

D R A F T

FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL COVENANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

~~MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR~~

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UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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DRAFTING COMMITTEE TO UNIFORM ENVIRONMENTAL COVENANTS ACT

WILLIAM R. BREETZ, JR., University of Connecticut School of Law, Connecticut Urban Legal Initiative, 35 Elizabeth Street, Room K-202, Hartford, CT 06105, *Chair*
MARION W. BENFIELD, JR., 10 Overlook Circle, New Braunfels, TX 78132
DAVID D. BIKLEN, Connecticut Law Revision Commission, State Capitol, Room 509A, Hartford, CT 06106
STEPHEN C. CAWOOD, 163 W. Short St., Suite 300, Lexington, KY 40507-1361
BRUCE A. COGGESHALL, One Monument Sq., Portland, ME 04101
FRANK W. DAYKIN, 4745 Giles Way, Carson City, NV 89704, *Committee on Style Liaison*
THEODORE C. KRAMER, 34 Allerton Ave., Brattleboro, VT 05301-2939
DONALD E. MIELKE, Ken Caryl Starr Centre, 7472 S. Shaffer Ln., Suite 100, Littleton, CO 80127
LARRY L. RUTH, 1233 Lincoln Mall, Suite 202, Lincoln, NE 68508, *Enactment Plan Coordinator*
HIROSHI SAKAI, 902 City Financial Twr., 201 Merchant St., Honolulu, HI 96813
YVONNE L. THARPES, Legislature of the Virgin Islands, Capitol Building, P.O. Box 1690, St. Thomas, VI 00804
MICHELE L. TIMMONS, Office of the Revisor of Statutes, 700 State Office Bldg., 100 Constitution Ave., St. Paul, MN 55155
KURT A. STRASSER, University of Connecticut School of Law, 65 Elizabeth St., Hartford, CT 06105-2290, *Reporter*

EX OFFICIO

K. KING BURNETT, P.O. Box 910, Salisbury, MD 21803-0910, *President*
CARL H. LISMAN, 84 Pine St., P.O. Box 728, Burlington, VT 05402, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

ROGER D. SCHWENKE, Carlton Fields, PA 1 Harbour Pl., 777 S. Harbour Is. Blvd., P.O. Box 3239, Tampa, FL33602-5950

EXECUTIVE DIRECTOR

WILLIAM HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall, Columbia, MO 65211, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

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

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

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

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

A second important policy served by this [Act] is the effort to return previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real estate 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, such covenants risk based remediation must be used carefully to ensure that the risk based remediation protects human health and the environment. Environmental covenants accomplish this goal by controlling so that it actually controls the risk presented by the residual contamination which remains in the real estate. The covenants can control this risk by imposing property and thereby protects human health and the environment. When risk based remediation imposes restrictions on how the property may be used after the cleanup, by requiring requires continued monitoring of the site, and by requiring or requires construction of permanent containment or other remedial structures on the site, environmental covenants are a crucial tools to make these restrictions and requirements effective. Yet, environmental covenants can perform this critical risk control function 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 in this to accomplish remediation effort.

Environmental covenants may be used as part of ~~environmental remediations~~ the remedial decision regulatory process to protect the public from residual contamination that remains while also permitting re-use of the site in an economically valuable way. Environmental remediation projects may be done in a widely diverse array of contamination fact patterns and regulatory contexts. For example, the remediation may be done at a large industrial operating or waste disposal site. In such a situation, the cleanup could be done under either federal CERCLA or RCRA authority. These federal statutes would also apply to remediation done at Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership. ~~The regulatory statutes and applicable regulations will provide the restrictions and controls to be included in the resulting environmental covenants in these settings.~~

In other situations, state law and regulation will be a more important source of regulatory policy. State law is given a role to play in the federal 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 ~~covenants used~~ use restrictions from residual contamination in any of these different situations. Once the governing regulatory system and the property owner have determined to use ~~an environmental covenant as part of a remediation project, this [Act]~~ a risk based approach to cleanup to protect the public from residual contamination, this Act supplies the legal infrastructure for creating and enforcing ~~that~~ 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, ~~as well as~~ potentially including the fee owner and the ~~holders~~ 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. ~~This would not be the case in a mandatory clean-up where a person or persons were held liable for the full cost of a complete clean-up.~~

The [Act] assumes the current owners will ~~participate in signing~~ 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 ~~estate~~ 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 ~~part of~~ tool in implementing the remediation project even in these situations.

When an owner which is either unavailable or unwilling to participate in the environmental response project, it may be appropriate to condemn and take a partial interest in the real ~~estate~~ property in order to be able to record a valid servitude on it. Under the law of some states, ~~agencies~~ 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 ~~agency~~ state have ~~such~~ a power of condemnation, this [Act] does not provide a substantive statutory basis for that power, and the ~~agency~~ State must therefore rely on other State law. Each State considering adoption of this [Act] may wish to consider the availability of should ensure that such a condemnation power to the agency 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 ~~limitations~~ and use ~~restrictions~~ 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 ~~limitations~~ and use ~~restrictions~~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 (a) a governmental program requiring environmental remediation of real
2 ~~estate~~property, including [insert references to state law requiring environmental remediation], or

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

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

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

13 (8) “Owner” means a person that holds ~~an~~the fee simple interest in real ~~estate, other than~~
14 ~~as security for an obligation, which~~property that is subject to an environmental covenant.

15 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,
16 limited liability company, association, joint venture, public corporation, or any other legal or
17 commercial entity.

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

19 (a) creates activity ~~limitations~~ and use ~~restrictions~~limitations with respect to real
20 ~~estate~~property;

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

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

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

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

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

9
10 **Reporter's Notes**

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

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

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

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

20 (d) any physical structure or device required to be placed on the real ~~estate~~property.

21
22 The governmental body with responsibility for the environmental response project in
23 question is the authorized agency under this [Act]. This agency will supply the public
24 supervision necessary to protect human health and the environment in creating and modifying the
25 environmental covenant. The agency, for purposes of this [Act], may be either a federal
26 government entity or the ~~department~~appropriate state regulatory agency for environmental
27 protection.

28
29 Subsection (54) states that an environmental covenant is created to implement an
30 environmental response project. An environmental response project may determine, in some
31 circumstances, to leave some residual contamination on the real ~~estate~~property. This may be
32 done because complete cleanup is technologically impossible, or because it is either ecologically
33 or economically undesirable. In this situation, the environmental response project may use
34 activity ~~limitations~~ and use ~~restrictions~~limitations to control residual risk which results from

1 contamination remaining in real estate property. An environmental covenant is then created to
2 ensure that the activity and use limitations are both legally and practically enforceable.

3
4 “Environmental response projects” covered by subsection (65) may be undertaken pursuant to
5 authorization by one of several different statutes. Subsection (65)(a) specifically covers
6 remediation projects required under state law. However, the subsection is written broadly to also
7 encompass both current federal law, future amendments to both state and federal law, as well as
8 new environmental protection regimes should they be developed. Without limiting this breadth
9 and generality, the [Act] intends to reach environmental response projects undertaken pursuant to
10 any of the following specific federal statutes:

11
12 (1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976",
13 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

14 (2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976",
15 42 U.S.C. sec. 6972 and 6973, as amended;

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

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

20
21 Subsection (65)(b) extends the [Act]'s Act's coverage to voluntary remediation projects that
22 are undertaken with approval and supervision by a governmental body. Environmental
23 covenants that are part of voluntary remediation projects may serve both the goal of
24 environmental protection and the goal of facilitating reuse of the real estate property. However,
25 supervision of these projects by a governmental body or other authorized party is essential to
26 insure that these goals are metserved. This [Act] is intended to apply only to environmental
27 covenants that are part of such publicly supervised remediation projects.

28
29 An owner may wish to provide for remediation of the real estate property beyond the
30 requirements of minimum applicable regulatory standards, to protect against possible future
31 liability for further remediation. Such provision can be part of the environmental response
32 project if the requirements of governmental approval and supervision are satisfied.

33
34 Some states authorize properly certified private parties to supervise remediation to pre-
35 existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these
36 are “licensed site professionals”. (Massachusetts: MGL ch. 21A §19; 310 CMR 40.1071;
37 Connecticut: CGS §§22a-133o, 22a-133y.) Supervision and certification by statutorily authorized
38 parties accomplishes the same public function as supervision and certification by the
39 governmental entity. Thus, these environmental response projects are also covered by this
40 definition.

41
42 Subsection (65)(b) also includes within environmental response projects specific agreements
43 between the owner and the agency for remediation that goes beyond prevailing requirements.

1 Because the owner may have residual liability for the site, even after remediation and transfer to
2 a third party for redevelopment, the owner may require further restrictions as a condition of
3 creating the environmental covenant and eventual reuse of the real ~~estate~~property. The agency's
4 approval and supervision will be sufficient to ensure that any further restriction is in the public
5 interest.

6
7 The definition of "holder" is in Subsection (76). As the practice of using environmental
8 covenants continues to grow, new entities may emerge to serve as holders, and one purpose of
9 the [Act] is to avoid limiting this process. A holder may be the agency, a governmental body, or
10 a person under the broad definition of this [Act]. The identity of an individual holder must be
11 approved by the agency and the owner as part of the process of creating an environmental
12 covenant, as specified in Section 3 of this [Act]. Section 4(f) contains an additional provision
13 concerning whether a holder's power to enforce the covenant is an interest in real ~~estate~~
14 property.

15
16 Section 9's definition of interested party reaches all owners of less than a fee simple
17 interest in the real estate. While such parties are frequently described as "holders" of such an
18 interest, that terminology is not used here to minimize the chance for confusion with the holder
19 as defined in this act. The definition of interested party reaches a person who hold an interest
20 solely as security for an obligation so that such person's consent will be required for creation of
21 an environmental covenant under Section 3 and modification under Section 9 if its interest is
22 affected by the covenant or modification. This Act does not create the interest held by any
23 interested party and thus should not effect the liability of any interested party under any other
24 law.

25 26 27 **SECTION 3. CREATION OF ENVIRONMENTAL COVENANTS.**

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

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

31 (2) describe the activity ~~limitations~~ and use ~~restrictions~~limitations on the real
32 ~~estate~~property, including any rights of access or other rights granted to a person in connection
33 with enforcement of the covenant; and

34 (3) be signed by:

35 (A) the agency;

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

2 (C) each owner and interested party whose interest in the real estateproperty will
3 be subordinated to the covenant.

4 (b) The agency may require an owner of real estateproperty and any interested party to
5 obtain written subordination of prior interests in the real estateproperty subject to an
6 environmental covenant as a condition to signing the covenant.

7 Reporter's Notes

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

14
15 An environmental covenant can be created only by agreement between the owner and the
16 agencyagency and the owner or an interested party which owns an interest which includes the
17 right to create the covenant. If there is a holder other than the agency, both the agency and the
18 owner must approve the identity of the holder, and the holder must agree to the terms of the
19 covenant. The agency may also refuse to agree to an environmental covenant if it does not
20 effectively implement the activity limitations and use restrictionslimitations specified in the
21 environmental response project.

22
23 This [Act] recognizes that there may be different owners ofparties which own different
24 interests in real estate. For example, property, other than the fee simple interest, and these are
25 defined as "interested parties" under Section 2 (9) of this Act. Examples include an interest in
26 mineral rights may be owned separately from surface rights, long term leases, mortgages and
27 liens. Subsection (a)(3)(iii)C requires that the interested party which owner ofsuch any interest
28 to be affected by the environmental covenant must agree to the covenant.

29
30 Subsection (b) is concerned with prior interests in the real estateproperty. If a prior
31 interest is not subordinated to the environmental covenant, and wasthen is foreclosed at some
32 later time, then under traditional real estateproperty law, that foreclosure would serve to
33 extinguish or limit an environmental covenant. Since such an outcome is antithetical to the
34 policies underlying this [Act], the [Act] contemplates that the agency may, before agreeing to the
35 covenant, require subordination of these interests. At the time of creation of the environmental
36 covenant, the agency must determine whether the prior interest presents a realistic threat to the

1 covenant's ability to accomplish its purpose to protect the environment protection and human
2 health.
3
4

5 **SECTION 4. VALIDITY.**

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

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

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

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

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

12 (4) it imposes a negative burden;

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

15 (6) the benefit or burden does not touch or concern real estateproperty; or

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

17 (c) An environmental covenant is not invalid or unenforceable because it is identified as
18 an easement, covenant, servitude, deed restriction, or other instrumentinterest.

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

23 (e) This [Act] does not invalidate any interest, whether designated as an environmental

1 covenant or other instrument interest, that is otherwise enforceable under the law of this State.

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

6 **Reporter's Notes**

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

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

16
17 This [Act]'s Act's policy supports the enforceability of environmental covenants by
18 precluding applicability of older common law doctrines limiting such enforcement. That policy
19 is broadly consistent with the Restatement of the Law Third of Property (Servitudes), including
20 §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5 (benefitted or
21 burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and concern
22 doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on alienation). .

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

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

33
34 Subsection (b)(3) addresses the problem posed by the common law's recognition of
35 servitudes that served only a limited number of purposes and its reluctance to approve so-called
36 "novel incidents". This restrictive view might defeat enforcement of covenants serving the
37 environmental protection ends enumerated in this [Act]. Accordingly, subsection (b)(3)

1 establishes that environmental covenants are not unenforceable solely because they do not serve
2 purposes or fall within the categories of easements traditionally recognized at common law.
3

4 Subsection (b)(4) deals with a variant of the foregoing problem. The common law
5 recognized only a limited number of “negative easements” – those preventing the owner of the
6 burdened real estate property from performing acts on his real estate property that he would be
7 privileged to perform absent the easement. Because a far wider range of negative burdens than
8 those recognized at common law might be imposed by environmental covenants, subsection
9 (b)(4) modifies the common law by eliminating the defense that an environmental covenant
10 imposes a “novel” negative burden.
11

12 Subsection (b)(5) addresses the opposite problem – the potential unenforceability at common
13 law of an easement that imposes affirmative obligations upon either the owner of the burdened
14 real estate property or upon the holder. Neither of those interests was viewed by the common law
15 as a true easement at all. The first, in fact, was labeled a “spurious” easement because it
16 obligated an owner of the burdened real estate property to perform affirmative acts. (The spurious
17 easement was distinguished from an affirmative easement, illustrated by a right of way, which
18 empowered the easement’s holder to perform acts on the burdened real estate property that the
19 holder would not have been privileged to perform absent the easement.)
20

21 Achievement of environmental protection goals may require that affirmative obligations be
22 imposed on the burdened real estate property owner or on the covenant holder or both. For
23 example, the grantor of an environmental covenant may agree to use restrictions and may also
24 agree to undertake affirmative monitoring or maintenance obligations. In addition, the covenant
25 might impose specific engineering or monitoring obligations on the holder, particularly a
26 charitable corporation or trust holder. In either case, the environmental covenant would impose
27 affirmative obligations. Subsection (b)(5) establishes that neither would be unenforceable solely
28 because it is affirmative in nature.
29

30 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract
31 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
32 of covenants and equitable servitudes.
33

34 Subsection (d) has further provisions for covenants created prior to the date of this [Act]. It
35 specifies that the common law defenses covered in subsection (b) will not make prior covenants
36 unenforceable, and that the identification of a prior covenant with one name or another will not
37 make it unenforceable. Beyond negating these specific defenses, this [Act] does not apply to
38 prior covenants. If the parties to a prior covenant wish to have the benefits of this [Act] for that
39 covenant, they will have to re-execute the covenant in a manner which satisfies the requirements
40 of this [Act].
41

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

1 Subsection (f) provides that a holder’s right to enforce an environmental covenant is not an
2 interest in real estate property. This provision is included for two reasons. First, some
3 environmental enforcement agencies are not authorized to own an interest in real estate property
4 and this provision will enable those agencies to serve as a holder under the act.
5 Act.
6

7 Second, the nature of the holder’s interest in the real property may influence whether its
8 rights and duties with respect to the real property are likely to lead to potential liability for future
9 environmental remediation, should such remediation become necessary. Under CERCLA an
10 “owner” is liable for remediation costs, 42 U.S.C.A. 9607(a)(1). Unfortunately, the definition of
11 “owner” in the statute is circular and unhelpful in evaluating whether a holder is potentially liable
12 under it. 42 U.S.C.A. 9601(20).
13

14 In general, a holder’s right to enforce the covenant should be considered comparable to the
15 rights covered in an easement and, thus, should not lead to CERCLA liability. The two cases
16 that have considered this question have found that the parties which held the easements were not
17 CERCLA “owners”. Long Beach Unified School District v. Dorothy B. Godwin California
18 Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk R.R. v. Acme Belt Recoating, 859 F.
19 Supp. 1125 (W.D.MI, 1994). In each case, the court reasoned that the circular definition of
20 owner meant that the term’s most common meaning would prevail. The common law’s
21 distinction between an easement holder and the property owner was then applied to find the
22 easement holder not to be an “owner” for purposes of this statute.
23

24 Where the holder has more extensive rights, a careful analysis will be required. The cases
25 typically emphasize that parties who exercise the degree of control over a site equivalent to the
26 control typically exercised by an owner of the site will be held liable as an “owner”. Under this
27 approach, for example, lessees have been held liable as owners when their control over the site
28 approximated that which an owner would have. See, e.g., Delaney v. Town of Carmel, 55 F.
29 Supp. 2d 237 (S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F. Supp. 1317
30 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984 (D.C.S.C.
31 1984.)
32

33 CERCLA liability also extends to an “operator” of the site (42 U.S.C.A. 9607(a)(1)), and the
34 case law interpreting this definition emphasizes that a party is liable as an operator if it has a high
35 degree of control over the operating decisions and day to day management at the site. A holder
36 will, in general, have only control authority over the site related to effective enforcement of the
37 environmental covenant and does not typically need more extensive day to day control. A holder
38 should be given more extensive control over the site only after careful consideration of the
39 potential CERCLA liability.
40
41
42
43

1 SECTION 5. OTHER LAW REGULATING USE OF REAL ~~ESTATE~~PROPERTY.

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

4 (b) Activity ~~limitations~~ and use ~~restrictions~~limitations in an environmental covenant may
5 prohibit or restrict real ~~estate~~property uses that are authorized by zoning or other law.

6
7 **Reporter's Notes**

8
9 Subsection (a) clarifies that this [Act] does not displace other restrictions on land use,
10 including zoning law. Restrictions under that law apply unchanged to real ~~estate~~property covered
11 by an environmental covenant.

12
13 Where the environmental covenant's activity ~~limitations~~ and use ~~restrictions~~limitations
14 prohibit or restrict uses ~~of~~ real ~~estate~~property, those prohibitions are necessary to protect human
15 health and the environment. Thus, pursuant to subsection (b), the prohibitions or restrictions in
16 an environmental covenant will apply even if other ~~law on real estate use~~property law, including
17 local zoning, would authorize the use. This section provides needed clarity where the
18 environmental covenant is implementing an environmental response project done under state
19 law. Where the environmental covenant is implementing an environmental response project
20 under federal CERLCA law, the federal law authorizing the environmental response project
21 preempts a conflicting city ordinance. U.S. v. City and County of Denver, 100 F.3d 1509 (10th
22 Cir. 1996).

23
24
25
26 **SECTION 6. ~~REGULATIONS~~AGENCY CONTROLS FOR ENVIRONMENTAL**
27 **COVENANTS**.

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

29 (1) provide to the agency information regarding ~~the~~ title to real ~~estate~~property that will
30 be subject to the covenant ~~and any adjoining real estate, and~~

31 ~~(2, as well as information regarding the interested parties and the interests they own,~~

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

3 (3) provide notice of the proposed covenant in a form and to persons satisfactory to
4 the agency.

5 (b) An environmental covenant may require ~~an~~the owner ~~or any person having a right of~~
6 ~~possession of any real estate subject to the covenant,~~ any interested party, and their successors
7 and assigns, to notify promptly the agency, the holder, and the ~~department~~[insert name of state
8 regulatory agency for environmental protection] if it is not the agency, of:

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

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

13 (c) In addition to other rights described in an environmental covenant or otherwise
14 granted by law, the agency, ~~the~~ [insert name of state regulatory agency for environmental
15 protection] if it is not the agency, and a holder may enter real ~~estate~~property subject to the
16 covenant at reasonable times and with reasonable advance notice for the purpose of determining
17 compliance with the terms of the covenant.

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

22 (e) An environmental covenant is not invalid or otherwise affected merely because a

1 person fails to comply with any of the requirements of this section or with the requirements of a
2 regulation implementing this section.

3 **Reporter's Notes**

4
5 Subsection (a) ~~authorizes the agency to require an owner creating~~ party to an
6 environmental covenant to furnish the agency with title information as well as the names and
7 addresses of the holders of all interests of record. It also authorizes the agency to require
8 information on abutting or other affected property. The subsection also authorizes the agency to
9 require the owner to give notice of the proposal to create an environmental covenant to all parties
10 it specifies. While this specification will be within the agency's discretion, notice to at least the
11 following will normally be appropriate:

- 12 1. All persons holding an interest of record in the real ~~estate~~ property.
- 13 2. All persons known to have an unrecorded interest in the real ~~estate~~ property.
- 14 3. All persons in possession of the real ~~estate~~ property.
- 15 4. All persons holding an interest of record in ~~adjoining real estate~~.
- 16 ~~5. The department~~ abutting real property and all persons holding an interest of record in other
17 real property likely to be affected by contamination remaining on the real property subject to the
18 covenant.
- 19 5. The [insert name of state regulatory agency for environmental protection] if it is not the
20 agency.
- 21 6. Any affected local government.

22
23 Subsection (b) authorizes the agency to require notice of a transfer of an interest in the
24 real ~~estate~~ property subject to an environmental covenant. This notice will facilitate enforcement
25 of the covenant. However, not all transfers of interests in the real ~~estate~~ property will implicate
26 enforcement of the covenant and, for those that do not, the agency need not require notification.
27 Similarly, subsection (b) also authorizes the agency to require notice of an application for a
28 building permit or change of use of the real ~~estate~~ property subject to an environmental covenant.
29 Here again, such a notice will facilitate enforcement of the covenant when it is required, although
30 it may not be needed for every building permit or land use change. In both situations, the agency
31 may specify when notice is required.

32
33 Subsection (d) authorizes the agency to require incorporation of the terms of the
34 environmental covenant in any instrument granting an interest in the real ~~estate~~ property. Such
35 incorporation should be required in most substantial conveyances to ensure effective enforcement
36 of the covenant, although it will likely not be needed in all instruments.

37 38 39 **[SECTION 7. RECORDING. Alternative A.**

- 40 (a) ~~Except with respect to the parties to the covenant or other persons having actual~~

1 ~~notice of the covenant, a~~ An environmental covenant is effective only if the covenant, or a notice
2 of the covenant that complies with the notice provisions specified in Section 13, is recorded in
3 the land records for every [county] in which land subject to the environmental covenant in
4 located. A modification or termination of a covenant is effective only if it, or a notice of it that
5 complies with the notice provisions specified in Section 13, is recorded in the land records for
6 every [county] in which land subject to the environmental covenant is located. This section shall
7 not apply to the parties to the covenant, or modification or termination of it, or to other persons
8 having actual notice of the covenant, or modification or termination of it.

9 (b) The ~~department~~ [insert name of state regulatory agency for environmental protection]
10 shall create and maintain a registry that contains all environmental covenants, any modification
11 or termination of those covenants, and any recorded notices of covenants. The registry may also
12 contain any other information concerning environmental covenants and the real ~~estate~~ property
13 subject to them which the agency considers appropriate. The registry is a public record for
14 purposes of [insert reference to State Freedom of Information Act].

15 1

16
17 **SECTION 7. RECORDING. Alternative B**

18 An environmental covenant, or a modification or termination of an environmental
19 covenant, is effective only if the covenant, modification, or termination is recorded in the land
20 records for each [county] in which land subject to the environmental covenant in located. This
21 section does not apply to the parties to the covenant, modification or termination, or to other
22 persons having actual notice of the covenant, modification or termination.

1 **Reporter's Notes**

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

9
10
11 **Reporter's Notes, Alternative A**

12
13 Subsection (a) requires that either a notice of the environmental covenant or the complete
14 covenant must be recorded in the land records to alert all interested parties to the existence of the
15 covenant. While a standard form of the notice is not required, Official Form 1 is adopted with
16 the text of this [Act] for use by those parties who wish to use it. Section 13 provides that use of
17 this Form will comply with the [Act]'s Act's notice requirements.

18
19 Subsection (b) requires creation of a new registry of environmental covenants by the
20 department[insert name of state regulatory agency for environmental protection]. This registry
21 may be combined with the new state registry of brownfield sites specified in the Small Business
22 Liability Relief and Brownfields Revitalization Act § 128(b)(1)(C), Pub. L. No. 107-118, ** Stat.
23 ** (2002) (HR 2869, 107th Cong. 1st Session), although this [Uniform Environmental Covenants
24 Act] calls for recording more extensive information to be recorded.

25
26 The full environmental covenant must be recorded in the registry in the department[insert
27 name of state regulatory agency for environmental protection]. In addition, the agency may
28 require recording of additional information about each covenant and the real estateproperty
29 subject to it. The agency may choose to require a description of the issues presented by the
30 residual contamination that give rise to an environmental covenant. The description will be
31 much more accessible than the full covenant to non specialists, including local government and
32 community interests:-

33
34 — At a minimum, thisthan the full covenant

35 This description may, at a minimum, identify the constituents of concern that have been left
36 in the real estateproperty, their location, the potential human and environmental exposure
37 pathways and receptors for those chemicals, and the permissible exposure limits:-

38
39 Creation of a specialized registry should improve access to this information by local
40 governments, citizens groups, and environmental interests, as well as real estateproperty
41 professionals.

1 **Reporter's Notes, Alternative B**

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

4
5
6 **SECTION 8. DURATION.**

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

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

13 **Reporter's Notes**

14 Subsection (a) is needed to ensure that the environmental covenant's protections continue as
15 long as needed. Subsection (b) makes environmental covenants survive later tax foreclosure
16 sales, and also survive potential common law impairments. These covenants seek to protect
17 human health and the environment as part of the environmental response project, beyond
18 reflecting the results of private bargaining between contracting private parties in specific private
19 transactions. To do so, environmental covenants must survive impairments arising from these
20 sources. However, this subsection does not restrict application of other environmental and
21 administrative law to judicial supervision of agency conduct.
22
23
24

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

1 appropriate consideration will be given to residual environmental risks.

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

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

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

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

16 (2) each current owner ~~of an~~ interest ~~that~~ party whose interest will be affected by
17 the modification or termination. _____

18 (b) A proposal to modify or terminate an environmental covenant must be accompanied
19 by ~~any~~ ll information required by the agency.

20 (c) A party that proposes to modify or terminate an environmental covenant ~~must~~ shall give
21 notice of the proposal, ~~together with~~ and the information required under subsection (b); to all
22 parties whose consent is required for the modification or termination and to other persons as
23 required by the agency.

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

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

3 **Reporter's Notes**

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

11
12 Subsection (b) authorizes the agency to require information to support a request for
13 modification or termination. The agency may wish to require one or more of the following:

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

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

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

20
21 Under subsection (c) the party requesting modification or termination is required to give
22 notice of the request to all parties whose consent is required and to other persons the agency
23 requires. The agency may wish to consider whether the following parties have a sufficient interest
24 in a particular proposal to make notice to them advisable:

25 (1) All affected local governments;

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

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

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

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

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

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

34 and

35 (8) The public.

36
37 Subsection (d) contemplates that the environmental covenant may impose additional
38 restrictions on modification or termination beyond those required by this [Act]. In some
39 circumstances the owner or another party may have contingent residual liability for further
40 cleanup of the real estate property subject to the environmental covenant and may seek further

1 restrictions in the covenant to protect against this contingent liability.
2
3
4

5 **SECTION 10. ENFORCEMENT.**

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

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

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

13 (2) the ~~department~~insert name of state regulatory agency for environmental
14 protection] if it is not the agency, or another state official authorized by state law to bring an
15 action on behalf of the ~~department~~insert name of state regulatory agency for environmental
16 protection];

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

20 (4) an affected local government;

21 (5) a person ~~expressly granted power to enforce in~~ the environmental covenant
22 expressly grants power to enforce;

23 [(c) In addition to the persons listed in subsection (b), any [person] [person aggrieved by
24 an alleged breach of ~~the an~~ environmental covenant] may maintain a civil action for injunctive or

1 other equitable relief against a party alleged to be in violation of an environmental covenant or the |
2 reporting requirements of subsection (d) of this Section. In any such action the court may award |
3 costs of litigation, including reasonable attorney and expert witness fees, to the prevailing or |
4 substantially prevailing party whenever the court determines such an award is appropriate. If an |
5 action is to be brought by such person, the following rules apply:

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

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

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

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

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

22 [(e) The agency shall inspect the real ~~estate~~property subject to an environmental covenant |

1 as often as necessary, and at least once every five years, to ensure compliance with the covenant.] |

2 **Reporter's Notes**

3 Subsection (a) recognizes that in many situations the statutes authorizing an environmental
4 response project will provide substantial authority for governmental enforcement of an
5 environmental covenant.
6

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

20 [Subsection (c) offers two alternatives for citizen suit enforcement of all environmental
21 covenants, ~~regardless of whether such a suit is~~ and the reporting requirements of subsection (d), in
22 addition to citizen’s suits authorized under ~~current~~ existing law. Either alternative would apply to
23 covenants established under state law in states that do not currently authorize such enforcement.
24 Local citizen and environmental interests have both the opportunity and the motivation to observe
25 compliance with use restrictions, and to some degree with activity limitations. Thus they will be
26 well positioned to seek enforcement of violations and thereby offer greater assurance of effective
27 implementation of the covenant. This section authorizes the court to award litigation costs,
28 including attorney and expert witness fees, to a substantially prevailing party authorized by this
29 subsection to bring a suit. This provision is based on analogous federal law authorizing citizen’s
30 suits. See, e.g., 42 U.S.C.A. §9659 (f).
31

32 The first alternative authorizes suit by any person, mirroring the provisions of federal law
33 discussed above. The second alternative is more limited, authorizing suit by any person aggrieved
34 by the alleged breach of the environmental covenant. “Person (or party) aggrieved” is used in
35 both federal and state administrative law. The federal courts, and some state courts, apply a two
36 part test in determining who is a “person aggrieved”, asking first if the person has suffered an
37 injury in fact, and second, if the person is arguably within the zone of interests sought to be
38 protected by the statute. See, e.g., National Credit Union Administration v. First Nat’l Bank and
39 Trust Co., 522 U.S. 479 (1998). The Model State Administrative Procedure Act, §5-106(a)(5)
40 uses a three part analysis: (i) has the agency action prejudiced the person, (ii) was the agency
41 required to consider the person’s interests in taking the challenged action, and (iii) will a judgment

1 in favor of the person substantially eliminate or redress the harm.

2
3 Subsection (c) also establishes enforcement priority for such citizen suits. The agency has the
4 first opportunity. If the department[insert name of state regulatory agency for environmental
5 protection] is not the agency which approved the environmental covenant, it has the second
6 opportunity. If either of these brings an action within its specified 60 day time period, that
7 precludes a citizen suit to enforce the covenant so long as the action is being diligently prosecuted.
8 This provision is based on the citizen's suit provisions common in many federal environmental
9 regulatory statutes.]

10
11 The five year reporting period of subsection (e) mirrors the reportingreview requirements for
12 the land use controls used as part of an environmental cleanup remedy that does not provide for
13 unrestricted use under the federal superfund program:
14

15
16
17 **SECTION 11. COORDINATION BY LOCAL GOVERNMENT.**

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

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

26
27 **Reporter's Notes**

28 Effective implementation of environmental covenants will require cooperation between
29 the agency and the affected local government which has jurisdiction over building permits and

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

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

14 **SECTION 12. MARKETABLE TITLE.**

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

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

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

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

27 (4) the land recording system in which the environmental covenant is recorded, [or the
28 registry created pursuant to Section 7(b) of this [Act]] is accessible by electronic means as of [the

1 effective date of this [Act]; or

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

4 **Reporter's Notes**

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

12
13 [In jurisdictions which index instruments in the land records by grantor and grantee names,
14 there is concern that environmental covenants that are older than the statutory period specified in
15 the Marketable Title Act, typically either 40 or 60 years, may be difficult to find even in the new
16 registry, and, as a result, may be excluded from coverage under title insurance policies. Thus, five
17 means of giving notice of the environmental covenant are specified. Where notice is given by one
18 of these means, the Marketable Title Act will not extinguish or impair the environmental
19 covenant. ~~This problem will arise only w~~With environmental covenants created pursuant to the
20 [Act], this problem will arise only after the statutory period of the Marketable Title Act.]

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

26 27 28 **[SECTION 13. NOTICE.**

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

31 (1) a legally sufficient description of the real estateproperty, and any available street
32 address;

33 (2) the name and address of:

1 (A) the owner of the real ~~estate~~property;

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

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

5 (3) a statement that:

6 (A) the covenant imposes significant restrictions and obligations with regard to
7 permissible activities on and uses of the real ~~estate~~property; and

8 (B) the restrictions and obligations [are likely to] affect all persons having an
9 interest in the real ~~estate~~property.

10 (4) a statement that the following are available in a registry at the [insert name and
11 address of ~~Department~~], ~~disclosing any and the method of~~state regulatory agency for
12 environmental protection], disclosing the method of any electronic access:

13 (A) the environmental covenant as executed; and

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

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

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

17 **Reporter's Notes**

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

20
21 This section and the following one should be used only by states that require creation of a
22 registry of environmental covenants pursuant to Section 7(b) of this Act. The notice specified in
23 this Section may be recorded in the land records in lieu of recording the environmental covenant.
24 However, such a notice should only be authorized if the registry is established and the
25 environmental covenant is recorded there. Where there is no separate registry, then the
26 environmental covenant should be recorded in the land records and this notice should not be

1 used.]

2
3
4 **[SECTION 14. OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT.**

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

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

- 8 7. This notice is filed on the land records of the [city/town/county] of [insert name of jurisdiction
9 in which the real estateproperty is located] pursuant to Sections 7 and 13 of the Uniform
10 Environmental Covenants [Act]. The [Act] has been codified in this State at [insert statutory
11 reference].
- 12
13 8. This notice and the covenant to which it refers impose significant legal restrictions and
14 obligations with respect to the future use of and activities on the property described below.
15 Those restrictions and obligations are likely to affect all persons having an interest in that
16 property.
- 17
18 9. A legally sufficient description of the property is attached as Exhibit A to this notice. The
19 address, if available, of the property which is subject to the environmental covenant is [insert
20 address of property].
- 21
22 10. The owner of the real estateproperty on the date of this notice is [insert name of current legal
23 owner of the Property]. The address of the owner is [insert the owner's current address as
24 shown on the tax records of the jurisdiction in which the Property is located].
- 25
26 11. The other parties to the covenant and their addresses are:
- 27
28 (a) [insert name and address of the agency and the department state regulatory agency for
29 environmental protection] if it is not the agency];
- 30
31 (b) [Insert names and addresses of all other parties to the covenant]; and
- 32
33 (c) [Insert names and addresses of any third party beneficiaries].
- 34
35 12. The environmental covenant regarding the real estateproperty was signed by all the parties on
36 [insert date on which the last party signed the covenant]. The covenant becomes effective for
37 all purposes on the date this notice is recorded on the land records of all jurisdictions in which
38 the property is located. This notice remains effective for all purposes until a release of this
39 notice is signed by the then owner of the property and by the agency and recorded.

1
2
3 **ACKNOWLEDGMENTS**
4

5
6 [INSERT STANDARD FORM OF ACKNOWLEDGMENT IN STATE]
7

8
9 [ATTACH PROPERTY DESCRIPTION AS EXHIBIT A]
10

11
12
13 **SECTION 15**
14

15
16
17 **SECTION 15. REGULATIONS.**

18 The [director of the state regulatory agency for environmental protection] shall have the
19 power to formulate, adopt, amend and repeal [rules][regulations] consistent with this [Act] and
20 necessary to implement this [Act].
21

22 **Reporter's Notes**

23 This Act authorizes adoption of rules or regulations needed to implement the Act. The
24 Act does not address the procedural requirements for this adoption as those will be supplied by
25 other state administrative procedure law.
26
27

28
29 **SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

30 In applying and construing this Uniform Act, consideration must be given to the need to
31 promote uniformity of the law with respect to its subject matter among States that enact it.
32

33 **SECTION 16.7. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.**

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

