

MEMORANDUM OF AGREEMENT

BETWEEN

THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF SPILL PREVENTION AND RESPONSE

AND

THE KENAI PENINSULA BOROUGH

This Memorandum of Agreement (MOA) is made between the Alaska Department of Environmental Conservation (DEC) Division of Spill Prevention and Response (SPAR) and the Kenai Peninsula Borough (KPB) (collectively, the Parties) for the purpose of addressing hazardous substance contamination at the contaminated site known as Zipmart Store-Sterling with DEC Hazard ID 23620 and street address 38525 Swanson River Road, KPB Parcel ID No. 06349049 (Property). The legal description of the Property is:

Sterling Heights Subdivision Addition No. 2 Part 4 Amended Lot 9-
A Block 3. KPB Parcel Number 06349049

A description of the Zipmart site and activities that have been conducted can be found on the Contaminated Sites database at the following URL: <https://dec.alaska.gov/Applications/SPAR/PublicMVC/CSP/SiteReport/23620>

This MOA provides for coordination and commitments between KPB and DEC relating to KPB's intent to:

1. Remove the recently collapsed Zipmart store through condemnation, agreement, or other legal process, and;
2. Possibly acquire the Property through the KPB's annual foreclosure proceeding for nonpayment of taxes pursuant to AS 29.45;

even as DEC continues environmental cleanup and monitoring at the Property, which is the source of contamination at the larger Zipmart site.

BOTH PARTIES MUTUALLY AGREE THAT:

1. The structure located at the Property has collapsed, potentially creating a public health hazard, and KPB has not identified a property owner able to take action to address the structure hazard.
2. KPB intends to remove the collapsed structure, possibly take title to the Property, and implement activity and use limitations but is concerned about liability for the current environmental contamination.

3. DEC wishes to continue remediation and monitoring of contamination on the Property to protect human health and the environment.

NOW, THEREFORE, THE PARTIES AGREE TO THE FOLLOWING:

1. KPB has initiated a process pursuant to KPB Code and its condemnation powers to issue an order of condemnation due to the collapsed Zipmart building being a potential fire hazard, health hazard, or public nuisance. This process may result in the KPB demolishing and removing the building. The building was built in 1985 and it is currently believed that the structure does not contain any asbestos, lead paint, or other hazardous materials. If the KPB does demolish and remove the property, the KPB agrees to be responsible for all costs and requirements related to removing and disposing of the Zipmart building. The KPB will only remove the building to the concrete slab and will not excavate earthen or any contaminated materials on the Property. DEC agrees that, based on the fact that KPB will not excavate, the demolition down to the concrete slab and structure removal activities as described will not make the KPB liable for environmental contamination currently existing at the Property.
2. In future years, the KPB may, but is not required (as part of this MOA) to, obtain a Clerk's Deed to the property pursuant to AS 29.45 and the KPB's annual foreclosure proceeding for unpaid real property taxes. Under the terms of this MOA, KPB is neither committed to, nor required to, take title to the Property.
3. In the event that KPB forecloses on the Property, DEC will not consider KPB liable for environmental contamination at the site that was present prior to KPB taking ownership in accordance with Alaska Statute (AS) 46.03.822(k)¹ as long as KPB does not cause or contribute to the release or threatened release of a hazardous substance at the Property. Continued migration of the plume is documented and expected. The failure to prevent passive leaching or migration at the Property is not considered causing or contributing to the release.

¹ A unit of state or local government that acquired ownership or control of a vessel or facility through bankruptcy, foreclosure, deed in lieu of foreclosure, tax delinquency proceeding, abandonment, escheat, the exercise of eminent domain authority by purchase or condemnation, or circumstances in which the governmental unit involuntarily acquired title by virtue of its function as a sovereign is not liable as an owner or operator under this section unless the governmental unit has caused or contributed to the release or threatened release of a hazardous substance at or from the facility or vessel, in which case, the governmental unit is subject to liability under this section in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. A hazardous substance release shall be determined to have occurred as provided in this section. For purposes of this subsection, "caused or contributed to the release or threatened release of a hazardous substance"

(1) does not include the failure to prevent the passive leaching or migration at or from a facility or vessel of a hazardous substance in the air, land, or water that had first been released to the environment by a person other than the governmental unit that acquired the facility or vessel;

(2) does not include the exercise or failure to exercise regulatory or enforcement authority;

(3) after the ownership or control of the facility or vessel has been acquired by the governmental unit, includes

(A) the spilling, leaking, pumping, pouring, emptying, injecting, escaping, or dumping of a hazardous substance from barrels, tanks, containers, or other closed receptacles; or

(B) the abandonment or discarding of barrels, tanks, containers, or other closed receptacles containing a hazardous substance.

4. In the event that KPB takes title to the Property with a Clerk's Deed, in accordance with AS 46.04.300 and within 120 days, KPB will file an environmental covenant in coordination with DEC. The covenant will provide for activity and use limitations intended to mitigate risk from exposure to contamination at the site and inform potential future owners or operators of the presence of contamination.
5. In the event the KPB takes title to the Property with a Clerk's Deed, the KPB will allow Property access to DEC personnel, contractors, and others approved by DEC for the purpose of operating and maintaining remediation systems, conducting sampling of environmental media, and conducting other cleanup and related activities. When possible, DEC will provide 48 hours' notice to the KPB when DEC needs physical access in and to the Property.
6. DEC will keep KPB informed of the status of DEC's activities at the Property through updates and attachments to the Contaminated Sites database at the URL listed above for Hazard ID 23620. In addition, upon request, the DEC will make available to KPB reports and analytical information produced from investigation, site work and remedial activities.
7. This MOA may be executed in counterparts, and may be executed using verified electronic signatures in compliance with AS 09.80, each of which when so executed will constitute an original and all of which together constitute one and the same instrument.

STATE OF ALASKA

KENAI PENINSULA BOROUGH

Tiffany M. Larson, Director
Division of Spill Prevention and Response
Department of Environmental
Conservation

Peter A. Micciche, Mayor

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

Sean Kelley, Borough Attorney

ATTEST:

Michele Turner, CMC
Acting Borough Clerk