

D R A F T  
FOR DISCUSSION ONLY

# **UNIFORM ENVIRONMENTAL COVENANTS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

Discussion Draft for Drafting Committee Meeting February 28, 2003

# **UNIFORM ENVIRONMENTAL COVENANTS ACT**

*WITH PREFATORY NOTE AND REPORTER'S NOTES*

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By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# **UNIFORM ENVIRONMENTAL COVENANTS ACT**

## **Prefatory Note**

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

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 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 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 control the 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

regulatory body, and governed by substantial regulatory controls that implement many requirements in addition to covenants. Environmental covenants are one tool used to accomplish remediation.

Environmental covenants may be used 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 an economically valuable way. Environmental remediation projects may be done in a widely diverse array of contamination fact patterns and regulatory contexts. For example, the remediation may be done at a large industrial operating or waste disposal site. In such a situation, the cleanup could be done under federal Comprehensive Environmental Response Cleanup Liability Act (CERCLA) authority. CERCLA would also apply to remediation done at Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership.

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

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

### **Legislative Notes**

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

The Act assumes the current owners will sign the covenant. Cooperation is not always possible, however. State and federal regulatory systems make a number of parties, in addition to the current owner of a fee simple or some other interests, potentially liable for the cost of remediation of contaminated real property. As a result, a remediation project may proceed even though an owner is no longer present or interested in the property. In those circumstances, the remediation project would be conducted pursuant to regulatory orders and could be financed either by other liable parties or by public funds. However, an environmental covenant may still

be a useful tool in implementing the remediation project even in these situations.

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

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

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

### **Policy and Legislative Findings.**

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

1                                   **UNIFORM ENVIRONMENTAL COVENANTS ACT**

2

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

4 [Act].

5

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

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

8 property.

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

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

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

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

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

14                   (4) “Environmental covenant” means a servitude arising under an environmental

15 response project that imposes activity and use limitations.

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

17 remediation of real property, conducted:

18                           (A) under a federal or state governmental program requiring environmental

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

20 remediation], or

21                           (B) incident to closing of a solid or hazardous waste management unit if the closing is

22 conducted with approval of an agency; or

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

4 (6) "Holder" means a person other than an agency or other governmental body that is  
5 named as a holder in an environmental covenant.

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

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

11 (9) "Person" means an individual; corporation; business trust; estate; trust; partnership;  
12 limited liability company; association; joint venture; government; governmental subdivision,  
13 agency, instrumentality or body; public corporation; or any other legal or commercial entity.

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

15 (A) creates activity and use limitations;

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

17 (C) was agreed to before [the effective date of this [Act]].

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

20 (12) "Security instrument" means a mortgage, deed of trust, security deed, contract for  
21 deed, land sale contract, lease, or other document that creates or provides for an interest in real  
22 property to secure payment or performance of an obligation, whether by acquisition or retention



1 of a lien, a lessor's interest under a lease, or title to the real property.

2 (13) "Sign" means:

3 (A) to execute or adopt a tangible symbol with present intent to authenticate or adopt  
4 a record

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

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

### 10 **Reporter's Notes**

11  
12 The following are examples of subsection (1) activity and use limitations:

13  
14 (1) a prohibition or limitation of one or more uses of or activities on the real property,  
15 including restrictions on residential use, drilling for or pumping groundwater, or interference  
16 with activity and use limitations or other remedies,

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

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

20 (4) any physical structure or device required to be placed on the real property.  
21

22 The governmental body with responsibility for the environmental response project in  
23 question is the agency under this Act. This agency will supply the public supervision necessary  
24 to protect human health and the environment in creating and modifying the environmental  
25 covenant. The agency, for purposes of this Act, may be either a federal government entity or the  
26 appropriate state regulatory agency for environmental protection.  
27

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

1 limitations are both legally and practically enforceable.

2  
3 “Environmental response projects” covered by subsection (5) may be undertaken pursuant to  
4 authorization by one of several different statutes. Subsection (5)(a) specifically covers  
5 remediation projects required under state law. However, the subsection is written broadly to also  
6 encompass both current federal law, future amendments to both state and federal law, as well as  
7 new environmental protection regimes should they be developed. Without limiting this breadth  
8 and generality, the Act intends to reach environmental response projects undertaken pursuant to  
9 any of the following specific federal statutes:

10  
11 (1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976",  
12 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

13 (2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976",  
14 42 U.S.C. sec. 6972 and 6973, as amended;

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

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

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

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

21 (7) “Atomic Energy Act”, 42 U.S.C. 2011 et. sec., as amended.  
22

23 Subsection (5)(c) extends the Act’s coverage to voluntary remediation projects that are  
24 undertaken with approval and supervision by a governmental body. Environmental covenants  
25 that are part of voluntary remediation projects may serve both the goal of environmental  
26 protection and the goal of facilitating reuse of the real property. However, supervision of these  
27 projects by a governmental body or other authorized party is essential to insure that the project  
28 serves these goals. This Act is intended to apply only to environmental covenants that are part of  
29 such publicly supervised remediation projects.  
30

31 To protect against possible future liability for further remediation, an owner may wish to  
32 provide for remediation of the real property beyond the requirements of minimum applicable  
33 regulatory standards. Such provision can be part of the environmental response project if the  
34 requirements of governmental approval and supervision are satisfied.  
35

36 Some states authorize properly certified private parties to supervise remediation to pre-  
37 existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these  
38 are “licensed site professionals”. (Massachusetts: MGL ch. 21A §19; 310 CMR 40.1071;  
39 Connecticut: CGS §§22a-133o, 22a-133y.) Supervision and certification by statutorily-authorized  
40 parties accomplishes the same public function as supervision and certification by the  
41 governmental entity. Thus, these environmental response projects are also covered by this  
42 definition.  
43

1 Under subsection (5)(c) environmental response projects may include specific agreements  
2 between the owner and the agency for remediation that goes beyond prevailing requirements.  
3 Because the owner may have residual liability for the site, even after remediation and transfer to  
4 a third party for redevelopment, the owner may require further restrictions as a condition of  
5 creating the environmental covenant and eventual reuse of the real property. The agency's  
6 approval and supervision will be sufficient to ensure that any further restriction is in the public  
7 interest.  
8

9 The definition of "holder" is in Subsection (6). As the practice of using environmental  
10 covenants continues to grow, new entities may emerge to serve as holders, and this Act does not  
11 intend to limit this process. A holder may be the agency or any non-governmental person under  
12 the broad definition of this Act although the agency and other governmental bodies indentified in  
13 an environmental covenant may also enforce the covenant in accordance with its terms pursuant  
14 to that governmental body's regulatory authority. The identity of an individual holder must be  
15 approved by the agency and the owner as part of the process of creating an environmental  
16 covenant, as specified in Section 4 of this Act. A holder is authorized to enforce the covenant  
17 under Section 11 and this section also contains an additional provision concerning whether a  
18 holder's power to enforce the covenant is an interest in real property. A holder may be given  
19 other rights or obligations in the environmental covenant.  
20

21 Subsection (9)'s definition of interested party reaches all owners of less than a fee simple  
22 interest in the real estate. While such parties are frequently described as "holders" of such an  
23 interest, that terminology is not used here to minimize the chance for confusion with the holder  
24 as defined in this act. The definition of interested party reaches a person who has an interest  
25 solely as security for an obligation so that such person's consent will be required for creation of  
26 an environmental covenant under Section 4 and modification under Section 10 if its interest is  
27 affected by the covenant or modification. This Act does not create the interest held by any  
28 interested party and thus should not effect the liability of any interested party under any other  
29 law.  
30

31 Subsection (12) defines security instrument broadly. The definition is taken from the  
32 Uniform Non-Judicial Foreclosures Act.  
33  
34

### 35 **SECTION 3. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.**

36 Unless displaced by the particular provisions of this [Act], the principles of law and equity,  
37 including the law of real property and environmental and administrative law, supplement the  
38 provisions of this [Act].  
39

1  
2       **SECTION 4. REQUISITES OF ENVIRONMENTAL COVENANT.**

3           (a) An environmental covenant must:

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

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

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

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

17                               **Reporter's Notes**

18           This Act does not provide the standards for environmental remediation nor the specific  
19 activity and use limitations to be used at a particular site. Those will be provided by other state  
20 and federal law governing mandatory and voluntary cleanups. Those standards will then be  
21 incorporated into the environmental response project, which, in turn, calls for activity and use  
22 restrictions that can be implemented through creation of an environmental covenant. This  
23 section addresses creation of the environmental covenants.  
24

25           An environmental covenant can be created only by agreement between the agency and the  
26 owner. If there is a holder other than the agency, both the agency and the owner must approve  
27 the holder, and the holder must agree to the terms of the covenant. The agency may refuse to

1 agree to an environmental covenant if it does not effectively implement the activity and use  
2 limitations specified in the environmental response project.  
3

4 Where no owner is available and willing to participate in the environmental response project,  
5 it may be appropriate for the agency to condemn and take an interest sufficient to record a valid  
6 servitude on the property where it has the power to do so.  
7

8 This Act recognizes that there may be parties which own different interests in real property,  
9 other than the fee simple interest, and these are defined as “interested parties” under Section 2 (9)  
10 of this Act. Examples include an interest in mineral rights may be owned separately from  
11 surface rights, long term leases, mortgages and liens.  
12

13 Subsection (b) is concerned with prior interests in the real property. If a prior interest is not  
14 subordinated to the environmental covenant, and then is foreclosed at some later time, under  
15 traditional real property law, that foreclosure would extinguish or limit an environmental  
16 covenant. Since such an outcome is antithetical to the policies underlying this Act, the Act  
17 contemplates that the agency may, before agreeing to the covenant, require subordination of these  
18 interests. At the time of creation of the environmental covenant, the agency must determine  
19 whether the prior interest presents a realistic threat to the covenant’s ability to accomplish its  
20 purpose to protect the environment protection and human health. By subordinating its interest,  
21 an owner or interested party does not change its liability with respect to the property subject to  
22 the environmental covenant. Any such liability of a subordinating party would arise by operation  
23 of other law and not under this Act.  
24

## 25 **SECTION 5. VALIDITY OF ENVIRONMENTAL COVENANT.**

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

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

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

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

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

32 (4) it imposes a negative burden;

33 (5) it imposes affirmative obligations upon the owner of an interest in the burdened

1 real property or upon the holder;

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

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

4 (8) it is subject to similar impediments to enforcement of that interest under the laws  
5 of this state; or

6 (9) it is identified as an easement, covenant, servitude, deed restriction, or other  
7 interest.

8 (c) A prior covenant is not invalid or unenforceable by reason of any of the limitations  
9 on enforcement of interests described in subsection (b). This [Act] does not apply in any other  
10 respect to a prior covenant.

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

### 13 **Reporter's Notes**

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

17  
18 Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation  
19 Easement Act. One of the Environmental Covenant Act's basic goals is to remove common law  
20 defenses that could impede the use of environmental covenants. This section addresses that goal  
21 by comprehensively identifying these defenses and negating their applicability to environmental  
22 covenants.

23  
24 This Act's policy supports the enforceability of environmental covenants by precluding  
25 applicability of doctrines, including older common law doctrines, that would limit enforcement.  
26 That policy is broadly consistent with the Restatement of the Law Third of Property (Servitudes),  
27 including §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5  
28 (benefitted or burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and  
29 concern doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on alienation). .  
30

1 Subsection (b)(1) provides that an environmental covenant, the benefit of which is held in  
2 gross, may be enforced against the grantor or his successors or assigns. By stating that the  
3 covenant need not be appurtenant to an interest in real property, it eliminates the requirement in  
4 force in some states that the holder of an easement must own an interest in real property (the  
5 “dominant estate”) benefitted by the easement.  
6

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

11 Subsection (b)(3) addresses the problem posed by the existing law’s recognition of servitudes  
12 that served only a limited number of purposes and that law’s reluctance to approve so-called  
13 “novel incidents”. This restrictive view might defeat enforcement of covenants serving the  
14 environmental protection ends enumerated in this Act. Accordingly, subsection (b)(3)  
15 establishes that environmental covenants are not unenforceable solely because they do not serve  
16 purposes or fall within the categories of easements traditionally recognized at common law or  
17 other applicable law.  
18

19 Subsection (b)(4) deals with a variant of the foregoing problem. Some applicable law  
20 recognizes only a limited number of “negative easements” – those preventing the owner of the  
21 burdened real property from performing acts on his real property that he would be privileged to  
22 perform absent the easement. Because a far wider range of negative burdens might be imposed  
23 by environmental covenants, subsection (b)(4) modifies existing law by eliminating the defense  
24 that an environmental covenant imposes a “novel” negative burden.  
25

26 Subsection (b)(5) addresses the opposite problem – the potential unenforceability under  
27 existing law of an easement that imposes affirmative obligations upon either the owner of the  
28 burdened real property or upon the holder. Under some existing law, neither of those interests  
29 was viewed as a true easement at all. The first, in fact, was labeled a “spurious” easement  
30 because it obligated an owner of the burdened real property to perform affirmative acts. (The  
31 spurious easement was distinguished from an affirmative easement, illustrated by a right of way,  
32 which empowered the easement’s holder to perform acts on the burdened real property that the  
33 holder would not have been privileged to perform absent the easement.)  
34

35 Achievement of environmental protection goals may require that affirmative obligations be  
36 imposed on the burdened real property owner or on the covenant holder or both. For example,  
37 the grantor of an environmental covenant may agree to use restrictions and may also agree to  
38 undertake affirmative monitoring or maintenance obligations. In addition, the covenant might  
39 impose specific engineering or monitoring obligations on the holder, particularly a charitable  
40 corporation or trust holder. In either case, the environmental covenant would impose affirmative  
41 obligations. Subsection (b)(5) establishes that neither would be unenforceable solely because it  
42 is affirmative in nature.  
43

1 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract  
2 defenses, respectively. They have traditionally been asserted as defenses against the enforcement  
3 of covenants and equitable servitudes.  
4

5 Subsection (c) has further provisions for covenants created prior to the date of this Act. It  
6 specifies that the defenses covered in subsection (b) will not make prior covenants  
7 unenforceable. Beyond negating these specific defenses, this Act does not apply to prior  
8 covenants. If the parties to a prior covenant wish to have the other benefits of this Act for that  
9 covenant, they will have to re-execute the covenant in a manner which satisfies the requirements  
10 of this Act.  
11

12 Section (d) disavows the intent to invalidate any interest created either before or after the Act  
13 which does not comply with the Act but which is otherwise valid under the state's law.  
14  
15

## 16 **SECTION 6. OTHER LAW REGULATING USE OF REAL PROPERTY.**

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

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

### 26 **Reporter's Notes**

27

28 Subsection (a) clarifies that this Act does not displace other restrictions on land use,  
29 including zoning law. Restrictions under that law apply unchanged to real property covered by  
30 an environmental covenant. Where other law, including either a state or federal environmental  
31 response project, requires structures or activities in order to perform the environmental  
32 remediation, the status of those requirements is determined by that other law and not by this Act.  
33



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

## 12 **SECTION 7. REQUIREMENTS FOR ENVIRONMENTAL COVENANT.**

13 (a) Unless waived or modified by the agency in a particular case, after an environmental  
14 covenant is signed, the owner or other person designated by the agency shall give notice of the  
15 environmental covenant promptly to the following persons:

- 16 (1) all interested parties in the real property subject to the covenant;
- 17 (2) all persons in possession of the real property subject to the covenant;
- 18 (3) all persons holding an interest of record in abutting real property;
- 19 (4) all persons holding an interest of record in other real property likely to be affected  
20 by contamination remaining on the real property subject to the covenant, as determined by the  
21 agency;
- 22 (5) any affected local government; and
- 23 (6) all persons liable for environmental remediation of the real property subject to the  
24 covenant as determined by the agency.

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

- 27 (1) a transferee to give notice to the agency, the holder, and the [insert name of state

1 regulatory agency for environmental protection] of a transfer of any interest in the real property  
2 subject to the environmental covenant;

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

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

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

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

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

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

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

1 the [insert name of state regulatory agency for environmental protection] shall so notify the  
2 applicant or the person proposing the use or activity.

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

5 (1) any information related to the title to the real property covered by the  
6 environmental covenant specified by the agency;

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

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

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

### 13 **Reporter's Notes**

14  
15 Subsection (a) mandates notice of a proposed environmental covenant unless the agency  
16 determines otherwise.

17  
18 Subsection (b) mandates inclusion of a number of specific requirements in an environmental  
19 covenant unless the agency determines otherwise.

20  
21 Subsection (b)(1) concerns notice of a transfer of an interest in the real property subject to an  
22 environmental covenant. Subsection (b)(4) concerns a covenant's requirement of notice of an  
23 application for a building permit, change of use of the real property subject to an environmental  
24 covenant, or for other specified activities.

25  
26 Where the [insert name of state regulatory agency for environmental protection] determines  
27 that a proposed building permit, change of use of the real property, or other activity notified  
28 under subsection (b)(4) would violate the environmental covenant, subsection (c) requires that it  
29 so notify the applicant or person proposing the activity.

30  
31 Subsection (e) authorizes the [insert name of state regulatory agency for environmental

1 protection] to require specified information as a condition to signing the environmental covenant.  
2  
3

4 **Alternative A.**  
5

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

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

13 (b) The [insert name of state regulatory agency for environmental protection] shall  
14 [create and maintain a][maintain its currently existing] registry that contains all environmental  
15 covenants and any modification or termination of those covenants. The registry may also contain  
16 any other information concerning environmental covenants and the real property subject to them  
17 which the agency considers appropriate. The registry is a public record for purposes of [insert  
18 reference to State Freedom of Information Act].]  
19

20 **Alternative B**

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

22 Except as otherwise provided in section 9(b), an environmental covenant, or any modification  
23 or termination of an environmental covenant, is subject to the laws of this state governing  
24 recording and priority of interests in real property.]

1 **Reporter's Notes**

2 Section 8 is offered in two versions. Alternative A is to be used in jurisdictions that will  
3 require creation or maintenance of an existing registry of environmental covenants at the [insert  
4 name of state regulatory agency for environmental protection]. This alternative authorizes either  
5 the environmental covenant or a notice of the covenant to be recorded in the land records.  
6 Alternative B is to be used in jurisdictions that do not require creation of a registry of  
7 environmental covenants. In those jurisdictions, the environmental covenant should be recorded  
8 in the land records and this Act's provisions on notice in Section 13 should not be used.  
9

10  
11 **Reporter's Notes, Alternative A**

12  
13 Subsection (a) provides that environmental covenants are subject to existing state law on  
14 recording and priority of interests in real property. Either the environmental covenant or a notice  
15 of the covenant may be recorded. While a standard form of the notice is not required, Official  
16 Form 1 is adopted with the text of this Act for use by those parties who wish to use it. Section 13  
17 provides that use of this Form will comply with the Act's notice requirements.  
18

19 Subsection (b) requires creation of a new registry, or maintenance of an existing registry of  
20 environmental covenants by the [insert name of state regulatory agency for environmental  
21 protection]. This registry may be combined with the new state registry of brownfield sites  
22 specified in the Small Business Liability Relief and Brownfields Revitalization Act  
23 §128(b)(1)(C), Pub. L. No. 107-118, \*\* Stat. \*\* (2002) (HR 2869, 107<sup>th</sup> Cong. 1<sup>st</sup> Session),  
24 although this [Uniform Environmental Covenants Act] calls for recording more extensive  
25 information.  
26

27 The full environmental covenant must be recorded in the registry in the [insert name of state  
28 regulatory agency for environmental protection]. In addition, the agency may require recording  
29 of additional information about each covenant and the real property subject to it. The agency  
30 may choose to require a description of the issues presented by the residual contamination that  
31 give rise to an environmental covenant. The description will be much more accessible to non  
32 specialists, including local government and community interests, than the full covenant. This  
33 description may, at a minimum, identify the constituents of concern that have been left in the real  
34 property, their location, the potential human and environmental exposure pathways and receptors  
35 for those chemicals, and the permissible exposure limits.  
36

37 Creation or maintenance of a specialized registry should improve access to this information  
38 by the public, local governments, citizens groups, and environmental interests, as well as real  
39 property professionals.  
40

41  
42 **Reporter's Notes, Alternative B**

1 This section provides that environmental covenants are subject to existing state law on  
2 recording and priority of interests in real property.]  
3  
4

## 5 **SECTION 9. DURATION OF ENVIRONMENTAL COVENANT.**

6 (a) An environmental covenant is perpetual unless limited by its terms to a specific  
7 duration or to the occurrence of a specific event or terminated pursuant to Section 10.

8 (b) Except as otherwise provided in Section 10(e), an environmental covenant may not be  
9 extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or  
10 application of the doctrines of adverse possession, abandonment, waiver, lack of enforcement, or  
11 any similar law.

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

### 14 **Reporter's Notes**

15 Subsection (a) is needed to ensure that the environmental covenant's restrictions continue as  
16 long as needed. Subsection (b) makes environmental covenants survive later tax foreclosure  
17 sales, and also survive potential common law and statutory impairments. These covenants seek to  
18 protect human health and the environment as part of the environmental response project, beyond  
19 reflecting the results of private bargaining between contracting private parties in specific private  
20 transactions. To do so, environmental covenants must survive impairments arising from these  
21 sources. However, this subsection does not restrict application of other environmental and  
22 administrative law to judicial supervision of agency conduct.  
23

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

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

5  
6 States which do not have a Marketable Record Title Act will not need subsection (c). States  
7 which do have a Marketable Record Title Act may choose to put this exception in that statute  
8 rather than in this Act.

9  
10 The exception to the Marketable Record Title statute in subsection (c) is analogous to  
11 exceptions commonly made for conservation and preservation servitudes. Restatement of the Law  
12 of Property Third (Servitudes) § 7.16 (5) (1998). It is based on the public importance of ensuring  
13 continued enforcement of environmental covenants to protect human health and the environment,  
14 as well as the relatively low cost of extending title searches to the registry of environmental  
15 covenants to be kept by the [insert name of state regulatory agency for environmental protection]  
16 under Section 7(b) of this Act.

17  
18 If there is any question whether a specific environmental covenant is exempt from the  
19 requirements of the Marketable Title Act, the agency should comply with that Act by re-recording  
20 the covenant within the Marketable Title Act's specified statutory period. This will insure that the  
21 covenant is not extinguished under the Marketable Title Act.

22  
23  
24  
25 **SECTION 10. MODIFICATION OR TERMINATION OF ENVIRONMENTAL**  
26 **COVENANT.**

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

- 28 (1) the agency;
- 29 (2) unless consent was waived, the current owner and any former owner who signed  
30 the covenant; and
- 31 (3) a party that originally signed the covenant and has a contingent future liability  
32 under the environmental response project.

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

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

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

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

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

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

#### 14 **Reporter's Notes**

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

22  
23 Subsection (a) specifies the parties which must consent to the modification. Subsection (a)(3)  
24 reaches a party which originally signed the covenant even though it was not an owner of the real  
25 property. Such parties might typically be ones which were liable for some or all of the  
26 environmental remediation specified in the environmental response project. This provision is  
27 intended to apply to successors in interest to the party which originally signed the covenant where  
28 the successor continues to be subject to the contingent liability under the environmental response  
29 project.



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

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

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

8 (3) Information demonstrating that one or more activity limitations or use restrictions  
9 is no longer necessary.  
10

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

16 (1) All affected local governments;

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

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

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

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

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

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

26 (8) The public.  
27

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

38 Subsection (f) contemplates that the environmental covenant may impose additional  
39 restrictions on modification or termination beyond those required by this Act. In some  
40 circumstances the owner or another party may have contingent residual liability for further  
41 cleanup of the real property subject to the environmental covenant and may seek further  
42 restrictions in the covenant to protect against this contingent liability.  
43

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

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

- 4                   (1) the agency and any other party to the covenant;
- 5                   (2) if it is not the agency, the [insert name of state regulatory agency for  
6 environmental protection]
- 7                   (3) a current or former owner or interested party whose interest in the real property  
8 may be affected by violation of the covenant, or that may be liable under the environmental  
9 response project;

10                  (4) an affected local government;

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

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

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

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

18           (c) The rights of an agency or other governmental body named in an environmental  
19 covenant to enforce the covenant are based on the agency's or governmental authority's  
20 regulatory power and are not an interest in the real property subject to an environmental covenant,  
21 unless the agency or other governmental body determine otherwise at the time of creation of the  
22 covenant or the covenant otherwise provides.

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

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

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

#### 10 **Reporter's Notes**

11 Subsection (a) specifies which persons may bring an action to enforce an environmental  
12 covenant.  
13

14 Subsection (b) recognizes that in many situations the statutes authorizing an environmental  
15 response project will provide substantial authority for governmental enforcement of an  
16 environmental covenant.  
17

18 Subsections (c) and (d) specify when the right to enforce an environmental covenant is not an  
19 interest in real property. These provisions are included for two reasons. First, some environmental  
20 enforcement agencies are not authorized to own an interest in real property and this provision will  
21 enable those agencies to have enforcement rights under the Act.  
22

23 Second, the nature of the holder's or other person's interest in the real property may influence  
24 whether its rights and duties with respect to the real property are likely to lead to potential liability  
25 for future environmental remediation, should such remediation become necessary. Under  
26 CERCLA an "owner" is liable for remediation costs, 42 U.S.C.A. 9607(a)(1). Unfortunately, the  
27 definition of "owner" in the statute is circular and unhelpful in evaluating whether a holder is  
28 potentially liable under it. 42 U.S.C.A. 9601(20).  
29

30 In general, the right to enforce the covenant should be considered comparable to the rights  
31 covered in an easement and, thus, should not lead to CERCLA liability. The two cases that have  
32 considered this question have found that the parties which held the easements were not CERCLA  
33 "owners". Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32

1 F.3d 1364 (9<sup>th</sup> Cir. 1994); Grand Trunk R.R. v. Acme Belt Recoating, 859 F. Supp. 1125  
2 (W.D.MI, 1994). In each case, the court reasoned that the circular definition of owner meant that  
3 the term's most common meaning would prevail. The common law's distinction between an  
4 easement holder and the property owner was then applied to find the easement holder not to be an  
5 "owner" for purposes of this statute.  
6

7 Where the holder or another person has more extensive rights, a careful analysis will be  
8 required. The cases typically emphasize that parties who exercise the degree of control over a site  
9 equivalent to the control typically exercised by an owner of the site will be held liable as an  
10 "owner". Under this approach, for example, lessees have been held liable as owners when their  
11 control over the site approximated that which an owner would have. See, e.g., Delaney v. Town of  
12 Carmel, 55 F. Supp. 2d 237 (S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F.  
13 Supp. 1317 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984  
14 (D.C.S.C. 1984.)  
15

16 CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the  
17 case law interpreting this definition emphasizes that a party is liable as an operator if it has a high  
18 degree of control over the operating decisions and day to day management at the site. A holder  
19 will, in general, have only control authority over the site related to effective enforcement of the  
20 environmental covenant and does not typically need more extensive day to day control. A holder  
21 should be given more extensive control over the site only after careful consideration of the  
22 potential CERCLA liability.  
23  
24

## 25 **SECTION 12. COPIES TO LOCAL GOVERNMENT.**

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

### 29 **Reporter's Notes**

30  
31 Effective implementation of environmental covenants will require cooperation between  
32 the agency and the affected local government which has jurisdiction over building permits and  
33 local land use decisions. Section 6 of this Act provides that an environmental covenant cannot  
34 authorize a land use that is prohibited by local law, and that an environmental covenant may  
35 restrict a land use that is authorized by local law. This Section requires the agency to notify all  
36 affected local governments of the creation, modification or termination of an environmental  
37 covenant.  
38

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

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

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

5           (2) the name and address of:

6               (A) the owner of the real property;

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

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

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

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

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

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

- 18   1. This notice is filed on the land records of the [political subdivision] of [insert name of  
19 jurisdiction in which the real property is located] pursuant to Sections 7 and 13 of the  
20 Uniform Environmental Covenants [Act]. The [Act] has been codified in this State at [insert  
21 statutory reference].  
22
- 23   2. This notice and the covenant, modification, or termination to which it refers impose  
24 significant legal restrictions and obligations with respect to the future use of and activities on  
25 the property described below.  
26

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 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 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 the covenant, modification, or termination and their addresses are:
  1. [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 the parties on [insert date on which the last party signed the covenant, modification, or termination]. The covenant, modification, or termination becomes effective for all purposes on the date this notice is recorded in the land records of all jurisdictions in which the property is located. This notice remains effective for all purposes until a release of the covenant is signed by the then owner of the property and by the agency and recorded.
7. The full text of the covenant, modification, or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the [insert name of state regulatory agency for environmental protection] at [insert address and room of building in which the registry is maintained]. [The covenant, modification, or termination may be found electronically at [insert web address for covenant]].

### **Reporter's Notes**

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

This section should be used only by states that require creation of a registry of environmental covenants pursuant to Section 7(b) of this Act. The notice specified in this Section may be recorded in the land records in lieu of recording the environmental covenant. However, such a notice should only be authorized if the registry is established and the environmental covenant is recorded there. Where there is no separate registry, 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.

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

**SECTION 16. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that Act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of that Act.

## Reporter's Notes

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

1 Executive Committee of the National Conference has reviewed and approved this language.

2  
3 **SECTION 17. SEVERABILITY.** If any provision of this [Act] or its application to any  
4 person or circumstance is held invalid, the invalidity does not affect other provisions or  
5 applications of this [Act] which can be given effect without the invalid provision or application,  
6 and to this end the provisions of this [Act] are severable.