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FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL COVENANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

March 18, 2003

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.

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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 potential environmental risks posed for a particular use, rather than to unrestricted use standards. Such risk based remediation is both environmentally and economically preferable in many circumstances, although it will often 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 potential risks presented by that residual contamination.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential 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 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~~blighted 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 the remedial steps taken~~effectively control the potential risk presented by the residual contamination which remains in the real property and thereby protect 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 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~~government regulatory body, and governed by substantial regulatory controls that implement many requirements in addition to a covenant~~s~~. ~~E~~An environmental ~~covenants are~~covenant is one tool used to accomplish remediation.

~~E~~An environmental covenant~~s~~ may be used to ensure that the property restrictions imposed in the remedial decision regulatory process remain effective, and thus protect the public from residual contamination that remains, while also permitting re-use of the site in a timely and 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 federal law and regulation, such as the Comprehensive Environmental Response ~~Cleanup~~Compensation and Liability Act (CERCLA)~~ authority~~. Generally speaking, 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~~n effective regulatory ~~policy~~framework. 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~~authority 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.

This Act does not require issuance of regulations. However, many state and federal agencies have developed implementation tools, including model covenants, statements of best practices, and advisory groups that include members of the real estate and environmental practice bars as well as business and environmental groups. Developing and sharing such implementation tools and advisory groups should support the effective implementation of the Act and is encouraged.

This Act does not address or change the larger context of environmental remediation regulation discussed above, and a number of aspects of that regulation should be noted here. Many contaminated properties are subject to the concurrent regulatory jurisdiction of both federal and state agencies. This Act does not address the exercise of such concurrent jurisdiction, and it

is not intended to limit the jurisdiction of any state agency. Both federal and state regulatory agencies attempt to concur on the requirements of a specific environmental remediation project. However, the potential exists for separate agencies to insist on separate requirements. Where possible, the best practice in creating environmental covenants is for all regulatory agencies with jurisdiction over the property to concur in the terms of the remediation project and the environmental covenant.

A specific issue arises with federal property that is not anticipated to be transferred to a non-federal owner. There is currently an unanswered question as to whether remediation of such property is subject to State regulatory jurisdiction. This Act takes no position on that question. Where federal property is transferred to a non-federal owner, state agencies will clearly have jurisdiction provided under state environmental law.

Buyers of property subject to an environmental covenant should also be aware that both state and federal environmental law authorize reopening the environmental remediation determination when the relevant statutory standards are met. While such reopeners are rare, they are possible to respond either to newly discovered contamination or new scientific knowledge of the risk posed by existing contamination. Under existing environmental law, the then current owner may have remediation liability. Federal law now provides protection for bona fide purchasers of such property under specified circumstances, and the law of some states may also afford some protection. However, this Act does not provide any such bona fide purchaser protection.

Environmental covenants recorded pursuant to this act will provide constructive notice of the covenant and in many circumstances recording will provide actual notice. However, to ensure that there is actual notice a state or a local recording authority may wish to highlight the existence of environmental covenants with maps showing the location of properties subject to environmental covenants similar to maps used to show the location of zoning or flood plains.

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 in some states 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.

UNIFORM ENVIRONMENTAL COVENANTS ACT

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

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Activity and use limitations" means restrictions or obligations with respect to real property.

(2) "Affected local government" means a county, city, municipality, or other unit of local government in which real property subject to an environmental covenant is located.

(3) "Agency" means ~~the~~a state or federal ~~governmental body~~agency that determines or approves the environmental response project ~~that includes creation of an~~pursuant to which the environmental covenant is created. The term includes the [insert name of state regulatory agency for environmental protection].

(4) "Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

(~~4~~5) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(~~5~~6) "Environmental response project" means a plan or work performed for

environmental remediation of real property, conducted:

(A) under a federal or state governmental program ~~requiring~~governing environmental remediation of real property, including [insert references to state law ~~requiring~~governing environmental remediation], or

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

(C) under a ~~program of~~state voluntary ~~remediation of real property subject to approval and supervision by a governmental authority or by a person authorized by a governmental authority or by statute.~~

~~(6~~clean-up program authorized in [insert reference to state statute or regulation].

(7) "Holder" means a person ~~other than an agency or other governmental body that is named as a holder in~~, including an owner or agency, that is the grantee of an environmental covenant. The interest of a holder is an interest in real property, except that the interest of a holder that is an agency is not an interest in real property if the environmental covenant so provides.

(~~7~~8) "Interested party" means any person, other than an owner, that has ~~an~~a recorded interest in the real property that is subject to an environmental covenant. The term includes a person that has an interest in the real property created by a security instrument.

(~~8~~9) "Owner" means a person that ~~holds~~owns the fee simple in real property that is subject to an environmental covenant.

(~~9~~10) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental agency,

subdivision~~, agency~~, instrumentality or body; public corporation; or any other legal or commercial entity.

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

~~(A) creates activity and use limitations;~~

~~(B) arose under an environmental response project; and~~

~~(C) 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; or

(B) to attach or logically associate an electronic sound, symbol, or process to or with a record with the present intent to authenticate the record.

(14) "State" means a 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 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.

The definition of "agency" makes clear that an environmental covenant is valid if one agency signs it. However, in many circumstances, both a federal and a state agency may have jurisdiction over the environmental contamination which lead to the environmental response project. In this situation, the best practice will be for both federal and state agencies with jurisdiction over the contaminated property to sign the environmental covenant.

Subsection (45) 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 (56) may be undertaken pursuant to authorization by one of several different statutes. Subsection (56)(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) "Comprehensive Environmental Response, Compensation, and Liability Act of 1980", 42 U.S.C. sec. 9601 to 9647, as amended;

(4) "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.

Whether state law requirements are applicable to active federal facilities is currently an unanswered question. This definition of “environmental response project”, and this Act generally, take no position on that question.

Subsection (~~5~~6)(c) extends the Act’s coverage to voluntary remediation projects that are undertaken ~~with approval and supervision by a governmental body~~ under state law. 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~~approval of these projects by a governmental body or other authorized party ~~is essential to insure~~ensures that the project serves these goals. This Act ~~is intended to apply only to environmental covenants that are part of such publicly supervised remediation projects.~~

~~To protect against possible future liability for further remediation, an owner may wish to provide for remediation of the real property beyond the requirements of minimum applicable regulatory standards. Such provision can be part of the environmental response project if the requirements of governmental approval and supervision are satisfied~~requires that covenants undertaken as part of a voluntary clean-up program must be signed by the agency in order to be effective.

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

Under subsection (~~5~~6)(c) environmental response projects may include specific agreements between the owner and the agency for remediation that goes beyond prevailing requirements if authorized by the state voluntary cleanup program. Because the owner may have residual liability for the site, even after remediation and transfer to a third party for redevelopment, the owner may require further restrictions as a condition of creating the environmental covenant and eventual reuse of the real property. The agency’s approval and supervision will be sufficient to ensure that any further restriction is in the public interest.

The definition of “holder” is in ~~S~~subsection (~~6~~7). As the practice of using environmental covenants continues to grow, new entities may emerge to serve as holders, and this Act does not

intend to limit this process. A holder may be ~~the agency or~~ any ~~non-governmental~~ person under the broad definition of this Act ~~although the agency and other governmental bodies indentified in an environmental covenant may also enforce the covenant in accordance with its terms pursuant to that governmental body's regulatory authority~~, including an affected local government. The identity of an individual holder must be approved by the agency and the owner as part of the process of creating an environmental covenant, as specified in Section 4 of this Act. A holder is authorized to enforce the covenant under Section 11 ~~and this section also contains an additional provision concerning whether a holder's power to enforce the covenant is an interest in real property. A holder~~. A holder has the rights specified in Section 4 of this act and may be given other rights or obligations in the environmental covenant.

Subsection (7)'s definition of a holder specifies that a holder's interest is an interest in real property, unless the environmental covenant specifies otherwise for an agency holder. This provision is included because some environmental enforcement agencies are not authorized to own an interest in real property after the environmental remediation is completed and this provision will enable those agencies to be holders under the Act.

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

In general, a holder's right to enforce the covenant under Section 11 should be considered comparable to the rights covered in an easement and, thus, should not lead to a determination that the holder is liable as an "owner" under CERCLA. The two cases that have considered this question have found that the parties which held the easements were not CERCLA "owners". Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk R.R. v. Acme Belt Recoating, 859 F. Supp. 1125 (W.D.MI, 1994). In each case, the court reasoned that the circular definition of owner meant that the term's most common meaning would prevail. The common law's distinction between an easement holder and the property owner was then applied to find the easement holder not to be an "owner" for purposes of this statute. In each of these cases, the party which held the easement had not contributed to contamination on the property. (The amendments to CERCLA Section 9601(35), Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, ** Stat. ** (2002)(HR 2869, 107th Cong. 1st Session), added the term "easement" to the definition of parties which are in a "contractual relationship" under CERCLA. However, this does not affect whether the easement holder will be held to be a CERCLA "owner".)

Where the holder or another person has more extensive rights than enforcement, a careful analysis will be required. The CERCLA liability cases typically emphasize that a party which exercises the degree of control over a site equivalent to the control typically exercised by an

owner of the site will be held liable as an "owner". Under this approach, for example, lessees have been held liable as owners when their control over the site approximated that which an owner would have. See, e.g., Delaney v. Town of Carmel, 55 F. Supp. 2d 237 (S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F. Supp. 1317 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984 (D.C.S.C. 1984.) A holder contemplating extensive control over the site should consider potential "owner" liability carefully.

CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the case law interpreting this definition emphasizes that a party is liable as an operator if it has a high degree of control over the operating decisions and day to day management at the site. Thus, for example, a party which held an easement could be liable as an operator if it's control met this standard. A holder will, in general, have only control authority over the site related to effective enforcement of the environmental covenant and does not typically need more extensive day to day control. However, a holder should be given more extensive control over the site only after careful consideration of the potential CERCLA "operator" liability.

Subsection (~~9~~8)'s definition of interested party reaches all owners of less than a fee simple interest in the real estate. While such parties are frequently described as "holders" of such an interest, that terminology is not used here to minimize the chance for confusion with the holder as defined in this act. The definition of interested party reaches a person who has an interest solely as security for an obligation so that such person's consent will be required for creation of an environmental covenant under Section 4 and modification under Section 10 if its interest is affected by the covenant or modification. This Act does not create the interest held by any interested party and thus should not effect the liability of any interested party under any other law.

The definition of "Person" in subsection (10) is different than the usual definition in that it includes government entities. The use of the word "Governmental Agency" includes "Agency" as defined in this section but also includes any other agency within the local, state or federal governments.

Subsection (12) defines security instrument broadly. The definition is taken from the Uniform Non-Judicial Foreclosures Act and is used in Section 2 (8) of this Act.

SECTION 3. 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 4. ~~REQUISITES~~CONTENTS OF ENVIRONMENTAL COVENANT.

(a) An environmental covenant must:

(1) state that the instrument is an environmental covenant executed pursuant to [insert statutory reference to this [Act].]

(~~1~~2) contain a legally sufficient description of the real property subject to the covenant;

(~~2~~3) describe the activity and use limitations on the real property, including any rights of access or other rights granted or retained in connection with enforcement of the covenant;~~ and~~

~~(3) be signed by the agency, each owner, and the holder.~~

~~(b~~

(4) identify the holder and describe its right to enforce the covenant and any other rights and obligations it has; and

(5) be signed with the formalities of a deed by an agency, all owners, and all holders.

(b) In addition to the information described in (a), an environmental covenant may contain whatever other information, restrictions and requirements are agreed to by the parties, including any:

(1) notice requirements following transfer of specified interests in the property subject to the covenant;

(2) periodic reporting requirements describing compliance with the covenant;

(3) rights of access to the property arising under other law;

(4) notice requirements concerning proposed changes in use of the property,

applications for building permits, or proposals for any site work affecting the contamination on the property subject to the covenant;

(5) information concerning the contamination and the remedy, including the contaminants of concern, the pathways of exposure, exposure limits, and a description of the location and full extent of the contamination plume including other properties to which the plume extends.

(6) restrictions or limitations on modification or termination of this covenant in addition to those contained in Sections 9 and 10 of this [Act].

(c) As a condition to signing an environmental covenant, ~~the~~an agency may require ~~an~~the owner or any interested party to ~~subordinate its~~

(1) provide any title information that the agency may require regarding the real property which will be subject the to covenant; and

(2) obtain a subordination agreement from any person with an interest in the real property which will be subject~~ed~~ 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 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~~owners' association. An agreement by a ~~lender~~n owner of a security interest, tenant, or other interested party to subordinate its interest to an environmental covenant does not impose liability on th~~e~~at person with respect to the covenant.

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, will 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. If there is a holder other than the agency or the owner, both the agency and the owner must approve 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.

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

This Act recognizes that there may be parties ~~which~~that own different interests in real property, other than the fee simple interest, and these are defined as "interested parties" under Section 2 (~~9~~8) ~~of this Act~~. Examples include an interest in mineral rights ~~may be~~ owned separately from surface rights, long term leases, mortgages and liens.

In addition to the parties specified in subsection 4(a)(5), other persons may sign the environmental covenant. Under the prevailing environmental law, persons other than the owner or an interested party may be liable for cleanup of the contamination, including contingent future liability if further cleanup is needed or personal injury claims are brought. These could be parties which previously used the property or whose waste was disposed of on the property. Such a person may be a participant in the environmental response project and wish to sign the covenant so as to be informed of future enforcement, modification and termination.

A holder is the grantee of the environmental covenant and the Act requires that there be a holder for a covenant to be valid and enforceable. In addition to enforcement rights, the holder may be given specific rights or obligations with respect to future implementation of the environmental covenant. These could include, for example, the obligation to monitor groundwater or maintain a cap or containment structure on the property. Such rights and obligations will be specified in the environmental covenant.

The Act requires an agency to sign the covenant. In some states it may be necessary to amend the state agency's enabling statute to empower it to so sign.

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

restrictions in the covenant to protect against this contingent liability.

Subsection (~~b~~c) is concerned with prior interests in the real property. If a prior interest is not subordinated to the environmental covenant, and then is foreclosed at some later time, under traditional real property law~~,~~ that foreclosure would extinguish or limit an environmental covenant. Since such an outcome is antithetical to the policies underlying this Act, the Act contemplates that the agency may, before agreeing to the covenant, require subordination of these interests. At the time of creation of the environmental covenant, the agency must determine whether the prior interest presents a realistic threat to the covenant's ability to ~~accomplish its purpose to~~ protect the environment ~~protection~~ and human health. By subordinating its interest, an owner or interested party does not change its liability with respect to the property subject to the environmental covenant. Any such liability of a subordinating party would arise by operation of other law and not under this Act.

SECTION 5. VALIDITY ~~OF ENVIRONMENTAL COVENANT~~.

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

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

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

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

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

(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;

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

~~(8) it is subject to similar impediments to enforcement of that interest under the laws~~

~~of this state; or~~

(~~9~~8) it is identified as an easement, covenant, servitude, deed restriction, or other interest~~.~~; or

(~~c~~9) ~~A prior covenant~~the persons identified as owner and holder in the environmental covenant are the same person.

(c) A servitude that creates activity and use limitations and was agreed to before the effective date of this [Act] is not invalid or unenforceable by reason of any of the limitations on enforcement of interests described in subsection (b). This [Act] does not apply in any other respect to such a ~~prior covenant~~servitude.

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

Reporter's Notes

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

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

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

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

Subsection (b)(2) also clarifies existing law by providing that a covenant may be enforced by an assignee of the holder. Section 10(cd) of this Act specifies that assignment to a new holder will be treated as a modification and Section 10 governs modification of environmental covenants.

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

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

Subsection (b)(5) addresses the opposite problem – the potential unenforceability under existing law of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Under some existing law, neither of those interests was viewed as a true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an owner of the burdened real property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened real property that the holder would not have been privileged to perform absent the easement.)

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

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

Subsection (b) identifies what the drafters believe to be the principal common law doctrines that have been applied to defeat covenants such as those created by this Act. Drafters in individual states may wish to consider whether references to other common law or statutory impediments of a similar nature ought to be added to this subsection.

Subsection (c) has further provisions for covenants created prior to the date of this Act. It specifies that the defenses covered in subsection (b) will not make prior covenants unenforceable. Beyond negating these specific defenses, this Act does not apply to prior covenants. If the parties to a prior covenant wish to have the other benefits of this Act for that covenant, they will have to re-execute the covenant in a manner which satisfies the requirements of this Act.

Section (d) disavows the intent to invalidate any interest created either before or after the Act which does not comply with the Act but which is otherwise valid under the state's law. Nor does the Act intend in any way to validate or invalidate an action taken by any person to remediate contamination pursuant to a state law that does not require formal governmental oversight or approval. However, a recorded instrument that does not satisfy all the requirements of this Act does not come within the scope of this Act.

SECTION 6. RELATIONSHIP TO OTHER ~~LAW REGULATING~~LAND USE ~~OF REAL PROPERTY~~LAW.

~~(a)~~ This [Act] does not, and an environmental covenant created pursuant to this [Act] may not, authorize a use of real property that is otherwise prohibited by zoning, by law other than this [Act] regulating use of real property, or by a recorded ~~covenant, condition or restriction~~instrument that has priority over the environmental covenant, except as required by law other than this [Act].

~~(b) Activity and use limitations in an~~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)~~This section 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~~ Thus, for example, 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).

Clearly, as provided in § 3 of the Act, the large and complex body of zoning and land use law and the law of environmental regulation supplement the provisions of this Act. In appropriate cases, a court will be called upon to articulate the interrelationship of this Act and those laws, and the drafters have not attempted to articulate all those outcomes. On the other hand, certain obvious examples may be helpful in understanding this interplay.

First, the Act contemplates that an environmental covenant might, for example, prohibit residential use on a parcel subject to a covenant. Under conventional real estate principles, without references to this Act, such a prohibition or restriction in an environmental covenant will be valid even if other real property law, including local zoning, would authorize the use for residential purposes. Alternatively, a covenant might, at the time it is recorded, permit both retail use and industrial use on a vacant parcel of contaminated real estate while prohibiting residential use. Assuming all retail and industrial uses were permitted by local zoning at the time the covenant is recorded, the municipality might, before construction begins, change that zoning to bar industrial use. If such a zone change is otherwise valid under state law, nothing in this Act would affect the municipality's ability to "down zone" the parcel. If, on the other hand, an industrial use was ongoing at the time the covenant was recorded, such state law doctrines as "vested rights" or non-conforming uses, rather than this Act, would govern the validity of the zoning action.

SECTION 7. ~~REQUIREMENTS FOR ENVIRONMENTAL COVENANT.~~

~~**(a) Unless waived or modified by the agency in a particular case, after**~~**NOTICE.**

(a) After an environmental covenant is signed, the owner or other person designated by the agency ~~shall give notice of the environmental covenant promptly to the following persons~~must provide a copy of the signed covenant within [7] days to:

(1) all interested parties ~~in the real property subject to the covenant~~;

(2) all persons in possession of the real property subject to the covenant;

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

~~(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, as determined by the agency;~~

~~(5~~who signed the covenant;

(4) any affected local government; and

~~(6) all persons liable for environmental remediation of the real property subject to~~5) such other persons as the agency requires.

(b) Failure to deliver the covenant as ~~determined by the agency.~~

~~(b) Unless waived or modified by the agency in a particular case, each~~required by this section does not affect the covenant's validity.

SECTION 8. RECORDING.

(a) A recorded 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)~~ [or a notice recorded pursuant to Section 15] shall be indexed in the [Grantor's] index

in the name of the owner and in the [Grantee's] index in the name of the holder.

(b) An environmental covenant is ~~not invalid or otherwise affected merely because a person fails to comply with any of the requirements of this section.~~subject to the laws of this state governing recording and priority of interests in real property, except as otherwise provided in Section 9(c). [Recording of a covenant consistent with the law of this state shall provide such constructive notice of the covenant as the recording of a deed of an interest in real property.]

Reporter's Notes

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

~~Subsection (b) 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. Subsection (b)(4) concerns a covenant's requirement of notice of an application for a building permit, change of use of the real property subject to an environmental covenant, or for other specified activities.~~

~~Where the [insert name of state regulatory agency for environmental protection] determines that a proposed building permit, change of use of the real property, or other activity notified under subsection (b)(4) would violate the environmental covenant, subsection (c) requires that it so notify the applicant or person proposing the activity.~~

~~Subsection (c) authorizes the [insert name of state regulatory agency for environmental protection] to require specified information as a condition to signing the environmental covenant.~~

~~**Alternative A.**~~

~~**[SECTION 8. RECORDING OF ENVIRONMENTAL COVENANT.**~~

~~(a) Except as otherwise provided in section 9(b), an environmental covenant, or any modification or termination of an environmental covenant, is subject to the laws of this state governing recording and priority of interests in real property. A notice of the environmental covenant, or any notice of modification or termination of an environmental covenant, that complies with Section 13 may be recorded in the land records in lieu of recording the entire environmental covenant, modification, or termination.~~

~~(b) The [insert name of state regulatory agency for environmental protection] shall~~

~~[create and maintain a][maintain its currently existing] registry that contains all environmental covenants and any modification or termination of those 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].]~~

~~**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 subject to the laws of this state governing recording and priority of interests in real property.]~~

~~**Reporter's Notes**~~

~~Section 8 is offered in two versions. Alternative A is to be used in jurisdictions that will require creation or maintenance of an existing registry of environmental covenants at the [insert name of state regulatory agency for environmental protection]. This alternative authorizes either~~confirms that customary indexing rules apply to the covenant. Since the owner is granting the enforcement right to a holder, the owner's name would appear in the grantor index and the holder's name would appear in the grantee index.

In those states where a tract or a recording system other than a grantor/grantee index is used, this section should be revised as appropriate.

The Act assumes that all parties will wish to record the environmental covenant ~~or a notice~~and accordingly makes the state's recording rules apply. The effectiveness of the covenant, however, does not depend on whether the covenant is recorded. A signed but unrecorded covenant, under traditional real estate law, binds the parties who sign it and, generally, those who have knowledge 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~~.

The Act makes clear that, as with all recorded instruments, an environmental covenant ~~should be recorded in the land records and this Act's provisions on notice in Section13 should not be used.~~

~~**Reporter's Notes, Alternative A**~~

~~Subsection (a)~~takes priority under the normal rules of "First in time, First in Right." *See* The Restatement of The Law Third Property–Mortgages § § 7.1 and 7.3. In that sense, the covenant does not enjoy the same priority afforded real estate tax liens, because of the substantial constitutional impediment such a change in priority would likely create.

However, the Act departs in important ways from the consequences of the normal priority and other traditional rules. For example, under § 9, foreclosure of a tax lien cannot extinguish an Environmental Covenant. *See* § 9(c).

Further, the Act provides that ~~environmental covenants are subject to existing state law on recording and priority of interests in real property. Either the~~even in those cases where an agency is serving as holder and where the covenant provides that the agency's interest is not a property interest, the Act declares that the agency's interest is valid in all respects.

Finally, in those case where the holder's interest is transferred to a successor holder, the assignment of that interest will be recorded, and the usual grantor/grantee indexing rules would apply.

SECTION 9. DURATION.

(a) An environmental covenant ~~or 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~~is perpetual unless

(1) terminated by consent pursuant to Section 10;

(2) limited by its terms to a specific duration or the occurrence of a specific event;

(3) terminated by judicial decree in an eminent domain proceeding, provided that the agency first consents to such judicial termination; or

(3) terminated by judicial decree pursuant to subsection (b).

(b) An environmental ~~covenants by the [insert name of state regulatory agency for environmental protection]. This registry~~covenant 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 provides that environmental covenants are subject to existing state law on recording and priority of interests in real property.]~~

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

~~(a) An environmental covenant is perpetual unless limited by its terms to a specific~~

duration or to the occurrence of a specific event or terminated pursuant to Section 10.

(b) terminated by a judicial determination of changed circumstances only after

(1) the agency concludes that the intended benefits of the covenant can no longer be realized; and

(2) all parties to the covenant have been made parties to a judicial proceeding in which that determination is sought.

(c) Except as otherwise provided in Ssubsection 10s 9(ca) and 9(b), an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrines of adverse possession, abandonment, waiver, lack of enforcement, or any similar lawdoctrine.

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

Reporter's Notes

Subsection (a) isand (b) are needed to ensure that the environmental covenant's restrictions continue as long as needed. Subsection (ba)(3) provides that the agency's approval is required to modify or terminate an environmental covenant by an exercise of eminent domain. An exercise of eminent domain may result in a change of use for real estate. Requiring the agency's approval to modify or terminate the covenant will ensure that the agency will determine whether the covenant's activity and use limitations or other restrictions are needed to protect public health and the environment.

Subsection (c) makes environmental covenants survive later tax foreclosure sales, and also survive potential common law and statutory impairments. These covenants seek to protect human health and the environment as part of the environmental response project, beyond reflecting the results of private bargaining between contracting private parties in specific private transactions. To do so, environmental covenants must survive impairments arising from these sources. However, this subsection does not restrict application of other environmental and administrative law to judicial supervision of agency conduct.

Subsection (b) gives two specific requirements for a judicial change in an environmental covenant by the doctrine of changed circumstances. The first require agency approval of such an application, for the same reason that agency approval is required for eminent domain. The second requires that all parties to the covenant be made parties to the proceeding. This will allow those parties to protect their interests in the proceeding, including their interests arising from contingent future liability.

Where an environmental covenant applies to real property that is otherwise subject to one of the doctrines listed in Subsection (~~b~~c) situations may arise in which the protections of the covenant are not needed in the particular circumstance. For example, rights gained by adverse possession would be limited by the environmental covenant's restrictions where a house had been inadvertently placed on real property subject to an environmental covenant that precluded residential use. In a case such as these, modification of the covenant can be sought pursuant to Section ~~9 where the environmental covenant's protections are not needed~~10. Seeking such a modification will ensure that appropriate consideration will be given to residual environmental risks.

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

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

The exception to the Marketable Record Title statute in subsection (~~c~~d) 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~~. For states adopting the registry of environmental covenants to be kept by the [insert name of state regulatory agency for environmental protection] under Section ~~7(b)~~15 of this Act, the cost of extending title searches to this registry should be low.

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 10. ~~MODIFICATION OR TERMINATION OF ENVIRONMENTAL~~

~~COVENANT~~AMENDMENT BY CONSENT.

(a) An environmental covenant may be ~~modified~~amended or terminated by consent ~~of~~only if the amendment or termination is signed by:

(1) the agency;

(2) the current owner;

(3) except as provided in subsection (e), the holder; and

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

~~(3) a party~~ in a signed record, each person 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~~.

(b) An interested party that subordinated its interest to an environmental covenant is not affected by a modification of the covenant unless th~~e holder~~at party consents to the ~~change.~~

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

~~(d~~modification or waived its right to consent to future modification in a signed record.

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

~~(e) An environmental covenant may be modified or extinguished by the exercise of eminent domain or by application of the doctrine of changed circumstances only with the approval~~

~~of the agency after notice and opportunity for hearing.~~

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

~~(g~~

(d) Except for an assignment undertaken pursuant to a government reorganization, assignment of an environmental covenant to a new holder is a modification.

(e) Subject to any provisions of the covenant, the agency, the current owner and the remaining parties to the covenant other than the holder may agree to remove or replace a holder for any reason they find desirable. Removal is effective when a record signed by all those persons is recorded.

Reporter's Notes

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

Subsection (a) specifies the parties ~~which~~that must consent to the modification. Subsection (a)(~~3~~4) reaches a party ~~which~~that originally signed the covenant ~~even though~~whether or not it was ~~not~~ an owner of the real property. Such parties might typically be ones which were liable for some or all of the environmental remediation specified in the environmental response project, including contingent future liability. This provision is intended to apply to successors in interest to the party which originally signed the covenant where the successor continues to be subject to the contingent liability under the environmental response project.

Some of the original parties to the covenant may have signed the covenant because they have contingent liability for future remediation should it become necessary. The extension of that liability to successor businesses is a complex subject controlled by the underlying state or federal environmental law creating the liability. See Blumberg, Strasser and Fowler, The Law of Corporate Groups: Statutory Law, 2002 Annual Supplement, §18.02 and §18.02.4 (Aspen, 2002)

and Blumberg and Strasser, The Law of Corporate Groups: Statutory Law–State §§ 15.03.2 and15.03.3 (Aspen, 1995). Where the party that originally signed the covenant has been merged into or otherwise become part of another business entity for purposes of future cleanup liability, subsection (a)(4) is intended to require the consent of that entity rather than the consent of the original party.

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

(1) All affected local governments;

~~Text Moved Here: 1~~

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

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

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

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

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

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

(8) The public.

~~End Of Moved Text~~

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

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

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

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

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

~~(1) All affected local governments;~~

~~Text Was Moved From Here: 1~~

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

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

SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.

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

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

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

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

~~(4) an affected local government;~~

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

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

~~(7~~the holder;

(2) any other person to ~~which~~whom the ~~environmental~~ covenant expressly grants power to enforce~~.~~;

(3) the agency;

(4) any other party to the covenant;

(5) if it is not the agency, the [insert name of state regulatory agency for environmental protection];

(6) a person whose interest in the real property or whose liability may be affected by the alleged violation of the covenant;

(7) an affected local government;

(8) a person who subordinated its interest in the real property pursuant to Section 4(c)(2); and

(9) a person authorized to enforce the environmental covenant by law other than this [Act].

(b) This [Act] does not limit the regulatory authority of the agency~~, or any other person to enforce an~~ or the [insert name of state regulatory agency for environmental protection] under other law with respect to the environmental response project ~~under law other than this [Act].~~

~~(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].~~

(~~c~~c) A ~~party~~person is not subject to environmental remediation 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.

Importantly, the Act seeks to distinguish between the expanded/equitable rights granted to enforce the covenant in accordance with its terms, and actions for money damages, restitution, tort claims and the like.

This Act does not create any new causes of action in any person. It simply confers standing on persons other than the agency and other parties to the covenant because of the important policies underlying compliance with the terms of the covenant. Thus for example, in the case of a covenant approved by a federal agency on real property which has been conveyed out of federal ownership, the Act confers standing on a state agency to enforce the covenant, even though the agency may not have signed it. Further, any local affected government is empowered to seek injunctive relief to enforce a covenant to which it may not be a party. In both cases, absent this Act, those state and municipal agencies might not be seen as having standing to enforce a covenant, and might simply be relegated to seeking standing under other law.

On the other hand, the Act does not provide any authority for a citizens' suit to enforce a covenant, although other law may authorize such suits.

The Act does not authorize any claims for damages, restitution, court costs, attorneys fees or other such awards. Standing to bring such claims, and the bases for any such cause of action, must be found, if at all, under other law. At the same time, while this action does not authorize

any such cause of action, it does not bar them.

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.

~~Subsections (c) and (d) specify when~~ in addition to rights specified in the ~~right to enforce an~~ environmental covenant ~~is not an interest in real property. These provisions 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 have enforcement rights under the Act.~~

~~Second, the nature of the holder's or other person's interest in the real property may influence whether its rights and duties~~.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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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 1~~6~~3. 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.

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~~with respect to the real property are likely to lead to potential liability for future environmental remediation, should such remediation become necessary. Under CERCLA an "owner" is liable for remediation costs, 42 U.S.C.A. 9607(a)(1). Unfortunately, the definition of "owner" in the statute is circular and unhelpful in evaluating whether a holder is potentially liable under it. 42 U.S.C.A.~~

9601(20).

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

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

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

SECTION 12. COPIES TO LOCAL GOVERNMENT.

The owner or other party designated by the agency shall send a copy of an environmental covenant and any modification or termination of the covenant to the affected local government within [ ] days after the covenant, modification, or termination is signed.

Reporter's Notes

Effective implementation of 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 14. 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.

[SECTION 15. REGISTRY; SUBSTITUTE NOTICE.

(a) The [insert name of state regulatory agency for environmental protection] shall [create and maintain a] [maintain its currently existing] registry that contains all environmental covenants ~~will require cooperation between the agency and the affected local government which has jurisdiction over building permits and local land use decisions. Section 6 of this Act provides that an environmental covenant cannot authorize a land use that is prohibited by local law, and that an environmental covenant may restrict a land use that is authorized by local law. This Section requires the agency to notify all affected local governments of the creation,~~and any modification or termination of ~~an~~those covenants. The registry may also contain any other information concerning environmental ~~covenant.~~

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

~~(a) A notice of~~covenants and the real property subject to them which the [state regulatory

agency for environmental protection] considers appropriate. The registry is a public record for purposes of [insert reference to State Freedom of Information Act].

(b) After an environmental covenant~~, and a notice of~~ or a modification or termination of ~~an environmental covenant,~~that covenant is filed in the registry pursuant to subsection (a), a notice of that covenant, modification or termination that complies with this section may be recorded in the land records in lieu of recording the entire covenant. Any such notice must contain:

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

(2) the name and address of:

(A) the owner of the real property; and

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

~~(C) any other person identified in the covenant, modification, or termination which is specifically authorized to enforce the covenant;~~

~~(3) a statement that the covenant, modification, or termination imposes significant restrictions and obligations with regard to permissible activities on and uses of the real property;~~

~~(4.~~

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

(~~5~~4) a statement that the notice is ~~filed pursuant to this [Act].~~

~~(b~~notification of an environmental covenant executed pursuant to [insert statutory reference to this [Act]].

(c) A statement in substantially the following form, executed with the same formalities as

a deed in this state, satisfies the requirements of this Section:

1. This notice is filed on the land records of the [political subdivision] of [insert name of jurisdiction in which the real property is located] pursuant to ~~Sections 7 and~~Section 1~~3~~5 of the Uniform Environmental Covenants [Act]~~. The [Act] has been codified in this State at~~, [insert statutory reference].

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

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

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

5. The ~~other parties to~~agency that signed the covenant, modification, or termination ~~and their addresses are:~~

~~1.~~ was [insert name and address of the agency ~~and [the state regulatory agency for environmental protection] if it is not the agency];~~

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

~~3. [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~~filed in the ~~parties~~registry 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.~~

1. This section should be used only by states that require creation of a registry of environmental covenants pursuant to this optional 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, the environmental covenant should be recorded in the land records and this notice should not be used.~~]~~

~~**SECTION 15. RULES.** The [director of the state regulatory agency for environmental protection] may formulate, adopt, amend, and repeal rules consistent with this [Act] and necessary to implement this [Act].~~

~~**Reporter's Notes**~~

~~This Act authorizes adoption of rules or regulations needed to implement the Act. In some states, such authority may already exist in a generic environmental law statute and this section will not be needed. The Act does not address the procedural requirements for adopting regulations, nor the standards for judicial review of the administrator's exercise of discretion in adopting regulations, as those will be supplied by other state administrative procedure law. The provisions of state law governing management of records also apply to actions taken pursuant to this Section.~~

~~**SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**~~

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~~**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.~~

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

3. The web address required to be contained in the notice by Para. 7 of the proposed notice form should reflect the most direct means of identifying the full covenant and accompanying information. As appropriate, the address may require a specific internet address, page or name reference, document number of other unique identifying name, number or symbol.]