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FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL COVENANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR
TUCSON, ARIZONA

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UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

Environmental covenants are increasingly being used as part of the environmental remediation of contaminated real estate. An environmental covenant typically allows the real estate to be cleaned up to a level determined by the environmental risks posed, rather than to absolute standards, which is both ecologically and environmentally preferable in many circumstances. Such risk based remediation will often authorize the parties to leave some residual contamination in the real estate.

There are two principal policies to be served by confirming the validity of environmental covenants. One is to insure 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 estate servitude. A variety of common law doctrines - the same doctrines which 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 effort to return contaminated property, often located in urban areas, to the stream of commerce. The environmental and real estate 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, such covenants must be used carefully to ensure that the risk based remediation protects human health and the environment. Environmental covenants accomplish this goal by controlling the risk presented by the residual contamination which remains in the real estate. The covenants can control this risk by imposing restrictions on how the property may be used after the cleanup, by requiring continued monitoring of the site, and by requiring construction of permanent containment or other remedial structures on the site. Yet environmental covenants can perform this critical risk control function 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 in this remediation effort.

Environmental covenants may be used as part of environmental remediations 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 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. The regulatory statutes and applicable regulations will provide the restrictions and controls to be included in the resulting environmental covenants in these settings.

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 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.

This [Act] is intended to apply to environmental covenants used in any of these different situations. Once the governing regulatory system and the property owner have determined to use an environmental covenant as part of a remediation project, this [Act] supplies the legal infrastructure for creating and enforcing that 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, as well as the fee owner and the holders 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. This would not be the case in a mandatory clean-up where a person or persons were held liable for the full cost of a complete clean-up.

The [Act] assumes the current owners will participate in signing 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 other interest, liable for the cost of remediation of contaminated real estate. 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 part of the remediation project even in these situations.

When an owner which is either unavailable or unwilling to participate in the

environmental response project, it may be appropriate to condemn a partial interest in the real estate in order to be able to record a valid servitude on it. Under the law of some states, agencies 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 agency have such a power of condemnation, this [Act] does not provide a substantive statutory basis for that power, and the agency must therefore rely on other State law. Each State considering adoption of this [Act] may wish to consider the availability of condemnation power to the agency 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. 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 limitations and use restrictions 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 limitations and use restrictions 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 limitations and use restrictions” means restrictions or obligations with

8 respect to real estate contained in an environmental covenant.

9 (2) "Affected local government" means a county, city, or municipality in which all or part

10 of real estate 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 creation of an environmental covenant. The term

13 includes the department as defined in this [Act].

14 (4) “Department” means [insert name of state regulatory agency for environmental

15 protection].

16 (5) “Environmental covenant” means a servitude that imposes specified activity

17 limitations and use restrictions on real estate described in the servitude to implement an

18 environmental response project, and satisfies the requirements of Section 3 of this [Act].

19 (6) “Environmental response project” means environmental remediation of real estate,

20 conducted pursuant to:

21 (a) a governmental program requiring environmental remediation of real estate,

22 including [insert references to state law requiring environmental remediation], or

1 (b) a program to do voluntary remediation of real estate, by owners of real estate or
2 other persons, subject to approval and supervision by a governmental body or by a person
3 authorized by a governmental body or by statute.

4 (7) "Holder" means a person, agency, or other governmental body named as a holder in
5 an environmental covenant.

6 (8) "Owner" means a person that holds an interest in real estate, other than as security for
7 an obligation, which is subject to an environmental covenant.

8 (9) "Person" means an individual, corporation, business trust, estate, trust, partnership,
9 limited liability company, association, joint venture, public corporation, or any other legal or
10 commercial entity.

11 (10) "Prior covenant" means a record that:

12 (a) creates activity limitations and use restrictions with respect to real estate;

13 (b) was required as part of an environmental response project; and

14 (c) was agreed to before [the effective date of this [Act]].

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

17 (12) "Sign" means, with present intent to authenticate or adopt a record, to execute or
18 adopt a tangible symbol or to attach to or logically associate with the record an electronic sound,
19 symbol, or process.

20 (13) "State" means a State of the United States, the District of Columbia, Puerto Rico, the
21 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
22 the United States.

Reporter's Notes

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

- (a) a prohibition or limitation of one or more uses of or activities on the real estate, including restrictions on residential use, drilling for or pumping groundwater, or interference with activity and use limitations or other remedies,
- (b) an activity required to be conducted on the real estate, including monitoring, reporting, or operating procedures and maintenance for physical controls or devices,
- (c) any right of access necessary to implement the activity and use limitations, and
- (d) any physical structure or device required to be placed on the real estate.

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 department.

Subsection (5) 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 estate. 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 limitations and use restrictions to control residual risk which results from contamination remaining in real estate. 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 (6) may be undertaken pursuant to authorization by one of several different statutes. Subsection (6)(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.

Subsection (6)(b) extends the [Act]'s coverage to voluntary remediation projects that are

1 undertaken with approval and supervision by a governmental body. Environmental covenants
2 that are part of voluntary remediation projects may serve both the goal of environmental
3 protection and the goal of facilitating reuse of the real estate. However, supervision of these
4 projects by a governmental body or other authorized party is essential to insure that these goals
5 are met. This [Act] is intended to apply only to environmental covenants that are part of such
6 publicly supervised remediation projects.

7
8 An owner may wish to provide for remediation of the real estate beyond the requirements of
9 minimum applicable regulatory standards, to protect against possible future liability for further
10 remediation. Such provision can be part of the environmental response project if the
11 requirements of governmental approval and supervision are satisfied.

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

20
21 Subsection (6)(b) also includes within environmental response projects specific agreements
22 between the owner and the agency for remediation that goes beyond prevailing requirements.
23 Because the owner may have residual liability for the site, even after remediation and transfer to
24 a third party for redevelopment, the owner may require further restrictions as a condition of
25 creating the environmental covenant and eventual reuse of the real estate. The agency’s approval
26 and supervision will be sufficient to ensure that any further restriction is in the public interest.

27
28 The definition of “holder” is in Subsection (7). As the practice of using environmental
29 covenants continues to grow, new entities may emerge to serve as holders, and one purpose of
30 the [Act] is to avoid limiting this process. A holder may be the agency, a governmental body, or
31 a person under the broad definition of this [Act]. The identity of an individual holder must be
32 approved by the agency and the owner as part of the process of creating an environmental
33 covenant, as specified in Section 3 of this [Act]. Section 4(f) contains an additional provision
34 concerning whether a holder’s power to enforce the covenant is an interest in real estate.

35 36 **SECTION 3. CREATION OF ENVIRONMENTAL COVENANTS.**

37 (a) To be effective, an environmental covenant must:

38 (1) contain a legally sufficient description of the real estate subject to the covenant;

39 (2) describe the activity limitations and use restrictions on the real estate, including

1 any rights of access or other rights granted to a person in connection with enforcement of the
2 covenant; and

3 (3) be signed by:

4 (A) the agency;

5 (B) a holder if other than the agency; and

6 (C) each owner whose interest in the real estate will be subordinated to the
7 covenant.

8 (b) The agency may require an owner of real estate to obtain written subordination of
9 prior interests in the real estate subject to an environmental covenant as a condition to signing the
10 covenant.

11 **Reporter's Notes**

12 This [Act] does not provide the standards for environmental remediation nor the specific
13 activity and use limitations to be used at a particular site. Those will be provided by other state
14 and federal law governing mandatory and voluntary cleanups. Those standards will then be
15 incorporated into the environmental response project, which, in turn, calls for creation of an
16 environmental covenant. This section addresses creation of the environmental covenants.
17

18 An environmental covenant can be created only by agreement between the owner and the
19 agency. If there is a holder other than the agency, both the agency and the owner must approve
20 the identity of the holder, and the holder must agree to the terms of the covenant. The agency
21 may also refuse to agree to an environmental covenant if it does not effectively implement the
22 activity limitations and use restrictions specified in the environmental response project.
23

24 This [Act] recognizes that there may be different owners of different interests in real estate.
25 For example, mineral rights may be owned separately from surface rights. Subsection (a)(3)(iii)
26 requires that the owner of any interest to be affected by the environmental covenant must agree to
27 the covenant.
28

29 Subsection (b) is concerned with prior interests in the real estate. If a prior interest is not
30 subordinated to the environmental covenant, and was foreclosed at some later time, then under
31 traditional real estate law, that foreclosure would serve to extinguish or limit an environmental
32 covenant. Since such an outcome is antithetical to the policies underlying this [Act], the [Act]

1 contemplates that the agency may, before agreeing to the covenant, require subordination of these
2 interests. At the time of creation of the environmental covenant, the agency must determine
3 whether the prior interest presents a realistic threat to the covenant's ability to accomplish its
4 purpose to protect the environment protection and human health.
5
6

7 **SECTION 4. VALIDITY.**

8 (a) An environmental covenant runs with the land and binds the parties to the covenant
9 and their successors and assigns.

10 (b) An environmental covenant is valid and enforceable even if:

11 (1) it is not appurtenant to an interest in real estate;

12 (2) it can be or has been assigned to a person other than the original holder;

13 (3) it is not of a character that has been recognized traditionally at common law;

14 (4) it imposes a negative burden;

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

17 (6) the benefit or burden does not touch or concern real estate; or

18 (7) there is no privity of estate or of contract.

19 (c) An environmental covenant is not invalid or unenforceable because it is identified as
20 an easement, covenant, servitude, deed restriction, or other instrument.

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

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

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

7 **Reporter's Notes**

8 Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation
9 Easement Act. One of the Environmental Covenant Act's basic goals is to remove common law
10 defenses that could impede the use of environmental covenants. This section addresses that goal
11 by comprehensively identifying these defenses and negating their applicability to environmental
12 covenants.

13
14 This [Act]'s policy supports the enforceability of environmental covenants by precluding
15 applicability of older common law doctrines limiting such enforcement. That policy is broadly
16 consistent with the Restatement of the Law Third of Property (Servitudes), including §2.6 and
17 chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5 (benefitted or burdened
18 estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and concern doctrine), 3.3
19 (rule against perpetuities), and 3.5 (indirect restraints on alienation). .

20
21 Subsection (b)(1) provides that an environmental covenant, the benefit of which is held in
22 gross, may be enforced against the grantor or his successors or assigns. By stating that the
23 covenant need not be appurtenant to an interest in real estate, it eliminates the requirement in
24 force in some states that the holder of an easement must own an interest in real estate (the
25 "dominant estate") benefitted by the easement.

26
27 Subsection (b)(2) also clarifies common law by providing that a covenant may be enforced by
28 an assignee of the holder. Section 9(e) of this [Act] specifies that assignment to a new holder
29 will be treated as a modification and Section 9 governs modification of environmental covenants.

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

1 Subsection (b)(4) deals with a variant of the foregoing problem. The common law
2 recognized only a limited number of “negative easements” – those preventing the owner of the
3 burdened real estate from performing acts on his real estate that he would be privileged to
4 perform absent the easement. Because a far wider range of negative burdens than those
5 recognized at common law might be imposed by environmental covenants, subsection (b)(4)
6 modifies the common law by eliminating the defense that an environmental covenant imposes a
7 “novel” negative burden.
8

9 Subsection (b)(5) addresses the opposite problem – the potential unenforceability at common
10 law of an easement that imposes affirmative obligations upon either the owner of the burdened
11 real estate or upon the holder. Neither of those interests was viewed by the common law as a true
12 easement at all. The first, in fact, was labeled a “spurious” easement because it obligated an
13 owner of the burdened real estate to perform affirmative acts. (The spurious easement was
14 distinguished from an affirmative easement, illustrated by a right of way, which empowered the
15 easement’s holder to perform acts on the burdened real estate that the holder would not have
16 been privileged to perform absent the easement.)
17

18 Achievement of environmental protection goals may require that affirmative obligations be
19 imposed on the burdened real estate owner or on the covenant holder or both. For example, the
20 grantor of an environmental covenant may agree to use restrictions and may also agree to
21 undertake affirmative monitoring or maintenance obligations. In addition, the covenant might
22 impose specific engineering or monitoring obligations on the holder, particularly a charitable
23 corporation or trust holder. In either case, the environmental covenant would impose affirmative
24 obligations. Subsection (b)(5) establishes that neither would be unenforceable solely because it
25 is affirmative in nature.
26

27 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract
28 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
29 of covenants and equitable servitudes.
30

31 Subsection (d) has further provisions for covenants created prior to the date of this [Act]. It
32 specifies that the common law defenses covered in subsection (b) will not make prior covenants
33 unenforceable, and that the identification of a prior covenant with one name or another will not
34 make it unenforceable. Beyond these specific defenses, this [Act] does not apply to prior
35 covenants. If the parties to a prior covenant wish to have the benefits of this [Act] for that
36 covenant, they will have to re-execute the covenant in a manner which satisfies the requirements
37 of this [Act].
38

39 Section (e) disavows the intent to invalidate any interest created either before or after the
40 [Act] which does not comply with the [Act] but which is otherwise valid under the state’s law.
41

42 Subsection (f) provides that a holder’s right to enforce an environmental covenant is not an
43 interest in real estate. Some environmental enforcement agencies are not authorized to own an

1 interest in real estate, and this provision will enable those agencies to serve as a holder under the
2 act.

3
4
5 **SECTION 5. OTHER LAW REGULATING USE OF REAL ESTATE.**

6 (a) Neither this [Act] nor an environmental covenant created pursuant to this [Act]
7 authorizes a use of real estate that is otherwise prohibited by zoning or other law.

8 (b) Activity limitations and use restrictions in an environmental covenant may restrict real
9 estate uses that are authorized by zoning or other law.

10 **Reporter's Notes**

11 Subsection (a) clarifies that this [Act] does not displace other restrictions on land use,
12 including zoning law. Restrictions under that law apply unchanged to real estate covered by an
13 environmental covenant.

14
15 Where the environmental covenant's activity limitations and use restrictions prohibit or
16 restrict uses on real estate, those prohibitions are necessary to protect human health and the
17 environment. Thus, pursuant to subsection (b), the prohibitions or restrictions in an
18 environmental covenant will apply even if other law on real estate use, including local zoning,
19 would authorize the use.

20
21
22 **SECTION 6. REGULATIONS.**

23 (a) The agency may require any party to a proposed environmental covenant to:

24 (1) provide to the agency information regarding the title to real estate that will be
25 subject to the covenant and any adjoining real estate, and

26 (2) provide notice of the proposed covenant in a form and to persons satisfactory to
27 the agency.

28 (b) An environmental covenant may require an owner or any person having a right of
29 possession of any real estate subject to the covenant, and their successors and assigns, to notify
30 promptly the agency, the holder, and the department if it is not the agency of:

1 (1) an application to a local government for a building permit or authorization for a
2 change in real estate use; and

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

5 (c) In addition to other rights described in an environmental covenant or otherwise
6 granted by law, the agency and a holder may enter real estate subject to the covenant at
7 reasonable times and with reasonable advance notice for the purpose of determining compliance
8 with the terms of the covenant.

9 (d) The agency may require each party to an environmental covenant to incorporate the
10 terms of the covenant into any lease, license, or other agreement signed by that party which
11 grants a right with respect to the real estate subject to the covenant. The incorporation may be in
12 full or by reference.

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

16 **Reporter's Notes**

17 Subsection (a) requires an owner creating an environmental covenant to furnish the
18 agency with title information as well as the names and addresses of the holders of all interest of
19 record. The subsection also authorizes the agency to require the owner to give notice of the
20 proposal to create an environmental covenant to all parties it specifies. While this specification
21 will be within the agency's discretion, notice to at least the following will normally be
22 appropriate:

- 23 1. All persons holding an interest of record in the real estate.
- 24 2. All persons known to have an unrecorded interest in the real estate.
- 25 3. All persons in possession of the real estate.
- 26 4. All persons holding an interest of record in adjoining real estate.
- 27 5. The department if it is not the agency.
- 28 6. Any affected local government.

1 Subsection (b) authorizes the agency to require notice of a transfer of an interest in the
2 real estate subject to an environmental covenant. This notice will facilitate enforcement of the
3 covenant. However, not all transfers of interests in the real estate will implicate enforcement of
4 the covenant and, for those that do not, the agency need not require notification. Similarly,
5 subsection (b) also authorizes the agency to require notice of an application for a building permit
6 or change of use of the real estate subject to an environmental covenant. Here again, such a
7 notice will facilitate enforcement of the covenant when it is required, although it may not be
8 needed for every building permit or land use change. In both situations, the agency may specify
9 when notice is required.

10
11 Subsection (d) authorizes the agency to require incorporation of the terms of the
12 environmental covenant in any instrument granting an interest in the real estate. Such
13 incorporation should be required in most substantial conveyances to ensure effective enforcement
14 of the covenant, although it will likely not be needed in all instruments.
15

16 **SECTION 7. RECORDING.**

17 (a) Except with respect to the parties to the covenant or other persons having actual
18 notice of the covenant, an environmental covenant is effective only if the covenant or a notice of
19 the covenant that complies with Section 13 is recorded in the land records.

20 (b) The department shall create and maintain a registry that contains all environmental
21 covenants, any modification or termination of those covenants, and any recorded notices of
22 covenants. The registry may also contain any other information concerning environmental
23 covenants and the real estate subject to them which the agency considers appropriate. The
24 registry is a public record for purposes of [insert reference to State Freedom of Information Act].

25 **Reporter's Notes**

26 Subsection (a) requires that either a notice of the environmental covenant or the complete
27 covenant must be recorded in the land records to alert all interested parties to the existence of the
28 covenant. While a standard form of the notice is not required, Official Form 1 is adopted with
29 the text of this [Act] for use by those parties who wish to use it. Section 13 provides that use of
30 this Form will comply with the [Act]'s notice requirements.
31

32 Subsection (b) requires creation of a new registry of environmental covenants by the

1 department. This registry may be combined with the new state registry of brownfield sites
2 specified in the Small Business Liability Relief and Brownfields Revitalization Act
3 §128(b)(1)(C), Pub. L. No. 107-118, ** Stat. ** (2002) (HR 2869, 107th Cong. 1st Session),
4 although this [Uniform Act] calls for more extensive information to be recorded.

5
6 The full environmental covenant must be recorded in the registry in the department. In
7 addition, the agency may require recording of additional information about each covenant and the
8 real estate subject to it. The agency may choose to require a description of the issues presented
9 by the residual contamination that give rise to an environmental covenant. The description will
10 be much more accessible than the full covenant to non specialists, including local government
11 and community interests.

12
13 At a minimum, this description may identify the constituents of concern that have been left in
14 the real estate, their location, the potential human and environmental exposure pathways and
15 receptors for those chemicals, and the permissible exposure limits.

16
17 Creation of a specialized registry should improve access to this information by local
18 governments, citizens groups, and environmental interests, as well as real estate professionals.

19
20
21 **SECTION 8. DURATION.**

22 (a) An environmental covenant is perpetual unless limited by its terms to a specific
23 duration or to the occurrence of a specific event, or terminated pursuant to Section 9.

24 (b) An environmental covenant may not be extinguished, limited, or impaired through
25 issuance of a tax deed, foreclosure of a tax lien, adverse possession, the exercise of eminent
26 domain, or application of the doctrines of abandonment, waiver, lack of enforcement, or any
27 similar common law doctrine.

28 **Reporter's Notes**

29 Subsection (a) is needed to ensure that the environmental covenant's protections continue as
30 long as needed. Subsection (b) makes environmental covenants survive later tax foreclosure
31 sales, and also survive potential common law impairments. These covenants seek to protect
32 human health and the environment as part of the environmental response project, beyond
33 reflecting the results of private bargaining between contracting private parties in specific private
34 transactions. To do so, environmental covenants must survive impairments arising from these
35 sources. However, this subsection does not restrict application of other environmental and

1 administrative law to judicial supervision of agency conduct.

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

7
8
9 **SECTION 9. MODIFICATION OR TERMINATION.**

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

11 (1) all the original parties to the covenant, other than an original party that waived the
12 right to consent, or their successors or assigns; and

13 (2) each current owner of an interest that will be affected by the modification or
14 termination. (b) A proposal to modify or terminate an environmental covenant must be
15 accompanied by any information required by the agency.

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

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

23 (e) For purposes of this [Act], assignment of an environmental covenant to a new holder
24 is a modification.

25 **Reporter's Notes**

26 Where there is a change in either the current knowledge of remaining contamination or

1 the current understanding of the environmental risks it presents, the environmental response
2 project may be changed or new regulatory action may be taken. In either situation, modification
3 of the environmental covenant to change its activity and use limitations or to terminate the
4 covenant may be necessary. A substantial modification or termination will usually be pursuant to
5 a change in the environmental response project or a new regulatory action.
6

7 Subsection (b) authorizes the agency to require information to support a request for
8 modification or termination. The agency may wish to require one or more of the following:

- 9 (1) New information showing that the risks posed by the residual contamination are
10 less or greater than originally thought;
11 (2) Information demonstrating that amount of residual contamination has diminished;
12 (3) Information demonstrating that one or more activity limitations or use restrictions
13 is no longer necessary.
14

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

- 19 (1) All affected local governments;
20 (2) The department if is not the agency for this environmental response project;
21 (3) All persons holding an interest of record in the real estate;
22 (4) All persons known to have an unrecorded interest in the real estate;
23 (5) All affected persons in possession of the real estate;
24 (6) All owners of adjacent real estate;
25 (7) All persons specifically designated to have enforcement powers in the covenant;
26 and
27 (8) The public.
28

29 Subsection (d) contemplates that the environmental covenant may impose additional
30 restrictions on modification or termination beyond those required by this [Act]. In some
31 circumstances the owner or another party may have contingent residual liability for further
32 cleanup of the real estate subject to the environmental covenant and may seek further restrictions
33 in the covenant to protect against this contingent liability.
34
35

36 **SECTION 10. ENFORCEMENT.**

37 (a) This [Act] does not limit the authority of the agency, the department or any other
38 person to enforce the terms of an environmental response project under other law.

39 (b) The following persons may maintain a civil action for injunctive or other equitable

1 relief against a person alleged to be in violation of an environmental covenant:

- 2 (1) the agency and any other party to the covenant;
- 3 (2) the department if it is not the agency, or another state official authorized by state
- 4 law to bring an action on behalf of the department;
- 5 (3) a current or former owner whose interest in the real estate may be affected by
- 6 violation of the covenant, or that may be liable under the environmental response project;
- 7 (4) an affected local government;
- 8 (5) a person expressly granted power to enforce in the environmental covenant;

9 [(c) In addition to the persons listed in subsection (b), any [person] [person aggrieved by

10 an alleged breach of the environmental covenant] may maintain a civil action for injunctive or

11 other equitable relief against a party alleged to be in violation of an environmental covenant. If an

12 action is to be brought by such person, the following rules apply:

13 (1) The person shall notify the agency, and the department if it is not the agency, that

14 it intends to institute an action to enforce the covenant 120 days before commencing the action.

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

16 (3) If the agency does not commence such an action within 60 days after the notice

17 was sent, the department, if it is not the agency, may bring the action within the next 60 days.

18 (4) If either the agency or the department brings an action within the periods

19 specified in paragraphs (2) and (3), the person giving the notice is precluded from bringing its

20 own action so long as the agency or the department is diligently prosecuting enforcement of the

21 covenant.]

22 (d) An owner of real estate subject to an environmental covenant, or another person

1 identified in the covenant, shall submit a written report to the agency each calendar year detailing
2 the status of compliance with the covenant. This requirement does apply to an owner of
3 detached, owner-occupied residential property.

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

6 **Reporter's Notes**

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

10
11 Environmental law frequently authorizes third party enforcement of environmental statutes,
12 regulations, and permits. Federal law authorizes citizen suits by “any person” against “any
13 person alleged to be in violation” of any “regulation. . . requirement. . . or order” under CERCLA
14 and RCRA remediation projects. 42 U.S.C.A. §§6972 (a) and 9659 (2001). Where the
15 environmental covenant is part of an environmental response project undertaken pursuant to one
16 of these statutes, it is presumably such a “requirement. . .or order” and should be enforceable by
17 “any person.” In addition, approximately 15 states authorize some form of citizen’s suits,
18 although the specific provisions are quite varied. Selmi & Manaster, State Environmental Laws
19 §16.52 (Clark Boardman, 2002 Supp.). Where state law so authorizes, a citizen suit would be
20 available to enforce an environmental covenant that is established pursuant to a state law
21 authorized environmental response project. This [Act] can not limit existing federal law and
22 does not limit existing state law authorizing that enforcement
23

24 [Subsection (c) offers two alternatives for citizen suit enforcement of all environmental
25 covenants, regardless of whether such a suit is authorized under current law. Either alternative
26 would apply to covenants established under state law in states that do not currently authorize
27 such enforcement. Local citizen and environmental interests have both the opportunity and the
28 motivation to observe compliance with use restrictions, and to some degree with activity
29 limitations. Thus they will be well positioned to seek enforcement of violations and thereby
30 offer greater assurance of effective implementation of the covenant.
31

32 The first alternative authorizes suit by any person, mirroring the provisions of federal law
33 discussed above. The second alternative is more limited, authorizing suit by any person
34 aggrieved by the alleged breach of the environmental covenant. “Person (or party) aggrieved” is
35 used in both federal and state administrative law. The federal courts, and some state courts,
36 apply a two part test in determining who is a “person aggrieved”, asking first if the person has
37 suffered an injury in fact, and second, if the person is arguably within the zone of interests sought

1 to be protected by the statute. See, e.g., National Credit Union Administration v. First Nat'l
2 Bank and Trust Co., 522 U.S. 479 (1998). The Model State Administrative Procedure Act, §5-
3 106(a)(5) uses a three part analysis: (i) has the agency action prejudiced the person, (ii) was the
4 agency required to consider the person's interests in taking the challenged action, and (iii) will a
5 judgment in favor of the person substantially eliminate or redress the harm.

6
7 Subsection (c) also establishes enforcement priority for such citizen suits. The agency has
8 the first opportunity. If the department is not the agency which approved the environmental
9 covenant, it has the second opportunity. If either of these brings an action within its specified 60
10 day time period, that precludes a citizen suit to enforce the covenant so long as the action is being
11 diligently prosecuted. This provision is based on the citizen's suit provisions common in many
12 federal environmental regulatory statutes.]

13
14 The five year reporting period of subsection (e) mirrors the reporting requirements for the
15 land use controls used as part of a remedy under the federal superfund program.
16

17 **SECTION 11. COORDINATION BY LOCAL GOVERNMENT.**

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

21 [(b) The agency may evaluate whether an application for a building permit or new land
22 use on real estate subject to an environmental covenant is consistent with the covenant. If the
23 agency determines that issuance of the building permit or approval of the new land use will
24 violate the covenant, the agency shall so notify the affected local government. The agency's
25 determination is binding on the affected local government.]
26

27 **SECTION 12. MARKETABLE TITLE.**

28 An environmental covenant may not be extinguished, limited, or impaired by application of
29 [insert reference to state Marketable Title statute][if notice of the existence of the covenant is

provided to interested persons by any of the following means:

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

(2) a map showing the location of the real estate subject to the covenant that is publicly displayed in the office of the custodian of the land records of the affected local government or in the registry maintained by the department;

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

(4) the land recording system in which the environmental covenant is recorded is accessible by electronic means as of [the effective date of this [Act]]; or

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

Reporter's Notes

This exception to the state Marketable Title statute is analogous to exceptions commonly made for conservation and preservation servitudes. Restatement of the Law of Property Third (Servitudes) § 7.16 (5) (1998). It is based on the public importance of ensuring 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 department 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. This problem will arise only with environmental covenants created pursuant to the [Act], after the statutory period of the Marketable Title Act.]

1

2 **SECTION 13. NOTICE.**

3 (a) To be effective, a notice of an environmental covenant must contain the following
4 information:

5 (1) a legally sufficient description of the real estate, and any available street address;

6 (2) the name and address of:

7 (A) the owner of the real estate;

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

9 (C) the name and address of any other person identified in the covenant that is
10 specifically authorized to enforce the covenant;

11 (3) a statement that:

12 (A) the covenant imposes significant restrictions and obligations with regard to
13 permissible activities on and uses of the real estate; and

14 (B) the restrictions and obligations are likely to affect all persons having an
15 interest in the real estate.

16 (4) a statement that the following are available in a registry at the [insert name and
17 address of Department] , disclosing any and the method of electronic access:

18 (A) the environmental covenant as executed;

19 (B) any other information required by the Agency; and

20 (5) a statement that the Notice is filed pursuant to this [Act].

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

22 **Reporter's Notes**

1 A description of the property under subsection (a)(1) may include identification by
2 latitude/longitude coordinates.
3
4

5 **SECTION 14. OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT.**

6 A statement in substantially the following form, executed with the same formalities as a deed
7 in this State, satisfies the requirements of Section 13.

8 **OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT**

- 9 7. This notice is filed on the land records of the [city/town/county] of [insert name of
10 jurisdiction in which the real estate is located] pursuant to Section 7 of the Uniform
11 Environmental Covenants [Act]. The [Act] has been codified in this State at [insert statutory
12 reference].
13
- 14 8. This notice and the covenant to which it refers impose significant legal restrictions and
15 obligations with respect to the future use of and activities on the property described below.
16 Those restrictions and obligations are likely to affect all persons having an interest in that
17 property.
18
- 19 9. A legally sufficient description of the property is attached as Exhibit A to this notice. The
20 address, if available, of the property which is subject to the environmental covenant is [insert
21 address of property].
22
- 23 10. The owner of the real estate on the date of this notice is [insert name of current legal owner of
24 the Property]. The address of the owner is [insert the owner's current address as shown on
25 the tax records of the jurisdiction in which the Property is located].
26
- 27 11. The other parties to the covenant and their addresses are:
28
29 (a) [insert name and address of the agency and the department];
30
31 (b) [Insert names and addresses of all other parties to the covenant]; and
32
33 (c) [Insert names and addresses of any third party beneficiaries].
34
- 35 12. The environmental covenant regarding the real estate was signed by all the parties on [insert
36 date on which the last party signed the covenant]. The covenant becomes effective for all
37 purposes on the date this notice is recorded on the land records of all jurisdictions in which
38 the property is located. This notice remains effective for all purposes until a release of this
39 notice is signed by the then owner of the property and by the agency and recorded.

1
2 13. The full text of the covenant is on file and available for inspection and copying in the registry
3 maintained for that purpose by the [insert name of environmental protection department in
4 this state] at [insert address and room of building in which the registry is maintained]. [The
5 covenant may be found electronically at [insert web address for Covenant]].
6

7 Dated at _____, _____ this ____ day of _____, _____.
8
9

10 Witness as to Owner

NAME OF OWNER

11
12
13 _____
14 By _____
15
16 _____
17

18
19 Witness as to Agency

NAME OF AGENCY

20
21
22 _____
23 By _____
24
25 _____
26

27
28 Witness as to Other Parties

NAME OF OTHER PARTIES

29
30
31 _____
32 By _____
33
34 _____
35
36

ACKNOWLEDGMENTS

[INSERT STANDARD FORM OF ACKNOWLEDGMENT IN STATE]

[ATTACH PROPERTY DESCRIPTION AS EXHIBIT A]

SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 16. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.

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

SECTION 17. 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.