

DRAFT

FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL REUSE AGREEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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WITH COMMENTS

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ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Comments

Environmental reuse agreements are increasingly being used as part of the environmental remediation of contaminated real estate. An environmental reuse agreement typically allows the real estate to be cleaned up to a level determined by the environmental risks posed, rather than to absolute standards, which is both ecologically and environmentally preferable in many circumstances. Specifically, risk based remediation will often authorize the parties to leave some residual contamination in the real estate.

Of course, such agreements must be used carefully to insure that the risk based remediation protects human health and the environment. Environmental reuse agreements accomplish this goal by controlling the risks presented by the residual contamination which remains in the real estate. The agreements can control these risks by imposing restrictions on how the property may be used after the cleanup, by requiring continued monitoring of the site, and by requiring construction of permanent containment or other remedial structures on the site.

Yet environmental reuse agreements can perform this critical risk control function 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 reuse agreements will always 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 as well as statutory controls that implement many more requirements than just reuse agreements. Environmental reuse agreements are one tool used in this remediation effort, and they are both authorized and controlled by it.

Environmental reuse agreements may be used as part of environmental remediations 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. This federal regulatory policy would also apply to cleanups done at Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership. The federal policies articulated in regulatory statutes and applicable regulations will provide the substance of the restrictions and controls to be included in the resulting environmental reuse agreements 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 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 reuse agreements a useful policy tool.

This Act is intended to apply to environmental reuse agreements used in any of these different situations. Once the governing regulatory system and the property owner have determined to use an environmental reuse agreement as part of a remediation project, this Act supplies the legal infrastructure for creating and enforcing that agreement under state law.

This Act does not include a section of policy and legislative findings, although some states frequently 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, is suggested.

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 remediation projects protect human health and the environment. The [General Assembly] finds that environmental remediation 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 engineered structures or engineering practices 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 maintenance, monitoring, or operation, and future land use restriction for as long as any residual contamination remains hazardous. The [General Assembly] therefore declares that it is in the public interest to create environmental reuse agreements for the protection of human health and the environment.

1 **UNIFORM ENVIRONMENTAL COVENANTS ACT**

2

3 **SECTION 1. TITLE.** This Act shall be known and may be cited as the Uniform

4 Environmental Reuse Agreements Act.

5

6 **SECTION 2. DEFINITIONS.** In this act:

7 (1) “Agency” means the state or federal government entity which is the lead agency

8 responsible for the environmental remediation project requiring creation of an environmental

9 reuse agreement. The State Department as defined herein, and any of the following federal

10 entities may be an agency for purposes of this Act: the Environmental Protection Agency, the

11 Department of Defense, the Department of Energy, [the Department of the Interior, or the

12 General Services Administration].

13 (2) “Engineering controls” means specified actions required in connection with an

14 environmental remediation project with respect to real estate, including, without limitation,

15 physical modifications, operating procedures, maintenance, monitoring, reporting or other

16 devices or acts.

17 (3) “Environmental reuse agreement” means an agreement as defined in Section 3 of this

18 act.

19 (4) “Environmental land use restriction” means, as part of an environmental remediation

20 project, a prohibition or limitation of one or more uses of or activities on the real estate,

21 including, for example, restrictions on residential use, drilling for or pumping groundwater, or

22 other prohibited uses or activities.

1 (5) “Environmental remediation project” means remedial action to close a hazardous
2 waste management unit or solid waste management unit, or to accomplish any other remediation
3 of environmental contamination on real estate, conducted under any of the following:

4 (a) [insert references to state law requiring environmental remediation]

5 (b) Any other governmental program requiring environmental remediation of real
6 estate,

7 (c) Any program in which parties undertake voluntary remediation of real estate
8 subject to prior approval and supervision by an agency, or other statutorily authorized party, to
9 insure that all applicable cleanup standards are satisfied.

10 (6) “Holder” means the grantee of interests in real estate pursuant to an environmental
11 reuse agreement, including the right to enforce that agreement. A holder may be:

12 (a) the agency

13 (b) any other governmental body empowered to hold an interest in real estate under
14 the laws of this State or the United States; or

15 (c) a stock or non-stock corporation, limited liability company, partnership charitable
16 association, charitable trust, or other form of business entity, so long as one of the purposes or
17 powers of the holder is protection of the environment. If an environmental reuse agreement
18 identifies a holder other than the agency, the holder has no rights or responsibilities under that
19 Agreement unless the holder has signed the Agreement.

20 (7) “Owner” means the person who holds or previously held record title to the real estate
21 that is subject to an environmental reuse agreement. “Current Owner” means the person who
22 currently holds record title to the real estate.

1 (8) “Prior agreement” means any instrument that meets all the following requirements:

2 (a) the instrument creates environmental land use restrictions or engineering controls
3 with respect to real estate, and

4 (b) the instrument was executed by the owner of the real estate,

5 (c) the instrument, a notice of the instrument, or a deed containing restrictions
6 reflecting the terms of the instrument was recorded in the land records of this state, and

7 (d) the instrument was required as part of an environmental remediation project that
8 was approved prior to [the date of this Act]

9 (9) “State Department” means [insert name of state environmental protection regulatory
10 agency].

11 **Comment**

12
13 The governmental entity with responsibility for the **environmental remediation project** in
14 question is the authorized **agency** under this act. This **agency** will supply the public supervision
15 necessary to protect human health and the environment in creating and modifying the
16 **environmental reuse agreement**. The **agency**, for purposes of this act, may be either a federal
17 government entity or the **state department**.

18
19 Examples of subsection (2) “**engineering controls**” include slurry walls, capping, hydraulic
20 controls for ground water, and point of use water treatment.

21
22 “**Environmental remediation projects**” covered by subsection (4) may be undertaken
23 pursuant to authorization by one of several different statutes. Subsection (4)(a) specifically
24 covers remediation projects required under state law.

25
26 Subsection (4)(b) is written broadly to encompass both current federal law, future
27 amendments to both state and federal law, as well as new environmental protection regimes
28 should they be developed. Without limiting this breadth and generality, the Act intends to reach
29 **environmental remediation projects** undertaken pursuant to any of the following specific
30 federal statutes:

31 (1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976",
32 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

33 (2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976",

1 42 U.S.C. sec. 6972 and 6973, as amended;

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

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

6
7 Subsection (4)(c) extends the Act's coverage to voluntary remediation projects that are
8 undertaken with prior approval and supervision by an **agency**. **Environmental reuse**
9 **agreements** that are part of voluntary remediation projects may serve both the goal of
10 environmental protection and the goal of facilitating reuse of the real estate. However,
11 supervision of these projects by an **agency** or other authorized party is essential to insure that
12 these goals are met. This Act is intended to apply only to **environmental reuse agreements** that
13 are part of such publicly supervised remediation projects.

14
15 Some states authorize properly certified private parties to supervise remediation to pre-
16 existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these
17 are "licensed site professionals". (Massachusetts: MGL ch. 21A §19; 310 CMR 40.1071;
18 Connecticut: CGS §§22a-133o, 22a-133y.) Supervision and certification by statutorily authorized
19 parties accomplishes the same public function as supervision and certification by the public
20 **agency**. Thus, these **environmental remediation projects** are also covered by this definition.

21
22 The definition of "**holder**" in Subsection (6) is modeled on the Uniform Conservation
23 Easements Act, although it considerably broadens the form of entities that may serve as **holders**.
24 As the practice of using **environmental reuse agreements** continues to grow, new entities may
25 emerge to serve as **holders**, and one purpose of the Act is to avoid limiting this process. The
26 identity of an individual **holder** must be approved by the **agency** as part of the process of
27 creating an **environmental reuse agreement**, as specified in Section 4 of this Act.

28 29 **SECTION 3. ENVIRONMENTAL REUSE AGREEMENT.**

30 An environmental reuse agreement is an agreement between the owner of the real estate
31 and the agency, and the holder if other than the agency, that satisfies the requirements of Section
32 4 of this Act. The goal of the environmental reuse agreement is to control residual risk which
33 results from contamination remaining in real estate after a risk-based cleanup of that real estate is
34 authorized by an environmental remediation project. Where a risk-based cleanup is authorized,
35 residual contamination may be left on the real estate at levels determined to be safe when subject

1 to the requirements and restrictions specified in the environmental reuse agreement. The
2 environmental reuse agreement specifies the requirements and restrictions applicable to the real
3 estate; it may include either engineering controls or environmental land use restrictions or both.
4 The rights and obligations granted to or imposed on parties to the environmental reuse agreement
5 are interests in the real estate that is subject to it..

6 **Comment**

7 Effective environmental remediation must protect human health and the environment and,
8 subject to this goal, remediation also seeks to return the remediated real estate to productive use.
9 An **environmental remediation project** may determine, in some circumstances, to leave some
10 residual contamination on the real estate. This may be done because complete cleanup is
11 technologically impossible, or because it is either ecologically or economically undesirable. In
12 this situation, an **environmental reuse agreement** will be required, both to protect human health
13 and the environment, and to facilitate returning the remediated real estate to productive use. The
14 agreement may impose restrictions on the real estate's reuse, requirements for monitoring of its
15 condition, as well as other requirements.

16 17 18 19 **SECTION 4. CREATION OF ENVIRONMENTAL REUSE AGREEMENTS.**

20 (a) An environmental reuse agreement may be created under this Act only by agreement
21 between the current owner and the agency, and the holder if other than the agency.

22 (b) An environmental reuse agreement under this Act may be created only where the
23 agency determines the Agreement will protect human health and the environment. The agency
24 may approve, refuse to approve, or conditionally approve a proposed environmental reuse
25 agreement.

26 (c) An environmental reuse agreement:
27 (1) must state any engineering controls and any environmental land use restrictions
28 which it creates,

(2) must contain a legally sufficient description of the real estate subject to the agreement and must be memorialized in an instrument executed with the same formalities as a deed,

(3) is effective only when the recording requirements of Section 8 have been satisfied.

Comment

This Act does not provide the standards for environmental cleanups nor the specific **environmental land use restrictions** and **engineering controls** to be used at a particular site. Those will be provided by other state and federal law governing mandatory and voluntary cleanups. Those standards will then be incorporated into the **environmental remediation project**, which, in turn, calls for creation of an **environmental reuse agreement**. This section addresses creation of the **environmental reuse agreements**.

In some states, such as New Jersey and Pennsylvania, the same statute addresses decisions on remediation, **environmental land use restrictions** and **engineering controls**, and the enforceability of the **environmental reuse agreement** to be used to accomplish these controls. In those states, adoption of this Act will require amending those statutes to separate the provisions specifically related to the **environmental reuse agreement**.

Because the state and federal regulatory systems make other parties liable, in addition to the current **owner**, a remediation project may proceed even though the **owner** is no longer present or interested in the property. Similarly, a remediation project may proceed even though the **owner** is unwilling to participate. In either case, the remediation project would be conducted pursuant to regulatory orders and could be financed either by other liable parties or by public funds. While the **owner** remains liable for the cost of remediation, enforcing that liability may not be practical.

In the case of **owner** which is either unavailable or unwilling to participate in the **environmental remediation project**, some agencies have the underlying regulatory power to take the property by condemnation proceedings, paying the value of the property taken, and then enter an **environmental reuse agreement** as the **owner**. Where there is substantial contamination, the property may have little or no market value beyond the cost of cleanup.

SECTION 5. VALIDITY.

(a) An environmental reuse agreement is valid, and a prior agreement is not invalid, even though:

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

(2) it can be or has been assigned to another holder;
(3) it is not of a character that has been recognized traditionally at common law;
(4) it imposes a negative burden;
(5) it imposes affirmative obligations upon the owner of an interest in the burdened real estate or upon the holder;

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

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

(b) An environmental reuse agreement or a prior agreement is not invalid or unenforceable because it is denominated an easement, covenant, servitude, deed restriction, or other instrument.

(c) A prior agreement is not invalid or unenforceable by reason of its failure to satisfy the requirements of Section 4 of this Act for creation of environmental reuse agreements.

(d) Section 5 of this Act applies to a prior agreement. Otherwise, this Act does not apply to a prior agreement unless that agreement or a subsequent amendment to it satisfies the requirements of Section 4 of this Act, and the parties subsequently agree in writing and the agency approves that this Act shall apply to the Agreement or subsequent amendment.

(e) This Act does not invalidate any interest, whether designated as an environmental reuse agreement or other instrument, that is otherwise enforceable under the law of this State.

Comment

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

1 This Act's broad policy supports the enforceability of **environmental reuse agreements** by
2 precluding applicability of older common law doctrines limiting such enforcement. That policy
3 is broadly consistent with the Restatement of the Law Third of Property (Servitudes), including
4 §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5 (benefitted or
5 burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and concern
6 doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on alienation). This Act also
7 provides that these common law defenses are not to make **prior agreements** unenforceable.
8

9 Subsection (a)(1) indicates that an **environmental reuse agreement**, the benefit of which is
10 held in gross, may be enforced against the grantor or his successors or assigns. By stating that
11 the reuse agreement need not be appurtenant to an interest in real estate, it eliminates the
12 requirement in force in some states that the **holder** of the easement must own an interest in real
13 estate (the "dominant estate") benefitted by the easement.
14

15 Subsection (a)(2) also clarifies common law by providing that a reuse agreement may be
16 enforced by an assignee of the **holder**. Section 10(a) of this act specifies that assignment to a
17 new **holder** will be treated as a modification and Section 10 governs modification of
18 **environmental reuse agreements**.
19

20 Subsection (a)(3) addresses the problem posed by the common law's recognition of
21 servitudes that served only a limited number of purposes and its reluctance to approve so-called
22 "novel incidents". This restrictive view might defeat enforcement of reuse agreements serving
23 the environmental protection ends enumerated in this Act. Accordingly, subsection (3)
24 establishes that **environmental reuse agreements** are not unenforceable solely because they do
25 not serve purposes or fall within the categories of easements traditionally recognized at common
26 law.
27

28 Subsection (a)(4) deals with a variant of the foregoing problem. The common law
29 recognized only a limited number of "negative easements" – those preventing the **owner** of the
30 burdened real estate from performing acts on his real estate that he would be privileged to
31 perform absent the easement. Because a far wider range of negative burdens than those
32 recognized at common law might be imposed by **environmental reuse agreements**, subsection
33 (4) modifies the common law by eliminating the defense that an **environmental reuse**
34 **agreement** imposes a "novel" negative burden.
35

36 Subsection (a)(5) addresses the opposite problem – the potential unenforceability at common
37 law of an easement that imposes affirmative obligations upon either the **owner** of the burdened
38 real estate or upon the **holder**. Neither of those interests was viewed by the common law as a
39 true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an
40 **owner** of the burdened real estate to perform affirmative acts. (The spurious easement was
41 distinguished from an affirmative easement, illustrated by a right of way, which empowered the
42 easement's **holder** to perform acts on the burdened real estate that the **holder** would not have
43 been privileged to perform absent the easement.)

1 Achievement of environmental protection goals may require that affirmative obligations be
2 imposed on the burdened real estate **owner** or on the reuse agreement **holder** or both. For
3 example, the grantor of an **environmental reuse agreement** may agree to real estate use
4 restrictions, and may also agree to undertake affirmative monitoring or maintenance of
5 **engineering controls**. In addition, the reuse agreement might impose specific engineering or
6 monitoring obligations on the **holder**, particularly a charitable corporation or trust **holder**. In
7 either case, the **environmental reuse agreement** would impose affirmative obligations.
8 Subsection (a)(5) establishes that neither would be unenforceable solely because it is affirmative
9 in nature.

10
11 Subsections (a)(6) and (a)(7) preclude the touch and concern and privity of estate or contract
12 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
13 of covenants and equitable servitudes.

14
15 Subsections (c) and (d) have further provisions for agreements created prior to the date of this
16 Act. They provide that such agreements are not made unenforceable if they do not satisfy the
17 Act's requirements for creation of an **environmental reuse agreement**. However, except for
18 this Section 5, the terms of this Act governing **environmental reuse agreements** are not
19 applicable to **prior agreements** unless the **owner** so chooses, the **agency** approves, and the
20 **prior agreement**, or a new substitute, complies with the Act's requirements. The Act
21 contemplates that some additional actions may be necessary for a **prior agreement** to satisfy the
22 terms of this Act. These could include execution and recording of a substitute agreement.

23
24 Section (e) disavows the intent to invalidate any interest created either before or after the Act
25 which does not comply with the Act but which is otherwise valid under the state's law.

26 27 28 **SECTION 6. AGENCY POLICIES AND PROCEDURES.**

29 (a) Any engineering controls or environmental land use restrictions that are created
30 pursuant to an environmental reuse agreement subject to this Act are in addition to any land use
31 restrictions arising under other state and local law regulating land use.

32 (b) In determining all applications for creating, modifying or terminating an
33 environmental reuse agreement, the agency shall observe the same requirements for public notice
34 and participation which were applicable to the environmental remediation project.

35 (c) The agency shall review and make a determination regarding all applications for

1 creating, modifying, or terminating an environmental reuse agreement in accordance with
2 applicable state or federal administrative law, and shall make a determination within [**] days
3 after receipt of such application. The agency shall give notice of its decision on the application
4 to all persons entitled to receive notice of the application under Sections 7(a) or 10(c) of this Act.

5 (d) The agency's determination on an application to create, modify, or terminate an
6 environmental reuse agreement shall be subject to appeal in accordance with the state or federal
7 administrative law applicable to the environmental remediation project.

8 **Comment**

9 Subsection (a) clarifies that this Act does not displace other state and local law restrictions on
10 land use, including zoning law. That law applies unchanged to real estate covered by an
11 **environmental reuse agreement**. Thus, land uses on such real estate will have to comply with
12 the requirements of that reuse agreement and any other applicable state and local law.
13

14 **SECTION 7. REGULATIONS.**

15 (a) A current owner proposing to create an environmental reuse agreement shall provide
16 written notice of its intention to all persons holding an interest of record in the real estate that
17 will be subject to the environmental reuse agreement, to all persons known to them to have an
18 unrecorded interest in the real estate, [to all affected persons in possession of the real estate,] to
19 all owners of adjacent real estate, and to the state department if it is not the agency for this
20 environmental remediation project.

21 (b) The current owner shall provide the agency with the following:

- 22 (1) A copy of the notice provided pursuant to subsection (a) above; and
23 (2) A list of the persons to whom notice was given and the address or other location to
24 which the notice was directed; and

1 (3) Such title information as the agency may require.

2 (c) The parties to an environmental reuse agreement may include requirements for or
3 other limitations on modification or termination of the reuse agreement, provided such
4 requirements or limitations are in addition to the provisions of this Act and not in conflict with it.
5 Any requirements and limitations on modification or termination which are not stated in the
6 environmental reuse agreement are invalid.

7 (d) The owner and any other party with the right of possession of any real estate covered
8 by an environmental reuse agreement shall provide the agency, the holder if other than the
9 agency, and the state department if it is not the agency for this environmental remediation project
10 with the following:

11 (1) notice of any transfer of ownership of some or all of the real estate subject to the
12 agreement, and

13 (2) notice of any application to a local government for a building permit or
14 authorization for a change in real estate use under state or local land use regulation, prior to
15 submitting the application.

16 (e) The owner and any other party with the right of possession of any real estate covered
17 by an environmental reuse agreement shall allow the agency, and the holder if other than the
18 agency, right of entry at reasonable times with prior notice for the purpose of determining
19 compliance with the terms of the environmental reuse agreement. Nothing in this Section shall
20 impair any other authority the agency or the state department to enter and inspect real estate
21 subject to the environmental reuse agreement.

22 (f) The owner and any other party with the right of possession of any real estate covered

1 by an environmental reuse agreement shall incorporate the terms of the Agreement in any lease,
2 license, or other instrument that grants a right that may be affected by the Agreement. The
3 incorporation may be either in full or by reference.

4 **Comment**

5 Subsection (c) contemplates that the **owner** may impose additional restrictions on
6 modification or termination of the agreement, beyond those required by this Act, with the
7 approval of the **agency**. The **owner** likely retains contingent residual liability for further cleanup
8 of the real estate specified in the environmental remediation agreement. Thus, the **owner** may
9 wish further restrictions in the agreement to protect against this contingent liability.

10
11 Subsection (d) requires notification of any transfer of ownership of the real estate, as well as
12 notification of application for a building permit or change of land use under state or local land
13 use regulation.
14

15 **SECTION 8. RECORDING.**

16 (a) Either a Notice of the environmental reuse agreement that complies with Section 14 of
17 this Act, or the complete text of the agreement, shall be recorded in the land records of this state.

18 (b) The state department shall create and maintain a registry that contains the complete
19 text of all environmental reuse agreements and any modification or termination of those
20 agreements. In addition, the registry shall contain, with respect to each such agreement:

21 (1) A short narrative summary of the chemicals of concern that have been left in the
22 real estate, the potential human and environmental exposure pathways and receptors for those
23 chemicals, and the permissible exposure limits, and

24 (2) Any other information required by the agency.

25 **Comment**

26 Subsection (a) requires that either a notice of the **environmental reuse agreement** or the
27 complete agreement must be recorded in the land records to alert all interested parties to the

1 existence of the agreement. While a standard form of the notice is not required, Official Form 1
2 is adopted with the text of this act for use by those parties who wish to use it. Section 14
3 provides that use of this Form will comply with the Act's notice requirements.
4

5 Subsection (b) requires creation of a new registry of **environmental reuse agreements** by
6 the **state department**. This registry may be combined with the new state registry of brownfield
7 sites specified in the Small Business Liability Relief and Brownfields Revitalization Act
8 §128(b)(1)(C), Pub. L. No. **, ** Stat. ** (2002) (HR 2869, 107th Cong. 1st Session), although
9 this Uniform Act calls for more extensive information to be recorded.
10

11 The full text of the **environmental reuse agreement** must be recorded in the registry in the
12 **state department**. In addition, a narrative statement and any other information the **agency**
13 requires must also be recorded in the registry. The narrative statement is intended to describe the
14 issues presented by the residual contamination that gives rise to an **environmental reuse**
15 **agreement**. Creation of a specialized registry should improve access to this information by local
16 governments, citizens groups, and environmental interests, as well as real estate professionals.
17
18

19 **SECTION 9. DURATION.**

20 (a) An environmental reuse agreement shall be perpetual unless limited by its terms to a
21 specific duration or the occurrence of a specific event, or subsequent termination pursuant to
22 Section 10 of this Act.

23 (b) An environmental reuse agreement may not be extinguished, limited, or impaired
24 either (i) through [issuance of a tax deed, foreclosure of a tax lien, or through] adverse
25 possession, or by the exercise of eminent domain, or (ii) by application of the doctrines of
26 abandonment, waiver, lack of enforcement, or other common law or equitable principles.

27 (c) The agency may require the owner of real estate to secure written subordination of
28 prior interests in the real estate to which the environmental reuse agreement applies, as the
29 agency deems appropriate, as a condition to approving an environmental reuse agreement.

30 (d) An environmental reuse agreement shall run with the land and shall bind the owner of
31 the real estate, the owner's heirs, successors and assigns, and any other person with the right to

possess or use the real estate.

Comment

The provisions of subsection (a) are common in the laws of states that have legislated on **environmental reuse agreements**.

Subsection (b) is not typical of existing state law. It is intended to make **environmental reuse agreements** survive later tax foreclosure sales, as well as to survive potential common law impairments. These agreements seek to protect the human health and the environment generally, beyond reflecting the results of private bargaining between contracting private parties in specific private transactions. To successfully protect human health and the environment, **environmental reuse agreements** must survive impairments arising from these sources.

Subsection (c) is concerned with prior interests in the real estate. If these prior interests extinguish or limit an **environmental reuse agreement**, they present the same environmental and human health concerns as those considered in subsection (b) above. The Act's remedy for this problem, with respect to prior interests, is to require subordination of these interests if the **agency** finds it to be necessary. Thus, at the time of creation of the **environmental reuse agreement**, the **agency** must determine whether the prior interest presents a realistic threat to the agreement's ability to accomplish its environmental protection and human health goals. For substantial prior interests, subordination will generally be required.

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

SECTION 10. MODIFICATION OR TERMINATION.

(a) The owner and any party authorized to enforce the environmental reuse agreement under this Act may request modification or termination of the agreement. For purposes of this Act, assignment of an environmental reuse agreement to a new holder must be treated as a modification.

(b) A request for modification or termination must contain information showing that the proposed modification or termination will, if implemented, ensure protection of human health

1 and the environment. Information to support a request for modification or termination may
2 include one or more of the following:

- 3 (1) A proposal to perform additional remedial work;
- 4 (2) New information regarding the risks posed by the residual contamination;
- 5 (3) Information demonstrating that residual contamination has diminished;
- 6 (4) Information demonstrating that one or more engineering controls or
7 environmental land use restrictions is no longer necessary;
- 8 (5) Information demonstrating that the proposed modification would not adversely
9 impact the environmental remediation project and is protective of human health and the
10 environment; and
- 11 (6) Other appropriate supporting information.

12 (c) Any person proposing to modify or terminate an environmental reuse agreement shall
13 provide written notice to all persons holding an interest of record in the real estate that is subject
14 to the environmental reuse agreement, to all persons known to have an unrecorded interest in the
15 real estate, to all affected persons in possession of the real estate, to all owners of adjacent real
16 estate, to any affected local government, to the agency, to the holder if other than the agency, to
17 the state department if is not the agency for this environmental remediation project, and to all
18 designated third party beneficiaries identified in the agreement.

19 (d) Any person proposing to modify or terminate an environmental reuse agreement shall
20 provide the agency with:

- 21 (1) A copy of the notice provided pursuant to subsection (c) above ; and
- 22 (2) list of the persons to whom notice was given and the address or other location to

1 which the notice was directed; and

2 (3) Any additional information the agency may require.

3 (e) After review of all relevant information submitted, the agency may approve the
4 proposal to modify or terminate the environmental reuse agreement only when the agency
5 determines that such modification or termination will ensure protection of human health and the
6 environment. No modification or termination of an environmental reuse agreement shall be
7 effective unless it has been approved in writing by the agency.

8 (f) If a court of competent jurisdiction makes a final determination that an environmental
9 reuse agreement is void or without effect for any reason, the owner and the agency may enter into
10 a new environmental reuse agreement within six months of such determination becoming final.
11 If they do not do so, or if that new environmental reuse agreement is void or without effect for
12 any reason, the owner of the subject real estate, in accordance with a schedule prescribed by the
13 agency, shall promptly abate pollution thereon consistent with the applicable standards for
14 remediation of real estate for unrestricted use.

15 **Comment**

16 Modifications under subsection (a) may be sought to either tighten or loosen restrictions,
17 depending on the current knowledge of remaining contamination and the current understanding
18 of the environmental risks that remaining contamination presents. Either or both of these may
19 change over time. The Act authorizes a diverse group of parties with diverse interests to seek
20 modification.

21
22 Subsection (e) specifies that **agency** approval is required for any modification or termination.
23 This is necessary to insure protection of human health and the environment.
24

25 Under subsection (f), the parties have 6 months to make a new **environmental reuse**
26 **agreement** if the agreement is declared invalid. Otherwise, the **owner** must clean the property to
27 unrestricted use standards.
28

1 **SECTION 11. ENFORCEMENT.**

2 (a) Nothing in this Act shall be construed to limit the authority of the agency or any other
3 person to enforce an environmental reuse agreement pursuant to existing authority to enforce the
4 remedy ordered in the environmental remediation project.

5 (b) The following parties may institute a civil action against any party alleged to be in
6 violation of the environmental reuse agreement. The action may be instituted in the [insert state
7 court name] court for the judicial district where the real estate is located, and may seek injunctive
8 or other equitable relief:

9 (1) The agency;

10 (2) The state department if it is not the agency for this environmental remediation
11 project, [or the Attorney General or other state official authorized by state law to bring suit on
12 behalf of the state department];

13 (3) The holder;

14 (4) Any owner which may be liable under the environmental remediation project;

15 (5) An affected local government as defined in Section 12;

16 (6) Any third party beneficiary specifically named in the environmental reuse
17 agreement;

18 (7) Any party aggrieved by the alleged breach of the environmental reuse agreement.

19 [(c-1) In any action brought by a party other than the agency or state department:

20 (1) The party bringing the suit shall notify the agency, and the state department if it is
21 not the agency for this environmental remediation project, 120 days before commencing an
22 action to enforce the environmental reuse agreement.

1 (2) The agency may bring an action to enforce the environmental reuse agreement.

2 (3) If the agency does not institute such an action within 60 days the state department
3 may bring an action to enforce the environmental reuse agreement within the next 60 days, if the
4 state department is not the agency for this environmental remediation project.

5 (4) If either the agency or the state department brings an action pursuant to
6 subsections (c)(2) or (3) above, all other parties shall be precluded from instituting their own
7 enforcement actions so long as the agency or the state department is diligently prosecuting
8 enforcement of the agreement.]

9 [(c-2) In any administrative or civil proceeding instituted by the agency or the state
10 department to enforce an environmental reuse agreement, any person authorized to bring a civil
11 action to enforce the agreement may intervene as a matter of right.]

12 (d) The owner of real estate subject to an environmental reuse agreement shall submit a
13 written report to the agency each calendar year detailing the status of compliance with the
14 environmental reuse agreement. This requirement shall not apply to the owner of detached
15 owner occupied residential property.

16 (e) The agency shall inspect the real estate to which an environmental reuse agreement
17 applies as often as necessary to ensure protection of human health and the environment, and at
18 least once every five years, to ensure compliance with the environmental reuse agreement and
19 that the reuse agreement remains protective of human health and safety and of the environment.

20 **Comment**

21 Subsection (a) recognizes that in many situations the **environmental remediation project**
22 will provide substantial authority for enforcing an **environmental reuse agreement**. Thus,
23 federal law authorizes citizens suits by “any person” against “any person alleged to be in

1 violation” of any “regulation. . requirement. . or order” under CERCLA and RCRA remediation
2 projects. 42 U.S.C.A. §§6972 (a) and 9659 (2001). Many state laws have similar provisions.
3 [**cite] The **environmental reuse agreement** should be enforceable as part of the remediation
4 project which is such a requirement or order. This Act does not intend to limit that enforcement.
5

6 Subsection (b) specifies the parties authorized to bring an action to enforce the
7 **environmental reuse agreement**. Environmental law frequently authorizes third party
8 enforcement of environmental law, regulations, and permits. This subsection extends the power
9 of enforcement to any “party aggrieved by the alleged breach” of the **environmental reuse**
10 **agreement**. “Party (or person) aggrieved” is taken from both federal and state administrative
11 law.
12

13 The federal courts, and some state courts, apply a two part test in determining who is a “party
14 aggrieved”, asking first if the party has suffered an injury in fact, and second, if the party is
15 arguably within the zone of interests sought to be protected by the statute. See, e.g., National
16 Credit Union Administration v. First Nat’l Bank and Trust Co., 522 U.S. 479 (1998). The Model
17 State Administrative Procedure Act, §5-106(a)(5) uses a three part analysis: (i) has the **agency**
18 action prejudiced the party, (ii) was the **agency** required to consider the party’s interests in taking
19 the challenged action, and (iii) will a judgment in favor of the party substantially eliminate or
20 redress the harm.
21

22 [Subsection (c-1) establishes enforcement priority. The **agency** has the first opportunity. If
23 the state environmental department is not the **agency** which approved the **environmental reuse**
24 **agreement**, it has the second opportunity. If either of these brings an action, that becomes the
25 exclusive action to enforce the agreement so long as the action is being diligently prosecuted.
26 This provision is based on the citizen’s suit provisions common in many federal environmental
27 regulatory statutes.]
28

29 [As an alternative, proposed subsection (c-2) authorizes non-**agency** parties to intervene in an
30 enforcement proceeding brought by an **agency**, including a **state department**.]
31

32 The reporting requirement of subsection (d) is a provision found in the law of several states,
33 although none include the exception for **owner** occupied residential property. The five year
34 reporting period of subsection (e) mirrors the reporting requirements for the land use controls
35 used as part of a remedy under the federal superfund program.
36

37 **SECTION 12. LOCAL GOVERNMENT COORDINATION.**

38 (a) For purposes of this Section, "affected local government" means every county, city
39 and county, or municipality in which all or part of any real estate subject to an environmental

reuse agreement is located.

(b) The agency shall evaluate whether an application for a building permit or new land use on real estate subject to an environmental reuse agreement is consistent with the environmental reuse agreement and shall notify the affected local government of the agency's determination in a timely fashion.

SECTION 13. MARKETABLE TITLE.

An environmental reuse agreement may not be extinguished, limited, or impaired by application of [insert reference to state Marketable Title statute.]

Comment

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

SECTION 14. NOTICE.

(a) A notice of environmental reuse agreement shall contain the following information:

(1) A legally sufficient description and any street address of the property subject to the environmental reuse agreement;

(2) The name and address of the following parties:

(i) The current owner;

(ii) The agency and the holder, if other than the agency;

1 (iii) The name and address of any identified third party beneficiaries to the
2 environmental reuse agreement;

3 (3) statement that the environmental reuse agreement imposes significant restrictions
4 on the property, and that those restrictions are likely to affect all persons having an interest in the
5 property;

6 (4) A statement that the following is available in a registry at the [insert name and
7 address of State department]:

8 (i) The full text of the environmental reuse agreement as executed;

9 (ii) A short narrative statement concerning the environmental contamination
10 covered by the agreement; and

11 (iii) A statement that this Notice of Environmental Reuse Agreement is filed
12 pursuant to the provisions of this Act.

13 (b) The notice may be in the form of Official Form 1. A notice in that form which is
14 properly recorded complies with the notice requirement of Section 8 of this Act.

15
16 **SECTION 15. RECORDING OF RESTRICTIONS FOR ACTIVE FEDERAL SITES.**

17 (a) “Active Federal site” means any real estate that is owned by the federal government
18 and meets these criteria:

19 (1) The owner has not contracted to transfer title to the real estate out of federal
20 government ownership and does not anticipate doing so; and

21 (2) The site is subject to engineering controls or environmental land use restrictions or
22 both, as part of an environmental remediation project.

1 (b) Neither creation, modification, nor recording of engineering controls or environmental
2 land use restrictions, or both, at an active federal site constitutes the transfer of a property
3 interest.

4 (c) Notice of engineering controls or environmental land use restrictions at active federal
5 sites in the form specified in Sections 8(b) and 14 of this Act may be recorded in the land records
6 of this state.

7 (d) Engineering controls or environmental land use restrictions at active federal sites and
8 other information specified in Section 8(c) of this Act may be recorded in the Environmental
9 Registry specified in Section 8(c) of this Act..

10 (e) Engineering controls or environmental land use restrictions at active federal sites are
11 not subject to the other provisions of this Act.

12 **Comment**

13 This section authorizes recording of **engineering controls** or **environmental land use**
14 **restrictions** used at active federal sites. This includes recording the notice in the land records
15 and recording the complete statement of controls and other information in the Environmental
16 Registry at the **state department**. While recording is not mandatory for active federal sites, it
17 will serve the useful public purpose of providing all interested parties notice of those provisions
18 and information about them. It will also allow the managers of active federal sites to use the
19 recording systems as a means of standardization if they so choose.

20
21 Subsection (b) is necessary because the federal **agency** managing and using property does not
22 have the authority to transfer a property interest in many situations.
23

24 **SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

25 This Act shall be applied and construed to effectuate its general purpose to make uniform the
26 laws with respect to the subject of the Act among states enacting it.
27

1 **SECTION 17. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.**

2 Unless displaced by the particular provisions of this Act, the principles of law and equity,
3 including without limitation the law of real property and environmental law, supplement the
4 provisions of this Act.

5 **Comment**

6 This is a standard provision in many Uniform Acts. **See, e.g.,** Uniform Commercial Code
7 Article 1, § 1-103; Uniform Common Interest Ownership Act, § 1-108.
8
9

1 **OFFICIAL FORM 1**
2 **NOTICE OF ENVIRONMENTAL REUSE AGREEMENT**
3

4 (To be executed with the same formalities as a deed in this State)

5 7. This Notice is filed on the land records of the [City/Town/County] of (insert name of
6 jurisdiction in which the Property is located) pursuant to Section 9(b) of the Uniform
7 **Environmental Reuse Agreements** Act (the "Act"). The Act has been codified in
8 this State at [insert statutory reference].
9

10 8. This Notice and the Agreement to which it refers imposes significant legal
11 restrictions on the future use of the property described below. Those restrictions are
12 likely to affect all persons having an interest in that property.
13

14 9. The address of the property which is subject to the **Environmental Reuse**
15 **Agreement** (the "Agreement") is [insert address of property] (the "Property"). A
16 legally sufficient description of the Property is attached as Exhibit A to this Notice.
17

18 10. The **Owner** of the Property on the date of this Notice is [insert name of current legal
19 **owner** of the Property]. The address of the **Owner** is [insert the **Owner's** current
20 address as shown on the tax records of the jurisdiction in which the Property is
21 located].
22

23 11. The other parties to the Agreement and their addresses are:
24

25 (a) [insert name and address of **Agency** and the **State Department**]
26

27 (b) [Insert names and addresses of all other parties to the Agreement].
28

29 (c) [Insert names and addresses of third party beneficiaries].
30

31 12. The **Environmental Reuse Agreement** regarding the Property was signed by all
32 the parties on [insert date on which the last party signed the Agreement]. The
33 Agreement becomes effective for all purposes on the date this Notice is recorded on
34 the land records of all jurisdictions in which the Property is located. This Notice
35 remains effective for all purposes until a Release of this Notice is signed by the then
36 **Owner** of the Property and by the **Agency** and recorded.
37

38 13. The full text of the Agreement, together with a short narrative statement concerning
39 environmental contamination covered by the Agreement, is on file and available for
40 inspection and copying in the Registry maintained for that purpose by the **State**
41 **Department** at [insert address and room of building in which the Registry is
42 maintained]. [The Agreement may be accessed electronically at [insert web address
43 for Agreement]].
44

1 Dated at _____, _____ this ____ day of _____, _____.
2
3

4 Witness as to **Owner**

NAME OF **OWNER**

5
6
7
8 _____
9 By
10 _____
11

12
13 Witness as to **Agency**

NAME OF **AGENCY**

14
15
16
17 _____
18 By
19 _____
20

21
22 Witness as to Other Parties

NAME OF OTHER PARTY(S)

23
24
25
26 _____
27 By
28 _____
29

30
31 **ACKNOWLEDGMENTS**
32

33
34 [INSERT STANDARD FORM OF STATE ACKNOWLEDGMENT]
35

36
37 [ATTACH PROPERTY DESCRIPTION AS EXHIBIT A]
38