

D R A F T

FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL COVENANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Discussion Draft for Drafting Committee Meeting ~~December 6-8~~ February 28,
20023

UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

Copyright ©20023

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE TO UNIFORM ENVIRONMENTAL COVENANTS ACT

WILLIAM R. BREETZ, JR., University of Connecticut School of Law, Connecticut Urban Legal

Initiative, 35 Elizabeth Street, Room K-202, Hartford, CT 06105, *Chair*

MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132

DAVID D. BIKLEN, Connecticut Law Revision Commission, State Capitol, Room 509A, Hartford, CT 06106

STEPHEN C. CAWOOD, 163 W. Short St., Suite 300, Lexington, KY 40507-1361

BRUCE A. COGGESHALL, One Monument Sq., Portland, ME 04101

FRANK W. DAYKIN, 4745 Giles Way, Carson City, NV 89704, *Committee on Style Liaison*

THEODORE C. KRAMER, 34 Allerton Ave., Brattleboro, VT 05301-2939

DONALD E. MIELKE, Ken Caryl Starr Centre, 7472 S. Shaffer Ln., Suite 100, Littleton, CO 80127

LARRY L. RUTH, 1233 Lincoln Mall, Suite 202, Lincoln, NE 68508, *Enactment Plan Coordinator*

HIROSHI SAKAI, 902 City Financial Twr., 201 Merchant St., Honolulu, HI 96813

YVONNE L. THARPES, Legislature of the Virgin Islands, Capitol Building, P.O. Box 1690, St. Thomas, VI 00804

MICHELE L. TIMMONS, Office of the Revisor of Statutes, 700 State Office Bldg., 100 Constitution Ave., St. Paul, MN 55155

KURT A. STRASSER, University of Connecticut School of Law, 65 Elizabeth St., Hartford, CT 06105-2290, *Reporter*

EX OFFICIO

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *President*

CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

ROGER D. SCHWENKE, Carlton Fields, PA 1 Harbour Pl., 777 S. Harbour Is. Blvd., P.O. Box 3239, Tampa, FL 33602-5950

EXECUTIVE DIRECTOR

WILLIAM HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall, Columbia, MO 65211, *Executive Director*

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

UNIFORM ENVIRONMENTAL COVENANTS ACT

TABLE OF CONTENTS

Prefatory Note	1
SECTION 1. TITLE	4
SECTION 2. DEFINITIONS	4
SECTION 3. CREATION SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE	8
SECTION 4. REQUISITES OF ENVIRONMENTAL COVENANT	9
SECTION 5. VALIDITY OF ENVIRONMENTAL COVENANT	10
SECTION 6. OTHER LAW REGULATING THE USE OF REAL PROPERTY	13
SECTION 7. REQUIREMENTS FOR ENVIRONMENTAL COVENANT	14
SECTION 8. RECORDING OF ENVIRONMENTAL COVENANT	17
SECTION 9. DURATION OF ENVIRONMENTAL COVENANTS	8
SECTION 4. VALIDITY	9
SECTION 5. OTHER LAW	13
SECTION 6. AGENCY CONTROLS FOR ENVIRONMENTAL COVENANTS	14
SECTION 7. RECORDING. Alternative A	16
SECTION 7. RECORDING. Alternative B	17
SECTION 8. DURATION	18
SECTION 9. COVENANT	19
SECTION 10. MODIFICATION OR TERMINATION	19
SECTION 10. ENFORCEMENT	21
SECTION 11. COORDINATION BY OF ENVIRONMENTAL COVENANT	20
SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT	23
SECTION 12. COPIES TO LOCAL GOVERNMENT	24
SECTION 12. MARKETABLE TITLE	25
SECTION 13. NOTICE	26
SECTION 14. OFFICIAL FORM: NOTICE OF ENVIRONMENTAL COVENANT	27
SECTION 14. REGULATIONS RULES	3028
SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION	30
SECTION 17. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE	3028
SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	3029
SECTION 17. SEVERABILITY CLAUSE	29

UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

Environmental covenants are increasingly being used as part of the environmental remediation of contaminated real property. An environmental covenant typically is used when the real property is to be cleaned up to a level determined by the environmental risks posed, rather than to unrestricted use standards. Such risk based remediation is both environmentally and economically preferable in many circumstances, although it will often ~~authorize~~ allow the parties to leave residual contamination in the real property. An environmental covenant is then used to implement this risk-based cleanup by controlling the risks presented by that residual contamination.

~~There are two~~ Two principal policies ~~to be~~ are served by confirming the validity of environmental covenants. One is to ~~insure~~ ensure that land use restrictions, -mandated environmental- monitoring requirements, and a wide range of common engineering controls designed to control the environmental risk of residual contamination will be reflected on the land records and effectively enforced over time as a valid real property servitude. A variety of common law doctrines - the same doctrines ~~which~~ that led to adoption of the Uniform Conservation Easement Act - cast doubt on such enforceability and this Act addresses those matters.

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties remain vacant, dangerous and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use. This Act should significantly aid in that effort by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.

Of course, risk-based remediation must be used carefully so that ~~it actually~~ the remedial steps taken controls the risk presented by the residual contamination which remains in the real property and thereby protects human health and the environment. When risk-based remediation imposes restrictions on how the property may be used after the cleanup, requires continued monitoring of the site, or requires construction of permanent containment or other remedial structures on the site, environmental covenants are ~~a~~ a crucial tools to make these restrictions and requirements effective. Yet environmental covenants can do so only if their legal status under state property law and their practical enforceability are assured, as this proposed [Uniform Act] seeks to do.

It is important to emphasize that environmental covenants exist in a larger context of

environmental remediation regulation, and they must be considered within that larger context. Thus, environmental remediation is usually based on a statutory command, overseen by a public regulatory body, and governed by substantial regulatory controls that implement many requirements in addition to covenants. Environmental covenants are one tool used to accomplish remediation.

Environmental covenants may be used ~~as part of~~ to ensure that the property restrictions imposed in the remedial decision regulatory process to remain effective, and thus protect the public from residual contamination that remains, while also permitting re-use of the site in an economically valuable way. Environmental remediation projects may be done in a widely diverse array of contamination fact patterns and regulatory contexts. For example, the remediation may be done at a large industrial operating or waste disposal site. In such a situation, the cleanup could be done under ~~either federal CERCLA or RCRA authority. These federal statutes~~ federal Comprehensive Environmental Response Cleanup Liability Act (CERCLA) authority. CERCLA would also apply to remediation done at Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership.

In other situations, state law and regulation will be a more important source of regulatory policy. State law is given a role to play in the federal environmental policy discussed above. Beyond this, state law may be the primary source of regulatory authority for many remediation projects. These may include larger sites and will often include smaller, typically urban brownfield sites. In addition, many states authorize and supervise voluntary cleanup efforts, and these also may find environmental covenants a useful policy tool. With both state and federal environmental remediation projects, the applicable cleanup statutes and regulations will provide the basis for the restrictions and controls to be included in the resulting environmental covenants.

This Act is intended to apply to environmental use restrictions from residual contamination in any of these different situations. Once the governing regulatory system and the property owner have determined to use a risk-based approach to cleanup to protect the public from residual contamination, this Act supplies the legal infrastructure for creating and enforcing the implementing environmental covenant under state law.

Legislative Notes

This Act contemplates a situation where a risk based clean-up is agreed to by the regulatory agency and the parties responsible for the clean-up, potentially including the fee owner and the owners of other interests in the property. As a consequence of that agreement, the Act assumes those parties will each negotiate the terms of and then sign the covenant.

The Act assumes the current owners will sign the covenant. Cooperation is not always possible, however. State and federal regulatory systems make a number of parties, in addition to the current owner of a fee simple or some other interests, potentially liable for the cost of

remediation of contaminated real property. As a result, a remediation project may proceed even though an owner is no longer present or interested in the property. In those circumstances, the remediation project would be conducted pursuant to regulatory orders and could be financed either by other liable parties or by public funds. However, an environmental covenant may still be a useful tool in implementing the remediation project even in these situations.

When an owner is either unavailable or unwilling to participate in the environmental response project, it may be appropriate to condemn and take a partial interest in the real property in order to be able to record a valid servitude on it. Under the law of some states, states have the power to take that owner's interest by condemnation proceedings, paying the value of the interest taken, and then enter an environmental covenant as an owner. Where there is substantial contamination the property may have little or no market value, and the court presumably would take the cost of remediation into account in establishing the fair market value of the interest taken. See, e.g., *Northeast Ct. Economic Alliance, Inc. v. ATC Partnership*, 256 Conn. 813, 776 A.2d 1068 (2001). Although effective implementation of this Act may require that the state have a power of condemnation, this Act does not provide a substantive statutory basis for that power, and the State must therefore rely on other State law. Each State considering adoption of this Act should ensure that such a condemnation power is available for this purpose.

Similarly, while this Act provides substantive law governing creation, modification, and termination of environmental covenants, it does not include special administrative procedures for these and does not change the remedial decision making process. Rather, the Act presumes that the State's general administrative law or any specific procedure governing the environmental response project would apply to these activities.

Finally, this Act does not include a section of policy and legislative findings, although some states may choose to use such a section. If such a section is desired, the following version, taken from the Colorado Statute, C.S.R.A. §25-15-317, may be appropriate.

Policy and Legislative Findings.

The [insert name of General Assembly or other State Legislative Body] declares that it is in the public interest to ensure that environmental response projects protect human health and the environment. The [General Assembly] finds that environmental response projects may leave residual contamination at levels that have been determined to be safe for a specific use, but not all uses, and may incorporate activity and use limitations that must be maintained or protected against damage to remain effective. The [General Assembly] further finds that in such cases, it is necessary to provide an effective and enforceable means to ensure the required activity and use limitations remain effective for as long as any residual contamination poses environmental risk. The [General Assembly] therefore declares that it is in the public interest to create environmental covenants to effectuate environmental response projects which protect human health and the environment.

1 **UNIFORM ENVIRONMENTAL COVENANTS ACT**

2

3 **SECTION 1. TITLE.** This [Act] may be cited as the Uniform Environmental Covenants

4 [Act].

5

6 **SECTION 2. DEFINITIONS.** In this [Act]:

7 (1) “Activity and use limitations” means restrictions or obligations with respect to real

8 property ~~contained in an environmental covenant.~~

9 (2) "Affected local government" means a county, city, municipality, or other unit of

10 local government in which ~~any~~ real property subject to an environmental covenant is located.

11 (3) “Agency” means the state or federal governmental body that determines or approves

12 the environmental response project ~~requiring~~that includes creation of an environmental covenant.

13 The term includes the [insert name of state regulatory agency for environmental protection].

14 (4) “Environmental covenant” means a -servitude ~~that imposes specified activity and~~

15 ~~use limitations on real property described in the servitude to implement~~arising under an

16 environmental response project, ~~that imposes activity and satisfies the requirements of Section 3~~

17 ~~of this [Act]~~use limitations.

18 (5) “Environmental response project” means a plan or work performed for environmental

19 remediation of real property, conducted;

20 (A) under: ~~(a)~~ a federal or state governmental program requiring

21 environmental remediation of real property, including [insert references to state law requiring

22 environmental remediation], or

1 (B) incident to closing of a solid or hazardous waste management unit if the closing is
2 conducted with approval of an agency; or

3 (bC) under a program to do of voluntary remediation of real property, ~~by owners of~~
4 ~~real property or other persons;~~ subject to approval and supervision by a governmental
5 ~~body~~authority or by a person authorized by a governmental ~~body~~authority or by statute.

6 (6) “Holder” means a person; ~~other than an~~ agency, ~~affected local government;~~ or other
7 governmental body ~~which~~that is named as a holder in an environmental covenant. ~~The rights and~~
8 ~~duties of a holder is described in Section 4(f) of this [Act].~~

9 (7) “Interested party” means any person, other than an owner, that ~~holds~~has an interest in
10 the real property that is subject to an environmental covenant. The term includes a person ~~who~~
11 ~~holds only a right of possession~~that has an interest in the real property, ~~and a person who holds~~
12 ~~the interest solely~~ created by as security ~~for an obligation~~instrument.

13 (8) “Owner” means a person that holds the fee simple ~~interest~~ in real property that is
14 subject to an environmental covenant.

15 (9) “Person” means an individual; ~~corporation;~~ ~~business trust;~~ ~~estate;~~ ~~trust;~~
16 ~~partnership;~~ ~~limited liability company;~~ ~~association;~~ ~~joint venture;~~ ~~joint venture;~~ ~~government;~~
17 ~~governmental subdivision, agency, instrumentality or body;~~ ~~public corporation;~~ or any other
18 legal or commercial entity.

19 (10) “Prior covenant” means a record that:

20 (aA) creates activity and use limitations ~~with respect to real property;~~

21 (bB) ~~was required as part of~~ arose under an environmental response project; and

22 (cC) was agreed to before [the effective date of this [Act]].

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Security instrument" means a mortgage, deed of trust, security deed, contract for deed, land sale contract, lease, or other document that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property.

(13) "Sign" means:

(A) to execute or adopt a tangible symbol with present intent to authenticate or adopt a record, ~~to execute or adopt a tangible symbol or~~

(B) to attach ~~to~~ or logically associate ~~with the record~~ an electronic sound, symbol, or process:

~~—— (13)~~ to or with a record with the present intent to authenticate the record

(14) "State" means a ~~S~~ state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Reporter's Notes

The following are examples of subsection (1) activity and use limitations:

(1) a prohibition or limitation of one or more uses of or activities on the real property, including restrictions on residential use, drilling for or pumping groundwater, or interference with activity and use limitations or other remedies,

(2) an activity required to be conducted on the real property, including monitoring, reporting, or operating procedures and maintenance for physical controls or devices,

(3) any right of access necessary to implement the activity and use limitations, and

(4) any physical structure or device required to be placed on the real property.

The governmental body with responsibility for the environmental response project in

question is the ~~authorized~~ agency under this Act. This agency will supply the public supervision necessary to protect human health and the environment in creating and modifying the environmental covenant. The agency, for purposes of this Act, may be either a federal government entity or the appropriate state regulatory agency for environmental protection.

Subsection (4) states that an environmental covenant is created to implement an environmental response project. An environmental response project may determine, in some circumstances, to leave some residual contamination on the real property. This may be done because complete cleanup is technologically impossible, or because it is either ecologically or economically undesirable. In this situation, the environmental response project may use activity and use limitations to control residual risk which results from contamination remaining in real property. An environmental covenant is then created to ensure that the activity and use limitations are both legally and practically enforceable.

“Environmental response projects” covered by subsection (5) may be undertaken pursuant to authorization by one of several different statutes. Subsection (5)(a) specifically covers remediation projects required under state law. However, the subsection is written broadly to also encompass both current federal law, future amendments to both state and federal law, as well as new environmental protection regimes should they be developed. Without limiting this breadth and generality, the Act intends to reach environmental response projects undertaken pursuant to any of the following specific federal statutes:

(1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976", 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

(2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976", 42 U.S.C. sec. 6972 and 6973, as amended;

(3) ~~The federal~~ "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", 42 U.S.C. sec. 9601 to 9647, as amended;

(4) ~~The federal~~ "Uranium Mill Tailings Radiation Control Act of 1978", 42 U.S.C. sec. 7901 et seq., as amended;

;

(5) “Toxic Substances Control Act”, 15 U.S.C. 2601 to 2692, as amended;

(6) “Safe Drinking Water Act”, 42 U.S.C. 300f to 300j-26, as amended;

(7) “Atomic Energy Act”, 42 U.S.C. 2011 et. sec., as amended.

Subsection (5)(~~b~~c) extends the Act’s coverage to voluntary remediation projects that are undertaken with approval and supervision by a governmental body. Environmental covenants that are part of voluntary remediation projects may serve both the goal of environmental protection and the goal of facilitating reuse of the real property. However, supervision of these projects by a governmental body or other authorized party is essential to insure that the project serves these goals ~~are served~~. This Act is intended to apply only to environmental covenants that are part of such publicly supervised remediation projects.

1 To protect against possible future liability for further remediation, an owner may wish to
2 provide for remediation of the real property beyond the requirements of minimum applicable
3 regulatory standards, to protect against possible future liability for further remediation. Such
4 provision can be part of the environmental response project if the requirements of governmental
5 approval and supervision are satisfied.
6

7 Some states authorize properly certified private parties to supervise remediation to pre-
8 existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these
9 are “licensed site professionals”. (Massachusetts: MGL ch. 21A §19; 310 CMR 40.1071;
10 Connecticut: CGS §§22a-133o, 22a-133y.) Supervision and certification by statutorily-
11 authorized parties accomplishes the same public function as supervision and certification by the
12 governmental entity. Thus, these environmental response projects are also covered by this
13 definition.
14

15 Under subsection (5)(b), also includes within environmental response projects may include
16 specific agreements between the owner and the agency for remediation that goes beyond
17 prevailing requirements. Because the owner may have residual liability for the site, even after
18 remediation and transfer to a third party for redevelopment, the owner may require further
19 restrictions as a condition of creating the environmental covenant and eventual reuse of the real
20 property. The agency’s approval and supervision will be sufficient to ensure that any further
21 restriction is in the public interest.
22

23 The definition of “holder” is in Subsection (6). As the practice of using environmental
24 covenants continues to grow, new entities may emerge to serve as holders, and one purpose of
25 the is Act is does not intend to avoid limiting limit this process. A holder may be the agency, or a
26 governmental body, or any non-governmental person under the broad definition of this Act
27 although the agency and other governmental bodies identified in an environmental covenant
28 may also enforce the covenant in accordance with its terms pursuant to that governmental body’s
29 regulatory authority. The identity of an individual holder must be approved by the agency and
30 the owner as part of the process of creating an environmental covenant, as specified in Section 3
31 of this Act. Section 4(f)4 of this Act. A holder is authorized to enforce the covenant under
32 Section 11 and this section also contains an additional provision concerning whether a holder’s
33 power to enforce the covenant is an interest in real property. A holder may be given other rights
34 or obligations in the environmental covenant.
35

36 — Section 9’s Subsection (9)’s definition of interested party reaches all owners of less than a
37 fee simple interest in the real estate. While such parties are frequently described as “holders” of
38 such an interest, that terminology is not used here to minimize the chance for confusion with the
39 holder as defined in this act. The definition of interested party reaches a person who holdhas an
40 interest solely as security for an obligation so that such person’s consent will be required for
41 creation of an environmental covenant under Section 34 and modification under Section 910 if its
42 interest is affected by the covenant or modification. This Act does not create the interest held by
43 any interested party and thus should not effect the liability of any interested party under any other

1 law.

2
3 Subsection (12) defines security instrument broadly. The definition is taken from the
4 Uniform Non-Judicial Foreclosures Act.
5
6
7

8 ~~Text Moved Here: 6~~

9 **SECTION ~~17~~3. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.**

10 Unless displaced by the particular provisions of this [Act], the principles of law and equity,
11 including the law of real property and environmental and administrative law, supplement the
12 provisions of this [Act].

13 ~~End Of Moved Text~~
14
15

16 **SECTION ~~34~~4. ~~CREATION~~REQUISITES OF ENVIRONMENTAL COVENANTS.**

17 (a) ~~To be effective, a~~ An environmental covenant must:

18 (1) contain a legally sufficient description of the real property subject to the
19 covenant;

20 (2) describe the activity and use limitations on the real property, including any rights
21 of access or other rights granted ~~to a person~~or retained in connection with enforcement of the
22 covenant; and

23 (3) ~~be signed by:~~

24 ~~_____ (A) the agency;~~

25 ~~_____ (B) a holder if other than the agency; and~~

26 ~~_____ (C) each owner and interested party whose interest in the real property will be~~

subordinated to the covenant.

— (b) ~~The~~ be signed by the agency, each owner, and the holder.

(b) As a condition to signing an environmental covenant, the agency may require an owner ~~of real property and~~ or any interested party to ~~obtain written subordination of~~ prior subordinate its interests in the real property subject to the covenant. The subordination may be contained in the environmental covenant or in a separate record or, in the case of an environmental covenant as a condition to signing the covenant, covering real property in a common interest community, in a record signed by the president or other authorized officer of the executive board of the unit owner's association. An agreement by a lender, tenant, or other interested party to subordinate its interest to an environmental covenant does not impose liability on the person with respect to the covenant.

Text Moved Here: 2

Reporter's Notes

End Of Moved Text

Reporter's Notes

This Act does not provide the standards for environmental remediation nor the specific activity and use limitations to be used at a particular site. Those will be provided by other state and federal law governing mandatory and voluntary cleanups. Those standards will then be incorporated into the environmental response project, which, in turn, calls for activity and use restrictions that can be implemented through creation of an environmental covenant. This section addresses creation of the environmental covenants.

An environmental covenant can be created only by agreement between the agency and the owner ~~or an interested party which owns an interest which includes the right to create the covenant.~~ If there is a holder other than the agency, both the agency and the owner must approve ~~the identity of~~ the holder, and the holder must agree to the terms of the covenant. The agency may refuse to agree to an environmental covenant if it does not effectively implement the activity and use limitations specified in the environmental response project.

1 Where no owner is available and willing to participate in the environmental response project,
2 it may be appropriate for the agency to condemn and take an interest sufficient to record a valid
3 servitude on the property where it has the power to do so.
4

5 This Act recognizes that there may be parties which own different interests in real property,
6 other than the fee simple interest, and these are defined as “interested parties” under Section 2 (9)
7 of this Act. Examples include an interest in mineral rights may be owned separately from
8 surface rights, long term leases, mortgages and liens. ~~Subsection (a)(3)(C) requires that the~~
9 ~~interested party which owns such an interest to be affected by the environmental covenant must~~
10 ~~agree to the covenant.~~
11

12 — Subsection (b) is concerned with prior interests in the real property. If a prior interest is
13 not subordinated to the environmental covenant, and then is foreclosed at some later time, under
14 traditional real property law, that foreclosure would extinguish or limit an environmental
15 covenant. Since such an outcome is antithetical to the policies underlying this Act, the Act
16 contemplates that the agency may, before agreeing to the covenant, require subordination of these
17 interests. At the time of creation of the environmental covenant, the agency must determine
18 whether the prior interest presents a realistic threat to the covenant’s ability to accomplish its
19 purpose to protect the environment protection and human health.
20

21 22 ~~SECTION 4. VALIDITY.~~

23 ~~(a) By subordinating its interest, an owner or interested party does not change its liability~~
24 ~~with respect to the property subject to the environmental covenant. Any such liability of a~~
25 ~~subordinating party would arise by operation of other law and not under this Act.~~
26

27 SECTION 5. VALIDITY OF ENVIRONMENTAL COVENANT.

28 (a) An environmental covenant runs with the land and binds the parties ~~to the covenant~~
29 and their successors and assigns.

30 (b) An environmental covenant that is otherwise valid is valid and enforceable even if:

- 31 (1) it is not appurtenant to an interest in real property;
32 (2) it can be or has been assigned to a person other than the original holder;
33 (3) it is not of a character that has been recognized traditionally at common law;
34 (4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened real property or upon the holder;

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

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

~~(c) An environmental covenant is not invalid or unenforceable because~~ (8) it is subject to similar impediments to enforcement of that interest under the laws of this state; or
(9) it is identified as an easement, covenant, servitude, deed restriction, or other interest.

~~(d)~~ A prior covenant is not invalid or unenforceable by reason of any of the ~~common law~~ limitations on enforcement of interests described in subsection (b) ~~or because of its identification as an easement, covenant, servitude, deed restriction or other instrument.~~ This [Act] does not apply in any other respect to a prior covenant.

~~(e)~~ This [Act] does not invalidate any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this State.

~~(f) A holder of an environmental covenant may enforce the covenant in accordance with its terms and may have other rights expressly identified in the covenant. The holder's right to enforce the covenant is not an interest in real property. This [Act] does not govern whether other rights held by a holder identified in the covenant are interests in real property.~~

Reporter's Notes

-Subject to the other provisions of this Act, environmental covenants are intended to be perpetual, as provided in subsection (a),. ~~Thus, c~~Covenants may be limited, as provided in Section ~~8~~9, or modified or terminanted under Section ~~9~~10.

Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation

1 Easement Act. One of the Environmental Covenant Act's basic goals is to remove common law
2 defenses that could impede the use of environmental covenants. This section addresses that goal
3 by comprehensively identifying these defenses and negating their applicability to environmental
4 covenants.

5
6 This Act's policy supports the enforceability of environmental covenants by precluding
7 applicability of doctrines, including older common law doctrines ~~limiting such~~ that would limit
8 enforcement. That policy is broadly consistent with the Restatement of the Law Third of
9 Property (Servitudes), including §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal
10 privity), 2.5 (benefitted or burdened estates), 2.6 (benefits in gross and third party benefits), 3.2
11 (touch and concern doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on
12 alienation). .

13
14 Subsection (b)(1) provides that an environmental covenant, the benefit of which is held in
15 gross, may be enforced against the grantor or his successors or assigns. By stating that the
16 covenant need not be appurtenant to an interest in real property, it eliminates the requirement in
17 force in some states that the holder of an easement must own an interest in real property (the
18 "dominant estate") benefitted by the easement.

19
20 Subsection (b)(2) also clarifies common existing law by providing that a covenant may be
21 enforced by an assignee of the holder. Section 910(e) of this Act specifies that assignment to a
22 new holder will be treated as a modification and Section 910 governs modification of
23 environmental covenants.

24
25 Subsection (b)(3) addresses the problem posed by the common existing law's recognition of
26 servitudes that served only a limited number of purposes and ~~its~~ that law's reluctance to approve
27 so-called "novel incidents". This restrictive view might defeat enforcement of covenants serving
28 the environmental protection ends enumerated in this Act. Accordingly, subsection (b)(3)
29 establishes that environmental covenants are not unenforceable solely because they do not serve
30 purposes or fall within the categories of easements traditionally recognized at common law or
31 other applicable law.

32
33 Subsection (b)(4) deals with a variant of the foregoing problem. ~~The common~~ Some
34 applicable law recognized ~~ed~~ only a limited number of "negative easements" – those preventing the
35 owner of the burdened real property from performing acts on his real property that he would be
36 privileged to perform absent the easement. Because a far wider range of negative burdens ~~than~~
37 ~~those recognized at common law~~ might be imposed by environmental covenants, subsection
38 (b)(4) modifies the common existing law by eliminating the defense that an environmental
39 covenant imposes a "novel" negative burden.

40
41 Subsection (b)(5) addresses the opposite problem – the potential unenforceability at
42 common under existing law of an easement that imposes affirmative obligations upon either the
43 owner of the burdened real property or upon the holder. ~~N~~ Under some existing law, neither of

1 those interests was viewed ~~by the common law~~ as a true easement at all. The first, in fact, was
2 labeled a “spurious” easement because it obligated an owner of the burdened real property to
3 perform affirmative acts. (The spurious easement was distinguished from an affirmative
4 easement, illustrated by a right of way, which empowered the easement’s holder to perform acts
5 on the burdened real property that the holder would not have been privileged to perform absent
6 the easement.)
7

8 Achievement of environmental protection goals may require that affirmative obligations be
9 imposed on the burdened real property owner or on the covenant holder or both. For example,
10 the grantor of an environmental covenant may agree to use restrictions and may also agree to
11 undertake affirmative monitoring or maintenance obligations. In addition, the covenant might
12 impose specific engineering or monitoring obligations on the holder, particularly a charitable
13 corporation or trust holder. In either case, the environmental covenant would impose affirmative
14 obligations. Subsection (b)(5) establishes that neither would be unenforceable solely because it
15 is affirmative in nature.
16

17 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract
18 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
19 of covenants and equitable servitudes.
20

21 Subsection (~~d~~c) has further provisions for covenants created prior to the date of this Act. It
22 specifies that the ~~common law~~ defenses covered in subsection (b) will not make prior covenants
23 unenforceable, ~~and that the identification of a prior covenant with one name or another will not~~
24 ~~make it unenforceable.~~ Beyond negating these specific defenses, this Act does not apply to prior
25 covenants. If the parties to a prior covenant wish to have the other benefits of this Act for that
26 covenant, they will have to re-execute the covenant in a manner which satisfies the requirements
27 of this Act.
28

29 Section (~~e~~d) disavows the intent to invalidate any interest created either before or after the
30 Act which does not comply with the Act but which is otherwise valid under the state’s law.
31

32 ~~Text Was Moved From Here. 1~~
33
34
35

SECTION 56. OTHER LAW REGULATING USE OF REAL PROPERTY.

(a) ~~Neither~~ This [Act] ~~nor~~ does not, and an environmental covenant created pursuant to this [Act] may not, ~~authorizes~~ a use of real property that is otherwise prohibited by zoning ~~or other law.~~

(b), by law other than this [Act] regulating use of real property, or by a recorded covenant, condition or restriction that has priority over the environmental covenant, except as required by law other than this [Act].

(b) Activity and use limitations in an environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or law other than this [Act]. An activity and use limitation that is valid when it is created remains valid for the duration of the environmental covenant notwithstanding changes in zoning or law other than this [Act] regulating use of real property.

Reporter's Notes

Subsection (a) clarifies that this Act does not displace other restrictions on land use, including zoning law. Restrictions under that law apply unchanged to real property covered by an environmental covenant. Where other law, including either a state or federal environmental response project, requires structures or activities in order to perform the environmental remediation, the status of those requirements is determined by that other law and not by this Act.

Where the environmental covenant's activity and use limitations prohibit or restrict uses of real property, those prohibitions are necessary to protect human health and the environment. Thus, pursuant to subsection (b), the prohibitions or restrictions in an environmental covenant will apply even if other real property law, including local zoning, would authorize the use. This section provides needed clarity where the environmental covenant is implementing an environmental response project done under state law. Where the environmental covenant is implementing an environmental response project under federal CERLCA law, the federal law authorizing the environmental response project preempts a conflicting city ordinance. U.S. v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996).

1
2 **SECTION 67. ~~AGENCY CONTROLS~~REQUIREMENTS FOR ENVIRONMENTAL** |
3 **COVENANTS.**

4 ~~—(a) The agency may require any party to a proposed environmental covenant to:~~ |

5 ~~—(1) provide to the agency information regarding title to real property that will be~~
6 ~~subject to the covenant, as well as information regarding the interested parties and the interests~~
7 ~~they own;~~

8 ~~—(2) provide to the agency information regarding abutting real property and any other~~
9 ~~real property likely to be affected by the contamination remaining on the real property, and~~

10 ~~—(3) provide notice of the proposed covenant in a form and to persons satisfactory to~~
11 ~~the agency.~~

12 ~~—(b) An environmental covenant may require the owner, any interested party, and their~~
13 ~~successors and assigns, to notify promptly the agency, the holder, and the [insert name of state~~
14 ~~regulatory agency for environmental protection] if it is not the agency, of:~~

15 ~~—(1) an application to a local government for a building permit or authorization for a~~
16 ~~change in real property use; and~~

17 ~~—(2) a proposal to conduct new excavation, trenching, installation of wells, use of~~
18 ~~ground water, or to undertake other activity which the agency specifies.~~

19 ~~—(c) In addition to other rights described in~~ Unless waived or modified by the agency in a |
20 particular case, after an environmental covenant ~~or otherwise granted by law, the agency, the~~ |
21 ~~[insert name of state regulatory agency for environmental protection] if it is not the agency, and a~~
22 ~~holder may enter real property subject to the covenant at reasonable times and with reasonable~~

advance notice for the purpose of determining compliance with the terms of the covenant.

~~(d) The agency may require each party to an~~ is signed, the owner or other person
designated by the agency shall give notice of the environmental covenant ~~to incorporate the terms~~
~~of the covenant into any lease, license, or other agreement signed by that party which grants a~~
~~right with respect to~~ promptly to the following persons:

(1) all interested parties in the real property subject to the covenant. ~~The incorporation~~
~~may be in full or by reference.~~

~~(e) An environmental covenant is not invalid or otherwise affected merely because a~~
~~person fails to comply with any of the requirements of this section or with the requirements of a~~
~~regulation implementing this section.~~

Text Was Moved From Here: 2

~~Subsection (a) authorizes the agency to require any party to an environmental covenant to~~
~~furnish the agency with title information as well as the names and addresses of the holders of all~~
~~interests of record. It also authorizes the agency to require information on abutting or other~~
~~affected property. The subsection also authorizes the agency to require the owner to give notice~~
~~of the proposal to create an environmental covenant to all parties it specifies. While this~~
~~specification will be within the agency's discretion, notice to at least the following will normally~~
~~be appropriate:~~

~~1. All~~ (2) all persons in possession of the real property subject to the covenant;

(3) all persons holding an interest of record in ~~the~~ abutting real property:

~~Text Was Moved From Here. 3~~

~~3. All persons in possession of the real property.~~

~~4. All persons holding an interest of record in abutting real property and;~~

(4) all persons holding an interest of record in other real property likely to be affected by contamination remaining on the real property subject to the covenant

~~5. The [insert name of state regulatory agency for environmental protection] if it is not the agency.~~

~~6. Any, as determined by the agency;~~

(5) any affected local government;

~~—; and~~

(6) all persons liable for environmental remediation of the real property subject to the covenant as determined by the agency.

(b) Unless waived or modified by the agency in a particular case, each environmental covenant must require:

(1) a transferee to give notice to the agency, the holder, and the [insert name of state regulatory agency for environmental protection] of a transfer of any interest in the real property subject to the environmental covenant;

(2) the owner of real property subject to an environmental covenant, or another person identified in the covenant, to submit written reports at specified periods to the agency, the holder and the [insert name of state regulatory agency for environmental protection] describing the

status of compliance with the covenant;

(3) rights of access to the property subject to the environmental covenant to be afforded to the agency and the [insert name of state agency for environmental protection], in addition to access authorized by law other than this [Act], and to the holder or any other persons specified in the covenant; and

(4) the owner to give notice to the agency, the holder, and the [insert name of state regulatory agency for environmental protection] of any:

(A) application to a local government for a building permit or authorization for a change in use of the real property; and

(B) proposal to conduct new excavation, trenching, installation of wells, or use of ground water, or to undertake additional activity specified in the environmental covenant.

(c) In addition to the requirements under subsection (b), each environmental covenant must contain whatever other information, restrictions, and requirements the agency determines to be necessary and appropriate.

(d) If notice is required under subsection (b)(4)(A) or (B) and the [insert name of state regulatory agency for environmental protection] determines that issuance of the building permit or approval of the new land use or other activity described in the notice will violate the covenant, the [insert name of state regulatory agency for environmental protection] shall so notify the applicant or the person proposing the use or activity.

(e) Unless waived or modified by the agency, the owner or other person designated by the agency shall provide to the agency:

(1) any information related to the title to the real property covered by the environmental

covenant specified by the agency;

(2) the name and current mailing address of interested parties in the real property covered by the environmental covenant and the nature of the interest of each; and

(3) the name and current mailing address of the other parties specified in subsection (a).

(f) An environmental covenant is not invalid or otherwise affected merely because a person fails to comply with any of the requirements of this section.

Reporter's Notes

Subsection (a) mandates notice of a proposed environmental covenant unless the agency determines otherwise.

Subsection (b) ~~authorizes the agency to require~~ mandates inclusion of a number of specific requirements in an environmental covenant unless the agency determines otherwise.

Subsection (b)(1) concerns notice of a transfer of an interest in the real property subject to an environmental covenant. This notice will facilitate enforcement of the covenant. However, not all transfers of interests in the real property will implicate enforcement of the covenant and, for those that do not, the agency need not require notification. Similarly, subsection (b) also authorizes the agency to require Subsection (b)(4) concerns a covenant's requirement of notice of an application for a building permit ~~or~~ ₂ change of use of the real property subject to an environmental covenant. ~~Here again, such a notice will facilitate enforcement of the covenant when it is required, although it may not be needed for every,~~ or for other specified activities.

Where the [insert name of state regulatory agency for environmental protection] determines that a proposed building permit ~~or land use,~~ ₂ change. In both situations, the agency may specify when notice is required.

~~— Subsection (d) authorizes the agency to require incorporation of the terms of~~ of use of the real property, or other activity notified under subsection (b)(4) would violate the environmental covenant in any instrument granting an interest in the real property. Such incorporation should be required in most substantial conveyances to ensure effective enforcement of the covenant, although it will likely not be needed in all instruments.

1 ~~— [SECTION 7. RECORDING. Alternative A.~~

2 ~~(a) An environmental covenant is effective only if the covenant, or a notice of the~~
3 ~~covenant that complies with the notice provisions specified in Section 13, is recorded in the land~~
4 ~~records for every [county] in which land subject to, subsection (c) requires that it so notify the~~
5 ~~applicant or person proposing the activity.~~

6
7 Subsection (e) authorizes the [insert name of state regulatory agency for environmental
8 protection] to require specified information as a condition to signing the environmental covenant
9 in located. A.

10
11
12 Alternative A.

13
14 [SECTION 8. RECORDING OF ENVIRONMENTAL COVENANT.]

15 (a) Except as otherwise provided in section 9(b), an environmental covenant, or any
16 modification or termination of a covenant is effective only if it, or a notice of it that complies
17 with the notice provisions specified in Section 13, is recorded in the land records for every
18 [county] in which land subject to an environmental covenant, is subject to the laws of this state
19 governing recording and priority of interests in real property. A notice of the environmental
20 covenant is located. This section shall not apply to the parties to the covenant, or, or any notice
21 of modification or termination of it, or to other persons having actual notice of the covenant, or
22 modification or termination of it.

23 an environmental covenant, that complies with Section 13 may be recorded in the land records in
24 lieu of recording the entire environmental covenant, modification, or termination.

25 (b) The [insert name of state regulatory agency for environmental protection] shall
26 [create and maintain a][maintain its currently existing] registry that contains all environmental
27 covenants, and any modification or termination of those covenants, and any recorded notices of
28 covenants. The registry may also contain any other information concerning environmental

covenants and the real property subject to them which the agency considers appropriate. The registry is a public record for purposes of [insert reference to State Freedom of Information Act].]

~~SECTION 7. RECORDING. Alternative B~~

~~An~~

Alternative B

SECTION 8. RECORDING OF ENVIRONMENTAL COVENANT.

Except as otherwise provided in section 9(b), an environmental covenant, or any modification or termination of an environmental covenant, is ~~effective only if the covenant, modification, or termination is recorded in the land records for each [county] in which land subject to the environmental covenant is located. This section does not apply to the parties to the covenant, modification or termination, or to other persons having actual notice of the covenant, modification or termination,~~ subject to the laws of this state governing recording and priority of interests in real property.]

Reporter's Notes

Section ~~7~~8 is offered in two versions. Alternative A is to be used in jurisdictions that will require creation or maintenance of ~~a~~an existing registry of environmental covenants at the [insert name of state regulatory agency for environmental protection]. This alternative authorizes either the environmental covenant or a notice of the covenant to be recorded in the land records. Alternative B is to be used in jurisdictions that do not require creation of a registry of environmental covenants. In those jurisdictions, the environmental covenant should be recorded in the land records and this Act's provisions on notice in ~~Sections 13 and 14~~Section 13 should not be used.

Reporter's Notes, Alternative A

Subsection (a) ~~requires that either a notice of~~provides that environmental covenants are subject to existing state law on recording and priority of interests in real property. Either the environmental covenant or the complete covenant must be recorded in the land records to alert all interested parties to the existence~~a notice~~ of the covenant may be recorded. While a standard form of the notice is not required, Official Form 1 is adopted with the text of this Act for use by those parties who wish to use it. Section 13 provides that use of this Form will comply with the Act's notice requirements.

Subsection (b) requires creation of a new registry, or maintenance of an existing registry of environmental covenants by the [insert name of state regulatory agency for environmental protection]. This registry may be combined with the new state registry of brownfield sites specified in the Small Business Liability Relief and Brownfields Revitalization Act §128(b)(1)(C), Pub. L. No. 107-118, ** Stat. ** (2002) (HR 2869, 107th Cong. 1st Session), although this [Uniform Environmental Covenants Act] calls for recording more extensive information.

The full environmental covenant must be recorded in the registry in the [insert name of state regulatory agency for environmental protection]. In addition, the agency may require recording of additional information about each covenant and the real property subject to it. The agency may choose to require a description of the issues presented by the residual contamination that give rise to an environmental covenant. The description will be much more accessible to non specialists, including local government and community interests, than the full covenant — This description may, at a minimum, identify the constituents of concern that have been left in the real property, their location, the potential human and environmental exposure pathways and receptors for those chemicals, and the permissible exposure limits.

-Creation or maintenance of a specialized registry should improve access to this information by the public, local governments, citizens groups, and environmental interests, as well as real property professionals.

Reporter's Notes, Alternative B

This ~~Section requires recording of the entire covenant, and any modification or termination, in the land records.]~~

— SECTION 8. DURATION section provides that environmental covenants are subject to existing state law on recording and priority of interests in real property.]

1 **SECTION 9. DURATION OF ENVIRONMENTAL COVENANT.**

2 (a) An environmental covenant is perpetual unless limited by its terms to a specific
3 duration or to the occurrence of a specific event; or terminated pursuant to Section 910.

4 (b) ~~A~~Except as otherwise provided in Section 10(e), an environmental covenant may not
5 be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien,
6 ~~adverse possession,~~or application of the doctrines of adverse possession, abandonment, waiver,
7 lack of enforcement, or any -similar ~~common law doctrine, or the exercise of eminent domain.~~law.

8 (c) An environmental covenant may not be extinguished, limited, or impaired by
9 application of [insert reference to state Marketable Title statute].

10
11 **Reporter's Notes**

12 Subsection (a) is needed to ensure that the environmental covenant's ~~protections~~restrictions
13 continue as long as needed. Subsection (b) makes environmental covenants survive later tax
14 foreclosure sales, and also survive potential common law and statutory impairments. These
15 covenants seek to protect human health and the environment as part of the environmental
16 response project, beyond reflecting the results of private bargaining between contracting private
17 parties in specific private transactions. To do so, environmental covenants must survive
18 impairments arising from these sources. However, this subsection does not restrict application of
19 other environmental and administrative law to judicial supervision of agency conduct.

20
21 Where an environmental covenant applies to real property that ~~would~~is otherwise ~~be~~ subject
22 to one of the doctrines listed in Subsection (b) situations may arise in which the protections of the
23 covenant are not needed in the particular circumstance. For example, ~~the relevant transportation~~
24 ~~authority might need to place a bridge support on real property where~~rights gained by adverse
25 possession would be limited by the environmental covenant precluded digging, and eminent
26 ~~domain would not be available to displace the environmental covenant. Similarly, adverse~~
27 ~~possession would not be available to perform its remedial function where, again for~~
28 ~~example,~~covenant's restrictions where a house had been inadvertently placed on real property
29 subject to an environmental covenant that precluded residential use. In a cases such as these,
30 modification of the covenant can be sought pursuant to Section 9 where the environmental
31 covenant's protections are not needed. Seeking such a modification will ensure that appropriate
32 consideration will be given to residual environmental risks.

1 The basic policy of this Act to ensure that environmental covenants survive impairment is
2 consistent with the broad policy articulated in the Restatement of the Law of Property (Servitudes)
3 Third, §7.9. In general, restrictions in an environmental covenant are state property law interests
4 that are not extinguishable in bankruptcy.
5
6
7

8 ~~SECTION 9. MODIFICATION OR TERMINATION.~~

9 ~~(a) An environmental covenant may be modified or terminated by consent of:~~

10 ~~(1) all the original parties to the covenant or their successors or assigns, other than an~~
11 ~~original party or a successor or assign that has waived the right to consent, except that consent is~~
12 ~~not required by a party whose interest will not be affected by the modification or termination; and~~

13 ~~(2) each current owner or interested party whose interest will be affected by the~~
14 ~~modification or termination.~~

15 ~~(b) A proposal to modify or terminate an environmental covenant must be accompanied~~
16 ~~by all information required by the agency.~~

17 ~~(c) A party that proposes to modify or terminate an environmental covenant shall give~~
18 ~~notice of the proposal and the information required under subsection (b) to all parties whose~~
19 ~~consent is required for the modification or termination and to other persons as required by the~~
20 ~~agency.~~

21 ~~(d) An environmental covenant may include provisions governing modification or~~
22 ~~termination of the covenant, but such a provision does not relieve any person of its obligations~~
23 ~~under this Act.~~

24 ~~(e) For purposes of this [Act], assignment of an environmental covenant to a new holder~~
25 ~~is a modification, except for an assignment undertaken pursuant to a government reorganization.~~

26 **Reporter's Notes**

27 ~~Where there is a change in either the current knowledge of remaining contamination or the~~
28 ~~current understanding of the environmental risks it presents, the environmental response project~~
29 ~~may be changed or new regulatory action may be taken. In either situation, modification of the~~
30 ~~environmental covenant to change its activity and use limitations or to terminate the covenant may~~
31 ~~be necessary. A substantial modification or termination will usually be pursuant to either a~~
32 ~~change in the underlying environmental response project that lead to creation of the covenant or a~~
33 ~~new regulatory action.~~

34 ~~—~~
35 ~~Subsection (b) authorizes the agency to require information to support a request for~~
36 ~~modification or termination. The agency may wish to require one or more of the following:~~

37 ~~(1) New information showing that the risks posed by the residual contamination are~~
38 ~~less or greater than originally thought;~~

39 ~~(2) Information demonstrating that the amount of residual contamination has~~
40 ~~diminished;~~

41 ~~(3) Information demonstrating that one or more activity limitations or use restrictions~~
42 ~~is no longer necessary.~~
43

1 ~~Under subsection (c) the party requesting modification or termination is required to give~~
2 ~~notice of the request to all parties whose consent is required and to other persons the agency~~
3 ~~requires. The agency may wish to consider whether the following parties have a sufficient interest~~
4 ~~in a particular proposal to make notice to them advisable:~~

- 5 ~~(1) All affected local governments;~~
6 ~~(2) The [insert name of state regulatory agency for environmental protection] if it is not~~
7 ~~the agency for this environmental response project;~~
8 ~~(3) All persons holding an interest of record in the real property;~~
9 ~~(4) All persons known to have an unrecorded interest in the real property;~~
10 ~~(5) All affected persons in possession of the real property;~~
11 ~~(6) All owners of, and all holders of other interests in, abutting real property and any~~
12 ~~other property likely to be affected by the proposed modification;~~
13 ~~(7) All persons specifically designated to have enforcement powers in the covenant;~~
14 ~~and~~
15 ~~(8) The public.~~

16
17 ~~Subsection (d) contemplates that the environmental covenant may impose additional~~
18 ~~restrictions on modification or termination beyond those required by this Act. In some~~
19 ~~circumstances the owner or another party may have contingent residual liability for further~~
20 ~~cleanup of the real property subject to the environmental covenant and may seek further~~
21 ~~restrictions in the covenant to protect against this contingent liability.~~

22
23
24
25 ~~**SECTION 10. ENFORCEMENT.**~~

26 ~~(a) This [Act] does not limit the authority of the agency,[the insert name of state~~
27 ~~regulatory agency for environmental protection,] or any other person to enforce an environmental~~
28 ~~response project under other law.~~

29 ~~(b) The following persons may maintain a civil action for injunctive or other equitable~~
30 ~~relief against a person alleged to be in violation of an environmental covenant or the reporting~~
31 ~~requirements of subsection (d) of this Section:~~

- 32 ~~(1) the agency and any other party to the covenant;~~
33 ~~(2) the [insert name of state regulatory agency for environmental protection] if it is not~~
34 ~~the agency, or another state official authorized by state law to bring an action on behalf of the~~
35 ~~[insert name of state regulatory agency for environmental protection];~~ (3) a
36 ~~current or former owner or interested party whose interest in the real property may be affected by~~
37 ~~violation of the covenant, or that may be liable under the environmental response project;~~
38 ~~(4) an affected local government;~~
39 ~~(5) a person the environmental covenant expressly grants power to enforce;~~

40 ~~[(c) In addition to the persons listed in subsection (b), any [person] [person aggrieved by~~
41 ~~an alleged breach of an environmental covenant] may maintain a civil action for injunctive or~~
42 ~~other equitable relief against a party alleged to be in violation of an environmental covenant or the~~
43 ~~reporting requirements of subsection (d) of this Section. In any such action the court may award~~

costs of litigation, including reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate. If an action is to be brought by such person, the following rules apply:

(1) The person shall notify the agency, and the [insert name of state regulatory agency for environmental protection] if it is not the agency, that it intends to institute an action 120 days before commencing an action.

(2) The agency may bring an action to enforce the covenant.

(3) If the agency does not commence an action within 60 days after the notice was sent, the [insert name of state regulatory agency for environmental protection], if it is not the agency, may bring the action within the next 60 days.

(4) If either the agency or the [insert name of state regulatory agency for environmental protection] brings an action within the periods specified in paragraphs (2) and (3), the person giving the notice is precluded from bringing its own action so long as the agency or the [insert name of state regulatory agency for environmental protection] is diligently prosecuting enforcement of the covenant.]

(d) An owner of real property subject to an environmental covenant, or another person identified in the covenant, shall submit a written report to the agency each calendar year describing the status of compliance with the covenant. This requirement does not apply to an owner of detached, owner-occupied residential property.

[(e) The agency shall inspect the real property subject to an environmental covenant as often as necessary, and at least once every five years, to ensure compliance with the covenant.]

Reporter's Notes

— Subsection (a) recognizes that in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement of an environmental covenant.

— Environmental law frequently authorizes third party enforcement of environmental statutes, regulations, and permits. Federal law authorizes citizen suits by “any person” against “any person alleged to be in violation” of any “regulation. . . requirement. . . or order” under CERCLA and RCRA remediation projects. 42 U.S.C.A. §§6972 (a) and 9659 (2001). Where the environmental covenant is part of an environmental response project undertaken pursuant to one of these statutes, it is presumably such a “requirement. . . or order” and should be enforceable by “any person.” In addition, approximately 15 states authorize some form of citizen’s suits, although the specific provisions are quite varied. Selmi & Manaster, *State Environmental Laws* §16.52 (Clark Boardman, 2002 Supp.). Where state law so authorizes, a citizen suit would be available to enforce an environmental covenant that is established pursuant to a state law authorized environmental response project. This Act can not limit existing federal law and does not limit existing state law authorizing that enforcement

— [Subsection (e) offers two alternatives for citizen suit enforcement of all environmental covenants and the reporting requirements of subsection (d), in addition to citizen’s suits authorized under existing law. Either alternative would apply to covenants established under state law in states that do not currently authorize such enforcement. Local citizen and

1 environmental interests have both the opportunity and the motivation to observe compliance with
2 use restrictions, and to some degree with activity limitations. Thus they will be well positioned to
3 seek enforcement of violations and thereby offer greater assurance of effective implementation of
4 the covenant. This section authorizes the court to award litigation costs, including attorney and
5 expert witness fees, to a substantially prevailing party authorized by this subsection to bring a suit.
6 This provision is based on analogous federal law authorizing citizen's suits. See, e.g., 42
7 U.S.C.A. §9659 (f).

8
9 — The first alternative authorizes suit by any person, mirroring the provisions of federal law
10 discussed above. The second alternative is more limited, authorizing suit by any person aggrieved
11 by the alleged breach of the environmental covenant. "Person (or party) aggrieved" is used in
12 both federal and state administrative law. The federal courts, and some state courts, apply a two
13 part test in determining who is a "person aggrieved", asking first if the person has suffered an
14 injury in fact, and second, if the person is arguably within the zone of interests sought to be
15 protected by the statute. See, e.g., *National Credit Union Administration v. First Nat'l Bank and*
16 *Trust Co.*, 522 U.S. 479 (1998). The Model State Administrative Procedure Act, §5-106(a)(5)
17 uses a three part analysis: (i) has the agency action prejudiced the person, (ii) was the agency
18 required to consider the person's interests in taking the challenged action, and (iii) will a judgment
19 in favor of the person substantially eliminate or redress the harm.

20
21 — Subsection (c) also establishes enforcement priority for such citizen suits. The agency has the
22 first opportunity. If the [insert name of state regulatory agency for environmental protection] is
23 not the agency which approved the environmental covenant, it has the second opportunity. If
24 either of these brings an action within its specified 60 day time period, that precludes a citizen suit
25 to enforce the covenant so long as the action is being diligently prosecuted. This provision is
26 based on the citizen's suit provisions common in many federal environmental regulatory statutes.]

27
28 — The five year reporting period of subsection (e) mirrors the review requirements for an
29 environmental cleanup remedy that does not provide for unrestricted use under the federal
30 superfund program

31 32 33 — **SECTION 11. COORDINATION BY LOCAL GOVERNMENT.**

34 — (a) The agency shall send a copy of an environmental covenant and any modification or
35 termination thereof to the affected local government at the time the covenant, modification or
36 termination is recorded.

37 — [(b) The agency may evaluate whether an application for a building permit or new land
38 use on real property subject to an environmental covenant is consistent with the covenant. If the
39 agency determines that issuance of the building permit or approval of the new land use will
40 violate the covenant, the agency shall so notify the affected local government. The agency's
41 determination is binding on the affected local government.]

42
43 Text Was Moved From Here: 4

1 ~~Effective implementation of environmental covenants will require cooperation between~~
2 ~~the agency and the affected local government which has jurisdiction over building permits and~~
3 ~~local land use decisions. Section 5 of this Act provides that an environmental covenant cannot~~
4 ~~authorize a land use that is prohibited by local law, and that an environmental covenant may~~
5 ~~restrict a land use that is authorized by local law. In subsection (a) this Section requires the~~
6 ~~agency to notify all affected local governments of the creation, modification or termination of an~~
7 ~~environmental covenant. Section 6 (b) authorizes an environmental covenant to require notice of~~
8 ~~applications for building permits or land use changes to be given to the agency. In this way, both~~
9 ~~the affected local government and the agency will have the information needed to coordinate their~~
10 ~~efforts and each avoid action which conflicts with action by the other.~~

11 ~~[Where the agency determines that a building permit or land use change will violate the~~
12 ~~covenant, subsection (b) provides that the agency's determination will be binding. Of course, the~~
13 ~~agency's determination remains subject to available judicial review under applicable state or~~
14 ~~federal administrative law.]~~

15 16 17 ~~SECTION 12. MARKETABLE TITLE.~~

18 ~~An environmental covenant may not be extinguished, limited, or impaired by application of~~
19 ~~[insert reference to state Marketable Title statute] if notice of the existence of the covenant is~~
20 ~~provided to interested persons by any of the following means:~~

21 ~~(1) visible evidence of the existence of the covenant located on any part of the real property~~
22 ~~subject to the covenant in the form of a sign, monument or other physical facility;~~

23 ~~(2) a map showing the location of the real property subject to the covenant that is publicly~~
24 ~~displayed in the office of the custodian of the land records of the affected local government or in~~
25 ~~the registry maintained by the [insert name of state regulatory agency for environmental~~
26 ~~protection];~~

27 ~~(3) the land recording system maintained by the custodian of the land records of the~~
28 ~~affected local government, or by the State, indexes all real property transactions on a universal~~
29 ~~parcel numbering system rather than on a system based on grantors and grantees;~~

30 ~~(4) the land recording system in which the environmental covenant is recorded, [or the~~
31 ~~registry created pursuant to Section 7(b) of this [Act]] is accessible by electronic means as of the~~
32 ~~effective date of this [Act]; or~~

33 ~~(5) [insert other means by which interested persons may secure actual knowledge of the~~
34 ~~existence of older environmental covenants.]]~~

35 **Reporter's Notes**

36 This States which do not have a Marketable Record Title Act will not need subsection (c).
37 States which do have a Marketable Record Title Act may choose to put this exception in that
38 statute rather than in this Act.

39
40 The exception to the ~~state~~ Marketable Record Title statute in subsection (c) is analogous to
41 exceptions commonly made for conservation and preservation servitudes. Restatement of the Law
42 of Property Third (Servitudes) § 7.16 (5) (1998). It is based on the public importance of ensuring
43 continued enforcement of environmental covenants to protect human health and the environment,

as well as the relatively low cost of extending title searches to the registry of environmental covenants to be kept by the [insert name of state regulatory agency for environmental protection] under Section 7(c) of this Act.

~~[In jurisdictions which index instruments in the land records by grantor and grantee names, there is concern that environmental covenants that are older than the statutory period specified in the Marketable Title Act, typically either 40 or 60 years, may be difficult to find even in the new registry, and, as a result, may be excluded from coverage under title insurance policies. Thus, five means of giving notice of the environmental covenant are specified. Where notice is given by one of these means, the Marketable Title Act will not extinguish or impair the environmental covenant. With environmental covenants created pursuant to the Act, this problem will arise only after the statutory period of the Marketable Title Act.]~~

b) of this Act.

If there is any question whether a specific environmental covenant is exempt from the requirements of the Marketable Title Act, the agency should comply with that Act by re-recording the covenant within the Marketable Title Act's specified statutory period. This will insure that the covenant is not extinguished under the Marketable Title Act.

~~§~~**SECTION 13. NOTICE.**

~~(a) To be effective, a notice~~**10. MODIFICATION OR TERMINATION OF ENVIRONMENTAL COVENANT.**

(a) An environmental covenant may be modified or terminated by consent of:

(1) the agency;

(2) unless consent was waived, the current owner and any former owner who signed the covenant; and

(3) a party that originally signed the covenant and has a contingent future liability under the environmental response project.

(b) A modification may not change a holder's rights or obligations under an environmental covenant unless the holder consents to the change.

(c) A proposal to modify or terminate an environmental covenant must be accompanied

1 by all information required by the agency.

2 (d) A party that proposes to modify or terminate an environmental covenant shall give
3 notice of the proposal and provide the information required under subsection (c) to all parties
4 whose consent is required for the modification or termination and to other persons as required by
5 the agency.

6 (e) An environmental covenant may be modified or extinguished by the exercise of
7 eminent domain or by application of the doctrine of changed circumstances only with the approval
8 of the agency after notice and opportunity for hearing.

9 (f) An environmental covenant may include an additional limitation on modification or
10 termination of the covenant if the limitation does not conflict with the requirements of this [Act].

11 (g) Except for an assignment undertaken pursuant to a government reorganization,
12 assignment of an environmental covenant must contain the following information:

13 —— (1) a legally sufficient description to a new holder is a modification.

15 Reporter's Notes

16 Where there is a change in either the current knowledge of remaining contamination or the
17 current understanding of the environmental risks it presents, the environmental response project
18 may be changed or new regulatory action may be taken. In either situation, modification of the
19 environmental covenant to change its activity and use limitations or to terminate the covenant may
20 be necessary. A substantial modification or termination will usually be pursuant to either a
21 change in the underlying environmental response project that lead to creation of the covenant or a
22 new regulatory action.

23
24 Subsection (a) specifies the parties which must consent to the modification. Subsection (a)(3)
25 reaches a party which originally signed the covenant even though it was not an owner of the real
26 property. Such parties might typically be ones which were liable for some or all of the
27 environmental remediation specified in the environmental response project. This provision is
28 intended to apply to successors in interest to the party which originally signed the covenant where

1 the successor continues to be subject to the contingent liability under the environmental response
2 project.

3
4 Subsection (c) authorizes the agency to require information to support a request for
5 modification or termination. The agency may wish to require one or more of the following:

6
7 (1) New information showing that the risks posed by the residual contamination are
8 less or greater than originally thought;

9 (2) Information demonstrating that the amount of residual contamination has
10 diminished;

11 (3) Information demonstrating that one or more activity limitations or use restrictions
12 is no longer necessary.

13
14 Under subsection (d) the party requesting modification or termination is required to give
15 notice of the request to all parties whose consent is required and to other persons the agency
16 requires. The agency may wish to consider whether the following parties have a sufficient interest
17 in a particular proposal to make notice to them advisable:

18
19 (1) All affected local governments;

20 (2) The [insert name of state regulatory agency for environmental protection] if it is
21 not the agency for this environmental response project;

22 (3) All persons holding an interest of record in the real property;

23
24 Text Moved Here: 3

25 2. (4) All persons known to have an unrecorded interest in the real property;

26 End Of Moved Text

27 (5) All affected persons in possession of the real property;

28 (6) All owners of, and all holders of other interests in, abutting real property and any
29 other property likely to be affected by the proposed modification;

30 (7) All persons specifically designated to have enforcement powers in the covenant;
31 and

32 (8) The public.

33
34 Subsection (e) provides that the agency's approval is required to modify or terminate an
35 environmental covenant by either an exercise of eminent domain or a judicial application of the
36 doctrine of changed circumstances. An exercise of eminent domain or a judicial application of the
37 doctrine of changed circumstances may result in a change of use for real estate. Requiring the
38 agency's approval for either of these to modify or terminate the covenant will ensure that the
39 agency will determine whether the covenant's activity and use limitations or other restrictions are
40 needed to protect public health and the environment. The Subsection's requirement of notice and
41 opportunity for a hearing anticipates that the process for the Agency's grant or denial of approval
42 will be in a contested administrative or judicial case.

1 Subsection (f) contemplates that the environmental covenant may impose additional
2 restrictions on modification or termination beyond those required by this Act. In some
3 circumstances the owner or another party may have contingent residual liability for further
4 cleanup of the real property subject to the environmental covenant and may seek further
5 restrictions in the covenant to protect against this contingent liability.
6
7

8 **SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.**

9 (a) Any of the following persons may maintain a civil action for injunctive or other
10 equitable relief for violations of an environmental covenant:

11 (1) the agency and any other party to the covenant;

12 (2) if it is not the agency, the [insert name of state regulatory agency for
13 environmental protection]

14 (3) a current or former owner or interested party whose interest in the real property
15 may be affected by violation of the covenant, or that may be liable under the environmental
16 response project;

17 (4) an affected local government;

18 (5) a person authorized to enforce the environmental covenant by law other than this
19 [Act]; and

20 (6) any person named as a holder in the environmental covenant; and

21 (7) any other person to which the environmental covenant expressly grants power to
22 enforce.

23 (b) This [Act] does not limit the authority of the agency, or any other person to enforce an
24 environmental response project under law other than this [Act].

25 (c) The rights of an agency or other governmental body named in an environmental

covenant to enforce the covenant are based on the agency's or governmental authority's regulatory power and are not an interest in the real property subject to an environmental covenant, unless the agency or other governmental body determine otherwise at the time of creation of the covenant or the covenant otherwise provides.

(d) The enforcement rights of a holder or other nongovernmental person to which the environmental covenant expressly grants power to enforce an environmental covenant are not an owner's interest in the real property subject to an environmental covenant. Whether other rights granted to or exercised by a holder with respect to the real property subject to an environmental covenant constitute an owner's interest in the real property is not governed by this [Act].

(e) A party is not subject to liability solely as a result of having the right to enforce an environmental covenant.

(f) The agency shall inspect the real property subject to an environmental covenant as often as necessary, and at least once every [five] years, to ensure compliance with the covenant.

Reporter's Notes

Subsection (a) specifies which persons may bring an action to enforce an environmental covenant.

Subsection (b) recognizes that in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement of an environmental covenant.

Text Moved Here: 1

Subsections (f) ~~provides that a holder's~~ and (d) specify when the right to enforce an environmental covenant is not an interest in real property. ~~This~~ These provision ~~is~~ are included for two reasons. First, some environmental enforcement agencies are not authorized to own an interest in real property and this provision will enable those agencies to ~~serve as a holder~~ have enforcement rights under the Act.

1 Second, the nature of the holder's or other person's interest in the real property may influence
2 whether its rights and duties with respect to the real property are likely to lead to potential liability
3 for future environmental remediation, should such remediation become necessary. Under
4 CERCLA an "owner" is liable for remediation costs, 42 U.S.C.A. 9607(a)(1). Unfortunately, the
5 definition of "owner" in the statute is circular and unhelpful in evaluating whether a holder is
6 potentially liable under it. 42 U.S.C.A. 9601(20).

7
8 In general, ~~a holder's~~ the right to enforce the covenant should be considered comparable to the
9 rights covered in an easement and, thus, should not lead to CERCLA liability. The two cases that
10 have considered this question have found that the parties which held the easements were not
11 CERCLA "owners". Long Beach Unified School District v. Dorothy B. Godwin California
12 Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk R.R. v. Acme Belt Recoating, 859 F.
13 Supp. 1125 (W.D.MI, 1994). In each case, the court reasoned that the circular definition of
14 owner meant that the term's most common meaning would prevail. The common law's
15 distinction between an easement holder and the property owner was then applied to find the
16 easement holder not to be an "owner" for purposes of this statute.

17
18 Where the holder or another person has more extensive rights, a careful analysis will be
19 required. The cases typically emphasize that parties who exercise the degree of control over a site
20 equivalent to the control typically exercised by an owner of the site will be held liable as an
21 "owner". Under this approach, for example, lessees have been held liable as owners when their
22 control over the site approximated that which an owner would have. See, e.g., Delaney v. Town of
23 Carmel, 55 F. Supp. 2d 237 (S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F.
24 Supp. 1317 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984
25 (D.C.S.C. 1984.)

26
27 CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the
28 case law interpreting this definition emphasizes that a party is liable as an operator if it has a high
29 degree of control over the operating decisions and day to day management at the site. A holder
30 will, in general, have only control authority over the site related to effective enforcement of the
31 environmental covenant and does not typically need more extensive day to day control. A holder
32 should be given more extensive control over the site only after careful consideration of the
33 potential CERCLA liability.

34
35 ~~End Of Moved Text~~

36 37 SECTION 12. COPIES TO LOCAL GOVERNMENT.

38 The owner or other party designated by the agency shall send a copy of an environmental
39 covenant and any modification or termination of the covenant to the affected local government

1 within [] days after the covenant, modification, or termination is signed.

2
3
4 ~~Text Moved Here: 4~~

5 **Reporter's Notes**

6 ~~End Of Moved Text~~

7
8 Effective implementation of environmental covenants will require cooperation between
9 the agency and the affected local government which has jurisdiction over building permits and
10 local land use decisions. Section 6 of this Act provides that an environmental covenant cannot
11 authorize a land use that is prohibited by local law, and that an environmental covenant may
12 restrict a land use that is authorized by local law. This Section requires the agency to notify all
13 affected local governments of the creation, modification or termination of an environmental
14 covenant.
15

16 **SECTION 13. NOTICE OF ENVIRONMENTAL COVENANT.**

17 (a) A notice of an environmental covenant, and a notice of modification or termination of
18 an environmental covenant, must contain:

19 (1) a legally sufficient description and any available street address of the real property;

20 (2) the name and address of:

21 (A) the owner of the real property;

22 (B) the agency and the holder, if other than the agency; and

23 (C) any other person identified in the covenant ~~that,~~ modification, or termination

24 which is specifically authorized to enforce the covenant;

25 (3) a statement that:

26 ~~(A)~~ (A) the covenant, modification, or termination imposes significant restrictions and
27 obligations with regard to permissible activities on and uses of the real property; ~~and~~

28 ~~(B) the restrictions and obligations [are likely to] affect all persons having an~~

1 ~~interest in the real property.~~

2 (4) a statement that the ~~following are~~ environmental covenant, modification, or
3 termination as executed is available in a registry at the [insert name and address of state regulatory
4 agency for environmental protection] , disclosing the method of any electronic access:

5 ~~_____ (A) the environmental covenant as executed; and~~

6 ~~_____ (B) any other information required by the Agency; and~~

7 (5) a statement that the ~~N~~ notice is filed pursuant to this [Act].

8 ~~_____ (b) A notice is sufficient if it is in the form of Official Form set forth in Section 14. _____~~

9 (b) A statement in substantially the following form, executed with the same formalities as a
10 deed in this state, satisfies the requirements of this Section:

11 1. This notice is filed on the land records of the [political subdivision] of [insert name of
12 jurisdiction in which the real property is located] pursuant to Sections 7 and 13 of the
13 Uniform Environmental Covenants [Act]. The [Act] has been codified in this State at [insert
14 statutory reference].

15
16 2. This notice and the covenant, modification, or termination to which it refers impose
17 significant legal restrictions and obligations with respect to the future use of and activities on
18 the property described below.

19
20 3. A legally sufficient description of the property is attached as Exhibit A to this notice. The
21 address, if available, of the property that is subject to the environmental covenant is [insert
22 address of property].

23
24 4. The owner of the real property on the date of this notice is [insert name of current legal owner
25 of the property]. The address of the owner is [insert the owner's current address as shown on
26 the tax records of the jurisdiction in which the property is located].

27
28 5. The other parties to the covenant, modification, or termination and their addresses are:

29
30 ~~Text Moved Here: 5~~

- 31
32 1. [insert name and address of the agency and [the state regulatory agency for environmental
33 protection] if it is not the agency];

2. [Insert names and addresses of all other parties to the covenant]; and

3. ~~End Of Moved Text~~

[Insert names and addresses of any parties authorized to enforce the covenant].

6. The environmental covenant, modification, or termination regarding the real property was signed by all the parties on [insert date on which the last party signed the covenant, modification, or termination]. The covenant, modification, or termination becomes effective for all purposes on the date this notice is recorded in the land records of all jurisdictions in which the property is located. This notice remains effective for all purposes until a release of the covenant is signed by the then owner of the property and by the agency and recorded.

7. The full text of the covenant, modification, or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the [insert name of state regulatory agency for environmental protection] at [insert address and room of building in which the registry is maintained]. [The covenant, modification, or termination may be found electronically at [insert web address for covenant]].

Reporter's Notes

A description of the property under subsection (a)(1) may include identification by latitude/longitude coordinates.

This section ~~and the following one~~ should be used only by states that require creation of a registry of environmental covenants pursuant to Section 7(b) of this Act. The notice specified in this Section may be recorded in the land records in lieu of recording the environmental covenant. However, such a notice should only be authorized if the registry is established and the environmental covenant is recorded there. Where there is no separate registry, ~~then~~ the environmental covenant should be recorded in the land records and this notice should not be used.]

~~[SECTION 14. OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT.~~

~~A statement in substantially the following form, executed with the same formalities as a deed~~

1 in this State, satisfies the requirements of Section 13.

2 ~~———— OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT~~

3 ~~1. This notice is filed on the land records of the [city/town/county] of [insert name of jurisdiction~~
4 ~~in which the real property is located] pursuant to Sections 7 and 13 of the Uniform~~
5 ~~Environmental Covenants [Act]. The [Act] has been codified in this State at [insert statutory~~
6 ~~reference].~~

7
8 ~~2. This notice and the covenant to which it refers impose significant legal restrictions and~~
9 ~~obligations with respect to the future use of and activities on the property described below.~~
10 ~~Those restrictions and obligations are likely to affect all persons having an interest in that~~
11 ~~property.~~

12
13 ~~3. A legally sufficient description of the property is attached as Exhibit A to this notice. The~~
14 ~~address, if available, of the property which is subject to the environmental covenant is [insert~~
15 ~~address of property].~~

16
17 ~~4. The owner of the real property on the date of this notice is [insert name of current legal owner~~
18 ~~of the Property]. The address of the owner is [insert the owner's current address as shown on~~
19 ~~the tax records of the jurisdiction in which the Property is located].~~

20
21 ~~5. The other parties to the covenant and their addresses are:~~
22

~~Text Was Moved From Here: 5~~

~~[Insert names and addresses of any third party beneficiaries].~~

~~6. The environmental covenant regarding the real property was signed by all the parties on [insert date on which the last party signed the covenant]. The covenant becomes effective for all purposes on the date this notice is recorded on the land records of all jurisdictions in which the property is located. This notice remains effective for all purposes until a release of this notice is signed by the then owner of the property and by the agency and recorded.~~

~~7. The full text of the covenant is on file and available for inspection and copying in the registry maintained for that purpose by the [insert name of state regulatory agency for environmental protection] at [insert address and room of building in which the registry is maintained]. [The covenant may be found electronically at [insert web address for Covenant]].~~

~~Dated at _____, _____ this ____ day of _____, _____.~~

~~Witness as to Owner _____ NAME OF OWNER~~

1 _____
2 _____ By _____
3 _____
4 _____
5 _____
6 _____
7 Witness as to Agency _____ NAME OF AGENCY
8 _____
9 _____
10 _____
11 _____ By _____
12 _____
13 _____
14 _____
15 _____
16 Witness as to Other Parties _____ NAME OF OTHER PARTIES
17 _____
18 _____
19 _____
20 _____ By _____
21 _____
22 _____

1

2 **ACKNOWLEDGMENTS**

3

4 ~~[INSERT STANDARD FORM OF ACKNOWLEDGMENT IN STATE]~~

5

6 ~~[ATTACH PROPERTY DESCRIPTION AS EXHIBIT A]~~

7

8

9 **SECTION 15. ~~REGULATIONS~~RULES.**

10 ——— The [director of the state regulatory agency for environmental protection] ~~shall have the~~

11 ~~power to~~may formulate, adopt, amend, and repeal ~~[rules]~~[regulations] consistent with this [Act]

12 and necessary to implement- this [Act].

13

14 **Reporter's Notes**

15 This Act authorizes adoption of rules or regulations needed to implement the Act. In some

16 states, such authority may already exist in a generic environmental law statute and this section will

17 not be needed. The Act does not address the procedural requirements for ~~this adoption~~adopting

18 regulations, nor the standards for judicial review of the administrator's exercise of discretion in

19 adopting regulations, as those will be supplied by other state administrative procedure law.

20 The provisions of state law governing management of records also apply to actions taken

21 pursuant to this Section.

22

23

24 **SECTION 165. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

25 In applying and construing this Uniform Act, consideration must be given to the need to

26 promote uniformity of the law with respect to its subject matter among States that enact it.

Text Was Moved From Here: 6

SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

— This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that Act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of that Act.

Reporter's Notes

This is a provision suggested for inclusion in uniform acts. It responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation. This proposed section was created by the Standby Committee for the Uniform Electronic Transactions Act for this purpose. The Executive Committee of the National Conference has reviewed and approved this language.

SECTION 17. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.