

Appendix H to KPC Consent Decree (draft)

Draft- (November 18, 1999)

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.]

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 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, info re DEC'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 lang.)].

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 Alaska Department of Environmental Conservation or its successor in administrative function or assigns (hereinafter, "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 effect 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 _____, 19____, recorded in the public land records on _____, 19____, 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.

IV. Termination

(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;

Equitable Servitude and Easement

[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

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