November 7, 2002

To: Uniform Environmental Covenants Act Drafting Committee and Advisors

From: Kurt Strasser

Re: Summary of revisions in December 6, 2002 draft and pending issues.

The Conference will be circulating the latest version of the Act both as a clean copy and one showing the changes from the Annual Meeting version. There are a number of significant revisions and this is offered only as a brief summary. If you have other material you would like sent to the group, please forward it to Bill or me and we will have the Conference send it out.

Changes

1. Prefatory Note. Most of the wording changes are for clarification. From specific suggestions people have made, it is clear that there is significant disagreement about the extent to which we should emphasize that the Environmental Covenant is a product of the environmental remediation regulatory process. I have attempted to achieve a compromise middle position and people can propose specific changes to this language at the meeting.

2. Section 2. Definitions. I have omitted the confusing separate definition of the state regulatory agency, thanks to David Biklen's excellent suggestion. We have redefined owner to mean only the fee owner, and created a new category of "interested parties" for the holders of other interests.

3. Section 4 (f). There is an extensive new comment which discusses CERCLA liability of holders.

4. Section 7 is now offered as two alternatives. Alternative A is a revised version of the previous Section 7. Alternative B is for use by jurisdictions that do not establish the new registry of environmental covenants. Jurisdictions using this alternative will also want to omit Sections 13 and 14 of the Act and these are now bracketed.

5. Section 8. A new comment explains that, where property subject to a covenant is needed for a public project, modification of the covenant will be needed and eminent domain will not extinguish the covenant. This is not a change, but is offered for clarity.

6. Section 9(a) has been changed to provide that consent to a modification or termination is not required from a party whose interest will not be affected. The section does not provide a mechanism for determining when a party's interest is affected.

7. Section 10. The bracketed citizen's suits provision is changed to authorize the court to award costs, including attorney's fees and expert witness costs to a prevailing party.

8. Section 11 has a new comment designed to explain the operation of the section. At this time

there is no change in the requirement of notification of all building permits and land use change applications.

9. New Section 15 authorizes the state regulatory agency to adopt regulations.

Issues

Here are several issues which have been raised, and I am sure this list is incomplete.

A. Should this covenant become effective as an exercise of the police power. I have attached a copy of the e-mail discussion of this topic among Bill Breetz, Dan Miller and myself.

B. Do we want to consider a provision limiting or ending further cleanup liability for either the new buyer or the old owner or other responsible parties?

C. Do we want to add an exception for minor modifications to Section 9's modification procedure?

D. Do we want to specify enforcement jurisdiction in Section 10. As it stands now, the Act authorizes enforcement in court. Presumably the state and federal agencies can also enforce using their own internal or judicial enforcement power to enforce the environmental response project.

E. Do we want to limit the building permit and land use change applications that are notified to the environmental agencies under section 5?

F. Do we want to consider whether the Reporter's Notes should become Comments and, if so, what goes in them? Thanks for Yvonne Tharpes for raising this issue.

-----Original Message-----
> From: Dan Miller [SMTP:dan.miller@state.co.us]
> Sent: Tuesday, October 15, 2002 7:16 PM
> To: kstrasse@law.uconn.edu; wbreetz@law.uconn.edu
> Subject: thought re next draft
>
> One issue that arose during the first reading of the EC Act was whether the E covenants should trump private covenants, such as
> subdivision CCRs. As I think I said at the discussion after first
> reading, I think the answer must be yes. The covenants are implementing
> regulatory decisions -- public policy decisions -- made under the
> police power or under the Commerce Clause. Below is a link to an article describing some CCRs in colorado that are certainly not in the public interest in time of drought. Should these CCR's be allowed to prevail over a state law (or regulatory decision) prohibiting watering of
> bludgrass lawns under certain drought conditions?
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> http://www.denverpost.com/Stories/0,1413,36%257E53%257E925145,00.html

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> -----Original Message-----
> From: Strasser, Kurt
> Sent: Wednesday, October 16, 2002 9:51 AM
> To: 'Dan Miller'; Breetz, William
> Subject: RE: thought re next draft
>
> Dan,
> I agree completely. It does seem to me that these covenants are prior interests in the real estate, and that subordination of them should be required by the agency at the time the EC is created. Otherwise, no EC and complete cleanup. Am I missing something with this approach?

> See you in December.
> BEst,
> Kurt

> -----Original Message-----
> From: Breetz, William
> Sent: Wednesday, October 16, 2002 11:27 AM
> To: Strasser, Kurt; 'Dan Miller'
> Subject: RE: thought re next draft
>
> Gentlemen:
>
> This is, of course, the identical issue that arises in the context of prior mortgages, and seems to me to go to the heart of the public
> policy tensions that confront us in this enterprise.
>
> If the State chooses unilaterally to exercise its police power to regulate either the use of water through rationing, or to mandate a
> clean-up of contaminated soil, I have no doubt that the State may do so regardless of existing covenants. In the case of watering, it seems to me that any court would conclude that an existing CC&R that mandated that each owner maintain a green and manicured Kentucky Blue Grass front yard would succumb to such rationing, and that a "residential use only"
> covenant in a CC&R would necessarily fail in the face of a State order that required abandonment of that use for health reasons.
>
> I thought Dan was raising a different issue. He says: "[would] the E covenants… trump private covenants, such as subdivision CCRs. As I think I said at the discussion after first reading, I think the answer must be yes." Kurt says: "I agree completely. ... these covenants are prior interests in the real estate, and... subordination of them should be required by the agency at the time the EC is created. Otherwise, no EC and complete cleanup."
>
> With deference to you both, I think you are saying different things. I read Dan's remarks to suggest that the EC [which as we have drafted it is an agreement, not an exercise of the police power] would trump private covenants - and mortgages- regardless of the agreement of the persons holding those interests. Kurt says he agrees with Dan, but then suggestsin his remarks that voluntary subordination by agreement should be
> required by the agency as a condition of doing a risk-based clean-up.
I agree with Kurt - I think I disagree with Dan at least as regards
> affirmative obligations to be imposed on prior interest holders.
>
> In a transaction where all the parties are at the table, it seems to me that the stakeholders ought to be able to negotiate that subordination, regardless of how real the threat of "complete clean-up" is. I also
> suppose that since the State in the exercise of its police power, could order a complete clean-up, it could order a risk-based clean-up.
>
> But then we face the problem directly - could the State use its
> police power to impose binding covenants to, for example, actively monitor the site, on holders of prior interests? I think not. I do think that an imposed restricted use covenant -"no wells or homes" - would probably stick, as an exercise of the police power and that covenant would bind prior interests who succeed to title following foreclosure. The question is how to enforce such an obligation. If we said in the statute that it were valid as an exercise of the police power and in the absence of
> agreement, I think the State wins. But I have always presumed that the bigger problem is the active monitoring - "thou shalt maintain a cap

and a fence, thou shalt report quarterly."
>
> Maybe in our drafting we ought to distinguish between these
> interests.
>
> I am not sending this missive to anyone else - but should be
enlarge the scope of the discussion?
>
>
>

>>> "Strasser, Kurt" <kstrasse@law.uconn.edu> 10/16/02 11:49AM >>>
Bill,
I think we should reach these interests only through subordination, so to that extent we agree. It is good environmental protection (and public health protection) policy to require subordination of them as a condition to getting an environmental covenant. (This may be an agreement with Dan.)
There are, it seems to me, at least two concerns with overriding the prior interests by statute, rather than doing it by agreed subordination. First, this likely presents taking issues, although I haven't thought it through carefully and the federal law is less than clear, up to and including the Tahoe-Sierra case this year. SEcond, this likely presents tremendous enactability problems, or at least that has been our working assumption.
I see noting wrong with sending this whole discussion to the whole group, if Dan agrees.
Best,
Kurt

[From Dan Miller to Bill Breetz and Kurt Strasser]

Well, this continues to be an incredibly thoughtful drafting process. I think that Bill's analysis of where Kurt and I stand is basically correct. Here's my review of the bidding:

If the covenant is simply an agreement between the owner and a gov't agency, it is not legally binding on prior recorded interests absent subordination. On the other hand, if the covenant is an exercise of the police power/Commerce Clause, then it is effective against prior interests, although it may result in a taking of such interests, unless subordination agreements are obtained.

The Colorado EC is, I think, an exercise of the police power. Our statute mandates its use in certain circumstances, it is expressly stated to be a requirement of our hazardous waste act, and agency decisions regarding covenants can be appealed in the same manner as other agency actions under our HW act. However, the statute does not explicitly state the covenants are a regulatory mechanism vs. a contract/property law creature. In practice, we are obtaining subordination agreements where we think they are warranted. Our statute

is silent on the impact of a covenant on prior interests.

I think the police power paradigm is the one we should follow. It may not always be feasible to obtain subordination agreements, and in some cases, it may be preferable to allow the EC to override a non-subordinated prior interest even without such an agreement. I would draft the statute so the covenant is an exercise of the police power. I would include a provision allowing for subordination of prior interests, but leave the determination of when to require a subordination agreement up to the agency. It can evaluate the nature of the interest and the potential that the covenant might effectuate a taking of that interest, and decide whether subordination is necessary. Let me illustrate with two examples.

(1) The property has subsurface soil contamination, which the owner proposes to leave in place withe a covenant prohibiting excavation. There is a gravel deposit in the area affected by the proposed covenant, and the mineral interest is held by someone other than the surface owner. the regulator would look at this case and might conclude that prohibiting excavation would result in a taking of the mineral right, so it would require subordination.

(2) The property has subsurface soil contamination which the owner proposes to cap with a soil cover. Because of concerns that irrigating the cap may mobilize residual contamination, the agency and the owner want to impose a restriction requiring landscaping that does not require watering (out here, we call it xeriscape). The property is in a subdivision with a subdivision covenant requirement for bluegrass landscaping that must be maintained in a healthy condition which, in this area, means frequent watering. The agency would review this situation and may conclude that overriding this covenant is a valid exercise of the police power that does not result in a taking, so it would not require subordination by all the owners of lots in the subdivision.

I think I've said previously that I also like the PP paradigm for other reasons:
-- it may facilitate the willingness of EPA to jointly hold a covenant if the covenant is not deemed an interest in property
-- MAY eliminate some of the federal agencies' objections to granting such covenants (I don't think that this should frustrate DOD/DOE, because the model act does not mandate use of the covenants, but obviously need to discuss w/ feds.)
-- helps answer questions about how agency decisions regarding modification/termination of the covenants may be appealed -- specifically, by putting it into the "agency action" paradigm, the agency will likely get some degree of judicial deference on its regulatory determinations made in connection w/ modification/termination requests
-- makes clear that the covenant overrides conflicting local govt ordinances (or at least creates good basis for arguing that it does)
-- allow the state agency to enforce through administrative order authority
-- may make it easier for state agency to assess fees related to oversight of covenants

Now that I've gone through that analysis, I'm not sure it would work for EC's that may be created between the owner and a federal agency, or ECs with only a non-state agency holder. Does this delegate state authority to the feds/other holder? I have always been more comfortable with a construct that requires the state agency to be one of the parties to the covenant.

My head is beginning to spin, so I think I will sign off for now . . .
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