

March 22, 2001

To: Uniform Environmental Covenants Act Drafting Committee and Advisors

From: Kurt Strasser

The discussion draft for our meeting April 19-21 has been sent separately. This new draft is such a fundamental revision of the November draft that a line by line comparison of the two has proved impossible and, in any event, would probably not be helpful.

This memo will briefly survey the principal changes. I have tried to incorporate the decisions we made in November. In addition, this draft proposes additional provisions which seemed to make sense. The comments have been substantially revised and expanded throughout.

You may remember that we had an extended but inconclusive discussion of whether the name should continue to be Environmental Covenants. This draft changes the name to Environmental Reuse Agreements in an attempt to choose an innocuous term with no technical meaning. Perhaps this term will serve until we decide to change it again in April.

SECTION 2: DEFINITIONS

1. "Agency" and has been revised to include federal agencies as well as the state department.
2. "Environmental remediation project" has been restructured to put most of the references to specific environmental statutes in the comments.
3. "Holder" has been expanded to include the agency as well as other business entities. The definition also makes clear that if the holder is not the agency, the holder has no rights or responsibilities under the agreement unless the holder has signed the agreement
4. "Remedial Decision" is no longer an explicitly defined term in the Act
5. "Prior Agreement" has been added. The specific provisions on prior agreements are in Section 5.
6. "State Department" is a new term, defined as the environmental protection regulatory agency of the state. While it may be the "agency" for purposes of this act, the state department is also covered by specific notification and enforcement provisions even when it is not the agency.

SECTION 3: ENVIRONMENTAL REUSE AGREEMENTS. This Section is entirely new to this draft and sets out the definition, goals and justifications of environmental reuse agreements

SECTION 4: CREATION OF ENVIRONMENTAL REUSE AGREEMENTS. This section has been greatly shortened. Some of the specific provisions from the earlier draft have been moved to a new Section 6, Agency Policies and Procedures and notice requirements have been moved to Section 8.

SECTION 5: VALIDITY. This section now covers the validity of prior agreements also.

SECTION 6: AGENCY POLICIES AND PROCEDURES. This new section includes some provisions from the former sections 4 and 5 in the earlier draft. It is intended to collect a number of specific provisions on procedures for the approval, creation, termination and modification of reuse agreements.

SECTION 7: REGULATIONS – this Section is new in this draft, although it incorporates some specific provisions from different sections of the earlier draft

1. It specifies the notice requirements for an owner proposing an environmental reuse agreement, as well as notice requirements for transfer of the property, application for building permits, or change of use of the property.
2. It allows parties to include additional modification or termination restrictions in their agreements as long as these do not conflict with the provisions of this Act.
3. It allows right of entry onto property to agency or other holder of reuse agreement to ensure compliance with the terms of the reuse agreement.
4. It requires incorporation of reuse agreement into terms of leases, licenses or other interests that may be affected by the agreement.

SECTION 8: RECORDING. This section substantially revises the November draft to allow recording of notice of environmental reuse agreement rather than recording of the entire instruments on the land records. A proposed form of the notice is given in the appendix. The section also requires the state department to create a new registry for reuse agreements and requires that they be recorded there, together with a narrative summary of the residual contamination and the risks it poses.

SECTION 9: DURATION. This section has been revised to reflect the Committee's decision to authorize the agency to require subordination of prior interests if it decides this is necessary. The other provisions on tax liens and sales, as well as common law impediments, are substantively unchanged.

SECTION 10: MODIFICATION/TERMINATION. This section is a substantial revision of the November draft's provisions. We did not reach consensus on many of these issues in November and we will doubtless need to work on them at this meeting.

SECTION 11: ENFORCEMENT. This section expands the civil suit enforcement provision to include "persons aggrieved" as well as any owner who may be held liable under the governing environmental remediation project. It also specifies a procedure for permitting or precluding private suits when there is governmental enforcement action pending.

SECTION 13: MARKETABLE TITLE . This section has been rewritten to incorporate the Committee's decision that Reuse Agreements created under the Act may not be extinguished,

limited or impaired by any applicable Marketable Title Statutes.

SECTION 14: NOTICE. This section is new.

SECTION 15: RECORDING OF RESTRICTIONS FOR ACTIVE FEDERAL SITES. This new section was added at the request of our friends in the federal family when we met with them in January. It basically authorizes the agencies managing these sites to use the recording and notice system of this Act if they wish to.

OFFICIAL FORM 1 – NOTICE OF ENVIRONMENTAL REUSE AGREEMENT. This is a new model form which meets the notice recording requirements of the Act.