



Toxics Cleanup Program

Procedure 440A: Establishing Environmental Covenants under the Model Toxics Control Act

Established: August 20, 2015

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Contact: Policy & Technical Support Unit, Headquarters

Purpose: This is one in a group of procedures related to establishing, amending, and removing Environmental Covenants that can be found on Ecology's Toxics Cleanup Program's policies and procedures webpage at:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>

References: [WAC 173-340-440](#)
[Chapter 70.105D RCW](#), Hazardous Waste Cleanup-Model Toxics Control Act
[Chapter 64.70 RCW](#), Uniform Environmental Covenants Act
[Voluntary Cleanup Program \(VCP\) User Manual](#) (on SharePoint)

Attachments: A – Option 1: Ecology drafts /Ecology consults
A – Option 2: PLP/VCP customer drafts /PLP/VCP customer consults
A – Option 3: PLP/VCP customer drafts /Ecology consults
B – Local Government Notification Letter for a Proposed Covenant
C – Environmental Covenant for MTCA Sites: Instructions for Use & Covenant Template

Disclaimer: This Procedure is intended solely for the guidance of Ecology staff. It is not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with this Procedure depending on site-specific circumstances, or modify or withdraw this Procedure at any time.

Approved by:

James J. Pendowski, Program Manager
Toxics Cleanup Program

Accommodation Requests: To request ADA accommodation, including materials in a format for the visually impaired, call Ecology's Toxics Cleanup Program at 360-407-7170. Persons with impaired hearing may call Washington Relay Service at 711. Persons with speech disability may call TTY at 877-833-6341

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Background and Applicability

WAC 173-340-440 of the Model Toxics Control Act (MTCA) regulation requires that restrictions be placed on the future use and activities at certain cleanup sites where residual contamination remains after completion of a cleanup. The legal mechanism that is typically used for these restrictions is an “environmental covenant,” which is placed on the property title or deed.

An environmental covenant can be thought of as this: a restriction or obligation attached to a property that entitles somebody other than the owner (in this case, Ecology and other specified persons) certain specific legal rights to ensure that the cleanup protects future users of the property, the environment, and the integrity of the remedial actions at the site.

The Uniform Environmental Covenants Act (UECA), Chapter 64.70 RCW, was passed by the Washington State Legislature in 2007. That law establishes the process and procedures that must be followed for restrictions on future uses or activities at cleanup sites, so that the restrictions will be valid and enforceable over the long term.

Procedure 440A describes how to establish an environmental covenant at a site cleaned up under MTCA authority.

Note that this procedure refers to parties as though they were separate entities, including the potentially liable person (PLP), the landowner, and owners of other property interests and encumbrances that may also need to grant the Covenant or subordinate their interests.¹ This may not be the situation at a particular site. For simplicity in this procedure, the landowner and owners of other interests and encumbrances are referred to collectively as the “property owner(s).”

While the exact sequence of steps, as well as who conducts the work (Ecology, potentially liable person (PLP) or Voluntary Cleanup Program (VCP) customer), may vary from site to site, all of the elements identified here must be addressed. The Cleanup Project Manager can adjust approaches as necessary to reflect the site-specific situation.

¹ An example of other property interests is an easement or right-of-way that is impacted by the restrictions. Examples of encumbrances are mortgages and liens. Persons holding these instruments may need to either sign the Covenant as a “grantor” or sign a subordination agreement (meaning that the restrictions in Ecology’s Covenant take precedence over their interest, i.e. they “subordinate” their interest). See the Environmental Covenant template for further discussion of this topic.

Procedure for Establishing an Environmental Covenant

Cleanup Project Manager	<ol style="list-style-type: none"> 1. Determines an Environmental Covenant (“Covenant”) is required under WAC 173-340-440(4). 2. Identifies issues to be addressed by Covenant. 3. Either proceeds with Steps 1 through 4 or, sends a letter or email to the PLP or VCP customer requesting that they complete one or more of these steps. See Attachment A for a suggested format for this letter or email, depending on the path selected.
Cleanup Project Manager or PLP / VCP Customer	<ol style="list-style-type: none"> 4. Contacts the local government land use planning authority to inform them of need for a Covenant and seeks input on the conceptual terms of the Covenant; documents this conversation. ²
Cleanup Project Manager or PLP / VCP Customer	<ol style="list-style-type: none"> 5. Arranges for a Title Company to conduct a title search. ³
Cleanup Project Manager (preferred) or PLP / VCP Customer	<ol style="list-style-type: none"> 6. Using Ecology’s template, works with property owner(s) to draft Covenant, and any necessary subordination agreements. ⁴

² UECA and MTCA require Ecology to consult with the local government land use planning authority. Ecology may require the PLP or VCP Customer to do this. But Ecology is ultimately responsible for ensuring that the consultation occurs and the required information is obtained. If tribal lands are involved, consult with Ecology’s tribal liaison.

The purpose of this consultation is to identify provisions in the Covenant that might conflict with current or future land use plans and development requirements for the property. It is recommended that an initial contact be made via phone or e-mail to discuss the proposed scope of the Covenant. Once the Covenant has been drafted, it should be sent to the local government for review (Step 11). See instructions in the Environmental Covenant template for a more comprehensive discussion of this topic.

³ In general, the title search should be the responsibility of the person conducting the cleanup. The title search must identify all landowners and other persons holding an interest or encumbrance on the property. See instructions in the Environmental Covenant template for a more comprehensive discussion of this topic.

⁴ In general, the preference is that Ecology drafts the Covenant and subordination agreements. However, Ecology may request that the PLP or VCP Customer do this.

Cleanup Project Manager (if Ecology drafts Covenant)	7. Sends draft Covenant and subordination agreement(s), if applicable, to PLP / VCP Customer and property owner(s) for review.
PLP / VCP Customer (if drafting Covenant)	8. Submits proposed draft Covenant and subordination agreement(s), if applicable, and the results of the title search to Ecology for review.
<p>Cleanup Project Manager</p> <p><i>NOTE: When establishing a Covenant, other than consulting with local government, there is no obligation to issue a public notice and comment opportunity on the Covenant. However, where a Covenant is expected to be used at formal process sites, this fact and any anticipated restrictions should be highlighted in the public notice used for the Cleanup Action Plan and the order or decree. (No public notice is required for Covenants at VCP sites.)</i></p> <p><i>See attached checklist for a summary of public involvement requirements for establishing a Covenant.</i></p>	<p>9. Reviews draft Covenant or PLP / VCP Customer and property owner(s)' comments on draft Covenant. If changes are made to the template, consults with AGO.</p> <p>10. After resolution of any issues, makes appropriate changes to Covenant.</p> <p>11. Sends draft Covenant to local land use planning authority for review. See Attachment B for a suggested format for this letter.</p> <p>12. After reviewing comments from local land use planning authority, makes appropriate changes in consultation with PLP and property owner(s).</p> <p>13. If appropriate, sends final Covenant and subordination agreement(s) to PLP / VCP Customer, with a request that they arrange for signatures.</p>
PLP / VCP Customer or Cleanup Project Manager ⁵	14. Arranges for property owner(s) to sign final Covenant and subordination agreement(s).
Property Owners(s)	15. Signs Covenant as "grantor" of Covenant or subordination agreement.
Property Owner(s) or PLP / VCP Customer	16. Sends signed documents to Cleanup Project Manager.
Section Manager	17. Upon receipt of final signed Covenant, signs Covenant as "holder" or "grantee" of Covenant.
Cleanup Project Manager	18. Retains a copy of the final signed Covenant and subordination agreement(s).

⁵ In general, the person conducting the cleanup should be responsible for collecting these signatures.

<p>Cleanup Project Manager (cont'd.)</p>	<p>19. Sends the PLP / VCP Customer the final signed Covenant and subordination agreement(s), with a request that the documents be recorded.</p>
<p>PLP / VCP Customer or Property Owner(s) or Ecology ⁶</p>	<p>20. Records the final signed Covenant and subordination agreement(s) with the County Auditor in every County where the real property subject to the Covenant is located.</p>
<p>PLP / VCP Customer or Property Owner(s) or Ecology ⁷</p>	<p>21. After recording, per RCW 64.70.070:</p> <ol style="list-style-type: none"> a. Sends original recorded Covenant to Ecology.⁸ b. Sends a legible copy of the recorded Covenant, with the recording number evident, to the following persons: <ul style="list-style-type: none"> • Each person who signed the Covenant or a subordination agreement. • Each person holding a recorded interest in the real property subject to the Covenant. • Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (such as renters). • The local government planning authority in which the real property subject to the covenant is located. • Any other person to whom the Covenant expressly grants the power to enforce the Covenant. • Any other person required by Ecology.

⁶ In general, this recording should be done by the person conducting the cleanup or the property owner(s).

⁷ In general, the distribution of the recorded documents should be done by the person conducting the cleanup or the property owner(s).

⁸ Some Counties retain the original. If that is the case, the Cleanup Project Manager should make sure Ecology receives a legible copy of the recorded Covenant with all the signatures and the recording number.

<p>Cleanup Project Manager or Assigned Staff⁹</p>	<p>22. Retains a copy of the recorded Covenant and subordination agreement(s) in the site file along with a note on where the original is located.</p> <p>23. Arranges for relevant information to be entered into ISIS and DSARS, and updates site web page, if applicable.</p> <p>24. Sends the original to HQ Fiscal Services for safekeeping. If there is a secure file/safe in the Regional Office for sensitive legal documents, the original may be placed there.</p>
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⁹ In some offices this is done by the Cleanup Project Manager; in other Offices the Community Outreach and Environmental Education Specialist or Administrative support staff may do this.

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**Public Involvement Checklist for
Establishing Environmental Covenants at Both VCP and
Formal Process Sites**

Public Involvement Checklist for Establishing Environmental Covenants at Both VCP and Formal Process Sites

The following public involvement steps are excerpted from Procedure 440A. Some of the steps may be completed by the PLP or VCP customer, instead of Ecology. *This is a summary checklist. For detailed instructions on how to complete these steps, and who should complete them, see Procedure 440A and the instructions included with the Environmental Covenant template.*

- ✓ Conduct a title search to identify all persons currently holding a recorded interest in the property. Use this information to determine who needs to sign the Covenant or a subordination agreement.
- ✓ Notify and consult with local government officials to make sure the Covenant does not conflict with zoning and development regulations.
 - Informal consultation first (by phone or e-mail)
 - Formal consultation using letter template in Attachment B in Procedure 440A
- ✓ Public notice - Ecology is not required to issue a public notice and provide an opportunity for the general public to comment when establishing a Covenant. However, because a Covenant can affect future uses of a property and potentially impact future development in the area, the following steps are recommended:
 - For formal process sites, if a Covenant is anticipated when issuing a notice for a cleanup action plan or order/decreed, include a general description of anticipated property restrictions with that notice.¹⁰
 - For both formal process and VCP sites, if there is a high level of public interest in the site and a public notice for the covenant cannot be combined with other notices, consider providing a public notice and comment period specifically for the Covenant.
- ✓ Update ISIS
- ✓ Create DSARs entry
- ✓ Update site web page (if applicable)

¹⁰ Formal process sites are sites where Ecology is doing the cleanup OR sites being cleaned up under an order or decree.

General Public Notice Instructions

If it is decided to issue a public notice (either separately or incorporated into another notice), the following additional tasks must be completed:

- ✓ Arrange for translation of site notices, fact sheets, and other documents as appropriate.
- ✓ Create and distribute postcard or fact sheet describing the proposed action.
 - 300 foot radius for VCP sites. ¹¹
 - Quarter mile radius for formal process sites. ¹⁷
 - Neighborhood and business associations encompassing site.
 - Plus, any person or organization that has asked to be noticed.
- ✓ Create/update the site web page
- ✓ Create and arrange for the publishing of a Display or Legal Ad
- ✓ Create and submit a Site Register notice for publishing
- ✓ Add a notice to Ecology's Public Calendar
- ✓ Inform your media consultant

¹¹ Recommended distance. Actual distance may vary depending on level of public interest and extent of potentially affected vicinity.

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Attachment A – Option 1 (Preferred Option):

**Ecology drafts Covenant &
Ecology consults with local land use planning authority**

Attachment A – Option 1 (Preferred Option)

Ecology Drafts Covenant & Ecology Consults with Local Land Use Planning Authority

See Procedure 440A for additional instructions for using this letter.

[Print on Ecology letterhead]

[DATE]

[PLP / VCP CUSTOMER]

[ADDRESS]

Re: **Proposed Activity and Use Restrictions at the following Cleanup Site:**

- **Site Name:** **[CLEANUP SITE NAME]**
- **Site Address:** **[CLEANUP SITE ADDRESS]**
- **Cleanup Site ID:** **[CSID NUMBER]**
- **Facility/Site ID:** **[FSID NUMBER]**
- **VCP Project ID:** **[VCP PROJECT NUMBER]** (Delete if not applicable)
- **Tax Parcels:** **[TAX PARCEL NUMBERS]**

Dear **[PLP/VCP CUSTOMER]**:

The Department of Ecology (Ecology) has completed a review of your cleanup for the above-referenced site. Because residual contamination will remain on the above-referenced property at the completion of the cleanup, Ecology has determined that certain future activities and uses of the property need to be restricted under WAC 173-340-440 to protect the integrity of the cleanup and protect human health and the environment.

Draft Covenant

Accordingly we have prepared the attached DRAFT environmental covenant (hereafter “Covenant”) to implement the following restrictions on the property:

[SUMMARY LIST OF RESTRICTIONS]

We have also preliminarily consulted with **[City/County]** to seek their review of the restrictions in accordance with RCW 70.105D.030(1)(f). Their initial feedback is that the restrictions are compatible with their land use plan and development regulations for this property.

Request for Review and Assistance

Ecology is sending you this letter to request that you do the following by **[DATE]**:

1. Review the Covenant. If you have any concerns with any of the provisions, indicate what those concerns are and provide alternate language. Note that any changes to the template will require approval from the Attorney General's Office.
2. Complete the legal description in Exhibit A and prepare a property map for Exhibit B to the Covenant.
3. Conduct a title search to identify all persons holding an interest in, or encumbrance on, the real property subject to the Covenant.

Please submit your comments on the Covenant, your drafts of Exhibits A and B to the Covenant, and the results of your title search to Ecology for consideration.

Next Steps

Once we come to agreement on a final Covenant, you will need to:

1. Obtain the signatures of each person holding a recorded interest in the property. Each of these persons will need to sign either the Covenant as a grantor or a subordination agreement.
2. Submit the Covenant to Ecology for our signature as the grantee.
3. Record the Covenant in every county where the real property subject to the Covenant is located. For detailed recording instructions, please refer to [Chapter 65.04 RCW](#).
4. Return the original signed and recorded Covenant to Ecology and provide a copy of the recorded Covenant to the following persons:
 - Each person who signed the Covenant.
 - Each person holding a recorded interest in the real property subject to the Covenant. This includes persons who signed subordination agreements.
 - Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (i.e., renters).
 - The local government planning authority in which real property subject to the Covenant is located.
 - Any other person to whom the Covenant expressly grants the power to enforce the Covenant.
 - Any other persons Ecology requires.

The copy must be legible and the recording number must be evident.

More Information

For more information on environmental covenants, see:

- Ecology's environmental covenant template:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.htm>
- Ecology's Toxics Cleanup Procedure 440A:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>.
- The Uniform Environmental Covenants Act (UECA), Chapter 64.70 RCW
(<http://apps.leg.wa.gov/RCW/default.aspx?cite=64.70>).
- [WAC 173-340-440](http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440) of the Model Toxics Cleanup Act (MTCA) Cleanup Regulation
(<http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440>)

If you have questions about how to complete the Covenant template or any of the directions provided above, please contact me at [PHONE] or [E-MAIL].

Sincerely,

[ECOLOGY CLEANUP PROJECT MANAGER]

Enclosure: Proposed Environmental Covenant

Attachment A – Option 2:

**PLP/VCP customer drafts Covenant &
PLP/VCP customer consults with local land use
planning authority**

Attachment A – Option 2

PLP/VCP Customer Drafts Covenant & PLP/VCP Customer Consults with Local Land Use Planning Authority

See Procedure 440A for additional instructions for using this letter.

[Print on Ecology letterhead]

[DATE]

[PLP/VCP CUSTOMER]

[ADDRESS]

Re: **Proposed Activity and Use Restrictions at the following Cleanup Site:**

- **Site Name:** [CLEANUP SITE NAME]
- **Site Address:** [CLEANUP SITE ADDRESS]
- **Cleanup Site ID:** [CSID NUMBER]
- **Facility/Site ID:** [FSID NUMBER]
- **VCP Project ID:** [VCP PROJECT NUMBER] (Delete if not applicable)
- **Tax Parcels:** [TAX PARCEL NUMBERS]

Dear [PLP/VCP CUSTOMER]:

The Department of Ecology (Ecology) has completed a review of your cleanup for the above-referenced site. Because residual contamination will remain on the above-referenced property at the completion of the cleanup, Ecology has determined that certain future activities and uses need to be restricted under WAC 173-340-440 to protect the integrity of the cleanup and protect human health and the environment. These restrictions include:

1. [INSTITUTIONAL CONTROL #1].

2. [INSTITUTIONAL CONTROL #2].

Ecology has also determined that these restrictions need to be implemented in an Environmental covenant (hereafter “Covenant”).

Request for Assistance

To create a Covenant, Ecology is requesting that you do the following:

1. Conduct a title search to identify all persons holding an interest in the real property subject to the Covenant. Generally, Ecology will not sign the Covenant unless all interest holders are willing to sign on as grantors or subordinate their interests. See step 5 below.

2. Draft the Covenant implementing the above restrictions using the template document available on the following web site. Please note that any changes to the template language in the Covenant must be approved by the Attorney General's Office.
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
3. Submit the draft Covenant for review and comment to the appropriate land use planning authority with jurisdiction over the site. See attached Ecology Procedure 440A for a description of who to contact and a transmittal letter template. When requesting such a review, please:
 - Send me a copy of your written request.
 - Provide the authority with my contact information.
 - Request that the authority send me a copy of any written response.

Ecology will not approve the Covenant unless the authority has been adequately consulted.

4. After completing your consultation with the local land use planning authority, submit the draft Covenant, along with a copy of the title search, to Ecology for review and approval. Please include any comments provided by the planning authority or, if none were provided, documentation of your consultation.
5. Upon Ecology approval, obtain the signatures of all grantors of the Covenant and obtain subordination agreements signed by any persons holding an interest in the real property subject to the Covenant who are not signing the Covenant as a grantor.
6. After obtaining the signatures of the grantors and any necessary subordination agreements, submit the Covenant to Ecology for its signature as the grantee.
7. Upon obtaining Ecology's signature, record the Covenant in every county where the real property subject to the Covenant is located. For detailed recording instructions, please refer to [Chapter 65.04 RCW](#).
8. After recording, return the original signed and recorded Covenant to Ecology and provide a copy of the recorded Covenant to the following persons:
 - Each person who signed the Covenant.
 - Each person holding a recorded interest in the real property subject to the Covenant.
 - Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (i.e., renters).
 - The local government planning authority in which real property subject to the Covenant is located.
 - Any other person whom the Covenant expressly grants the power to enforce the Covenant.
 - Any other persons Ecology requires.

The copy must be legible and the recording number must be evident.

More Information

For more information and instructions on how to create an environmental covenant, see:

- Ecology's environmental covenant template:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
- Ecology's Toxics Cleanup Procedure 440A:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
- The Uniform Environmental Covenants Act (UECA), [Chapter 64.70 RCW](http://apps.leg.wa.gov/RCW/default.aspx?cite=64.70).
(<http://apps.leg.wa.gov/RCW/default.aspx?cite=64.70>)
- [WAC 173-340-440](http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440) (<http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440>) of the Model Toxics Cleanup Act (MTCA) Cleanup Regulation.

If you have questions about how to complete the Covenant template or any of the directions provided above, please contact me at [\[PHONE\]](#) or [\[E-MAIL\]](#).

Sincerely,

[\[ECOLOGY CLEANUP PROJECT MANAGER\]](#)

Attachment A – Option 3:

**PLP/VCP customer drafts Covenant &
Ecology consults with local land use planning authority**

Attachment A – Option 3

PLP/VCP Customer Drafts Covenant & Ecology Consults with Local Land Use Planning Authority

See Procedure 440A for additional instructions for using this letter.

[Print on Ecology letterhead]

[DATE]

[PLP/VCP CUSTOMER]

[ADDRESS]

Re: Proposed Activity and Use Restrictions at the following Cleanup Site:

- **Site Name:** **[CLEANUP SITE NAME]**
- **Site Address:** **[CLEANUP SITE ADDRESS]**
- **Cleanup Site ID:** **[CSID NUMBER]**
- **Facility/Site ID:** **[FSID NUMBER]**
- **VCP Project ID:** **[VCP PROJECT NUMBER]** (Delete if not applicable)
- **Tax Parcels:** **[TAX PARCEL NUMBERS]**

Dear **[PLP/VCP CUSTOMER]**:

The Department of Ecology (Ecology) has completed a review of your cleanup for the above-referenced site. Because residual contamination will remain on the above-referenced property at the completion of the cleanup, Ecology has determined that certain future activities and uses need to be restricted under WAC 173-340-440 to protect the integrity of the cleanup and protect human health and the environment. These restrictions include:

1. [INSTITUTIONAL CONTROL #1].

2. [INSTITUTIONAL CONTROL #2].

Ecology has also determined that these restrictions need to be implemented in an Environmental covenant (hereafter “Covenant”).

Request for Assistance

To create a Covenant, Ecology is requesting that you do the following:

1. Conduct a title search to identify all persons holding an interest in the real property subject to the Covenant. Generally, Ecology will not sign the Covenant unless all interest holders are willing to sign on as grantors or subordinate their interests. See step 5 below.
2. Draft the Covenant implementing the above restrictions using the template document available on the following web site. Please note that any changes to the template

language in the Covenant must be approved by the Attorney General's Office.

<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>

3. Submit the draft Covenant, along with the title search, to Ecology for review and approval. Before approving the Covenant, Ecology will consult with and consider any comments the local land use planning authority may have regarding the Covenant.
4. Upon Ecology approval, obtain the signatures of all grantors of the Covenant and obtain subordination agreements signed by any persons holding an interest in the real property subject to the Covenant who are not signing the Covenant as a grantor.
5. After obtaining the signatures of the grantors and any necessary subordination agreements, submit the Covenant to Ecology for its signature as the grantee.
6. Upon obtaining Ecology's signature, record the Covenant in every county where the real property subject to the Covenant is located. For detailed recording instructions, please refer to [Chapter 65.04 RCW](#).
7. After recording, return the original signed and recorded Covenant to Ecology and provide a copy of the recorded Covenant to the following persons:
 - Each person who signed the Covenant.
 - Each person holding a recorded interest in the real property subject to the Covenant. This includes persons who signed subordination agreements.
 - Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (i.e., renters).
 - The local government planning authority in which real property subject to the Covenant is located.
 - Any other person whom the Covenant expressly grants the power to enforce the Covenant.
 - Any other persons Ecology requires.

The copy must be legible and the recording number must be evident.

More Information

For more information and instructions on how to create an environmental covenant, see:

- Ecology's environmental covenant template:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
- Ecology's Toxics Cleanup Procedure 440A:
<http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
- The Uniform Environmental Covenants Act (UECA), [Chapter 64.70 RCW](http://apps.leg.wa.gov/RCW/default.aspx?cite=64.70):
(<http://apps.leg.wa.gov/RCW/default.aspx?cite=64.70>).
- [WAC 173-340-440](http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440) (<http://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-440>) of the Model Toxics Cleanup Act (MTCA) Cleanup Regulation.

If you have questions about how to complete the Covenant template or any of the directions provided above, please contact me at [\[PHONE\]](#) or [\[E-MAIL\]](#).

Sincerely,

[\[ECOLOGY CLEANUP PROJECT MANAGER\]](#)

Attachment B:

**Local Government Notification Letter for a
Proposed Covenant**

Attachment B

Local Government Notification Letter for a Proposed Covenant

Use this letter to notify the local government land use planning authority when proposing an environmental covenant.

See Procedure 440A for additional instructions for using this letter.

Ecology is required under RCW 70.105D.030(1)(f) to consult with the local government land use planning authority when proposing an environmental covenant. The purpose of the consultation is to identify provisions in the covenant that might conflict with current or future land use plans and development requirements for the property subject to the covenant.

When should I use this letter?

As specified in Procedure 440A, there are two steps to the consultation process:

1. Before drafting the covenant, call or meet informally with the local government land use planning authority to inform them of the need for a covenant and seek input on the conceptual terms of the Covenant and any potential conflicts (Procedure 440A, Step 4).
2. After drafting the covenant, send the proposed covenant to the local government land use planning authority for formal review and comment. **This letter may be used for this purpose** (Procedure 440A, Step 11).

To whom should I send this letter?

Identify the applicable local government and department with land use planning authority. While technically the Mayor or Executive is this authority, this procedure recommends contacting the staff who work with land use issues. However, if the jurisdiction prefers the contact be through the local elected executive, the letter can be sent to the Mayor/Executive instead. Use the following table as a guide:

Jurisdiction	Department
City or Town	City or Town Planning Department
Unincorporated Areas	County Planning Department
Urban Growth Areas not Annexed to City or Town	Both City or Town Planning Department and County Planning Department

Note that in larger communities, planning staff who work on zoning and comprehensive plan issues are typically different than those who review development proposals. *Make sure you are contacting the right staff.*

[Print on Ecology letterhead]

[DATE]

[LAND USE PLANNING DIRECTOR]

[LOCAL GOVERNMENT]

[ADDRESS]

Re: **Proposed Activity and Use Restrictions at the following Cleanup Site:**

- **Site Name:** [CLEANUP SITE NAME]
- **Site Address:** [CLEANUP SITE ADDRESS]
- **Cleanup Site ID:** [CSID NUMBER]
- **Facility/Site ID:** [FSID NUMBER]
- **VCP Project ID:** [VCP PROJECT NUMBER] (Delete if not applicable)
- **Tax Parcels:** [TAX PARCEL NUMBERS]

Dear [LAND USE PLANNING DIRECTOR]:

The purpose of this letter is to notify your agency that the Department of Ecology (Ecology) is proposing an environmental covenant to restrict certain activities and uses on the above-referenced property as part of the cleanup of the [SITE NAME] (Site). The proposed covenant is necessary because some residual contamination in the [GROUNDWATER/SOIL] will be left on the property after the cleanup is completed. As the local land use planning authority with jurisdiction over the property, Ecology is seeking your input on the proposed covenant (enclosed) in accordance with RCW 70.105D.030(1)(f).

Under the covenant, the following restrictions are proposed for this property:

[LIST RESTRICTIONS IN SUMMARY FORM]

Are any of these restrictions incompatible with your current comprehensive plan, zoning ordinances, and development requirements encompassing the above-referenced property?

Ecology would appreciate your response to this question in writing by letter or e-mail by [DATE].¹ If we do not hear from you by this date, we will assume you have no concerns. A copy of the environmental covenant will be sent to you after it is recorded.

If you have any questions regarding this letter or the cleanup of this property, please feel free to contact me at [E-MAIL] or [PHONE].

Sincerely,

[ECOLOGY CLEANUP PROJECT MANAGER]

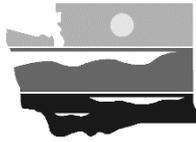
Enclosure: Proposed Environmental Covenant

¹ Unless another deadline has been agreed to through a prior conversation, provide at least 20 calendar days for a response.

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Attachment C:

Environmental Covenant for MTCA Sites: Instructions for Use and Covenant Template



Environmental Covenant for MTCA Sites: Instructions for Use and Covenant Template

Established: August 20, 2015

Revised: December 22, 2016

To: Interested Persons

From: James. J. Pendowski, Program Manager
Toxics Cleanup Program

Contact: Policy & Technical Support Unit, Headquarters

Note: This is Attachment C in Procedure 440A. For additional instructions on using this Covenant, please see Toxics Cleanup Program's **Procedure 440A: Establishing Environmental Covenants under the Model Toxics Control Act**, publication no. 15-09-054.

Instructions for Use

The following steps provide guidance on how to develop an environmental covenant using the enclosed template. While the exact sequence of steps, as well as who conducts the work (Ecology, potentially liable person (PLP) or Voluntary Cleanup Program (VCP) customer), may vary from site to site, all of the elements identified here must be addressed. When requesting a Covenant, Ecology should identify which steps are the responsibilities of the PLP or VCP customer at the site. Questions about specific provisions in the Covenant template should be directed to the Ecology Cleanup Project Manager assigned to the site. If no Cleanup Project Manager has been assigned, contact Ecology's Toxics Cleanup Program at (360) 407-7170 and ask for advice from the Toxics Cleanup Program (TCP) Policy Unit.

Step 1: Identify the Parcels Subject to the Covenant

Using the County Assessors Tax records, identify the parcels subject to the Covenant. Even though the site (or part of the site subject to the Covenant) may be owned by one entity, it may actually encompass more than one parcel of real property as shown on the County's property (and tax) records.

Step 2: Identify the Specific Activity and Use Restrictions for the Property

Create a conceptual list of specific prohibited activities (e.g., don't drill wells on the property) and prohibited uses (e.g., property can't be used for residential uses).

Work with the PLP/VCP customer, the property owner, and owners of other property interests (if different) to refine the language implementing these restrictions.

Step 3: Consult with the Local Government Land Use Planning Authority

The Uniform Environmental Covenants Act (UECA) and Model Toxics Control Act (MTCA) require Ecology to “consult” with the local government land use planning authority on the terms of the Covenant. While technically the Mayor/Executive is this authority, this guidance recommends contacting the staff that who work with land use issues. However, if the jurisdiction prefers the contact be through the local elected executive, work through the Mayor/Executive instead.

Ideally, before drafting the Covenant, Ecology staff should discuss the proposed restrictions with the local government staff by phone or email. **Once the Covenant has been drafted, the full covenant should be sent to the local government for review.** This consultation should be done by Ecology, but may be delegated to the PLP or VCP customer, upon agreement by Ecology.

The purpose of this consultation is to identify provisions in the Covenant that might conflict with current or future land use plans and development regulations for the property. For example, a provision requiring the land to remain in industrial use won't hold up in the long term if the comprehensive plans for the area call for future mixed residential and commercial use development. Similarly, a provision prohibiting infiltration of stormwater anywhere on the property may conflict with local development regulations requiring all stormwater to be retained and infiltrated on the property. If there is a conflict, see if it's possible to apply the restriction to only part of the property where the exposure pathway is of concern.

Use the following table as a guide for whom to contact:

Jurisdiction	Department
City or Town	City or Town Planning Department
Unincorporated Areas	County Planning Department
Urban Growth Areas not Annexed to City or Town ¹	Both City or Town Planning Department and County Planning Department

Note: In larger communities, planning staff who work on zoning and comprehensive plan issues are typically different than those who review development proposals. *Make sure you are talking to the right staff.*

¹ City limits and urban growth area should be identified in the City's and County's comprehensive plans. They can typically be found on the local jurisdiction's website. If not, call the jurisdiction's staff to obtain a copy.

Step 4: Confirm the Recorded Interests in the Property

To determine who owns the property and any relevant property interests that may need to be superseded by the Covenant, a title search must be conducted to identify all recorded interests in the Property. The title search should be the responsibility of the PLP (or VCP customer) and conducted by a title company. **The results of this search, typically called a title report or plat certificate, must be included with any request asking Ecology to sign a Covenant.** An uninsured title report is sufficient for this purpose.

In general, the title search should be no more than six months old to ensure it reflects the current status of the property. However, under some circumstances, Ecology may accept an older title search, such as that completed during the PLP identification process. Accepting older title searches should be done only if Ecology has been closely involved with the site during the intervening time period since the last title search, and there is no reason to suspect the owner has changed or an easement or other interest in the property has been granted. Examples of changes that would trigger the need for a new title search are:

- Establishment of a new business on the property;
- Change in the name of the business currently on the property;
- Subdivision of the property;
- Construction of new utilities or roads across the property;
- Foreclosure on the property;
- Change in the status of the persons owning the property (death, divorce or marriage); and
- Bankruptcy of the site owner or operator.

Step 5: Determine Who Needs to Sign the Covenant

Real property interests are prioritized according to the date on which they were recorded with the land record authority. Such interests include not only ownership of the property, but may also include mortgages; tax or mechanics' liens; utility easements; surface land rights; and judgments. If a senior mortgage holder forecloses on the property, for instance, it may be able to dispose of all other interests, including Ecology's Covenant. For this reason, to ensure the restrictions in a Covenant are enforceable, the Covenant must supersede these pre-existing property interests.

Grantors or signatories to a Covenant not only are granting access to Ecology and agreeing to adhere to the restrictions on future activities or uses of the property, they are also agreeing to be responsible for any "affirmative obligations" described in the Covenant, such as maintaining the remedy and monitoring.

Signing a subordination agreement means the person holding a senior property interest is agreeing that the Covenant takes precedent over their interest, including providing Ecology with access, and consenting to the restrictions on future uses and activities on the property. However, they are not necessarily agreeing to the affirmative obligations in the Covenant.

Use the following as a guide to determine who must sign the Covenant as a grantor or subordinate their interests:

a) Persons holding fee simple title to the property (i.e., landowners).

The landowner must always sign the Covenant as a Grantor.

b) Persons holding other property interests (such as easements, right-of-ways, water & mineral rights).

In general, if a person holds a title to:

- a) An easement or right-of-way,
- b) Water rights (if groundwater use is restricted); or
- c) Mineral rights,

...that is located within the area of activity or use restrictions, and compliance with those restrictions could be overridden by the person exercising their rights, then the person holding the title should either:

- a) Sign the covenant as a Grantor, or
- b) Subordinate their interests by signing a subordination agreement.

However, if a current contact cannot be located, or if the holder's interest is not critical to the success of the Covenant, it is probably not necessary to expend a lot of effort to track them down and obtain a signature. For example, many properties, especially in eastern Washington State, have underlying mineral rights that are controlled by someone different than the owner. In most urban areas it is unlikely those rights would be exercised to the detriment of the remedy, and so there would be no reason to pursue a signature.

Similarly, the holder of an easement or right-of-way for overhead power lines that is unlikely to affect the performance of the remedy does not need to be pursued.

However, if a cap is part of the remedy, and the easement or right-of-way grants the holder the right to conduct activities that could compromise the integrity of the cap (such as installation and maintenance of road or an underground utility), these holders should be required to sign the Covenant as a Grantor or subordinate their interests.

c) Persons holding encumbrances on the property (such as lien and mortgage holders).

In general, persons holding a lien have merely a monetary interest (lien imposed because of lack of payment of a bill) and do not need to sign the Covenant or subordinate their interests. However, if the lien holder is claiming a right that could affect the performance of the remedy, such as control over future sale and development of the property, then they should be required to subordinate their interest.

Mortgage holders such as banks usually hold the title to the property until the property owner pays off the loan for purchase of the property. Should they foreclose on a property, they may be able to extinguish all subsequent interests, including Ecology's Covenant. As such, they should be required to sign a subordination agreement.

A Covenant or subordination agreement must be voluntarily granted. There may be circumstances where the holder of an interest or encumbrance on the property (other than the property owner) refuses to grant a Covenant or subordinate their interests, can't be located, or are not responsive. In these cases, the Ecology Cleanup Project Manager should, in consultation with the Assistant Attorney General assigned to the site, consider the success of the remedy without their signature. If it is deemed necessary to secure their signature and they refuse to sign, then a more complete cleanup will be required.

In cases where there is minimal risk to the success of the remedy and it is decided to proceed without their signature, a letter should be sent to the holder of this interest or encumbrance notifying them that, should they do anything on the property that affects the integrity of the remedial action or results in a release of a hazardous substance, they could trigger liability under MTCA. If the holder of this interest is unresponsive or cannot be located, work with the Assistant Attorney General assigned to the site on an appropriate notification procedure.

Step 6: Prepare the Covenant

Use the attached Ecology template to prepare the Covenant.

A precise legal description of the Property and any interests in the Property (such as an easement) is essential to know where the Covenant applies. A map must also be developed to provide a visual representation of where the restrictions apply on the Property.

- If the restrictions apply to the entire Property, the legal description in the Property deed and a map of the Property should be sufficient.
- If the restrictions apply to only part of the Property, a new legal description and map will need to be developed, and boundary markers or reference monuments will need to be established on the Property by a licensed surveyor.

If the Property includes more than one parcel of real property, the legal description and map should cover all of the parcels. This will enable recording of the same covenant on each parcel instead of creating and recording a different covenant for each parcel.

There are specific formatting requirements that apply to recorded Covenants. For example, there must be a three inch margin on the top of the first page and a one inch margin on the bottom and sides. See Chapter 65.04.045 RCW for additional format requirements.

Step 7: Public Involvement

In general, there is no requirement for a public notice and comment period on a Covenant, other than the requirement for local government consultation discussed above. However, because a Covenant can affect future uses of a property and potentially impact future development in the area, any public notice issued for the cleanup action plan or order or decree governing the cleanup should highlight the fact that there will be restrictions on future activities or uses of the property.

For sites with a high level of public interest or controversy, it may be appropriate to provide a separate opportunity for public comment. The Ecology Cleanup Project Manager should consult with the public involvement specialist assigned to the site regarding the appropriate level of public involvement.

Step 8: Sign the Covenant

The Ecology Cleanup Project Manager must ensure all appropriate persons sign the Covenant and that each of those signatures is notarized. This responsibility can be delegated to the PLP (or VCP applicant) but Ecology staff must verify this step has been completed.

Ecology's representative should sign the Covenant only after all other parties to the Covenant have signed.

Step 9: Record the Covenant

The Covenant must be recorded on the title of each parcel of real property subject to the Covenant. Recording is done by the County Auditor. If the area covered by the Covenant extends across a County boundary, the Covenant will have to be recorded in both Counties.

Step 10: Send the Recorded Covenant to Ecology and Others per RCW 64.70.070

- a. Send the original recorded Covenant to Ecology's contact for the site. ²
- b. Send a legible copy of the recorded Covenant, with the recording number evident, to the following persons (per RCW 64.70.070):
 - Each person who signed the Covenant.
 - Each person holding a recorded interest in the real property subject to the Covenant (including each person who subordinated their interests to Ecology's Covenant).
 - Each person in possession of the real property subject to the Covenant at the time the Covenant is executed (such as renters).
 - The local government planning authority in which the real property subject to the Covenant is located.
 - Any other person to whom the Covenant expressly grants the power to enforce the Covenant.
 - Any other persons required by Ecology.

Note: These instructions and attached template are intended solely for the guidance of Ecology staff. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with these instructions and the attached template depending on site-specific circumstances, or modify or withdraw these documents at any time.

² Some Counties retain the original. If that is the case, make sure Ecology receives a legible copy of the recorded Covenant with all the signatures and with recorded notation.

Environmental Covenant for MTCA Sites: Covenant Template

*See Toxics Cleanup Program's **Procedure 440A** for
additional instructions on the use of this Covenant.*

**Text highlighted by yellow are instructions/comments and options.
Those instructions and related footnotes should be removed from the Covenant.**

After Recording Return
Original Signed Covenant to: ¹
[ECOLOGY SITE MANAGER]
Toxics Cleanup Program
Department of Ecology
[ECOLOGY OFFICE ADDRESS]

NOTE: This Covenant is not valid without Ecology's approval and signature.

Environmental Covenant

(For MTCA Sites – August 20, 2015 Version)

Grantor: [NAME OF THE LANDOWNER OR OTHER GRANTOR] ²
Grantee: State of Washington, Department of Ecology (hereafter “Ecology”)
Brief Legal Description: [BRIEF LEGAL DESCRIPTION]
Tax Parcel Nos.: [INSERT TAX PARCEL NUMBERS]
Cross Reference: [SEE BOX]

- **If superseding or amending an existing Covenant, insert one of the following:**
“Original Covenant # _____ (superseding)” OR “Original Covenant # _____ (amending)”
- **Insert a reference to any subordination agreements, if separately recorded**
- **Insert a list of other related documents such as consent decree, order, or NFA opinion**
- **Otherwise, delete**

RECITALS ³

- a.** This document is an environmental (restrictive) covenant (hereafter “Covenant”) executed pursuant to the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW, and Uniform Environmental Covenants Act (“UECA”), chapter 64.70 RCW.
- b.** The Property that is the subject of this Covenant is part or all of a site commonly known as [ECOLOGY SITE NAME AND FACILITY ID]. The Property is legally described in Exhibit A, and illustrated in Exhibit B, both of which are attached (hereafter “Property”). If there are differences between these two Exhibits, the legal description in Exhibit A shall prevail.
- c.** The Property is the subject of remedial action conducted under MTCA. This Covenant is required because residual contamination remains on the Property after completion of remedial actions. Specifically, the following principal contaminants remain on the Property: ⁴

¹ Some counties keep the original Covenant, others don't. If the signed original is available, it must be sent to Ecology. If the signed original is not available, send a legible copy to Ecology.

² The Grantor of a Covenant typically is the fee simple land owner of the property. The Grantor may also include holders of other property interests such as a holder of an easement, right-of-way, mineral right, lien, or mortgage.

³ This section is primarily used to describe this document and its purpose. It should not be used for substantive binding provisions.

⁴ List the contaminants for the associated media. If more than a few are present, list the top three to five for each medium.

Medium	Principal Contaminants Present
Soil	
Groundwater	
Surface Water/Sediment	

d. It is the purpose of this Covenant to restrict certain activities and uses of the Property to protect human health and the environment and the integrity of remedial actions conducted at the site. Records describing the extent of residual contamination and remedial actions conducted are available through Ecology. **[Optional--This includes the following documents: (list key documents such as RI/FS, Cleanup Action Plan, Voluntary Cleanup Report(s), As-built report)].**

e. This Covenant grants Ecology certain rights under UECA and as specified in this Covenant. As a Holder of this Covenant under UECA, Ecology has an interest in real property, however, this is not an ownership interest which equates to liability under MTCA or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* The rights of Ecology as an “agency” under UECA, other than its’ right as a holder, are not an interest in real property.

f. **[Include the following statement if this Covenant is superseding another environmental covenant.]** This Covenant supersedes and replaces the existing Environmental (Restrictive) Covenant, which is recorded with [] County as [# OF ORIGINAL COVENANT].

COVENANT

[NAME OF LANDOWNER OR OTHER GRANTOR], as Grantor ⁵ and **[FEE SIMPLE, EASEMENT OR OTHER]** owner of the Property hereby grants to the Washington State Department of Ecology, and its successors and assignees, the following covenants. Furthermore, it is the intent of the Grantor that such covenants shall supersede any prior interests the GRANTOR has in the property and run with the land and be binding on all current and future owners of any portion of, or interest in, the Property.

Section 1. General Restrictions and Requirements.

The following general restrictions and requirements shall apply to the Property:

a. **Interference with Remedial Action.** The Grantor shall not engage in any activity on the Property that may impact or interfere with the remedial action and any operation, maintenance, inspection or monitoring of that remedial action without prior written approval from Ecology.

b. **Protection of Human Health and the Environment.** The Grantor shall not engage in any activity on the Property that may threaten continued protection of human health or the environment without prior written approval from Ecology. This includes, but is not limited to, any activity that results in the release of residual contamination that was contained as a part of the remedial action or that exacerbates or creates a new exposure to residual contamination remaining on the Property.

⁵ If there is more than one Grantor, use the term “Grantors” here and throughout this document.

c. Continued Compliance Required. Grantor shall not convey any interest in any portion of the Property without providing for the continued adequate and complete operation, maintenance and monitoring of remedial actions and continued compliance with this Covenant.

d. Leases. Grantor shall restrict any lease for any portion of the Property to uses and activities consistent with this Covenant and notify all lessees of the restrictions on the use of the Property.

e. Preservation of Reference Monuments. Grantor shall make a good faith effort to preserve any reference monuments and boundary markers used to define the areal extent of coverage of this Covenant. Should a monument or marker be damaged or destroyed, Grantor shall have it replaced by a licensed professional surveyor within 30 days of discovery of the damage or destruction.

Section 2. Specific Prohibitions and Requirements.

In addition to the general restrictions in Section 1 of this Covenant, the following additional specific restrictions and requirements shall apply to the Property.

[See Appendix 1 for example restrictions.]

Select from the restrictions in Appendix 1 as appropriate, based on site-specific circumstances. Most sites will have only some of these restrictions. Options are provided to illustrate the range of potential restrictions. In some cases, the options are mutually exclusive (pick one or the other, but not both). In other cases, several options may need to be combined to cover the range of conditions at the site. This is not intended to be an all-inclusive list. In circumstances where none of the categories or suggested options fit the site conditions, adjust the language as appropriate to fit the situation.

- a. Land use.**
- b. Containment of soil/waste materials.**
- c. Stormwater facilities.**
- d. Vapor/gas controls.**
- e. Groundwater use.**
- f. Sediments.**
- g. Monitoring.**
- h. Other.**

Section 3. Access.

a. The Grantor shall maintain clear access to all remedial action components necessary to construct, operate, inspect, monitor and maintain the remedial action.

b. The Grantor freely and voluntarily grants Ecology and its authorized representatives, upon reasonable notice, the right to enter the Property at reasonable times to evaluate the effectiveness of this Covenant and associated remedial actions, and enforce compliance with this Covenant and those actions, including the right to take samples, inspect any remedial actions conducted on the Property, and to inspect related records.

c. No right of access or use by a third party to any portion of the Property is conveyed by this instrument.

Section 4. Notice Requirements.

a. Conveyance of Any Interest. The Grantor, when conveying any interest [IN ANY PART OF THE PROPERTY] OR [WITHIN THE AREA OF THE PROPERTY DESCRIBED AND ILLUSTRATED IN EXHIBITS B AND C], including but not limited to title, easement, leases, and security or other interests, must:

- i. Provide written notice to Ecology of the intended conveyance at least thirty (30) days in advance of the conveyance.⁶
- ii. Include in the conveying document a notice in substantially the following form, as well as a complete copy of this Covenant:

NOTICE: THIS PROPERTY IS SUBJECT TO AN ENVIRONMENTAL COVENANT GRANTED TO THE WASHINGTON STATE DEPARTMENT OF ECOLOGY ON [DATE] AND RECORDED WITH THE [COUNTY] COUNTY AUDITOR UNDER RECORDING NUMBER [RECORDING NUMBER]. USES AND ACTIVITIES ON THIS PROPERTY MUST COMPLY WITH THAT COVENANT, A COMPLETE COPY OF WHICH IS ATTACHED TO THIS DOCUMENT.

- iii. Unless otherwise agreed to in writing by Ecology, provide Ecology with a complete copy of the executed document within thirty (30) days of the date of execution of such document.

b. Reporting Violations. Should the Grantor become aware of any violation of this Covenant, Grantor shall promptly report such violation in writing to Ecology.

c. Emergencies. For any emergency or significant change in site conditions due to Acts of Nature (for example, flood or fire) resulting in a violation of this Covenant, the Grantor is authorized to respond to such an event in accordance with state and federal law. The Grantor must notify Ecology in writing of the event and response actions planned or taken as soon as practical but no later than within 24 hours of the discovery of the event.

d. Notification procedure. Any required written notice, approval, reporting or other communication shall be personally delivered or sent by first class mail to the following persons. Any change in this contact information shall be submitted in writing to all parties to this Covenant. Upon mutual agreement of the parties to this Covenant, an alternative to personal delivery or first class mail, such as e-mail or other electronic means, may be used for these communications.

⁶ Ecology may waive this notice provision for some units at a Property where the anticipated use is a multi-tenant/owner building where some owners or tenants are unlikely to be exposed to residual contamination. For example: upper story apartments or condominiums, or commercial tenants in a strip mall, with limited rights to use the grounds under and around the building (such as for parking).

If Ecology agrees to such a waiver, the circumstances of the waiver must be detailed in paragraph 4.a.i. In addition to the specific circumstances, this provision must include the following statement: "Waiver of this advance notice to Ecology for these transactions does not constitute waiver of this notice for the entire Property nor a waiver of the requirement in Section 4.a.ii. to include this notice in any document conveying interest in the Property."

<p>[insert contact name, address, phone number and e-mail for Grantor]</p>	<p>Environmental Covenants Coordinator Washington State Department of Ecology Toxics Cleanup Program P.O. Box 47600 Olympia, WA 98504 – 7600 (360) 407-6000 ToxicsCleanupProgramHQ@ecy.wa.gov</p>
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Section 5. Modification or Termination.

a. Grantor must provide written notice and obtain approval from Ecology at least sixty (60) days in advance of any proposed activity or use of the Property in a manner that is inconsistent with this Covenant.⁷ For any proposal that is inconsistent with this Covenant and permanently modifies an activity or use restriction at the site:⁸

i. Ecology must issue a public notice and provide an opportunity for the public to comment on the proposal; and

ii. If Ecology approves of the proposal, the Covenant must be amended to reflect the change before the activity or use can proceed.

b. If the conditions at the site requiring a Covenant have changed or no longer exist, then the Grantor may submit a request to Ecology that this Covenant be amended or terminated. Any amendment or termination of this Covenant must follow the procedures in MTCA and UECA and any rules promulgated under these chapters.

c. **[Optional]** By signing this agreement, per RCW 64.70.100, the original signatories to this agreement, other than Ecology, agree to waive all rights to sign amendments to and termination of this Covenant.⁹

Section 6. Enforcement and Construction.

a. This Covenant is being freely and voluntarily granted by the Grantor.

b. Within ten (10) days of execution of this Covenant, Grantor shall provide Ecology with an original signed Covenant and proof of recording and a copy of the Covenant and proof of recording to others required by RCW 64.70.070.

c. Ecology shall be entitled to enforce the terms of this Covenant by resort to specific performance or legal process. All remedies available in this Covenant shall be in addition to any

⁷ Example of inconsistent uses are using the Property for a use not allowed under the covenant (i.e. mixed residential and commercial use on a property restricted to industrial uses), OR drilling a water supply well when use of the groundwater for water supply is prohibited by the covenant.

⁸ An example of an activity that is unlikely to be considered a permanent modification is a proposal to disturb a cap to repair an existing underground utility that passes through the site. However, installing a new underground utility within a capped area would be a permanent change.

⁹ As time passes, the original grantor and other signers of the Covenant may no longer exist as viable entities. This provision is intended to allow future amendments or termination of the Covenant without Ecology having to seek court authorization, as provided by RCW 64.70.100.

and all remedies at law or in equity, including MTCA and UECA. Enforcement of the terms of this Covenant shall be at the discretion of Ecology, and any forbearance, delay or omission to exercise its rights under this Covenant in the event of a breach of any term of this Covenant is not a waiver by Ecology of that term or of any subsequent breach of that term, or any other term in this Covenant, or of any rights of Ecology under this Covenant.

d. The Grantor shall be responsible for all costs associated with implementation of this Covenant. Furthermore, the Grantor, upon request by Ecology, shall be obligated to pay for Ecology’s costs to process a request for any modification or termination of this Covenant and any approval required by this Covenant.

e. This Covenant shall be liberally construed to meet the intent of MTCA and UECA.

f. The provisions of this Covenant shall be severable. If any provision in this Covenant or its application to any person or circumstance is held invalid, the remainder of this Covenant or its application to any person or circumstance is not affected and shall continue in full force and effect as though such void provision had not been contained herein.

g. A heading used at the beginning of any section or paragraph or exhibit of this Covenant may be used to aid in the interpretation of that section or paragraph or exhibit but does not override the specific requirements in that section or paragraph.

[GRANTOR’S SIGNATURE BLOCK FOR ORIGINAL COVENANTS]

Each person who signs must have a separate signature block and applicable notary acknowledgment. Repeat as many times as necessary.

Holders of other property interests must either sign the amended Covenant as a GRANTOR or sign the subordination agreement in Exhibit D.

The undersigned Grantor warrants he/she holds the title **[to the Property] OR [to an (Easement/Right of Way/etc.) on the Property]** and has authority to execute this Covenant.

EXECUTED this _____ day of _____, 20__.

_____ **[SIGNATURE]** _____

by: _____ **[PRINTED NAME]** _____

Title: _____

Insert one of the following, as applicable after each signature. See example format on page after next:

INDIVIDUAL ACKNOWLEDGMENT

CORPORATE ACKNOWLEDGMENT

REPRESENTATIVE ACKNOWLEDGEMENT

[GRANTOR'S SIGNATURE BLOCK FOR AMENDED COVENANTS]

Each person who signs must have a separate signature block and applicable notary acknowledgment. Repeat as many times as necessary.

When amending a Covenant, each GRANTOR of the existing Covenant must sign the amended Covenant unless the GRANTOR waived its rights under Section 5(b) of the Covenant.

Holders of other property interests must either sign the amended Covenant as a GRANTOR or sign the subordination agreement in Exhibit D.

The undersigned Grantor warrants he/she holds the title **[to the Property] OR [to an (Easement/Right of Way/etc.) on the Property]** and has authority to execute this Covenant.

EXECUTED this _____ day of _____, 20____.

The undersigned further acknowledges **[Environmental or Restrictive]** Covenant **[# OF THE ORIGINAL COVENANT]** filed in **[]** County, is hereby terminated and replaced with the above Environmental Covenant.

_____ **[SIGNATURE]** _____

by: _____ **[PRINTED NAME]** _____

Title: _____

Insert one of the following, as applicable. See example format on next page:

INDIVIDUAL ACKNOWLEDGMENT

CORPORATE ACKNOWLEDGMENT

REPRESENTATIVE ACKNOWLEDGEMENT

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the individual described herein and who executed the within and foregoing instrument and signed the same at **his/her** free and voluntary act and deed for the uses and purposes therein mentioned.

Notary Public in and for the State of Washington ¹⁰
Residing at _____
My appointment expires _____

CORPORATE ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the corporation that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said corporation.

Notary Public in and for the State of Washington ¹⁵
Residing at _____
My appointment expires _____

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** signed this instrument, on oath stated that **he/she** was authorized to execute this instrument, and acknowledged it as the _____ [**TYPE OF AUTHORITY**] of _____ [**NAME OF PARTY BEING REPRESENTED**] to be the free and voluntary act and deed of such party for the uses and purposes mentioned in the instrument.

Notary Public in and for the State of Washington ¹⁵
Residing at _____
My appointment expires _____

¹⁰ Where landowner is located out of state, replace with appropriate out-of-state title and location.

[ECOLOGYS SIGNATURE BLOCK]

The Department of Ecology, hereby accepts the status as GRANTEE and HOLDER of the above Environmental Covenant.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

_____ [SIGNATURE] _____

by: _____ [PRINTED NAME] _____

Title: _____

Dated: _____

STATE ACKNOWLEDGMENT

STATE OF _____

COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the state agency that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said state agency.

Notary Public in and for the State of Washington

Residing at _____

My appointment expires _____

Exhibit A

LEGAL DESCRIPTION

(Required)

Exhibit B

PROPERTY MAP

(Required)

Exhibit C

MAP ILLUSTRATING LOCATION OF RESTRICTIONS

While a map illustrating the location of the restrictions is required, the grantor has the option of creating a separate map or including this information in Exhibit B.

More than one map may be necessary to illustrate the area subject to restrictions. For example, the area encompassing a soil cap may be different than the area where vapor or groundwater contamination is a concern.

The area subject to the restrictions, if less than the entire property, should be a contiguous area with even boundaries that follow physical features on the site so the boundary can be easily discerned in the field.

Exhibit D

SUBORDINATION AGREEMENT

KNOW ALL PERSONS, That ___ [HOLDER'S NAME] ___, the owner and holder of that certain ___ [INSTRUMENT – E.G. EASEMENT/ROW/MORTGAGE/ETC.] ___ bearing the date the _____ day of ___ [MONTH] ___, ___ [YEAR] ___, executed by ___ [NAME OF PERSON THAT GRANTED THE INTEREST BEING SUBORDINATED] ___, ___ [LEGAL STATUS OF ORIGINAL GRANTOR – E.G. LANDOWNER, CORPORATE OFFICER, ETC.] ___, and recorded in the office of the County Auditor of ___ [COUNTY] ___ County, State of Washington, on ___ [DATE] ___, under Auditor's File Number _____, does hereby agree that said Instrument shall be subordinate to the interest of the State of Washington, Department of Ecology, under the environmental (restrictive) covenant dated ___ [DATE] ___, executed by ___ [NAME OF PERSON SIGNING THIS SUBORDINATION AGREEMENT] ___, and recorded in ___ [COUNTY] ___ County, Washington under Auditor's File Number _____.

_____ [SIGNATURE] _____

by: _____ [PRINTED NAME] _____

Title: _____

Dated: _____

Insert one of the following, as applicable. See example format on next page:
 INDIVIDUAL ACKNOWLEDGMENT
 CORPORATE ACKNOWLEDGMENT
 REPRESENTATIVE ACKNOWLEDGEMENT

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the individual described herein and who executed the within and foregoing instrument and signed the same at **his/her** free and voluntary act and deed for the uses and purposes therein mentioned.

Notary Public in and for the State of Washington ¹¹
Residing at _____
My appointment expires _____

CORPORATE ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** is the _____ of the corporation that executed the within and foregoing instrument, and signed said instrument by free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that **he/she** was authorized to execute said instrument for said corporation.

Notary Public in and for the State of Washington ¹⁶
Residing at _____
My appointment expires _____

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 20__, I certify that _____ personally appeared before me, acknowledged that **he/she** signed this instrument, on oath stated that **he/she** was authorized to execute this instrument, and acknowledged it as the _____ [**TYPE OF AUTHORITY**] of _____ [**NAME OF PARTY BEING REPRESENTED**] to be the free and voluntary act and deed of such party for the uses and purposes mentioned in the instrument.

Notary Public in and for the State of Washington ¹⁶
Residing at _____
My appointment expires _____

¹¹ Where landowner is located out of state, replace with appropriate out-of-state title and location.

APPENDIX 1

EXAMPLE SITE-SPECIFIC COVENANT PROVISIONS**a. Land Use.** ¹²

Option 1 Industrial Land Use: The remedial action for the Property is based on a cleanup designed for industrial property. As such, the Property shall be used in perpetuity only for industrial uses, as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, growing of food crops, and non-industrial commercial uses.

Option 2 Commercial Land Use: The remedial action for the Property is based on a cleanup designed for commercial property. As such, the Property shall be used in perpetuity only for commercial land uses as that term is defined in the rules promulgated under Chapter 70.105D RCW. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, parks, grazing of animals, and growing of food crops.

Option 3 Park: The remedial action for the Property is based on a cleanup designed for a public park. As such, the Property shall be used in perpetuity only for a public park. Prohibited uses on the Property include but are not limited to residential uses, childcare facilities, K-12 public or private schools, grazing of animals, and growing of food crops.

Option 4 [Specify other land use limitations as appropriate.]

b. Containment of Soil/Waste Materials. ¹³

[Use where contaminated soil or solid or hazardous waste remains on the property.]

The remedial action for the Property is based on containing contaminated soil **[and waste materials]** under a cap consisting of **[Insert a description of the cap]** ¹⁴ and located as illustrated in **[Exhibit B/C]** ¹⁵. The primary purpose of this cap is to **[Insert purpose of cap]**. ¹⁶ As such, the following restrictions shall apply within the area illustrated in **[Exhibit B/C]** ¹⁷:

Option 1 [Use where a cap is required.] Any activity on the Property that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; grading; excavation; installation of underground utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

¹² Use one of these restrictions only if the underlying zoning allows the use.

¹³ Waste materials means solid wastes as defined in Chapter 70.95 RCW or hazardous wastes as defined in Chapter 70.105 RCW and the rules promulgated under these statutes.

¹⁴ Such as: an X foot thick layer of clean soil; an engineered cap consisting of X inches of clean soil overlying a X mil thick geomembrane and/or clay layer; asphalt pavement; an X square foot building, etc.]

¹⁵ Be very clear in describing or diagramming where the contamination is located relative to a legally defined benchmark such as a property line or survey monument; or use a legal description.

¹⁶ Such as: minimize the potential for contact with contaminated soil; minimize leaching of contaminants to groundwater and surface water; prevent runoff from contacting contaminated soil; minimize airborne contaminants. A cap may have multiple purposes.

¹⁷ NOTE: More than one exhibit may be necessary to illustrate the area restricted by this and other limitations.

Option 2 [Use when contamination is left behind under a building.]

The Grantor shall not alter or remove the existing structures on the Property in any manner that would expose contaminated soil [and waste materials], result in a release to the environment of contaminants, or create a new exposure pathway, without prior written approval of Ecology. Should the Grantor propose to remove all or a portion of the existing structures illustrated in [Exhibit B/C] so that access to the underlying contamination is feasible, Ecology may require treatment or removal of the underlying contaminated soil [and waste materials].

Option 3: [Use when periodic inspections of a cap/building are included.]

The Grantor covenants and agrees that it shall annually, or at another time as approved in writing by Ecology, inspect the [cap/building] and report within thirty (30) days of the inspection the condition of the [cap/building] and any changes to the [cap/building] that would impair its performance.

c. Stormwater facilities. [Use when infiltration needs to be controlled to minimize leaching from soil or waste materials, or spreading of groundwater contamination.]

To minimize the potential for mobilization of contaminants remaining in the [soil/waste materials/groundwater] on the Property, no stormwater infiltration facilities or ponds shall be constructed [on the Property] OR [within the area of the Property illustrated in Exhibit B/C]. All stormwater catch basins, conveyance systems, and other appurtenances located within this area shall be of water-tight construction.¹⁸

d. Vapor/gas controls. [Use when vapors and/or methane gas are a concern. An example of when this provision would be appropriate is if a soil cap or a groundwater conditional point of compliance are being used to address volatile contaminants remaining on the property.]

The residual contamination on the Property includes [volatile chemicals that may generate harmful vapors] and/or [biodegradable wastes/chemicals that may generate methane, a combustible gas]. As such, the following restrictions shall apply [on the Property] or [within the area of the Property illustrated in Exhibit B/C] to minimize the potential for exposure to these vapors:

1. No building or other enclosed structure shall be constructed [on the Property/within this area] unless approved by Ecology.
2. If a building or other enclosed structure is approved, it shall be constructed with a sealed foundation and a [vapor/gas] control system that is operated and maintained to prevent the migration of [vapors/gas] into the building or structure, unless an alternative approach is approved by Ecology.

e. Groundwater Use. [Use when groundwater use restrictions are required.]

The groundwater beneath [the Property] OR [within the area of the Property illustrated in Exhibit B/C] remains contaminated and shall not be extracted for any purpose other than temporary construction dewatering, investigation, monitoring or remediation. Drilling of a well for any water supply purpose is strictly prohibited. Groundwater extracted [from the

¹⁸ NOTE: Most local ordinances require on-site infiltration of runoff. If redevelopment of the Property is anticipated, the cleanup plan should reserve an area for this infiltration to occur without exacerbating leaching of residual soil contamination or enhancing movement of contaminants within the groundwater.

Property/within this area for any purpose shall be considered potentially contaminated and any discharge of this water shall be done in accordance with state and federal law.

f. Sediments. [Use for sediment cleanup sites.]¹⁹

The residual contamination on the Property includes contaminated sediments. As such, the following restrictions shall apply to minimize potential disturbance of these sediments **[on the Property] OR [within the area of the Property illustrated in Exhibit B/C]**:

Option 1 [Use where a cap is required.] Any activity **[on the Property/within this area]** that will compromise the integrity of the cap including: drilling; digging; piercing the cap with sampling device, post, stake or similar device; excavation; installation of buried utilities; removal of the cap; or, application of loads in excess of the cap load bearing capacity, is prohibited without prior written approval by Ecology. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to the cap. Unless an alternative plan has been approved by Ecology in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

Option 2 No docks or other structures shall be constructed **[on the Property/within this area]** without prior written approval of Ecology.

Option 3 No dredging shall be allowed **[on the Property/within this area]** without prior written approval of Ecology.

Option 4 No ships or boats shall be allowed to anchor or use side thrusters **[on the Property/within this area]**. A no wake zone shall be enforced and ships and boats shall be limited to a draft depth of **[XX]** feet **[on the Property/within this area]**.

Option 5 No digging for clams, setting of crab pots or fishing nets, anchoring of mooring buoys or channel markers, or similar activities that could disturb the surface of the sediment shall be allowed **[on the Property/within this area]** without prior written approval of Ecology.

g. Monitoring. [Use for long-term protection of monitoring devices.]

Several **[groundwater monitoring wells, vapor probes, etc.]** are located on the Property to monitor the performance of the remedial action. The Grantor shall maintain clear access to these devices and protect them from damage. The Grantor shall report to Ecology within forty-eight (48) hours of the discovery of any damage to any monitoring device. Unless Ecology approves of an alternative plan in writing, the Grantor shall promptly repair the damage and submit a report documenting this work to Ecology within thirty (30) days of completing the repairs.

h. Other.

[Add other property-specific use or activity restrictions and affirmative obligations that are necessary but not identified above. Examples include special remedy-specific requirements such as restrictions on structures over leachate/groundwater collection systems, or protection requirements for cut-off walls or sheet piling.]

¹⁹ NOTE: Sediment restrictions are currently evolving. Additional guidance can be found in Ecology's Sediment Cleanup Users Manual II (SCUM II), Publication No. 12-09-057, located at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1209057.html>

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