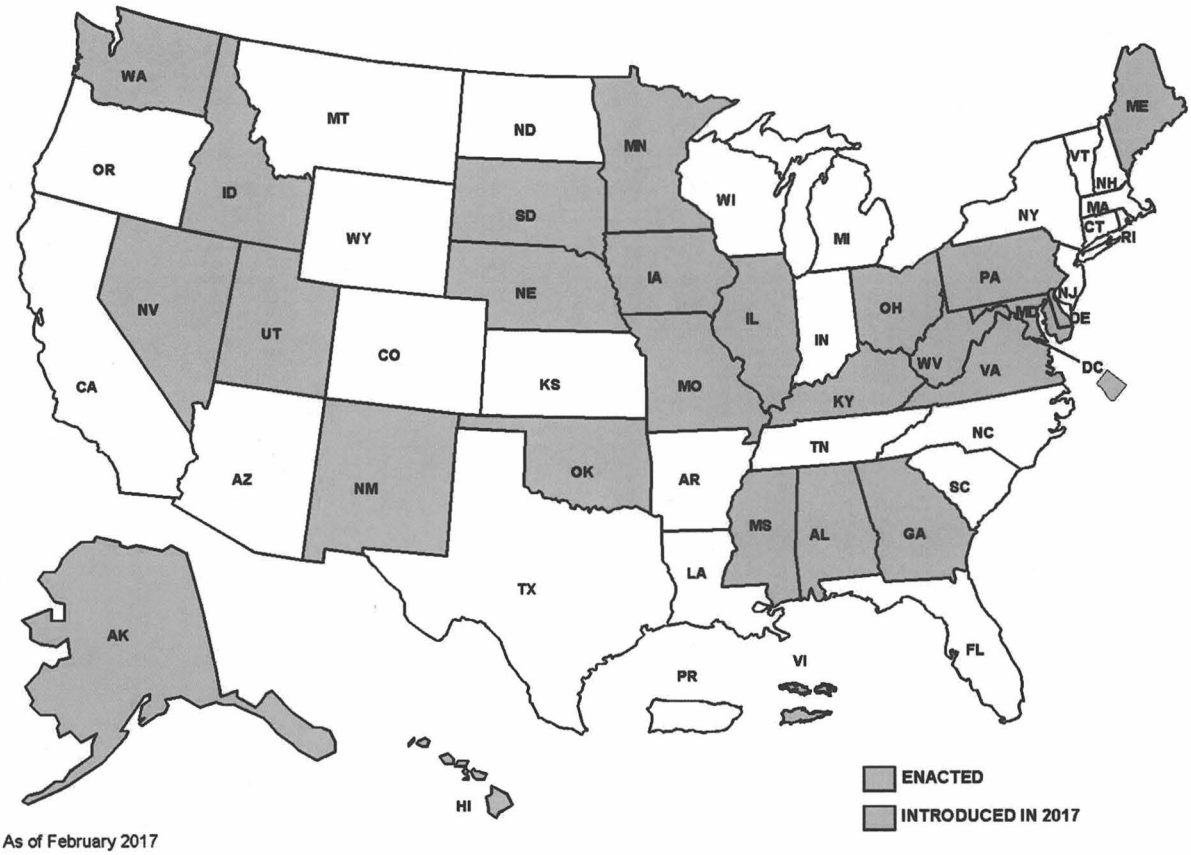
You may think, why can't landowners enter into these agreements under current laws? The answer is: they can – but future owners probably will not be bound by those agreements. Various common-law doctrines dating back to medieval England and incorporated into United States property law work against these long-term restrictions on real property. UECA overrides the common law to allow parties to voluntarily execute legally binding, environmental covenants.

An environmental covenant is recorded in the land records and "runs with the land," binding not only the current owner but also the owner's heirs or assignees. It is a very flexible tool that can include any type of use restriction or reporting requirement that the parties believe is appropriate for the particular parcel of land. It can only be changed or eliminated with the permission of all the parties to the original agreement (including the Department of Environmental Conservation), or their successors.

If environmental covenants were available fifty years ago, we might have avoided large-scale disasters like Love Canal in upstate New York, or Times Beach in Missouri. They are an important tool for ensuring environmental restrictions are monitored and enforced in the long run. This allows land that otherwise might lie vacant due to indefinite remediation requirements to return to a productive use, with appropriate restrictions to ensure public safety.

UECA was completed by the ULC in 2003 and has since been adopted by twenty-three states, plus the District of Columbia and the U.S. Virgin Islands. Your enactment of SB 64 will give the Alaska Department of Conservation a powerful tool to ensure Alaskans also can benefit from the use environmental covenants.

UNIFORM ENVIRONMENTAL COVENANTS ACT



As of February 2017

Alaska Oil and Gas Association

AOGA

121 W. Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114
Email: moriarty@aoga.org
Kara Moriarty, President & CEO

March 7, 2017

Senator Peter Micciche
Alaska State Senate
State Capitol, Room 408
Juneau, AK 99801-1182

Dear Senator Micciche:

I am writing on behalf of the Alaska Oil and Gas Association (AOGA) to express our support for Senate Bill 64, an act adopting the Uniform Environmental Covenants Act (UECA). AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA's members have a long history of prudent and environmentally responsible oil and gas exploration and development in Alaska. From AOGA's perspective, there a number of benefits associated with adopting UECA.

Well over a decade ago, the Uniform Law Commissioners drafted a Uniform Covenants Act in an attempt to address flaws, gaps, and other inadequacies related to the common law rules. Providing a structure for environmental covenants affords property owners to sell property with use limitations to mitigate risk. Currently, Alaska is one of only 7 states lacking an environmental covenant law. An environmental covenant is a specific recordable interest in the real estate that would be tracked through an Alaska Department of Environmental Conservation (ADEC) database. Each respective covenant would be specific to the respective risks associate with a particular site. Doing so would restrict activities that could result in exposure but would allow other uses to go forward which often is all that is necessary to make property viable again.

AOGA believes that UECA will provide a beneficial mechanism to enact enforceable environmental covenants, where no formal mechanism currently exists. The proposed statute (Sec. 46.04.350) will protect private and public entities interests' related to property transactions at or adjacent to environmental response projects. This is particularly important at Resource Conservation and Recovery Act (RCRA) or Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) sites subject to cleanup under EPA oversight. The current Institutional Control process doesn't meet EPA's requirements for enforceability. Furthermore, UECA will enable more efficient use of resources to address chemical contamination to protect human health and the environment at environmental response sites. Cleanups will be fit for purpose and reflective of current and foreseeable future land use for the subject property. Finally, UECA will make real estate transactions more

efficient by reducing the amount of due diligence required in some instances. Existing environmental contamination will have already been documented via a covenant.

AOGA appreciates the opportunity to offer our support for SB 64 and encourages the Alaska legislature to adopt the bill.

Sincerely,

Kara Moriarty

KARA MORIARTY
President/CEO
Alaska Oil and Gas Association

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

03 March 2017

Senator Micciche
Alaska State Legislature
State Capitol Room 508
Juneau, AK 99801

Subject: DoD Comments on Alaska Senate Bill 64

Dear Senator Micciche:

As the U.S. Department of Defense Regional Environmental Coordinator for Region 10, which includes the State of Alaska, I recommend amendments to Senate Bill 64 (SB 64) to address national defense concerns.

The Department of Defense is concerned that it cannot comply with the proposed law as drafted 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. This concern only applies so long as the property is owned by the United States and under the administrative jurisdiction of the Department of Defense. The Department is also concerned that the proposed statute is based on application of the State's police powers on federal property, to which the United States has not consented.

When transferring property to a non-Federal entity, the Department can, and normally does, require an environmental covenant in order to protect any remedy the Department has put in place and thereby prevent endangerment of public health and safety. The Department believes that it and the State should work closely to achieve the substantive goals of an environmental covenant, namely to prevent, over the long term, land uses that would either interfere with the remedy or cause an exposure to contamination that would threaten human health and safety. The Department believes the State's efforts in this regard would likely qualify for payment under the Defense State Memorandum of Agreement. To avoid its concern, while still allowing the two agencies to work toward their mutual goal of ensuring the public health and safety are protected, the Department recommends editing the proposed statute as follows:

Amend section 46.04.300 by adding the following new subsection:
"(f) An environmental covenant is not required in the case of real property owned by the United States and under the administrative jurisdiction of the Department of Defense so long as

the real property remains under the administrative jurisdiction of the Department of Defense. The department may enter into agreements or decision documents with the Department of Defense to achieve the substantive goals of an environmental covenant."

Amend section 46.04.340 by adding the following new subsection:

"(l) A notice of activity and use limitation is not required in the case of real property owned by the United States and under the administrative jurisdiction of the Department of Defense so long as the real property remains under the administrative jurisdiction of the Department of Defense. The department may enter into agreements or decision documents with the Department of Defense to achieve the substantive goals of a notice of activity and use limitation."

The Department also suggests changing "AS 46.04.300" to "AS 46.04.340" in section 46.04.340(b) to avoid inadvertently incorporating by reference requirements that do not, by their terms, appear to be relevant to the notice of activity and use limitation. In addition, the Department suggests referring to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" in section 46.04.390(3)(A), which is the statutory short title of the law mentioned. Similarly the Department suggests changing "Resource Conservation and Recovery Act" to "Solid Waste Disposal Act" in section 46.04.390(A), which is the statutory short title for the entire law, of which RCRA is only an amendment.

The Department remains committed to working with the State of Alaska and its Department of Environmental Conservation and the Alaska Statement of Cooperation agencies on environmental cleanup and other issues. Please feel free to contact my office if you have any questions or need any additional information. 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

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

PHONE NO: 465-5065

FROM: Kristin Ryan KR
Director

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."

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

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

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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PRD:JohnQ.Martin:10/16/1998:AW

THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Environmental Conservation

DIVISION OF SPILL PREVENTION AND RESPONSE
Contaminated Sites Program

555 Cordova Street
Anchorage, AK 99501
Main: 907-269-7604
Fax: 907-269-7687
www.dec.alaska.gov

April 12, 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: Response to Department of Defense Supplemental Comments on Alaska Senate Bill 64

The Alaska Department of Environmental Conservation (DEC) disagrees with the assertions made in the Department of Defense Supplemental Comments on Alaska Senate Bill 64. SB 64 specifically contemplates their concerns and addresses them by establishing a Notice of Activity Use Limitation (AUL) which would be utilized on federal property. There is no mention of a transfer of property interest in the AUL whereas in a covenant interest in property are transferred to a holder. That is intentional because we knew the federal government would argue that is not allowed. Therefore, their claim that there is no difference between an environmental covenant and EUL is incorrect.

Additionally, the Department of Defense and all federal agencies for that matter are currently restricting use of their property when they do not clean up contamination to safe levels. Oddly, they make this point by including our manual on institutional controls with their letter. Establishing institutional controls on property is identical to putting an AUL in place. If SB64 passes, our institutional control process will stay the same but be recorded on the title of property if a covenant is utilized. If the property is federal our institutional control will become an AUL. An AUL is voluntary. The responsible party always has the option to clean up the contamination to safe levels and avoid land use restrictions.

Respectfully,

Kristin Ryan

Kristin Ryan
Director, Spill Prevention and Response

THE STATE
of ALASKA
GOVERNOR BILL WALKER

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
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November 29, 2017

The Honorable Pete Kelly, President
Alaska State Senate
State Capitol, Room 111
Juneau, AK 99801-1182

The Honorable Bryce Edgmon, Speaker
Alaska State Capitol
State Capitol, Room 208
Juneau, AK 99801-1182

Re: Alaska Annual Report on Activities of the National Conference of Commissioners on Uniform State Laws

Dear President Kelly and Speaker Edgmon:

On behalf of Alaska's delegation to the National Conference of Commissioners on Uniform State Laws, I submit this year's annual report.

I. OVERVIEW OF UNIFORM LAW COMMISSION

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, has worked for the uniformity of state laws since 1892. The sole purpose of the ULC is to research, draft, and promote enactment of uniform state laws where uniformity is desirable and practical. Accordingly, the work of the ULC simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. It has sought to bring uniformity to the divergent legal traditions of more than 50 sovereign jurisdictions, and has done so with significant success.

There is only one fundamental requirement for the more than 300 uniform law commissioners: that they are members of the bar. While some commissioners serve as state legislators and other state officials, most are practitioners, judges and law professors. Uniform law commissioners serve for specific terms, and receive no salaries or fees for their work with the Uniform Law Commission.

Commissioners study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. The ULC can only propose – no uniform law is effective until a state legislature adopts it.

The work of the ULC simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. Representing both state government and the legal profession, it is a genuine coalition of state interests. It has sought to bring uniformity to the divergent legal traditions of more than 50 jurisdictions, and has done so with significant success.

In 2019, Alaskans will have the honor of hosting the ULC annual meeting in Anchorage, Alaska. The ULC commissioners look forward to the opportunities this presents to showcase the beauty and strong state spirit that is Alaska.

II. HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

In August 1892, the first National Conference of Commissioners on Uniform State Laws (NCCUSL) convened in Saratoga, New York, three days preceding the annual meeting of the American Bar Association. By 1912, every state was participating in the ULC. The District of Alaska joined the conference that year.

In each year of service, the ULC steadily increased its contribution to state law. Since its founding, the ULC has drafted more than 200 uniform laws on numerous subjects and in various fields of law, setting patterns for uniformity across the nation. Uniform Acts include the Uniform Probate Code, the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Anatomical Gift Act, the Uniform Interstate Family Support Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Prudent Management of Institutional Funds Act.

Most significant was the 1940 ULC decision to attack major commercial problems with comprehensive legal solutions – a decision that set in motion the project to produce the Uniform Commercial Code (UCC). Working with the American Law Institute, the UCC took ten years to draft and another 14 years before it was enacted across the country. It remains the signature product of the ULC.

Today the ULC is recognized primarily for its work in commercial law, family law, the law of probate and estates, the law of business organizations, health law, and conflicts of law.

III. DIVERSITY STATEMENT

Each member jurisdiction determines the number of uniform law commissioners it appoints to the Uniform Law Commission, the terms of uniform law commissioners and the individuals who are appointed from the legal profession of that jurisdiction. The Uniform Law Commission encourages the appointing authorities to consider, among other factors, diversity of membership in their uniform law commissions, including race, ethnicity and gender in making appointments. The Uniform Law Commission does its best work when the uniform law commissioners are drawn from diverse backgrounds and experiences.

IV. THE OPERATION OF THE ULC

Each member jurisdiction determines the number of uniform law commissioners it appoints to the Uniform Law Commission, the terms of uniform law commissioners, and the individuals who are appointed from the legal profession of that jurisdiction. The Uniform Law Commission encourages the appointing authorities to consider among other factors, diversity of membership in their uniform law commissions, including race, ethnicity and gender in making appointments. There is only one fundamental requirement for the more than 300 uniform law commissioners: that they are members of the bar.

The ULC is convened as a body once a year. It meets for a period of seven days, usually in mid-summer. In the interim, drafting committees composed of commissioners meet to supply the working drafts that are considered at the annual meeting. At each annual meeting, the work of the drafting committees is read and debated. Each Act must be considered over a substantial period of years. No Act becomes officially recognized as a Uniform Act until the ULC is satisfied that it is ready for consideration in the state legislatures. The ULC also is a reliable source of information and assistance to states considering adoption and modification of ULC Uniform and Model Acts.

The ULC maintains relationships with several sister organizations. Official liaison is maintained with the American Bar Association, which contributes an amount each year to the operation of the ULC. Liaison is also maintained with the American Law Institute, the Council of State Governments, and the National Conference of State Legislatures on an ongoing basis. Liaison and activities may be conducted with other associations as interests and activities necessitate.

The ULC benefits Alaskans, since the enactment by Alaska and other states of Uniform and Model Acts aids interstate commerce and expeditious resolution of disputes between parties in different states. Alaska business benefits directly from the ULC work in making interstate transactions and procedures more predictable in nature. Such

uniformity has encouraged adoption in Alaska of 105 Uniform Acts drafted by the ULC and use of ULC Model Acts in drafting Alaska legislation.

V. PROCEDURES

At each annual meeting, the ULC considers, debates, and refines drafts of proposed uniform legislation. Additionally, proposals that Uniform Acts be drafted, received from many sources, are referred to the Committee on Scope and Program that makes an investigation, sometimes hears interested parties or recommends a further study, and reports to the ULC whether the subject is one on which it is desirable and feasible to draft a uniform law.

If the ULC decides to accept a subject, a special committee of commissioners is appointed to prepare a draft of an Act. In the case of the Uniform Commercial Code, representatives of the American Law Institute are appointed to the committee. The American Bar Association is invited to appoint an advisor to each drafting committee. Drafts are not submitted to the ULC until they have received extensive committee consideration.

A draft Act must be discussed and considered section by section by the entire ULC at normally not fewer than two annual meetings before the ULC may decide by a vote of states whether to promulgate the draft as a Uniform Act. Each state is entitled to one vote, and an Act is not promulgated unless a majority of the states represented at an annual meeting and at least 20 jurisdictions have approved the draft.

In addition, each Uniform Act may be submitted for consideration to the American Bar Association. The drafting committees of the ULC establish liaison with the American Bar Association and other interested groups throughout the drafting process.

VI. ANNUAL MEETING

The 2017 annual meeting of the ULC was held July 14 - 20, 2017 in San Diego, California. Summarized below are the Uniform Acts that were approved at the meeting and the proposed Acts that were discussed but which have not yet been approved.

UNIFORM ACTS AND AMENDMENTS TO UNIFORM ACTS APPROVED

1. Uniform Directed Trust Act

The Uniform Directed Trust Act (UDTA) addresses the rise of directed trusts. In a directed trust, a person other than a trustee has a power over some aspect of the trust's administration. Such a person may be called a "trust protector," "trust adviser," or in the

terminology of the UDTA, a "trust director." The division of authority between a trust director and a trustee raises difficult questions about how to divide fiduciary power and duty. The Uniform Directed Trust Act provides clear, functional rules that allow a settlor to freely structure a directed trust while preserving key fiduciary safeguards for beneficiaries. The UDTA also provides sensible default rules for a variety of matters that might be overlooked in the drafting of a directed trust, including information sharing among trustees and trust directors, the procedures for accepting appointment as a trust director, the distinction between a power of direction and a nonfiduciary power of appointment, and many other matters.

2. Uniform Guardianship Conservatorship and Other Protective Arrangements Act

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act is an updated version of the Uniform Guardianship and Protective Proceedings Act, originally promulgated in 1969 as part of the Uniform Probate Code, and revised in 1982 and 1997. This new version is a comprehensive and modern guardianship statute that better protects the individual rights of both minors and adults subject to a guardianship or conservatorship order. The Act promotes person-centered planning to incorporate an individual's preferences and values into a guardianship order, and requires courts to order the least-restrictive means necessary for protection of persons who are unable to fully care for themselves. The act includes a set of optional forms to help courts implement its provisions effectively.

3. Uniform Parentage Act (2017)

The Uniform Parentage Act (2017) is a revision of the Uniform Parentage Act (UPA) of 2000, which has been adopted in 11 states. The UPA covered several topics, including: the parent-child relationship; voluntary acknowledgments of paternity; registry of paternity; genetic testing; proceedings to adjudicate parentage of children of assisted reproduction. As a result of the Supreme Court decision in *Obergefell v. Hodges*, as well as other developments in the states, a revision to the Act became necessary. The revised Act addresses issues related to same-sex couples, surrogacy, the right of a child to genetic information, de facto parentage, and parentage of children conceived through sexual assault.

4. Uniform Protected Series Act

The Uniform Protected Series Act provides a comprehensive framework for the formation and operation of a protected series limited liability company. A protected series LLC has both "horizontal" liability shields, as well as the standard "vertical" liability shield. All modern business entities provide the traditional, "vertical" shield –

protecting the entity's owners (and their respective assets) from automatic, vicarious liability for the entity's debts. A "series" limited liability company provides "horizontal" shields – protecting each protected series (and its assets) from automatic, vicarious liability for the debts of the company and for the debts of any other protected series of the company. A horizontal shield likewise protects the series limited liability company (and its assets) from creditors of any protected series of the company. The Act integrates into any existing LLC Act, whether it is the Uniform Limited Liability Company Act or not.

5. Uniform Regulation of Virtual Currency Business Act

The Uniform Regulation of Virtual-Currency Businesses Act (URVCBA) creates a statutory framework for regulating virtual currency business activity, which includes businesses engaged in the exchange of virtual currencies for cash, bank deposits, or other virtual currencies; the transfers of virtual currency between customers; and certain custodial or fiduciary services. Under the Act, "virtual currency" is a digital representation of value that is used as a medium of exchange, unit of account, or store of value and is not legal tender. This technology-neutral definition covers as many types of virtual currency as possible. The URVCBA's unique, three-tiered structure clarifies whether an individual or company engaging in virtual currency business activity is (1) exempt from the act; (2) must register; or (3) must obtain a license. The URVCBA also contains numerous consumer protections.

6. Model Veterans Treatment Court Act and Rules

Veterans' courts have been created in many judicial districts around the United States to ensure that veterans in the criminal justice system receive the treatment and support necessary to rehabilitate them into being productive members of society. Very few states have legislation on veterans' courts, but many local judicial districts have effectively created veterans' courts by rule or practice. The Model Veterans Treatment Court Act provides guidelines for the establishment of veterans' courts while permitting substantial local discretion necessary to accommodate circumstances in different communities. Some of the issues that the model act and rules address include: what subset of veterans are entitled to diversion into a veterans' court; for what type of offenses is diversion into a veterans' court appropriate; what rights should victims have to participate in proceedings in veterans' courts; and how, in general, should veterans' courts be organized and operated. The Act provides that participation in the veterans' treatment program requires approval of the prosecutor, but expressly reserves to the court all power regarding punishment including probation, conditions of probation, and consequences of violation of terms of participation in the treatment program. This Act can also be implemented as a set of court rules.

VII. ACTIVITIES OF THE ALASKA COMMISSIONERS

A. The Alaska Commissioners serving during the 2017 annual report period were:

- The Honorable Craig F. Stowers (Chief Justice of Alaska Supreme Court)
- Susan R. Pollard (lawyer, Chief Assistant Attorney General, Legislation and Regulations Section)
- Terry L. Thurbon (lawyer) (resigned November 16, 2017)

B. Current Alaska life members of the National Conference of Commissioners on Uniform State Laws:

- W. Grant Callow (lawyer, private practice)
- Deborah Behr (retired lawyer)
- Arthur H. Peterson (retired lawyer)

C. The Alaska associate member is:

- Douglas D. Gardner (lawyer, Director of Division of Legislative Legal and Research Services)

D. The present ULC committee assignments for Commissioners and Life Members from Alaska are:

- The Honorable Craig Stowers, member of the Drafting Committee for the Nonparental Child Custody and Visitation Act and member of the Scope and Program committee.
- Deborah E. Behr, member of the Committee on Style and Uniform Law Commission History Committee;
- W. Grant Callow, member of the Committee to Review Conference Acts,; member of the committee to draft a ULC act harmonizing the law of Canada and the United States concerning the registration of foreign judgments.
- Terry L. Thurbon, member of the Legislative Committee and Model Veterans Court Act; drafting committee;
- Arthur H. Peterson, member of the Drafting Committee for the Nonparental Child Custody and Visitation Act;

- Susan R Pollard, member of the Technology Committee, Criminal Justice Reform Committee and the drafting committee for amendments to the Revised Uniform Laws on Notarial Acts.

E. Alaska Commissioners and Life Members hold regular telephone conference meetings during the year.

F. Alaska Commissioners and Life Members attending the 2017 Annual ULC conference were:

- Deborah E. Behr
- Arthur H. Peterson
- Susan R. Pollard
- The Honorable Craig Stowers
- Terry Thurbon

G. 2019 Annual meeting, Anchorage

In 2019, the Uniform Law Commission will hold the annual meeting in July in Anchorage. The Alaska delegates look forward to the opportunities this presents to showcase the beauty and strong state spirit of our state.

VIII. RECOMMENDATIONS FOR PASSAGE

The Alaska Uniform Law commissioners and Life Members are recommending passage of the Uniform Environmental Covenants Act (currently pending in the 30th Alaska State Legislature as SB 64).

The Alaska Uniform Law commissioners and Life Members recommend that the Unsworn Foreign Declarations Act (domestic judgments only) be considered by the Alaska Supreme Court for promulgation as a court rule.

Sincerely,

Susan R Pollard

Susan R Pollard
Alaska Uniform Law Delegation

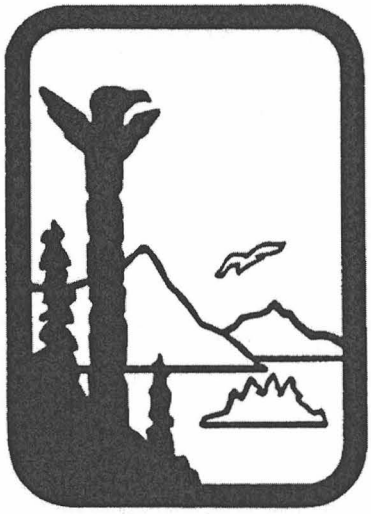
SRP/jkc

cc (*via email*): Anita Ramasastry, President, National Conference of Commissioners on Uniform State Laws
Legislative Office, Office of the Governor
Alaska Uniform Law Commissioners and Life Members

Attachment 1

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION AND RESPONSE
CONTAMINATED SITES PROGRAM



GUIDANCE ON USING INSTITUTIONAL CONTROLS IN OIL AND OTHER HAZARDOUS SUBSTANCE CLEANUPS

February 2011

PURPOSE: This guidance is for use by Contaminated Sites Program staff to evaluate whether institutional controls (ICs) are necessary when responding to a release of oil or other hazardous substances. The guidance describes various types of ICs that may be used, and the basic steps in creating, removing, and tracking them. It may also assist other parties in understanding the role of ICs in the cleanup process.

BACKGROUND:

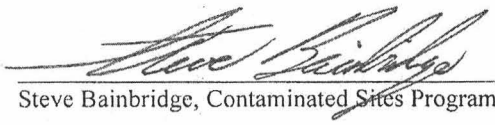
Alaska's Oil and Hazardous Substances Pollution Control regulations (18 AAC 75) and Underground Storage Tank regulations (18 AAC 78) establish cleanup requirements for responding to contamination caused by releases of oil or other hazardous substances. Institutional controls may be necessary to protect human health and the environment during the investigation and cleanup stages. In other cases, institutional controls are applied to closed sites with residual oil or other hazardous substances remaining above levels that would otherwise allow for unrestricted future land or water use. If the land or water uses change, the institutional controls may need to be modified to assure the cleanup remains protective.

APPLICABILITY:

This guidance will be used by staff when evaluating ICs as a component of cleanup plans and oil and hazardous substance cleanup decisions under 18 AAC 75, Article 3, and 18 AAC 78.

This guidance may be revised or updated from time to time to account for regulatory and policy revisions.

APPROVAL:



Steve Bainbridge, Contaminated Sites Program Manager

February 14, 2011
Date

Contributing authors: John Halverson, Bill Janes, Evonne Reese, and Sally Schlichting

GUIDANCE ON USING INSTITUTIONAL CONTROLS IN OIL AND OTHER HAZARDOUS SUBSTANCE CLEANUPS

TABLE OF CONTENTS

GUIDANCE ON USING INSTITUTIONAL CONTROLS IN OIL AND OTHER HAZARDOUS SUBSTANCE CLEANUPS

1 Disclaimer

This document was developed in accordance with 18 AAC 75 and 18 AAC 78 and does not constitute rulemaking by the State of Alaska. This guidance does not create any rights or benefits, substantive or procedural, enforceable at law or in equity, by any person. DEC may take action at variance with this guidance.

2 What are institutional controls and why do we need them?

The Environmental Protection Agency's Superfund Program defines ICs as non-engineered instruments, such as administrative and legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy.

The State of Alaska interprets ICs as both engineered controls and administrative and legal controls. Alaska Administrative Code at 18 AAC 75.375 defines institutional controls to include:

- The requirement for and maintenance of physical measures, such as fences and signs, to limit an activity that might interfere with cleanup or result in exposure to a hazardous substance at the site;
- The requirement for and maintenance of engineering measures, such as liners and caps, to limit exposure to a hazardous substance;
- Restrictive covenants, easements, deed restrictions, or other measures that would be examined during a routine title search, and that limit site use or site conditions over time or provide notice of any residual contamination; and
- A zoning restriction or land use plan by a local government with land use authority.

Institutional controls may be thought of as both the legal or administrative instrument (IC mechanism) and the attached site-specific requirements or conditions. For example, a compliance order (IC mechanism) may contain the requirement to maintain an engineered control, such as a concrete cap over contaminated soil. ICs can be further categorized into four main types: proprietary controls, governmental controls, enforcement and permit tools with IC components, and informational devices. These general categories are discussed here. Within each category, there are a number of instruments that may be employed which are further detailed in Section 3.0.

2.1 *Proprietary Controls*

Proprietary controls are generally created pursuant to state and tribal law to prohibit activities that may compromise the effectiveness of the response action or restrict activities or future resource use that may result in unacceptable risk to human health or the environment. The most common examples of proprietary controls are easements and covenants.

2.2 *Governmental Controls*

Governmental controls impose restrictions on land use or resource use, using the authority of a government entity. Typical examples of governmental controls include zoning; building codes; state, tribal, or local ground water use regulations; and commercial fishing bans and sports/recreational fishing limits posed by federal, state and/or local resources and/or public health agencies. In many cases, federal landholding agencies, such as the Department of Defense, possess the authority to enforce ICs on their property. At active federal facilities, land use restrictions may be addressed in Base Master Plans, facility construction review processes, facility digging permit systems, and/or the facility well permitting systems.

2.3 *Enforcement-Related Controls*

Enforcement and permit tools with IC components are legal tools, such as administrative orders, permits, Federal Facility Agreements (FFAs) and Consent Decrees (CDs), that limit certain site activities or require the performance of specific activities (e.g., to monitor and report on an IC's effectiveness). They may be issued unilaterally or negotiated.

2.4 *Informational Devices*

Informational devices provide information or notification to local communities that residual or contained contamination remains on site. As such, the site manager and site attorney should make sure to provide language that clearly conveys the purpose of the informational device. Two common informational devices in Alaska include the contaminated sites on-line database and a Notice of Environmental Contamination filed at the State Recorders Office.

Institutional controls play an important role in site remedies because they reduce exposure to contamination by limiting land or resource use and guide human behavior at a site while allowing re-development and land transfers to proceed. Institutional controls may be used in a temporary fashion to help protect human health and the environment during the cleanup process. They may also be used for long-term protection of human health and the environment at sites where cleanup has been completed and residual contamination remains above levels that allow for unrestricted land use.

Institutional controls are tools to manage risk, but they do not eliminate risk entirely.

3 What are some examples of institutional control mechanisms?

3.1 *Equitable Servitudes and Easements*

Equitable servitudes and easements (***proprietary controls***) are written instruments through which a property owner transfers an interest in the property to another party. In other words, the interest "runs with the land." Equitable servitudes and easements are useful because they can be written to include a wide or narrow range of specific provisions, detailed requirements and prohibitions. They are legally enforceable against current and future owners of the affected land; readily identifiable during title searches; and can be crafted so that DEC has a right to access the property to verify the effectiveness of remedies. They may also contain provisions which allow for modifications or termination of the requirements through a recorded release and cross-referencing to the earlier recorded document. See Appendices D and E for a template and instructions for completing an Equitable Servitude Agreement.

Equitable servitudes and easements can be difficult and time-consuming to negotiate and execute. Moreover, the (DNR) is the state agency designated to hold the property interest negotiated through a servitude agreement, and must assign a "management right" to DEC. For these reasons, equitable servitudes and easements are used very judiciously and at higher risk sites only.

3.2 *Local Ordinances/Zoning*

Parties can work with local government, such as a municipality, to establish land or resource use limitations through ***government controls*** such as ordinances or zoning. This may be a helpful option where there are multiple parcels or landowners involved, such as large groundwater contaminant plumes. However, ordinances and zoning may change as politics and economic factors fluctuate and may initially require a time-consuming process with uncertain results. Any zoning or ordinances specifically created or modified to affect contaminated sites should include language that requires notification to and concurrence from DEC prior to any subsequent modifications or waivers.

3.3 *Administrative or Compliance Order by Consent*

These "orders" or ***enforcement tools*** are essentially contracts between DEC and the subject party in which the parties agree to particular requirements and/or prohibitions. It is important to remember these agreements are only enforceable against the parties identified in the agreement. Administrative or compliance orders can be implemented and modified fairly easily. Any such agreement should also require a notification to DEC prior to any land transfer or lease, as the agreement may not apply to subsequent landowners.

3.4 *Signed DEC Agreement*

An agreement and signature page often accompanies each cleanup complete decision (with ICs) issued. Failure to comply with the terms of the agreement may result in the department reopening the site for further action. The agreement can be used as a stand-alone mechanism for lower risk sites, or used in combination with more robust IC mechanisms described above.

3.5 *Deed Restriction*

Language can be crafted in a quitclaim deed in which the property "grantor," in order to protect its long-term interests, stipulates certain use restrictions or other conditions to the "grantee." This mechanism may be particularly suitable when a public land parcel with residual contamination is transferred to private ownership.

3.6 *Recorded Notice of Environmental Contamination (Deed Notice)*

Alaska land is divided into 34 recording districts. A state recorder's office in each district is where land-related documents may be recorded for public notice and researched for title searches. Anyone can record a document with a recorder's office, as long as the document fulfills certain regulatory and statutory technical criteria. Thus, notices of contamination, cleanup or other such notices may be recorded in the appropriate recording district(s), with reference to the property's legal description so that it may be cross-referenced (See Appendix A for detail on legal descriptions). Recorded notices are ***informational devices*** that simply provide notice to interested parties; they do not transfer a property interest and, beyond providing notice, are not legally binding upon anyone. Notices cannot restrict land use or create any duties. They should not be used when an enforceable IC is needed. When drafting a notice, it is crucial that the information in the notice is correct, specific, and factual. Notices cannot be removed from the recorder's office. In order to terminate the effect of a notice, a second notice must be recorded which cross-references the earlier-recorded notice. See Appendices F, G and H for deed notice templates and instructions.

3.7 *IC Layering*

Using more than one type of IC mechanism (called IC layering) may help assure that a remedy remains protective throughout the years. For example, a compliance order may be negotiated with a current landowner, an equitable servitude and easement may be established, and local zoning may be used to ensure coordination with land use planners.

3.8 *Some Common Examples of Site-specific Controls and Conditions*

Below are a few examples of site-specific controls and conditions

- Fencing or signs to prevent people from entering an area of contamination
- Capping residual contamination with clean soil or other material
- Prohibiting excavation without prior DEC approval
- Groundwater or surface water use restrictions
- Signs posted to warn the public of the contamination issues
- Commercial/industrial land usage only (no 24-hour occupancy)

4 How are different IC mechanisms used?

The type of legal or administrative instrument employed generally depends on the level of risk posed and expected future land use. Appendices B and C provide quick reference guides for applying certain types of ICs, depending on soil and groundwater conditions at the site. Detailed examples are provided below.

- *Direct contact and inhalation cleanup levels are not achieved throughout the top 15 feet of soil. (e.g., 18 AAC 75.340(j))* - May warrant an enforceable mechanism such as an equitable servitude and easement if it involves a limitation on future land use. Based on the volume of contaminated soil, type of contaminant and how accessible it is, an informational mechanism such as a deed notice may be appropriate.

- *Groundwater cleanup levels (18 AAC 75.345 Table C) not achieved and groundwater is a current or potential future drinking water source (e.g.., 18 AAC 75.350(a)(2)(C) and 18 AAC 78.620)* – Typically warrants an equitable servitude or another enforceable mechanism, unless an alternative drinking water supply is being used (such as the mandated use of a public water system).

- *Groundwater cleanup levels (18 AAC 75.345 Table C or method 4) not achieved and groundwater is* ***not*** *a current or potential future drinking water source (e.g., 18 AAC 75.350(a)(2)(C) and 18 AAC 78.620)* – ICs may be unnecessary; more typically, an informational IC mechanism may be warranted. The need for (and type of) ICs in these situations also depends on the current or potential future use of the aquifer for purposes other than drinking water (such as aquaculture). Institutional controls may be needed in these situations to account for potential human and ecological exposure and surface water quality concerns, including the potential for de-watering activities.

  Land use is restricted to commercial/industrial (e.g., under 18 AAC 75.340(d) method 3 or 4) – Typically warrants an equitable servitude agreement unless land use controls (such as zoning restrictions) are already in place.

- *Cleanup includes capping, covering or leaving contaminants in place (e.g., 18 AAC 75.375(d)(2) and 18 AAC 78.625(d)(1) and (2))* - May warrant either an enforceable mechanism (i.e., equitable servitude or compliance order) or an informational mechanism (i.e., deed notice) depending on the volume of contaminated soil remaining, the type and concentration of contaminant(s) and accessibility to them. An IC will normally be required if concentrations of petroleum hydrocarbon in soil to a depth of 15 feet exceed the maximum allowable levels in 18 AAC 75.341 Table B2.

- *Alternative point of compliance for groundwater approved under 18 AAC 75.345(e)* - May involve a range of mechanisms, from simple notices to enforceable controls depending on the specific circumstances.

- *Cleanup to the approved cleanup levels is determined impracticable (e.g., 18 AAC 75.325(f)(1))* - May involve a range of mechanisms, from simple notices to enforceable controls based on the potential risk posed by the remaining contaminants.

5 How are ICs applied to lands owned by the government?

For federal properties, a notice of environmental contamination may be recorded in state and federal land status plats. Compliance agreements may be developed. Land management plans may be utilized to provide notice of contamination or restrict specific activities. Other tools may be appropriate. Each federal facility must be researched individually to determine what formal orders or agreements it is governed under and by whom. At federal facilities, ICs will need to be developed through close coordination between DEC, the Department of Law (DOL) and the federal agency.

DEC staff should consult with landowners/managers, responsible parties and (DOL) to develop appropriate ICs for state-owned lands. Interagency memorandums of agreement or understanding may be an efficient method to achieve some land use planning between the agencies. Also, it is important to check with DNR to see if the subject property is within one of its area, regional or local use plans so that any IC documents that the government agencies create remain consistent with any existing plan. Such agreements or other notices can be recorded in the DNR land records.

6 Are there special considerations for ICs on Alaska Native lands?

Lands possessed or selected by tribes, villages, or corporations under the Alaska Native Claims Settlement Act (See 43 U.S.C. § 1613) are not precluded from carrying institutional controls. However, like any landowner, Alaska Native entities must agree to whether an institutional control will be placed on property they own or whether they are willing to accept transfer of lands that have contamination-related restrictions on future development. In cases where institutional controls may be proposed by responsible parties for native lands, DEC staff should engage the appropriate Alaska Native entities in these decisions.

7 Who is responsible for institutional controls?

The responsibility for maintaining and paying the costs associated with ICs typically rests with the responsible person (RP). However, deciding which IC to use and drafting of any necessary documents must be discussed, reviewed and approved by DEC before being established. DEC project managers should always consult with DOL when considering enforceable ICs. Informational ICs generally do not need DOL input.

8 During what point in the cleanup process should ICs be considered?

If cleanup plans are developed based on an assumption that there will be limitations on future land use, or if contamination above approved cleanup levels is expected to remain in place following the cleanup, the need for ICs should be evaluated and addressed as early as possible in the site characterization and cleanup processes. Problems have arisen in the past when ICs have been added at the end of a cleanup and landowner reluctance was identified too late. An RP may have the impression that ICs are an easy, cost-effective substitute for a more complete cleanup. However, careful analysis of the steps necessary, the costs and the long-term liabilities and other implications involved in creating and maintaining ICs may prove differently.

When using an IC in a cleanup, DEC project managers must work with RPs to ensure the following basic steps are addressed:

- Clearly identify the objectives behind the ICs;
- Gather the relevant and necessary information:
    - Confirm the correct and accurate legal description of the property, copies of the prior conveyance(s) of the subject property may be helpful. (See Appendix A- Legal Descriptions);
    - For equitable servitudes, conduct a "pre-litigation" or "attorney's" title search to ensure that all parties with an interest in the subject land, including mortgage holders, holders of existing easements, lien holders, etc. are identified (the responsible party can perform this, or DEC could do so and then cost recover);
    - Find out how the property is zoned and whether any land use ordinances or other land management plans apply to the land;
    - Gather documentation including site and vicinity maps, drawn to scale and showing the extent and type of the remaining contamination, buildings and other site characteristics, and property boundaries; and
    - If the IC is only intended to address a portion of the property described in the legal description, the IC needs to clearly identify the affected portion; for large parcels of land this could include having the affected area surveyed.
- Briefly review the site background and preferred IC choices with DOL when considering or using enforceable ICs. For equitable servitudes, the draft documents should be reviewed by DOL before being shared with parties outside DEC; in addition, DOL may need to contact DNR at this point if it appears an interest in land will be transferred to the State (equitable servitude) (note,

sufficient time must be provided to DNR to review and process such documents, depending on the complexity of the legal description(s) this may require several weeks);

- If a site will be limited to industrial or commercial land use (18 AAC 75.340(e)(3)(a)), public participation is necessary, including consultation with any existing local zoning authority;

- Current and long-term costs for developing, maintaining and enforcing ICs should be included in any evaluation of cleanup alternatives;

- Any IC and associated cleanup plan should include language indicating that if the ICs are found to be ineffective, it may be necessary to reevaluate the cleanup and additional cleanup may be required; and

- Remember that layering more than one IC can help assure that a cleanup will remain protective and that potential exposure remains controlled.

9 How does DEC manage institutional controls?

CSP project managers should:

- Require that a copy of any recorded document or certified copy of any document, ordinance, zoning law, contract, order, relevant section of a land use plan, etc. used as an IC be provided to DEC for inclusion in the project file, and attached electronically in the database closure documents;

- Provide a copy of all completed enforceable IC documents to DOL;

- Ensure that any document created contains information to assist with future cross-referencing, such as an accurate legal description, parties' full names and addresses, date of creation/signing, reference the date and name of relevant DEC reports, plans and regulations, the site tracking number (database ID number), and DOL file number, if applicable;

- Use the Task Tracker module in the contaminated sites database to document and track all aspects of the ICs;

- Require regular (i.e. annual, two-year, five-year, etc.) IC compliance reporting;

- Notify relevant local government agencies and utilities of the ICs, including land use planning and zoning agencies; and

- Provide documentation affecting groundwater use restrictions or determinations to DEC's Drinking Water Program and DNR for water rights management.

Institutional controls are managed long-term by the CSP's IC Unit. Staff assigned to the IC Unit periodically evaluate sites closed with ICs to ensure they are functioning as intended, conduct IC site inspections, and recommend non-compliance enforcement actions to DEC management.

10 What happens if a party does not comply with an IC condition?

Enforcement options for non-compliance with IC conditions should be evaluated on a site-specific basis in consultation with DEC management. In the event of continued non-compliance, a site may be re-opened and further response actions required (or taken by DEC) in order to protect human health and the environment.

APPENDIX A - LEGAL DESCRIPTIONS

It is important that property law notices and equitable servitudes uniquely and precisely identify the property affected. This is important for at least two reasons: so the subject documents will actually provide notice during a standard title search and so there is no confusion about what property is affected. As discussed above, the responsible person must request an Attorney's (or Pre-Litigation) Title Report from a title company. The Recorder's Office does not prescribe a particular format for any legal description; rather they index the document based on the information provided by the customer and the office's internal business rules for indexing.

In the past, the grantor/grantee index was the only official index to recorded documents. Historically, the location index was maintained only as a courtesy index and contained many gaps and omissions over the years. In 1996, the location index was mandated by statute as an official index and all documents containing a legal description that are capable of being indexed are indexed into the location index as well as into the grantor/grantee index. Title companies regularly pick up all available information from recording office records, regardless of where the documents appear in the index. In January 1999, the Recorder's Office began utilizing a new indexing system with additional search capabilities, which will continue to expand.

Generically speaking, the Recorder's Office location index accommodates subdivided lands as well as sectionalized land described by aliquot parts. The following indicates how the different types of descriptions are indexed into the public record:

Subdivided lands: Lot, block, tract and/or apt/unit plus complete subdivision name, preferably including a reference to the plat number for that subdivision plat and recording district. (Searchers will find it easier to locate documents indexed with a plat number than with only a subdivision name reference.)

Section land: Section, township, range and meridian, including any aliquot parts or metes and bounds descriptions within a section. Full quarter/quarter sections are separately indexed into the system but descriptions constituting lands other than quarter/quarter sections are indexed under an additional legal field.

If a survey number is provided (U.S. Survey, U. S. Mineral Survey (U.S.M.S), Alaska State Land Survey, etc.) the survey number is indexed into the system. If a lot, block and/or tract are identified within a survey, it is also indexed. If a document contains both a survey and a plat number, it is indexed under the plat number only. If a document contains a survey and a townsite reference, it is indexed only under the survey. Indexing generally defaults to a survey number, but additional information should be included within the document as applicable to more fully identify the parcel.

If a description contains a metes and bounds reference, the above indexing rules apply as normal, and a reference to metes and bounds (M/B) is also entered into the index to alert researchers to look at the actual document for more information.

Every document submitted for recording should contain a reference to the recording district in which the property lies. If a description falls within multiple districts, the customer should consider recording in all affected districts to ensure the broadest possible notice of the recording.

Note that if there are typographical or other errors in the description contained on the document, the erroneous information will become part of the indexed data.

APPENDIX B - INSTITUTIONAL CONTROL QUICK REFERENCE GUIDE - SOIL

Residual Contaminant Concentrations	**Representative contaminant levels greater than human health levels (Table B direct contact or inhalation) or site-specific ecological risk levels**	**Representative contaminant levels between the most conservative default cleanup levels and human health levels (Table B direct contact or inhalation); ecological risk mitigated or controlled**	**Representative contaminant concentrations below the most stringent level for the applicable precipitation zone**
Implementation Mechanism or Instrument	Generally enforceable: Equitable servitude, restrictive covenant, management right assignment, compliance order by consent. On-line availability of *cleanup complete* determination, other decision documents and land and activity use control details; default "reopener" and soil disposal notification conditions articulated in *cleanup complete* determination	Generally not needed; in some cases informational controls such as a deed notice or other informational mechanism may be used if concerned about relocation of contaminated soil to a sensitive area. On-line availability of *cleanup complete* determination and any condition details; default "reopener" and soil disposal notification conditions articulated in *cleanup complete* determination	Generally no IC's: On-line availability of *cleanup complete* determination; default "reopener" and soil disposal notification conditions articulated in *cleanup complete* determination
Monitoring and Reporting	Annual scheduled monitoring and reporting periods tracked on the DEC database, possibly combined with DEC inspections	Variable monitoring and reporting requirements, based on individual site circumstances, tracked on the DEC database; DEC inspections infrequent or unnecessary	Generally none

APPENDIX C - INSTITUTIONAL CONTROL QUICK REFERENCE GUIDE - GROUNDWATER

Residual Contaminant Concentrations	**Representative contaminant levels above Table C – current or potential drinking water aquifer**	**Representative contaminant levels above Table C – not a current or potential drinking water aquifer**	**Representative contaminant concentrations below Table C**
Implementation Instrument or Mechanism	Generally enforceable: Equitable servitude and management right assignment; restrictive covenant;; compliance order by consent; local ordinance requiring public water supply use; enforceable land use plan. On-line availability of *cleanup complete* determination, other decision documents and land and activity use control detail; default "reopener" and groundwater disposal notification conditions articulated in *cleanup complete* determination	Generally informational: Deed notice or other informational mechanism depending on site specific circumstances; in some cases ICs may be unnecessary. On-line availability of *cleanup complete* determination and condition details; default "reopener" and groundwater disposal notification conditions articulated in *cleanup complete* determination	No IC's: On-line availability of *cleanup complete* determination; default "reopener" and groundwater disposal notification conditions articulated in *cleanup complete* determination
Monitoring and Reporting	Annual scheduled monitoring and reporting periods, possibly combined with DEC inspections	Variable monitoring and reporting requirements based on individual site circumstances; notification of proposed industrial or other uses or dewatering activities; DEC inspections infrequent or unnecessary	None

APPENDIX D - EQUITABLE SERVITUDE TEMPLATE

PLEASE SEE THE "EQUITABLE SERVITUDE TEMPLATE FAQs" FOR ASSISTANCE IN FINALIZING THIS DOCUMENT

EQUITABLE SERVITUDE [AND EASEMENT] [AND RIGHT OF ENTRY]
[AS 34.17.010 - AS 34.17.060]

This Equitable Servitude [and Easement][and Right of Entry] (hereinafter "Instrument") is made between _____, by [Name(s) and Addresses(s) of any entities with an existing fee interest in the subject property], as grantors (hereinafter, with [its] successors and assigns, "Grantor[s]"), and the State of Alaska (whose address is State of Alaska, Department of Natural Resources, Division of Mining, Lands, and Water Realty Services Section, 3601 "C" Street, Suite 960, Anchorage, Alaska 99503), as grantee (hereinafter, with its assigns, "Grantee"), for good and valuable consideration.

WHEREAS, Grantor is the [owner of] certain real property subject to this Instrument (hereinafter the "Property") [if there is more than one Grantor, identify each Grantor and identify interest in the property] which is more particularly described below:

[Legal description: the responsible person must pay for an Attorney (or "Pre-Litigation") Title Search from a title company, which should contain a legal description. NOTE: the title company merely supplies a description derived from the title record, which is not necessarily the definitive legal description. In addition, add identifying and descriptive information regarding the location of the contamination (such as a map, site survey or diagram) if it is a portion of the property.]

WHEREAS, the Property was subject to a release of oil or another hazardous substance regulated under [18 AAC 75 or 18 AAC 78] and [a risk-based cleanup level and site closure/a soil and/or groundwater cleanup level determination under 18 AAC (check exact section and add date of current regulation) that is less stringent than a residential cleanup level, or a determination under 18 AAC 75.350 (date) that groundwater is not a current or potential future drinking water source].

WHEREAS, in lieu of a more comprehensive cleanup, the Alaska Department of Environmental Conservation (along with its successor in administrative function or assigns hereinafter "ADEC") has determined, and Grantor has agreed that, the recording of this Instrument is necessary as an institutional control as part of [name and date of spill plan/report, UST #] and 18 AAC [check exact section and add date of current regulation]; [may also add additional paragraphs giving background: when Property was contaminated and with what, information regarding ADEC's evaluation, assumptions and risk-level established]; and

WHEREAS, the requirements, rights, covenants, conditions, prohibitions and restrictions of this Instrument (hereinafter "Provisions") are intended to protect human health, safety, and welfare and the environment [and maintain (and/or enhance) water quality (conservation easement statutory language)].

NOW, THEREFORE, pursuant to the laws of Alaska, [including AS 34.17.010 - AS 34.17.060 and the common law,] Grantor does hereby grant and convey to Grantee forever, with warranties of title, subject to conditions, restrictions and limitations of record, an equitable servitude [and easement][and right of entry] over the Property of the nature and character and to the extent set forth below.

1. Prohibited Activities:

Unless otherwise specifically authorized in writing by the ADEC, the activities listed below are prohibited.

SAMPLE LANGUAGE:

a. Any action at or use of the Property, including, without limitation, subsurface utility repairs, construction or excavation activities, that interferes with or impairs the integrity of, or is reasonably likely to interfere with, or impair the integrity of [result in the creation of additional exposure pathways that increase the risk to human health, safety or welfare or to the environment][groundwater monitoring wells or other . . .][structures, systems, procedures or devices constructed or implemented at the Property, except that in case of an emergency requiring an immediate response, necessary action may begin immediately on the condition that ADEC is notified by Grantor in writing within _____ hours . . . [and necessary steps are undertaken by Grantor within _____days to reestablish ADEC approved (groundwater wells, systems, procedures, devices . . . constructed or implemented at the Property.)] [including but not limited to excavation, drilling, scraping, flooding or erosion . . .][NOTE: that unless all easement holders, such as underground utilities, agree to this document, they will not be subject to this limitation.]

b. Any use of groundwater at the Property, by extraction through wells or other means, which use involves consumption or other beneficial use of groundwater. [This prohibition shall not apply to the extraction of groundwater associated with temporary dewatering activities related to construction development, or the installation of sewer or utilities at the Property. . . .] [dewatering would likely not be considered a beneficial use of the groundwater; may need to specifically address dewatering and the need to properly manage and discharge the wastewater (if a type of groundwater use is allowed, reconcile with broad prohibitions above)].

c. The following operations and uses:

1. residential use of any type [definition? For example, the definition found in 18 AAC 75.990.]
2. agricultural use of any type [definition?]

d. [Constructing a new structure with a basement.]

e. [Soil excavation within the area where (residual soil contamination exists or where wastes are capped and left in place) as shown in the attached site (diagram/survey)].

f. Soil excavation or movement of soil off-site, as required by 18 AAC 75.325(i)(1) and (2) [add date of latest reg revision].

g. [Flooding the property by water diversion or snow stockpiles which saturate the soils and result in upward migration of pollution.]

2. Required Activities

Unless otherwise specifically authorized in writing by ADEC, the activities listed below are required.

a. Grantor shall install and maintain [the applicable engineering controls, such as a cap, as described by an attached agreement (i.e., a cleanup, monitoring and/or maintenance plan).]

3. Right of Entry

During reasonable hours, after reasonable notice and subject to reasonable security requirements, ADEC and its Agents shall have the right to enter in, on, upon, over and across any portion of the Property to determine whether the Provisions herein have been or are being complied with. Violation of, or reasonable suspicion of the violation of, any of the Provisions herein, shall give ADEC and its Agents the right, privilege, and license to enter in, on, upon, over, and across any portion of the Property and to investigate, abate, mitigate or cure such violation, at the expense of Grantor, provided written notice of the violation is given to Grantor, describing what activity is necessary to investigate or correct the violation and Grantor fails to cure the violation within a time specified in such notice. Such activities include but are not limited to the right to store, move, and remove equipment and supplies; construct, operate, maintain, alter, repair and remove devices for the monitoring, containment and treatment of contamination in soil, air and water; investigate and collect samples; excavate and remove waste, pollutants, hazardous substances, contaminated soils, contaminated waste; deposit uncontaminated soil; and the performance of any other activity which may be reasonably necessary and incident to ADEC's investigation and response. Any such entry by ADEC or its Agents shall not be deemed a trespass or any other wrongful entry or remaining on the Property, and Grantee shall not be subject to liability to Grantor for such entry or any action taken to investigate, abate, mitigate or cure a violation. ADEC and its Agents shall be considered invitees on the property and the Grantor shall make every reasonable effort to inform ADEC and its Agents of hazards or hazardous areas to prevent personal injury.

4. General Provisions:

a. This Instrument is for the benefit of Grantee and conveys the perpetual right to Grantee, acting through ADEC and contractors, employees, agents and authorized representatives acting on ADEC's behalf (herein, "Agents"), to enforce and implement the Provisions herein. Nothing herein shall be deemed to create in any third party the right to enforce this Instrument.

b. All real estate, lots, parcels, or portions thereof located within or on the Property, and any lease, conveyance, or transfer covering or describing any part thereof or interest therein, shall be subject to the Provisions herein. By acceptance of such conveyance or transfer, each lessee, transferee or grantee and each of their heirs, successors, transferees or assigns agrees with Grantor and each other to be bound by the Provisions herein.

c. Nothing in this Instrument shall be construed as preventing Grantor from [i.e., properly maintaining or repairing any existing or future monitoring wells, engineering controls or cleanup equipment that is specifically authorized in writing by ADEC . . .]

d. The Provisions herein shall run with the land in perpetuity and shall be binding upon Grantor.

e. Nothing in this Instrument shall relieve Grantor from liability for injuries occurring on, or resulting from [his/her/their] activities on the Property, for which Grantor would otherwise ordinarily be liable. Grantor shall be liable for and shall indemnify and hold Grantee harmless from liability for injuries and damage which

arise because of its status as Grantee. Grantor shall also indemnify Grantee for all costs, including attorneys' fees, which arise from its status as Grantee.

f. Grantor hereby covenants to and with Grantee that Grantor is lawfully seized of the surface estate [, in fee simple,] of the Property, has good and lawful right and power to sell and convey the same, that the same is free and clear of encumbrances, except as specified herein and as of record, and that Grantor will forever warrant and defend the equitable servitude [and easement][and right of entry] conveyed to Grantee by this Instrument against the claims and demands of all persons.

g. To the maximum extent permitted by law, the Provisions herein shall not be subject to waiver or abandonment due to non-enforcement or violation of this Instrument or any of the Provisions herein on all or any portion of the Property. No waiver of the breach of any of the Provisions herein shall constitute a waiver of a subsequent breach of the same Provision or any other Provision. No right of action shall accrue for or on account of the failure of any person to exercise any right created by this Instrument nor for imposing any Provision which may be unenforceable.

h. This Instrument may be enforced by Grantors or Grantee in a court of law. The interpretation and performance of this Instrument shall be governed by the laws of Alaska.

i. Upon violation of any of the Provisions herein, Grantee may seek any available legal or equitable remedy to enforce this Instrument and shall be entitled to recover damages for violations of the Provisions herein to the public or to the environment protected herein under applicable federal or state law.

j. Any notice, demand, request, consent, approval, or communication that a party desires or is required to give another shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantor:
[Name and Address]

To Grantee:
Director, Division of Mining, Land and Water
Realty Services Section
Dept. of Natural Resources
3601 "C" Street, Suite 960
Anchorage, Alaska 99503

With a copy to:
[ADEC Contact Person
Alaska Department of Environmental Conservation
Appropriate office address]

k. The determination that any Provision herein, or its application to any person or circumstance, is invalid shall not affect any other Provision herein or its application and the other Provisions herein shall remain in full force and effect.

l. Any general rule of construction to the contrary notwithstanding, this Instrument shall be construed so as to affect the purpose for which it was granted to Grantee. Any ambiguities shall be resolved in a manner that best accomplishes the purpose of this Instrument.

m. Grantor shall notify ADEC at least ten (10) days before the effective date of any conveyance, grant, gift, or other transfer, in whole or in part, of Grantor's interest in the Property. Grantor shall include in any instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

> NOTICE: The interest conveyed hereby is subject to an Equitable Servitude [and Easement][and Right of Entry] dated_____, 20___, recorded in the public land records on _____, 20___, in book _____, page _____, of the _____ Recording District [(s) repeat as necessary], Alaska, in favor of, and enforceable by, the State of Alaska.

n. Grantor shall notify ADEC within ten (10) days prior to Grantor's petitioning for or filing of any document initiating a rezoning of the Property under _____ zoning code or any successor code.

o. This Equitable Servitude [and Easement] [and Right of Entry] does not impose liability on the State of Alaska nor does it make the State of Alaska a responsible party under the Comprehensive Environmental Response, Compensation and Liability Act or AS 46.03 or similar federal or state statutes, regulations or local ordinances.

5. Termination

This Instrument shall be vacated and shall be of no further force and effect upon the recordation in the Recording District, _____ Judicial District, State of Alaska by ADEC of a Notice of Vacation of Equitable Servitude [and Easement][and Right of Entry]. ADEC shall execute and record a Notice of Vacation of Equitable Servitude [and Easement][and Right of Entry] at such time as it, in its sole discretion, determines that the prohibited and required activities and other provisions of this Instrument are no longer necessary for the protection of human health, safety, welfare and the environment. The Notice of Termination of Equitable Servitude [and Easement][and Right of Entry] shall be executed by ADEC and state that ADEC has determined that the prohibited and required activities and other provisions of the Equitable Servitude [and Easement][and Right of Entry] are no longer necessary for the protection of human health, safety and welfare and the environment and further state that the Equitable Servitude [and Easement][and Right of Entry] is hereby vacated. If Grantor requests a termination of this Instrument, any costs incurred by ADEC in reviewing a potential termination shall be paid by Grantor.

IN WITNESS WHEREOF Grantor and Grantee have set their hand on the dates written below. This Equitable Servitude [and Easement][and Right of Entry] is effective on the date of the last acknowledged signature.

[Identify Grantor]

By: _____

(Signature)

(Typed or printed name)

Its:

GRANTOR'S ACKNOWLEDGMENT

[Example for an individual]

STATE OF _____)
) ss.
_____JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, _____, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn as such, personally appeared _____, to me known and known to be the person [she/he] represented [her/himself] to be, and the same identical person who executed the above and foregoing EQUITABLE SERVITUDE [AND EASEMENT][AND RIGHT OF ENTRY] freely and voluntarily for the uses and purposes therein mentioned

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

_____

(Signature)

_____

(Typed or printed name)

Notary Public in and for the State of _____
residing at _____.
My commission expires:_____

(SEAL)

GRANTOR'S ACKNOWLEDGMENT

[Example for an individual signing for corporation]

STATE OF _____)
) ss.
_____ JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, _____, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn as such, personally appeared _____, to me known and known to be the _____, and the person who executed the above and foregoing EQUITABLE SERVITUDE [AND EASEMENT][AND RIGHT OF ENTRY] on behalf of the _____, and who acknowledged to me that [she/he] signed the same as the _____, in the name of and for and on behalf of the _____, freely and voluntarily and by authority of its - _____ for the uses and purposes therein mentioned and on oath stated that [she/he] was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

_____
(Signature)

_____
(Typed or printed name)

Notary Public in and for the State of _____
residing at _____.
My commission expires:_____

(SEAL)

CERTIFICATE OF SECRETARY OF _____ CORPORATION
(Example for Corporate Grantor Acknowledgment)

I, the undersigned, to hereby certify the following:

1. I am now the duly elected, qualified and acting Secretary of the ____ Corporation [brief mention of what laws the corp. exists and is organized under].

2. Attached as Exhibit ____ are true and correct copies of (i) the Articles of Incorporation of the Corporation, which were filed with the State of Alaska on [date]; (ii) [list any amendments to or restated articles and filing date]. [Review articles which are in] full force and effect as of the date of this Certificate of Secretary and have not been revoked, modified, altered, or amended in any way.

3. Attached as Exhibit ____ is a true and correct copy of [any board and/or shareholder resolution or other authorizing mechanisms for the conveyance at issue in this Instrument; the approval percentage and existence of a quorum].

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of the Corporation this ___ day of _____, _____.

_____[Name], Secretary
_____ Corporation

[SEAL]
Confirmed and approved;

[Name], President
_____ Corporation

ACCEPTANCE

Pursuant to AS 38.05.035(a)(12), [check exact section and add date of statute] the State of Alaska hereby accepts this EQUITABLE SERVITUDE [AND EASEMENT][AND RIGHT OF ENTRY] conveying to the State of Alaska, its successors in administrative function and assigns, the interests in the Property described therein as an Institutional Control, pursuant to 18 AAC _____ and 18 AAC _____, [add exact section and date of regulation] to be managed and enforced by ADEC pursuant to a Management Right Assignment between ADEC and the Alaska Department of Natural Resources, to protect human health, safety, and welfare, and the environment [and to enhance or maintain water quality (conservation easement language)].

STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES

By:_____
_____
Director
Division of Mining, Land and Water

Location Index:
_____, Section ____,
Township _____, Range _____,
Seward Meridian, Alaska

NO CHARGE- STATE BUSINESS
AFTER RECORDING RETURN TO:
[Assigned DOL Attorney]

State of Alaska
Department of Law
Environmental Section
1031 Fourth Ave., Suite 200
Anchorage, AK 99501

I:\HsiehE\IC & Land Notices\Equitable Servitude Template.doc
2/26/04

APPENDIX E – EQUITABLE SERVITUDE - FREQUENTLY ASKED QUESTIONS

Purpose

The purpose of this Manual is to give some background and assistance in using the Alaska Department of Environmental Conservation's (DEC) Division of Spill Prevention and Response Equitable Servitude Template to create an enforceable, legal instrument. Whether to use an equitable servitude as part of a cleanup plan is addressed in the DEC's "Guidance on Using Institutional Controls in Oil and Other Hazardous Substance Cleanups."

Background

The Equitable Servitude Template was created by DEC, in conjunction with the Alaska Department of Law (DOL). The purposes of the Template include:
-assisting in streamlining the equitable servitude drafting process;
-lending consistency to the equitable servitudes created under this program; and
-providing interested parties notice of the type and form of equitable servitude created under this program.

Why Does the Template have Alternative Titles?

The Template has alternative titles depending upon the content and intent of the instrument created. If the instrument references Alaska's conservation easement statutes (see below), the instrument will be titled, "Equitable Servitude and Easement, AS 34.17.010 – AS 34.17.060," with "easement" referring both to the conservation easement and providing notice of a right of entry provision in the instrument, as easements traditionally referred to rights such as entry and access to the subject land. If the conservation statutes are not referenced, the instrument will be titled, "Equitable Servitude and Right of Entry."

Conservation Easements Under AS 34.17

Equitable servitudes and easements are created by a long history of court cases, or "common law." However, Alaska Statute Title 34 Chapter 17 also allows for the creation of a "conservation easement" under certain circumstances, including the protection of natural, scenic, or open spaces or maintenance of air or water quality. *See*, AS 34.17.060(1). Thus, where the purposes of the equitable servitude are consistent with AS 34.17, they may be referenced in the instrument to lend an additional measure of legal foundation. In order to determine whether the conservation easement statutes are appropriate for a particular site, DEC staff should seek the DOL assistance.[1]

Which Provisions May be Altered?

The Template is generally comprised of two types of provisions. One type of provision relates to site-specific information, such as identifying the parties involved, site history, requirements and prohibitions; the second type of provision relates to the legal specifics of the instrument, such as waiver, termination and enforceability.

Site-Specific Provisions: DEC staff, together with the responsible person, landowner and DOL should work together to draft provisions relating to site-specific information. These site-specific provisions are found in the opening pages of the Template and Section I, Prohibited Activities and Section 2, Required Activities.

[1] Each equitable servitude project should be assigned to a specific DOL attorney who can assist in the drafting and recording process. Once an attorney is assigned, they will be the DOL contact for all questions and issues which may arise for the particular equitable servitude.

Form Legal Provisions: Provisions addressing such general topics as Right of Entry and termination of the instrument, waiver, etc. are legal provisions which have been drafted specifically for the Template by the DOL. These provisions cannot be revised by either DEC staff or other interested parties. If DEC staff or interested parties have a concern regarding a provision, DEC staff must contact DOL and discuss whether alternative language may be used. These provisions are generally found in Section 3, Right of Entry and Section 4, General Provisions.

Altering the Provisions After the Instrument is Recorded: Section I, Prohibited Activities, and Section 2, Required Activities, may be altered by a specific, written authorization by DEC, as stated in the Section I and 2 opening paragraphs. Other provisions may be altered by DEC recording an addendum to the equitable servitude; an addendum must be drafted in cooperation with DOL.

The Role of the Alaska Department of Natural Resources

Creating an equitable servitude not only involves DEC and DOL staff, it also depends directly upon the approval and involvement of the Alaska Department of Natural Resources (DNR). DEC does not have the statutory ability to accept interests in land, such as an equitable servitude creates. Thus, DNR has conditionally agreed to act as a receptor of equitable servitude interests created under this DEC program. Because of this important role, DNR must review and approve any equitable servitude or related instrument which DEC wishes to record. Depending upon the site and, more specifically, how well legal descriptions are researched and drafted, a DNR review may be a brief or extremely complex process. In order to streamline this agency cooperation, the following guidelines must be followed:

DEC staff and private parties must contact the DOL if they have questions or concerns. They should not contact DNR directly; such contact will not assist the process;

DEC staff should inform DOL as soon as they believe it is likely they will use an equitable servitude as part of a cleanup plan. DOL will, in turn, notify DNR so that DNR staff may plan their schedules and resources and so that DNR may make any concerns known at that time so that any potential issues are dealt with early on in the process;

Consult DEC's Guidance on Using Institutional Controls in Oil and Other Hazardous Substances, "A Note About Legal Descriptions," when researching and preparing a legal description of the subject property.

EMH/2004/SGS updated 2011

APPENDIX F – NOTICE OF ENVIRONMENTAL CONTAMINATION (NEC) – LUST

NOTICE OF ENVIRONMENTAL CONTAMINATION

Recording District: **Anchorage**
Official State Business – No Charge[2]

As required by the Alaska Department of Environmental Conservation, Grantee[3], pursuant to 18 AAC 78.625 (insert property owners and all holders of property interest), Grantor, as the owner [and operator] of the subject property, hereby provides public notice that the property located at: _____, Alaska, 99__, and more particularly described as follows:

(provide complete legal description including all plat numbers that may apply if available.),

has been subject to a discharge or release and subsequent cleanup of oil or other hazardous substances, regulated under 18 AAC 78, as amended October 2006. This release and cleanup are documented in the Alaska Department of Environmental Conservation (ADEC) contaminated sites database at http://www.dec.state.ak.us/spar/csp/db_search.htm under Hazard ID number (insert Hazard ID).

ADEC reviewed and approved, subject to this and other institutional controls, the cleanup as protective of human health, safety, welfare, and the environment. No further cleanup is necessary at this site unless new information becomes available that indicates to ADEC that the site may pose an unacceptable risk to human health, safety, welfare, or the environment. ADEC determined, in accordance with 18 AAC 78.090 - 276 corrective action rules, that site cleanup has been performed to the maximum extent practicable even though residual (describe contaminant(s) remaining, e.g. fuel-contaminated soil and/or groundwater) exists on-site. Further cleanup was determined to be impracticable because (describe rationale for determination, i.e., the remaining contaminated soil is beneath a building or other site structure, within fractured bedrock and further cleanup was not practicable, etc.).[4]

Attached is a site survey or diagram drawn to scale that shows the property boundaries, locations of existing structures, the area that has been cleaned up, the approximate location and extent of remaining soil and/or groundwater contamination and the locations where confirmation soil samples were collected.

(Include the IC details here, copied and pasted from the closure letter, ensuring they are the same as listed in the IC tracker details. For example:

1. DEC shall be notified before any new groundwater wells are drilled at this site.
2. Signs and fencing shall be placed around the contaminated area and maintained to prevent access.

Alternatively, could cite the closure letter attached to this NEC.) In the event that the remaining contaminated soil becomes accessible (by the building or other structure being removed or through some other action that fits the site circumstances), or other information becomes available which indicates that the site may pose an unacceptable risk to human health, safety, welfare or the environment, the land owner and/or operator are required under 18 AAC 78.220 to notify ADEC and evaluate the environmental status of the contamination in accordance with applicable laws and regulations; further site characterizations and cleanup may be necessary under 18 AAC 78, Article 2.

---

[2] Only needed if ADEC is filing the NEC. If filed by the RP or their consultant, they'll have to pay the regular fee.

[3] ADEC is always the grantee and the current property owner is the grantor even if we file the NEC for the property owner.

[4] The closure letter can be included as part of the NEC. If this is the case, very little specific detail is required here.

In the future, if soil is removed from the site or groundwater is brought to the surface (for example to dewater in support of construction) it must be characterized and managed following regulations applicable at that time. Pursuant to 18 AAC 78.274 (b), DEC approval is required prior to moving soil or groundwater that is, or has been, subject to 18 AAC 78, Article 2.

This notice remains in effect until a written determination from ADEC is recorded that states that soil [and/or groundwater] at the site has been shown to meet the most stringent soil cleanup levels in method two of 18 AAC 75.340 [and/or groundwater meets the cleanup levels in Table C in 18 AAC 75.345] and that off-site transportation of soil [and/or groundwater] is not a concern.

Please return original copy of this notice to the address below:

Signature: ____(landowner)_____

Printed Name: _____

Mailing Address: _____

_____

(Notarization seal) Subscribed and sworn to before me this ___ day of _____, 20___.

Notary Public in and for the State of _____
My commission expires:_____

Note: Please refer to 11 AAC 05.010 (a)(14) for the required fee. The information requested on this form should be typed or legibly printed in English. Any attachments or exhibits must not exceed 8.5" x 14". This form is intended to comply with the recording requirements of AS 40.17.030 and 11 AAC 06.040, please double-check recording requirements.

APPENDIX G - NOTICE OF ENVIRONMENTAL CONTAMINATION (NEC) – CS

NOTICE OF ENVIRONMENTAL CONTAMINATION

Recording District: **Anchorage**
Official State Business – No Charge[5]

As required by the Alaska Department of Environmental Conservation, Grantee,[6] pursuant to 18 AAC 75.375 (insert property owners and all holders of property interest), Grantor, as the owner [and operator] of the subject property, hereby provides public notice that the property located at: _____, Alaska, 99__, and more particularly described as follows:

(provide complete legal description including all plat numbers that may apply, if available.),

has been subject to a discharge or release and subsequent cleanup of oil or other hazardous substances, regulated under 18 AAC 75, Article 3, as amended October 9, 2008. This release and cleanup are documented in the Alaska Department of Environmental Conservation (ADEC) contaminated sites database at http://www.dec.state.ak.us/spar/csp/db_search.htm under Hazard ID number (insert Hazard ID).

ADEC reviewed and approved, subject to this and other institutional controls, the cleanup as protective of human health, safety, welfare, and the environment. No further cleanup is necessary at this site unless new information becomes available that indicates to ADEC that the site may pose an unacceptable risk to human health, safety, welfare, or the environment. ADEC determined, in accordance with 18 AAC 75.325 – 390 site cleanup rules, that cleanup has been performed to the maximum extent practicable even though residual (describe contaminant(s) remaining, e.g. fuel-contaminated soil and/or groundwater) exists on-site. Further cleanup was determined to be impracticable because (describe rationale for determination, i.e., the remaining contaminated soil is beneath a building or other site structure, within fractured bedrock and further cleanup was not practicable, etc.).[7]

Attached is a site survey or diagram drawn to scale that shows the property boundaries, locations of existing structures, the area that has been cleaned up, the approximate location and extent of remaining soil and/or groundwater contamination and the locations where confirmation soil samples were collected.

(Include the IC details here, copied and pasted from the closure letter, ensuring they are the same as listed in the IC tracker details. For example:

1. DEC shall be notified before any new groundwater wells are drilled at this site.
2. Signs and fencing shall be placed around the contaminated area and maintained to prevent access.

Alternatively, could cite the closure letter attached to this NEC.) In the event that the remaining contaminated soil becomes accessible (by the building or other structure being removed or through some other action that fits the site circumstances), or other information becomes available which indicates that the site may pose an unacceptable risk to human health, safety, welfare or the environment, the land owner and/or operator are required under 18 AAC 75.300 to notify ADEC and evaluate the environmental status of the contamination in accordance with applicable laws and regulations; further site characterizations and cleanup may be necessary under 18 AAC 75.325-.390.

Pursuant to 18 AAC 75.325(i)(1) and (2), DEC approval is required prior to moving soil or groundwater that is, or has been, subject to the cleanup rules found at 18 AAC 75.325-.370. At this site, in the future, if soil is removed from the site or groundwater is brought to the surface (for example to dewater in support of construction) it must be characterized and managed following regulations applicable at that time.

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[5] Only needed if ADEC is filing the NEC. If filed by the RP or their consultant, they will have to pay the regular fee.

[6] ADEC is always the grantee and the current property owner is the grantor even if we file the NEC for the property owner.

[7] The closure letter can be included as part of the NEC. If this is the case, very little specific detail is required here.

This NEC remains in effect until a written determination from ADEC is recorded that states that soil [and/or groundwater] at the site has been shown to meet the most stringent soil cleanup levels in method two of 18 AAC 75.340 [and/or groundwater meets the cleanup levels in Table C in 18 AAC 75.345] and that off-site transportation of soil [and/or groundwater] is not a concern.

This document will be filed in the Anchorage recording district.

Please return original copy of this NEC to the address below:

Signature(s): ____(landowner(s) and holders of property interest)_____

Printed Name(s): _____

Mailing Address(s): _____

_____

(Notarization seal) Subscribed and sworn to before me this ___ day of _____, 20___.

Notary Public in and for the State of _____
My commission expires:_____

Note: Please refer to 11 AAC 05.010 (a)(14) for the required fee. The information requested on this form should be typed or legibly printed in English. Any attachments or exhibits must not exceed 8.5" x 14". This form is intended to comply with the recording requirements of AS 40.17.030 and 11 AAC 06.040, please double-check recording requirement.

APPENDIX H – RP INSTRUCTIONS FOR COMPLETING AN NEC

Responsible party information and instructions for completing a Notice of Environmental Contamination

A Notice of Environmental Contamination (NEC) is a deed notice, which provides information to interested parties regarding oil or hazardous substance contamination on a property; it does not transfer a property interest and is not legally binding upon anyone. Notices cannot restrict land use or create any duties.

Alaska is divided up into recording districts and each district has a state recorder's office where documents may be recorded for public notice and researched for title searches. Notices of contamination, cleanup or other such notices may be recorded in the appropriate recording district(s), with reference to the property's legal description so that it may be cross-referenced.

The correct recording district for filing, document preparation and other information regarding recording a deed notice can be found at the Recorder's Office website at the URL: http://www.dnr.state.ak.us/ssd/recoff/default.cfm

Complete the necessary information found in the NEC. The text in parentheses, highlighted in gray, needs to be customized with text appropriate to the particular site's conditions. (Once customized text is added the highlighting, comments, and parentheses should be removed.)

When drafting a notice, it is crucial that the information is correct, specific, and factual. The deed notice should include as much legal description information as possible, including plat, block, and lot numbers. In some cases a property may reside within several different plats. In this case all plat numbers should be included.

If you have any questions regarding the NEC content, please contact the DEC site project manager.

Once you have the NEC template completed with the appropriate information and after the DEC project manager approves the contents, have the form notarized, attach the closure letter and file the documents at the appropriate recorder's office.

There is a filing fee of $20.00 for the first page and $5.00 for each subsequent page.

The Recorder's Office will only accept documents that have a 2 inch top margin and 1 inch bottom and side margins on the first page and all other pages should have 1 inch margins on all sides.

After recording the notice, the original stamped deed notice will be returned to you in a few weeks.

A copy of the recorded notice must be submitted to the DEC project manager as soon as possible.