

D R A F T
FOR APPROVAL

UNIFORM ENVIRONMENTAL COVENANTS ACT

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ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

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

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

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use.

Large numbers of contaminated sites are unlikely to be successfully recycled until regulators, potentially responsible parties, affected communities, prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.

Of course, risk-based remediation must effectively control the potential risk presented by the residual contamination which remains in the real property and thereby protect human health and the environment. When risk-based remediation imposes restrictions on how the property may be used after the cleanup, requires continued monitoring of the site, or requires construction of permanent containment or other remedial structures on the site, environmental covenants are

crucial tools to make these restrictions and requirements effective. Yet environmental covenants can do so only if their legal status under state property law and their practical enforceability are assured, as this proposed Uniform Act seeks to do.

At the time this Act was promulgated, approximately half the states had laws providing for land use restrictions in conjunction with risk-based remedies. Those existing laws vary greatly in scope – some simply note the need for land use restrictions, while others create tools similar to many of the legal structures envisioned by this Act. Most such acts apply only to cleanups under a state program.

In contrast, this Act includes a number of provisions absent from most existing state laws, including the Act's applicability to both federal and state-led cleanups. For example, this Act expressly precludes the application of traditional common law doctrines that might hinder enforcement. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. The Act also provides detailed provisions regarding termination and amendment of older covenants, and includes important provisions on dealing with recorded interests that have priority over the new covenant. Further, it offers guidance to courts confronted with a proceeding that seeks to terminate such a covenant through eminent domain or the doctrine of changed circumstances.

This Act benefitted greatly during the drafting process from broad stakeholder input. As a result, the Act contains unique provisions designed to protect a variety of interests commonly absent in existing state laws. For example, the Act confers on property owners that grant an environmental covenant the right to enforce the covenant and requires their consent to any termination or modification. This should mitigate an owner's future liability concerns for residual contamination and encourage the sale and reuse of contaminated properties. And, following traditional real estate principles, the Act validates the interests of lenders who hold a prior mortgage on the contaminated property, absent voluntary subordination.

It is important to emphasize that environmental covenants are but one tool in a larger context of environmental remediation regulation; remediation is typically overseen by a government agency enforcing substantial statutory and regulatory requirements. The covenant should be the crucial end result of that process - it may be used to ensure that the activity and use limitations imposed in the agency's remedial decision process remain effective, and thus protect the public from residual contamination that remains, while also permitting re-use of the site in a timely and economically valuable way.

Environmental remediation projects may be done in a widely diverse array of contamination fact patterns and regulatory contexts. For example, the remediation may be done at a large industrial operating or waste disposal site. In such a situation, the cleanup could be done under federal law and regulation, such as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") or the Resource Conservation and Recovery Act ("RCRA"). Generally speaking, CERCLA and RCRA would also apply to remediation done at

Department of Defense or Department of Energy sites that are anticipated to be transferred out of federal ownership.

In other situations, state law and regulation will be an effective regulatory framework for remediation projects. 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, 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 does not supplant or impose substantive clean-up standards, either generally or in a particular case. The Act assumes those standards will be developed in a prior regulatory proceeding. Rather, The Act is intended to validate site-specific, environmental use restrictions resulting from an environmental response project that proposes to leave residual contamination in the ground in any of the different situations described above. Once the governing regulatory authority and the property owner have determined to use a risk-based approach to cleanup to protect the public from residual contamination, this Act supplies the legal infrastructure for creating and enforcing the implementing environmental covenant under state law.

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

This Act does not address or change the larger context of environmental remediation regulation discussed above, and a number of aspects of that regulation should be noted here.

First, many contaminated properties are subject to the concurrent regulatory jurisdiction of both federal and state agencies. This Act does not address the exercise of such concurrent jurisdiction, and it is not intended to limit the jurisdiction of any state agency.

A specific issue arises with federal property that is not anticipated to be transferred to a non-federal owner. This Act takes no position regarding the question of whether remediation of such property is subject to State regulatory jurisdiction. In contrast, where federal property is transferred to a non-federal owner, state agencies will clearly have jurisdiction under state environmental law over environmental covenants on the transferred property.

Second, potential purchasers of property subject to an environmental covenant should be aware that both state and federal environmental law other than this Act may authorize reopening the environmental remediation determination, even after the relevant statutory standards have been met on that site. While such reopeners are rare, they may be possible to respond either to newly discovered contamination or new scientific knowledge of the risk posed by existing contamination. As a consequence, under existing environmental law, the then current owner may have remediation liability. While the dampening effect of such potential liability on the willingness of potential purchasers to buy contaminated property is clear, the issue remains important in the eyes of some interest groups. Federal law now provides protection for bona fide purchasers of such property under specified circumstances, and the law of some states may also afford some protection. However, this Act does not provide any such bona fide purchaser protection.

For these and other reasons, the drafters believe it is important that prospective purchasers of contaminated properties - particularly those successors who may buy some years after a clean-up has been completed - have actual knowledge of covenants at the time of purchase. Environmental covenants recorded pursuant to this Act will provide constructive notice of the covenant and in many circumstances recording will provide actual notice. However, to ensure that such persons have actual notice, a state or a local recording authority may wish to highlight the existence of environmental covenants in their communities with maps showing the location of properties subject to environmental covenants, similar to the kinds of maps commonly found in local land records offices to show the location of zoning or flood plains.

Legislative Notes

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

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

When an owner is either unavailable or unwilling to participate in the environmental response project, it may be appropriate to condemn and take a partial interest in the real property in order to be able to record a valid servitude on it. Under the law of some states, states have the

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

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

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

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

1 **UNIFORM ENVIRONMENTAL COVENANTS ACT**

2

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

4 Act.

5

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

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

8 property created under this [Act].

9 (2) “Agency” means the [insert name of state regulatory agency for environmental

10 protection] or any other state or federal agency that determines or approves the environmental

11 response project pursuant to which the environmental covenant is created. .

12 (3) “Common interest community” means a condominium or other real property with respect

13 to which a person, by virtue of his ownership of a parcel of real property, is obligated to pay for

14 property taxes, insurance premiums, maintenance, or improvement of other real property

15 described in a recorded covenant that creates the common interest community.

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

17 project that imposes activity and use limitations.

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

19 remediation of real property, conducted:

20 (A) under a federal or state program governing environmental remediation of real

21 property, including [insert references to state law governing environmental remediation];

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

3 (C) under a state voluntary clean-up program authorized in [insert reference to state
4 statute or regulation].

5 (6) "Holder" means a person, that is the grantee of an environmental covenant. The term
6 includes an owner or agency.

7 (7) "Owner" means a person that owns a fee simple interest in real property that is subject to
8 an environmental covenant.

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

12 (9) "Record", when used as a noun, means information that is inscribed on a tangible
13 medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

17 Preliminary Comments

18
19 1. The following are examples of subsection (1) activity and use limitations:

20
21 (1) a prohibition or limitation of one or more uses of or activities on the real property,
22 including restrictions on residential use, drilling for or pumping groundwater, or interference
23 with activity and use limitations or other remedies,

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

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

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

1 The origination of the specific activity and use limitations in any covenant will depend on the
2 nature of the proceeding in the environmental response project that led to the covenant. For
3 example, in a major environmental response project where the administrative process was
4 conducted by either a state or federal agency, the activity and use limitations would generally be
5 identified in the record of decision and then implemented in the environmental covenant pursuant
6 to this Act. In contrast, in a voluntary clean-up supervised by privately licensed professionals, as
7 authorized in some states, the activity and use limitations would not be developed by the agency
8 during an administrative proceeding but by the parties themselves and their contracted
9 professionals.

10
11 Nothing in this Act prevents the use of privately negotiated use restrictions which are
12 recorded in the land records, without agency involvement: the validity of such covenants,
13 however, is not governed by this Act but by other law of the enacting state. *See* Section 5(d).

14
15 2. The governmental body with responsibility for the environmental response project in
16 question is the agency under this Act. Generally, this agency will supply the public supervision
17 necessary to protect human health and the environment in creating and modifying the
18 environmental covenant.

19
20 In addition, as noted in Comment 1, the definition of “environmental response project”
21 contemplates the possibility that the project may be undertaken pursuant to a voluntary clean-up
22 program, where the actual determination of the sufficiency of the proposed clean-up is made by a
23 private professional party, rather than an agency. In this case, the definition contemplates that an
24 agency - typically, the state environmental agency - will nevertheless be asked to consent to the
25 environmental covenant by signing it, and Section 4 of the Act makes clear that the covenant is
26 not valid under this Act unless an agency signs it. Section 3 of the Act makes clear that the mere
27 signature of the agency, without more, means only that the agency has “approved” the covenant
28 in order to satisfy the definitional requirements of Section (2) (2) and the mandated contents of
29 Section 4. That signature imposes no duties or obligations on the agency.

30
31 3. The agency, for purposes of this Act, may be either a federal government entity or the
32 appropriate state regulatory agency for environmental protection.

33
34 Further, in some cases, the appropriate federal agency may be the Environmental Protection
35 Agency, the Department of Defense as ‘lead agency’ under federal law, or another body.

36
37 4. Section 4 of the Act makes clear that an environmental covenant is valid if only one
38 agency signs it. However, in many circumstances, both a federal and a state agency may have
39 jurisdiction over the environmental contamination which lead to the environmental response
40 project. In this situation, the best practice may be for both federal and state agencies with
41 jurisdiction over the contaminated property to sign the environmental covenant.
42

1 5. Subsection (4) states that an environmental covenant is a “servitude”; the term generally
2 refers to either a burden or restriction on the use of real estate, or to a benefit that flows from the
3 ownership of land, that in either case “runs with the land” - that is, the benefit or the burden
4 passes to successive owners of the real estate.
5

6 The law of servitudes is a long established body of real estate law. The term is defined in
7 §1.1 of the Restatement (3d) of Servitudes as follows: “(1) A servitude is a legal device that
8 creates a right or an obligation that runs with land or an interest in land.” The Restatement goes
9 on to provide that the forms of servitudes which are subject to that Restatement are “easements,
10 profits, and covenants.”
11

12 This Act emphasizes that an environmental covenant is a servitude in order to implicate this
13 full body of real estate law and to sustain the validity and enforceability of the covenant. By first
14 characterizing the environmental covenant as a servitude, the Act expressly avoids the argument
15 that an environmental covenant is simply a personal common law contract between the agency
16 and the owner of the real estate at the time the covenant is signed, and thus is not binding on later
17 owners or tenants of that land.
18

19 6. The definition of “environmental covenant” also provides that the servitude is created to
20 implement an environmental response project. An environmental response project may
21 determine, in some circumstances, to leave some residual contamination on the real property.
22 This may be done because complete cleanup is technologically impossible, or because it is either
23 ecologically or economically undesirable. In this situation, the environmental response project
24 may impose activity and use limitations to control residual risk which results from contamination
25 remaining in real property. An environmental covenant is then recorded on the land records as
26 required by Section 8 to ensure that the activity and use limitations are both legally and
27 practically enforceable.
28

29 7. An “environmental response project” covered by subsection (5) may be undertaken
30 pursuant to authorization by one of several different statutes. Subsection (5)(a) specifically
31 covers remediation projects required under state law. However, the subsection is written broadly
32 to also encompass both current federal law, future amendments to both state and federal law, as
33 well as new environmental protection regimes should they be developed. Without limiting this
34 breadth and generality, the Act intends to reach environmental response projects undertaken
35 pursuant to any of the following specific federal statutes:
36

37 (1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976",
38 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;

39 (2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976",
40 42 U.S.C. sec. 6972 and 6973, as amended;

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

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

3 (5) "Toxic Substances Control Act", 15 U.S.C. 2601 to 2692, as amended;

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

5 (7) "Atomic Energy Act", 42 U.S.C. 2011 et. sec., as amended.
6

7 8. Subsection (5)(c) extends the Act's coverage to voluntary remediation projects that are
8 undertaken under state law. Environmental covenants that are part of voluntary remediation
9 projects may serve both the goal of environmental protection and the goal of facilitating reuse of
10 the real property. However, approval of these projects by a governmental body or other
11 authorized party ensures that the project serves these goals. Even though preparation of the clean-
12 up plan and supervision of the work may be undertaken by private parties, this Act requires that
13 covenants undertaken as part of a voluntary clean-up program must be approved by the agency as
14 evidenced by the agency's signature on the covenant, in order to be effective under this Act.
15

16 9. Some states authorize properly certified private parties to supervise remediation to pre-
17 existing standards and certify the cleanup. For example, in Connecticut and Massachusetts, these
18 are "licensed site professionals". *See*, e.g., M.G.L. ch. 21A §19; 310 CMR 40.1071; C.G.S.
19 §§22a-133o, 22a-133y.) Supervision and certification by statutorily-authorized parties is intended
20 to accomplish the same public function as supervision and certification by the governmental
21 entity. Thus, these environmental response projects are also covered by this definition.
22

23 10. Under subsection (5)(c), environmental response projects may include specific
24 agreements between the owner and the agency for remediation that go beyond prevailing
25 requirements if authorized by the state or federal agency's voluntary cleanup program.
26 Alternatively, the owner may choose to contract with a potential purchaser for additional use
27 restrictions in an instrument that does not purport to come within this Act; *see* §5(d). Because the
28 owner may have residual liability for the site, even after remediation and transfer to a third party
29 for redevelopment, the owner may require further restrictions as a condition of creating the
30 environmental covenant and eventual reuse of the real property.
31

32 11. The definition of "holder" is in subsection (6). As the practice of using environmental
33 covenants continues to grow, new entities may emerge to serve as holders, and this Act does not
34 intend to limit this process. A holder may be any person under the broad definition of this Act,
35 including an affected local government, the agency, or the owner. The identity of an individual
36 holder must be approved by the agency and the owner as part of the process of creating an
37 environmental covenant, as specified in Section 4 of this Act. A holder is authorized to enforce
38 the covenant under Section 11. A holder has the rights specified in Section 4 of this Act and
39 may be given other rights or obligations in the environmental covenant.
40

41 Section 3(a) makes clear that a holder's interest is an interest in real property. The drafters
42 recognize that some environmental enforcement agencies are not authorized by their enabling
43 legislation to own an interest in real property after the environmental remediation is completed.

1 As a consequence, those agencies may not be entitled to serve as holders under the Act. In those
2 cases where an agency wishes to be certain that a viable holder exists, it may cause a private
3 entity to be created for this purpose, acting by contract in accordance with the agency's direction.
4 The second sentence of Section 3(a) of the Act, however, makes clear that this indirect method of
5 enforcement may be unnecessary, since an agency's right to enforce the covenant in accordance
6 with its terms is not an interest in real property.

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

14
15 In general, a holder's right to enforce the covenant under Section 11 should be considered
16 comparable to the rights covered in an easement and, thus, should not lead to a determination that
17 the holder is liable as an "owner" under CERCLA. The two cases that have considered this
18 question have found that the parties which held the easements were not CERCLA "owners".
19 Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364
20 (9th Cir. 1994); court reasoned that the circular definition of owner meant that the term's most
21 common meaning would prevail. The common law's distinction between an easement holder
22 and the property owner was then applied to find the easement holder not to be an "owner" for
23 purposes of this statute. In each of these cases, the party which held the easement had not
24 contributed to contamination on the property. The amendments to CERCLA Section 9601(35),
25 Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, **
26 Stat. ** (2002) (HR 2869, 107th Cong. 1st Session), added the term "easement" to the definition
27 of parties which are in a "contractual relationship" under CERCLA. However, this does not
28 affect whether the easement holder will be held to be a CERCLA "owner".

29
30 Where the holder or another person has more extensive rights than enforcement, a careful
31 analysis will be required. The CERCLA liability cases typically emphasize that a party which
32 exercises the degree of control over a site equivalent to the control typically exercised by an
33 owner of the site will be held liable as an "owner". Under this approach, for example, lessees
34 have been held liable as owners when their control over the site approximated that which an
35 owner would have. *See, e.g., Delaney v. Town of Carmel*, 55 F. Supp. 2d 237 (S.D.N.Y. 1999);
36 *U.S. v. A & N Cleaners and Launderers*, 788 F. Supp. 1317 (S.D.N.Y. 1990); *U.S. v. S.C. Dept.*
37 *of Health and Env. Control*, 653 F. Supp. 984 (D.C.S.C. 1984.) Accordingly, a holder
38 contemplating extensive control over the site should consider potential "owner" liability
39 carefully.

40
41 CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the case
42 law interpreting this definition emphasizes that a party is liable as an operator if it has a high degree
43 of control over the operating decisions and day to day management at the site. Thus, for example,

1 a party which held an easement could be liable as an operator if its degree of control met this
2 standard. A holder will, in general, have only control authority over the site related to effective
3 enforcement of the environmental covenant and does not typically need more extensive day to day
4 control. However, this will not likely be true in all cases.

5
6 Subsection (7) defines “owner” as “an” owner – not necessarily the sole owner – of the real
7 property to be subjected to the covenant. In an appropriate case, this may become an important
8 distinction.

9
10 For example, it is common practice in mining states – Kentucky, West Virginia,
11 Pennsylvania, and others – for the fee ownership of the mineral interests to be conveyed separate
12 and apart from the fee ownership of the remaining parcel. Thus, under the conventional real
13 estate practices of these states, there may be two separate fee ownership interests in the same
14 “parcel” of real estate. It may be that those two owners of different interests in the same parcel
15 have an agreement between them prohibiting separate conveyances of interests in the land
16 without permission of the other. However, if that agreement does not appear of record, it would
17 not run with the land, would likely not be binding on the agency [in the absence of the agency’s
18 actual knowledge] and thus not affect the validity of a covenant signed by one of the owners with
19 respect to that owner’s interest in the real estate.

20
21 In contrast, Husband and Wife may own Blackacre as tenants in common, joint tenants, or
22 tenants of the entirety. In all of these configurations of ownership, both Husband and Wife are
23 owners of Blackacre – and Section 4 requires that “all owners” – here, both Husband and Wife –
24 must sign an environmental covenant in order for it to be valid. There may be circumstances – a
25 99 year leasehold of a parcel, for example – where the practical owner of the economic value of
26 the parcel is not the “fee” owner but the holder of the leasehold interest. Indeed, it may be that
27 the fee owner may be difficult to locate in such a case. However, the definition of ‘owner’
28 requires the agency to secure the signature of the fee owner and does not require the signature of
29 the leaseholder. The agency, of course, would likely require the signature of the leaseholder as
30 well.

31 32 33 **SECTION 3. NATURE OF RIGHTS; SUBORDINATION OF INTERESTS.**

34 (a) The interest of a holder is an interest in real property. The rights of an agency under this
35 [Act] or under an approved environmental covenant, other than as a holder, are not interests in
36 real property.

(b) An agency is bound by the obligations it assumes in an environmental covenant, but an agency does not assume obligations merely by approving an environmental covenant.

(c) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) A prior interest is not affected by an environmental covenant unless the owner of the interest is a party to the covenant or subordinates its interest to the covenant.

(2) This [Act] does not require an owner of a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record or, if the environmental covenant covers commonly owned property in a common interest community, in a record signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

Preliminary Comments

The first sentence of subsection (a) confirms that the holder – whose rights are to be identified in the covenant pursuant to Section 4 – holds an interest in real property, thus distinguishing that right from a personal or contractual right that does not run with the land. The definition of 'holder' in Section 2, departing from traditional real estate concepts, makes clear that the holder may be the agency or the owner – thus making it possible for the owner to be both grantor and grantee.

The second sentence of subsection (a) makes clear that if the agency chooses to be the holder, the agency will thereby hold an interest in the real estate. Otherwise, the agency's interest in the covenant as a consequence of signing the covenant or having a statutory right to enforce it is not an interest in real estate. Thus, a state or federal agency will be able to comply with legal

1 restrictions on the agency's right to hold interests in real estate, even while exercising its
2 statutory rights and responsibilities under this Act.

3
4 Subsection (b) validates and confirms any contractual obligations that an agency may assume
5 in an environmental covenant. So, for example, if the agency were to agree to authorize certain
6 activities on the property, to undertake periodic inspections of the site or to provide notice of
7 particular actions to specified persons, those undertakings and obligations would be enforceable
8 against the agency in accordance with their terms by parties adversely affected by any breach.
9

10 At the same time, the Act makes clear that the mere act of signing the covenant in order to
11 signify the agency's 'approval' of the covenant – required by the Act as a condition of its
12 effectiveness under this Act – is not an assumption of obligations and the agency has not thereby
13 exposed itself to any liability.
14

15 Subsection (c) restates and clarifies traditional real estate rules regarding the effect of an
16 environmental covenant on prior recorded interests. The basic rule remains that pre-existing prior
17 interests – “First in time, first in right” – remain valid. As § 7.1 of the Restatement (3d) of
18 Property: Mortgages states:
19

20 “A valid foreclosure of a mortgage terminates all interests in the foreclosed real
21 estate that are junior [that is, later in time] to the mortgage being
22 foreclosed....Foreclosure does not terminate interests ...that are senior....”
23

24 At the same time, it is not uncommon for interested parties to re-order the priorities among
25 them by agreement in order to accommodate the economic interests of various parties. The usual
26 device used to re-order priorities is a so-called ‘subordination’ agreement. Again, this section
27 tracks the outcome suggested in The Restatement (3d) of Property: Mortgages, Section 7.7 of the
28 Restatement provides in pertinent part that:
29

30 A mortgage, by a declaration of its mortgagee, [that is, the lender] may be made
31 subordinate in priority to another interest in the mortgaged real estate, whether
32 existing or to be created in the future....A subordination that would materially
33 prejudice the mortgagor [that is, the owner of the real estate] or the person whose
34 interest is advanced in priority is ineffective without the consent of the person
35 prejudiced.
36

37 The issue of priorities and the impact of junior lien holders [in this case, the newly recorded
38 environmental covenant] is sufficiently important that the drafters have emphasized this issue
39 both in this section and in Sections 8(b) and 9(c). In all these instances, the Act provides that the
40 usual rules of priorities are preserved, except in the case of foreclosure of tax liens.
41

42 The combined effect of Sections 3, 8 and 9 creates a curious “circular” lien problem, where
43 (1) foreclosure of a 2003 municipal tax lien would terminate a 2000 pre-existing mortgage (the

1 usual outcome), but (2) that same foreclosure would not affect the environmental covenant
2 created in 2002 under this Act; while (3) foreclosure of the 2000 pre-existing mortgage would
3 terminate the 2002 environmental covenant (again, the usual rule), but (4) not the 2003 municipal
4 tax lien (also, the usual rule). Circular liens, however, are not unique to this situation.
5

6 **SECTION 4. CONTENTS OF ENVIRONMENTAL COVENANT.**

7 (a) An environmental covenant must:

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

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

11 (3) describe the activity and use limitations on the real property;

12 (4) identify the holder which may be an owner or agency;

13 (5) be signed by the agency, all owners of the real property subject to the covenant and
14 the holders with the formalities for a deed; and

15 (6) identify the name and location of any administrative record for the environmental
16 response project reflected in the environmental covenant.

17 (b) In addition to the information required by subsection (a), an environmental covenant may
18 contain other information, restrictions, and requirements agreed to by the persons who signed it,
19 including any:

20 (1) requirements for notice following transfer of a specified interest in, or concerning
21 proposed changes in use, applications for building permits, or proposals for any site work
22 affecting the contamination on, the property subject to the covenant;

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

1 (3) rights of access to the property granted in connection with implementation or
2 enforcement of the covenant;

3 (4) a brief narrative description of the contamination and remedy, including the
4 contaminants of concern, the pathways of exposure, limits on exposure, and the location and
5 extent of the contamination;

6 (5) restriction or limitation on amendment or termination of the covenant in addition to
7 those contained in Sections 9 and 10; and

8 (6) rights of the holder in addition to its right to enforce the covenant pursuant to Section
9 11.

10 (c) An agency may refuse to sign an environmental covenant for any reason.

11 Preliminary Comments

12
13 1. Subsection (a)(2) of this section requires that the covenant contain a “legally sufficient
14 description” of the “real property” subject to the covenant. While these terms are familiar to real
15 estate practitioners, it may be useful to describe precisely what is required by this section.

16
17 First, a description of the real property which is “legally sufficient” will depend upon the
18 practice of the enacting state. The purpose of such a requirement, for the real estate practitioner,
19 will be to assure that the particular parcel subject to the covenant will be properly indexed in the
20 land records and thus readily located during the course of a title search. This, in turn, will enable
21 a buyer, lender or other interest holder to be confident of what they own or hold as security.

22
23 The most commonly used legal descriptions of land are: (1) a metes and bounds description -
24 that is, a description that begins with reference to a known point on the surface of the earth,
25 followed by references to distances and angles from that point to other monuments or terminals
26 that mark the outer boundaries of the parcel; (2) reference to a recorded map or survey, that
27 contains a “picture” of the metes and bounds description; (3) reference to a particular parcel
28 number on a governmental grid system; and (4) a coordinates reference system, derived from a
29 Global Positioning System or other mapping tool. These, and other generally obsolete forms of
30 legal description [e.g., “starting at the black oak tree in the pasture, then running along a stone
31 wall to Bloody Creek, then generally south and west along the creek to a dirt road, then back to
32 the tree where you started, being the same 50 acres, more or less, conveyed to my father by

1 Lisman”] may all serve the same purpose, and would meet the requirement of being “legally
2 sufficient.”
3

4 In contrast, as described in Comment 10 below, more precise measurements may be very
5 useful for identifying precisely the “geospatial” location of sub-surface contaminants.
6

7 Second, the “real property” that is subject to the covenant may be narrowly or broadly
8 defined, depending on the wishes of the parties. It may be, for example, that only a 3 acre
9 portion of a 5,000 acre ranch is contaminated; in such a case, it may be unnecessary to describe
10 all 5000 acres of real property as being subject to the covenant.
11

12 Alternatively, in a remote location, it may be that the 3 acre contaminated parcel owned by
13 one person must be reached only by crossing a private road located on a 5000 acre ranch owned
14 by another person. In such a case, a careful property description will want to include reference to
15 the easement or other access right across the land owned by another person.
16

17 It is important to recognize, however, that real estate is a three-dimensional concept (or a
18 four-dimensional concept when one considers time as a dimension). A legal description of a
19 particular parcel of real estate which has only perimeter boundaries and no upper and lower
20 boundaries encompasses both the surface of the earth within those boundaries, the airspace above
21 the surface, all the dirt and minerals below the surface and all spaces within that volume of space
22 that may be filled with water. Thus, in appropriate cases, a title searcher will need to be sensitive
23 to cases where interests in the “real property” or “real estate” have been sold or leased which
24 leave the owner with less than all of the real estate. A ten-year lease of the entire parcel, for
25 example, represents a time-defined “boundary” to the owner’s interest in the real property in
26 question. An agency seeking to identify all the interests in the parcel in order to secure their
27 approval of a covenant will therefore want to insure that a title search identifies all these
28 interests.
29

30 2. This Act does not provide the standards for environmental remediation nor the specific
31 activity and use limitations to be used at a particular site. Those will be provided by the state or
32 federal agency based on other state and federal law governing mandatory and voluntary cleanups.
33 This Act contemplates that those standards will then be incorporated into the environmental
34 response project, which, in turn, will call for activity and use restrictions that can be implemented
35 through creation of an environmental covenant. This section addresses creation of the
36 environmental covenants.
37

38 3. Ordinarily, an environmental covenant can be created only by agreement between the
39 agency and the owner. If there is a holder other than the agency or the owner, both the agency
40 and the owner must approve the holder, and the holder must agree to the terms of the covenant.
41 The agency may refuse to agree to an environmental covenant if it does not effectively
42 implement the activity and use limitations specified in the environmental response project.
43

1 Where no owner is available or willing to participate in the environmental response project, it
2 may be necessary for the agency to condemn and take an interest sufficient to record an
3 environmental covenant on the property where it has the power to do so. This Act does not
4 contain independent condemnation authority for the agency. Alternatively, in some states, there
5 may be a basis for an agency to require an owner to cooperate with the implementation of the
6 covenant as a regulatory matter.

7
8 4. This Act recognizes that there may be parties that own different interests in real property,
9 other than the fee simple interest. Examples include an interest in mineral rights owned
10 separately from surface rights, long term leases, mortgages and liens.

11
12 5. In addition to the parties specified in Section 4(a)(5), other persons may wish to sign the
13 environmental covenant and, in any event, the agency may require their signature as a condition
14 of approving the covenant; *see* Section 4(c). Under current law, persons other than the owner
15 may be liable for cleanup of the contamination, including contingent future liability if further
16 cleanup is needed or personal injury claims are brought. These could be parties which previously
17 used the property or whose waste was disposed of on the property. Such a person may have
18 liability for some or all of the cost of the environmental response project and may thus have a
19 compelling interest in signing the covenant so as to be informed of future enforcement,
20 modification and termination.

21
22 6. A holder is the grantee of the environmental covenant and the Act requires that there be a
23 holder for a covenant to be valid and enforceable. Under Section 4(a)(4), the grantee may also be
24 the grantor – the owner of the property (who might retain that status upon sale of the property) or
25 the agency. In addition to enforcement rights, the holder may be given specific rights or
26 obligations with respect to future implementation of the environmental covenant. These could
27 include, for example, the obligation to monitor groundwater or maintain a cap or containment
28 structure on the property. Such rights and obligations will be specified in the environmental
29 covenant and, like any obligations, would be enforceable against the holder if the holder failed to
30 satisfy its obligations.

31
32 7. Section 4(a)(5) of the Act requires an agency to sign the covenant. In some states it may
33 be necessary to amend the state agency's enabling statute to empower it to so sign.

34
35 8. Section 4(a)(6) requires the covenant to disclose the "name and location of any
36 administrative record" for the underlying environmental response project. Typically, this
37 information will require a docket or file number, identifying names of the parties, and an
38 indication of the agency office in which the record of decision or other administrative record has
39 been retained. In those cases where a state-wide registry is maintained, the registry also requires
40 this information. In the case of voluntary clean-ups, of course, there may not be an administrative
41 record.

1 Section (4) (b) is a permissive provision intended by the breadth of its provisions (“...may
2 contain other information ...agreed to by the persons who signed it...”) to encourage the agency
3 and the other parties to include provisions in the particular covenant that are tailored to the
4 specific needs of that project. The drafters anticipate that this will be accomplished in order to
5 maximize the likelihood that the covenant, when properly implemented and monitored, will
6 protect human health and the environment.
7

8 Persons dealing with this Act must recognize that no statute and no commentary, can fully
9 contemplate all the possibilities that are likely to arise in implementation of this Act, and this
10 issue permeates this subsection. In (b)(1), for example, the text contemplates the possibility that
11 the agency may, in a particular case, require the owner or other persons to notify the agency
12 before, among other things, that party applies for “...building permits.” The suggested language
13 is not intended to exclude notice of any other type of work permit – drilling or excavation
14 permits, for example – that might trigger a violation of an environmental covenant.
15

16 9. Section 4(b)(4) suggests that, in an appropriate case, the agency may wish to provide a
17 summary of the contamination on the site and the remedial solutions that have been identified.
18 From a public health perspective, this may be very useful. The reference to “pathways of
19 exposure” requires a statement that, for example, the contaminant might be of danger if it comes
20 in contact with skin, if breathed, or only if ingested.
21

22 10. Section 4(b)(4) suggests that, in an appropriate case, the agency may require the covenant
23 to contain not only a legally sufficient description of the real estate subject to the covenant (as
24 mandated under section 4(a)(2)) but also the ‘location of the contamination.’
25

26 During the drafting process, several federal and private advisors drew the drafters’ attention
27 to the work of an entity known as the Federal Geographic Data Committee, with offices at the
28 U.S. Geological Survey. Their collective recommendation is that the “location” of the
29 contamination might best be understood by adding the adjective “geospatial” to “location”. The
30 Federal Geographic Data Committee defines that term as follows:
31

32 Geospatial Data: Information that identifies the geographic location and characteristics of
33 natural or constructed features and boundaries on the Earth. This information may be
34 derived from, among other things, remote sensing, mapping, and surveying technologies.
35 Statistical data may be included in this definition....
36

37 Depending on the nature of the contamination and the size of the parcel subject to the
38 covenant, a description of the “geospatial location” of the contamination and the legal boundary
39 description of the real estate parcel on which those contaminants are located may be very
40 different, and the kinds of information required to usefully describe the “location” of the
41 contamination may also differ. As a simple example, it may be appropriate to use grid
42 coordinates and projected elevations below ground level to define the upper and lower levels of a
43 groundwater contamination plume, together with sensing or other data that projects the mobility

1 of that plume over time, in order to accurately provide useful information that a simple metes and
2 bounds description could not convey.

3
4 11. Subsection (b)(5) contemplates that the environmental covenant may impose additional
5 restrictions on amendment or termination beyond those required by this Act. For example, in
6 some circumstances the owner or another party may have contingent residual liability for further
7 cleanup of the real property subject to the environmental covenant and may seek further
8 restrictions in the covenant to protect against this contingent liability.

9
10 12. Subsection (c) confirms that the agency is under no obligation to approve a particular
11 environmental covenant by signing it, and may impose conditions to its approval. This may be
12 particularly significant in those cases where the agency was unable to secure subordination of
13 prior interests in the real estate which is proposed to be subject to the covenant. If a prior
14 security or other interest is not subordinated to the environmental covenant, and then is
15 foreclosed at some later time, under traditional real property law that foreclosure would
16 extinguish or limit an environmental covenant. Since such an outcome is antithetical to the
17 policies underlying this Act, the Act contemplates that the agency may, before agreeing to the
18 covenant, require subordination of these interests. At the time of creation of the environmental
19 covenant, the agency must determine whether the prior interest presents a realistic threat to the
20 covenant's ability to protect the environment and human health. Section 3 of the Act makes clear
21 that by subordinating its interest, an owner of a prior interest does not change its liability with
22 respect to the property subject to the environmental covenant. Any such liability of a
23 subordinating party would arise by operation of other law and not under this Act.

24
25 Subsection (c) contemplates an unending range of unanticipated circumstances that might
26 cause an agency, in the exercise of its regulatory discretion as defined in other law, to either
27 refuse to sign a covenant in the form presented, or to agree to sign it only upon satisfaction of
28 specified conditions. The listing of the following examples is intended to be illustrative, not
29 exhaustive.

30
31 Example 1: As a condition of signing the covenant, the agency requires the owner to provide
32 an abstract of title of the property to be subjected to the covenant. If the owner declines to do so,
33 the agency may reasonably be expected to decline to approve the covenant, since it will have
34 insufficient evidence of the priority of its new covenant.

35
36 Example 2: The owner provides the title abstract, which discloses that the property to be
37 subjected to the covenant is presently subject to a first mortgage for \$5 million. The agency's
38 decision to condition its approval on the first lender's willingness to subordinate to the covenant
39 would plainly be appropriate.

40
41 Example 3: The agency's policies require that an independent company regularly engaged in
42 the business of monitoring and enforcing environmental covenants on behalf of the agency be

1 named as 'holder' in the covenant. The owner's refusal to agree to such a provision would
2 justify an agency's refusal to approve the covenant.
3
4

5 **SECTION 5. VALIDITY.**

6 (a) An environmental covenant that complies with this [Act] runs with the land.

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

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

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

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

11 (4) it imposes a negative burden;

12 (5) it imposes an affirmative obligation on any person having an interest in the real
13 property or on the holder;

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

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

16 (8) the holder dies, ceases to exist, resigns, or is replaced; or

17 (9) the persons identified as owner and holder in the environmental covenant are the same
18 person.

19 (c) An instrument that creates activity and use limitations designed to protect human health
20 or the environment and that was agreed to before [the effective date of this [Act]] is not invalid
21 or unenforceable by reason of any of the limitations on enforcement of interests described in
22 subsection (b) or because it was identified as an easement, servitude, deed restriction, or other
23 interest. This [Act] does not apply in any other respect to such an instrument.

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

4 **Preliminary Comments**

5 1. Subsection (a), when considered with the common law, makes clear that environmental
6 covenants will be binding not only on the persons who originally negotiate them but on
7 subsequent owners of the property and those who – like tenants – hold an interest in the property
8 so long as those persons have actual or constructive knowledge of the covenant.
9

10 In order to be binding on future owners who may not have actual knowledge of the covenant,
11 the Act requires that the covenant must comply with all provisions of the Act. Section 8(a) of
12 this Act requires the covenant to be recorded. The Act then states the usual real estate rule, that a
13 recorded instrument “runs with the land” and binds all who have an interest in it.
14

15 2. Recording requirements are an important means by which the law protects ‘bona fide
16 purchasers’ - BFP’s - who acquire property without knowledge of its conditions. Even in the
17 absence of recording a document on the land records, the common law has long held that those
18 who have actual knowledge of the document take title subject to the document. The BFP, on the
19 other hand, is only bound - at common law - by an instrument affecting the real property to the
20 extent he has constructive knowledge of the document.
21

22 Importantly, a BFP is charged with constructive knowledge of the land records. In some
23 respects, one of the fundamental tensions between traditional real estate law and environmental
24 law is the change in this rule, by which environmental law seeks to impose liability on
25 “innocent” purchasers of contaminated property who take without knowledge of the property’s
26 condition and may have no practical means of learning of its condition. To the extent this Act
27 tracks traditional real estate practice by requiring recorded covenants, this tension may be
28 considerably lessened.
29

30 3. Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation
31 Easement Act. One of the Environmental Covenant Act’s basic goals is to remove common law
32 defenses that could impede the use of environmental covenants. This section addresses that goal
33 by comprehensively identifying these defenses and negating their applicability to environmental
34 covenants.
35

36 This Act’s policy supports the enforceability of environmental covenants by precluding
37 applicability of doctrines, including older common law doctrines, that would limit enforcement.
38 That policy is broadly consistent with the Restatement of the Law Third of Property (Servitudes),
39 including §2.6 and chapter 3. For specific doctrines see §§ 2.4 (horizontal privity), 2.5

1 (benefitted or burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and
2 concern doctrine), 3.3 (rule against perpetuities), and 3.5 (indirect restraints on alienation).

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

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

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

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

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

38
39 Achievement of environmental protection goals may require that affirmative obligations be
40 imposed on the burdened real property owner or on the covenant holder or both. For example,
41 the grantor of an environmental covenant may agree to use restrictions and may also agree to
42 undertake affirmative monitoring or maintenance obligations. In addition, the covenant might
43 impose specific engineering or monitoring obligations on the holder, which may be a for profit

1 corporation, a charitable corporation or trust holder. In all these cases, the environmental
2 covenant would impose affirmative obligations and Subsection (b)(5) makes clear that the
3 covenant would not be unenforceable solely because it is affirmative in nature.
4

5 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract
6 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
7 of covenants and equitable servitudes.
8

9 Subsection (b) (8) addresses the possibility that the holder may have died or for other reason
10 fails to exist. Failure of the holder ought not invalidate the covenant and Sections 10(c), (d) and
11 (e) authorize replacement of a holder in various circumstances.
12

13 Subsection (b) (9) addresses the case where an owner of a contaminated parcel may agree to
14 remedy an existing condition and may further agree to serve as holder in order to perform the
15 necessary tasks. Under this Act, the Owner may be willing to do so because Section 4 of the Act
16 requires that a holder be named and the owner may not be inclined to create an interest in a
17 stranger. Under these circumstances, the owner's name would appear as both the grantor and the
18 grantee in the land records, and this outcome ought not invalidate the covenant.
19

20 Subsection (b) identifies what the drafters believe to be the principal common law doctrines
21 that have been applied to defeat covenants such as those created by this Act. Drafters in
22 individual states may wish to consider whether references to other common law or statutory
23 impediments of a similar nature ought to be added to this subsection.
24

25 Subsection (c) addresses the treatment of instruments recorded before the date of this Act
26 that seek to accomplish the purposes of environmental covenants under this Act. It seeks to
27 validate such instruments, in a limited way, by specifying that the defenses covered in subsection
28 (b), or the fact that the instrument was identified as something other than an environmental
29 covenant, will not make prior covenants unenforceable. Beyond negating these specific defenses,
30 however, this Act does not apply to prior covenants. If the parties to a prior covenant wish to
31 have the other benefits of this Act for that covenant, they must re-execute the covenant in a
32 manner which satisfies the requirements of this Act.
33

34 Section (d) is a general savings clause for other interests in real property. It disavows the
35 intent to invalidate any interest created either before or after the Act which does not comply with
36 the Act but which otherwise may be valid under the state's law. Nor does the Act intend in any
37 way to validate or invalidate an action taken by a person to remediate contamination that is taken
38 without formal governmental oversight or approval. A recorded instrument that does not satisfy
39 the requirements of this Act does not come within the scope of this Act; it does not enjoy the
40 protections of this Act and must be evaluated under other law of the state.
41

42 For example, the Act is clear that its requirements only apply to land use restrictions placed
43 on real property pursuant to an "environmental response project" as that term is defined in the

1 Act. If private parties choose to use conventional deed restrictions or other devices to place
2 further activity and use restrictions on a parcel, nothing in this Act would affect that contractual
3 arrangement to either insulate it from attack as invalid under that state's other law or to invalidate
4 it under this law.
5
6

7 **SECTION 6. RELATIONSHIP TO OTHER LAND-USE LAW.**

8 This [Act] does not authorize a use of real property that is otherwise prohibited by zoning or
9 by law other than this [Act] regulating use of real property, or by a recorded instrument that has
10 priority over the environmental covenant. An environmental covenant may prohibit or restrict
11 uses of real property which are authorized by zoning or by law other than this [Act].

12 **Preliminary Comments**

13
14 This section clarifies that this Act does not displace other restrictions on land use laws,
15 including zoning laws, building codes, sanitary sewer or subdivision requirements and the like.
16 Restrictions under those laws apply unchanged to real property covered by an environmental
17 covenant.
18

19 Where other law, including either a state or federal environmental response project, requires
20 structures or activities in order to perform the environmental remediation, the status of those
21 requirements is likely to be determined by that other law and not by this Act. Thus, for example,
22 where the environmental covenant is implementing an environmental response project under
23 federal CERCLA law, a federal appellate court has held that the federal law authorizing the
24 environmental response project preempts a conflicting city ordinance. U.S. v. City and County
25 of Denver, 100 F.3d 1509 (10th Cir. 1996).
26

27 Clearly, the large and complex body of zoning and land use law and the law of environmental
28 regulation supplement the provisions of this Act. In appropriate cases, a court will be called
29 upon to articulate the interrelationship of this Act and those laws, and the drafters have not
30 attempted to articulate all those outcomes. On the other hand, certain obvious examples may be
31 helpful in understanding this interplay.
32

33 First, the Act contemplates that an environmental covenant might, for example, prohibit
34 residential use on a parcel subject to a covenant. Under conventional real estate principles,
35 without references to this Act, such a prohibition or restriction in an environmental covenant will
36 be valid even if other real property law, including local zoning, would authorize the use for
37 residential purposes.

1 Alternatively, a covenant might, at the time it is recorded, permit both retail use and
2 industrial use on a vacant parcel of contaminated real estate while prohibiting residential use.
3 Assuming all retail and industrial uses were permitted by local zoning at the time the covenant is
4 recorded, the municipality might, before construction begins, change that zoning to bar industrial
5 use. If such a zone change is otherwise valid under state law, nothing in this Act would affect the
6 municipality's ability to "down zone" the parcel.

7
8 If, on the other hand, an industrial use was existing and ongoing at the time the covenant was
9 recorded, and an effort was then made to prohibit that use by ordinance, such state law doctrines
10 as "vested rights" or non-conforming uses, rather than this Act, would govern the validity of the
11 zoning action.
12
13

14 **SECTION 7. NOTICE.**

15 (a) The owner or another person designated by the agency shall provide a copy of a signed
16 environmental covenant as required by the agency to:

- 17 (1) all persons who signed the covenant;
- 18 (2) all persons holding a recorded interest in the real property subject to the covenant;
- 19 (3) all persons in possession of the real property subject to the covenant;
- 20 (4) each municipality or other unit of local government in which real property subject to
21 the covenant is located; and
- 22 (5) any other persons the agency requires.

23 (b) Failure to provide a copy of the covenant as required by the agency does not affect the
24 covenant's validity.

25 **Preliminary Comments**

26
27 This section contemplates that the agency will normally require that the final signed
28 environmental covenant be sent to affected parties. In addition to the obvious persons who
29 should be notified, in an appropriate case, the agency might require notice to abutting property
30 owners. These persons are likely to have been directly involved in any major administrative

1 proceeding, but in other cases – such as a voluntary clean-up – may have no knowledge of the
2 existing conditions on abutting land.

3
4 In any event, the extent and manner of giving notice rests in the discretion of the agency, and
5 the statute imposes an affirmative duty on the persons required to provide that notice to comply.
6
7

8 **SECTION 8. RECORDING.**

9 (a) An environmental covenant and any amendment or termination of the covenant must be
10 recorded in every [county] in which any portion of the real property subject to the covenant is
11 located. A recorded environmental covenant [or a notice recorded pursuant to Section 12] must
12 be indexed in [the grantor's index] in the names of the owners of the real property subject to the
13 covenant and in the grantee's index] in the name of the holder]. [Insert other indexing
14 requirements appropriate under state law].

15 (b) Except as otherwise provided in Section 9 (c), an environmental covenant is subject to
16 the laws of this state governing recording and priority of interests in real property. Recording of a
17 covenant pursuant to the law of this state provides the same constructive notice of the covenant
18 as the recording of a deed provides of an interest in real property.

19 **Preliminary Comments**

20
21 Subsection (a) confirms that customary indexing rules apply to the covenant. Since the
22 owner is granting the enforcement right to a holder, all the owners' names would appear in the
23 grantor index and the holder's name would appear in the grantee index.
24

25 In those states where a tract or a recording system other than a grantor/grantee index is used,
26 this section should be revised as appropriate.
27

28 The Act assumes that all parties will wish to record the environmental covenant and
29 accordingly makes the state's recording rules apply. As between the parties, however, the
30 effectiveness of the covenant does not depend on whether the covenant is recorded. A signed

1 but unrecorded covenant, under traditional real estate law, binds the parties who sign it and,
2 generally, those who have knowledge of the covenant.
3

4 The Act makes clear that, as with all recorded instruments, an environmental covenant takes
5 priority under the normal rules of “First in time, First in Right.” *See* The Restatement of The
6 Law Third Property–Mortgages § § 7.1 and 7.3. In that sense, the covenant does not enjoy the
7 same priority afforded real estate tax liens, because of the substantial constitutional impediment
8 such a change in priority would likely create.
9

10 However, the Act departs in important ways from the consequences of the normal priority
11 and other traditional rules. For example, under § 9, foreclosure of a tax lien cannot extinguish
12 an environmental covenant. *See* § 9(c).
13

14 Finally, in those case where the holder’s interest is transferred to a successor holder, the
15 assignment of that interest will be recorded, and the usual grantor/grantee indexing rules would
16 apply. Note, however, that under § 10(d), the assignment would be treated as an amendment of
17 the covenant.
18
19

20 **SECTION 9. DURATION.**

21 (a) An environmental covenant is perpetual unless:

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

23 (2) terminated by consent pursuant to Section 10;[or]

24 (3) terminated pursuant to subsection (b)[; or]

25 (4) terminated or modified by judicial decree in an eminent domain proceeding, if:

26 (A) the agency that signed the covenant first consents to the judicial action; and

27 (B) all persons identified in Sections 10 (a) and (b) are given notice of the pendency
28 of the eminent domain proceeding].

29 (b) A judicial decree terminating an environmental covenant or reducing its burden on the
30 real property subject to the covenant under the doctrine of changed circumstances may be
31 rendered only after:

1 (1) all persons identified in Sections 10 (a) and (b) are given notice of the pendency of
2 the judicial proceeding in which the determination is sought; and

3 (2) the agency that signed the covenant has filed a determination with the court that the
4 intended benefits of the original covenant can no longer be realized.

5 (c) Except as otherwise provided in subsections(a) and (b), an environmental covenant may
6 not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien,
7 or application of the doctrine of adverse possession, prescription, abandonment, waiver, or lack
8 of enforcement, or any similar doctrine.

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

11 **Preliminary Comments**

12
13 1. Subject to the other provisions in this Act, environmental covenants are intended to be
14 perpetual, as provided in subsection (a). A covenant may be limited by its terms as provided in
15 this Section, or amended or terminated under Section 10. Alternatively, in the limited
16 circumstances described in this section and with concurrence of the agency, it may be modified
17 either in an eminent domain proceeding (if the optional text is retained) or in a judicial
18 proceeding asserting “changed circumstances.”
19

20 2. Subsections (a)(3) and (4) provide that the agency’s approval is required to modify or
21 terminate an environmental covenant by an exercise of eminent domain or pursuant to the
22 doctrine of changed circumstances. The rationale for this requirement is important.
23

24 An exercise of eminent domain may result in a change of use for real estate. Requiring
25 approval by the agency that originally signed the covenant to amend or terminate the covenant
26 should help ensure that the agency will determine whether the covenant’s activity and use
27 limitations or other restrictions are needed to protect public health and the environment.
28

29 Similar involvement by the agency is appropriate in a proceeding in which a person seeks a
30 reduction in the burden on real estate arising from an environmental covenant.
31

32 The Act does not attempt to resolve the many complex issues likely to arise when one
33 government agency seeks to condemn an environmental covenant imposed by another agency

1 pursuant to an agreement with a current or former owner of the property. For example, eminent
2 domain may result in a change of use of that property. If the changed use requires that the agency
3 terminate the covenant's existing activity and use limitations because additional clean-up is now
4 required, complex questions of liability and financial responsibility may arise. Alternatively,
5 state law may already address questions of which governments have or do not have authority to
6 condemn real estate, or who are necessary or indispensable parties. State statutes are also likely
7 to include so-called "quick take" provisions, to have a well developed Administrative Procedures
8 Act, and other important aspects of condemnation proceedings beyond the scope of this Act.

9
10 Rather than address these matters, this Act suggests that an enacting state address the issue of
11 condemnation in one of two alternate ways. First, Section 9(a)(4) is drafted as an optional
12 provision; if deleted, the matter would be resolved under other law.

13
14 Second, if the optional text is retained, the Act would simply mandate notice of the
15 proceeding to those parties whose consent would be required to amend the covenant, and then
16 require that the state agency tasked with consideration of environmental matters be required to
17 approve termination or alteration of any environmental covenant as part of the proceeding.

18
19 On the other hand, if the eminent domain proceeding were to go forward without the need to
20 terminate or amend the environmental covenant, the existing covenant would remain in place and
21 then the approval required by this subsection of the Act would not apply.

22
23 3. Subsection (c) provides that environmental covenants are not extinguished by later tax
24 foreclosure sales, or by a range of potential common law and statutory impairments. The drafters
25 concluded that as a matter of public policy, these new forms of covenants seek to protect human
26 health and the environment and, presumably, the contamination of the real property that led to
27 the activity and use limitations would still be present if the covenant were extinguished.
28 Accordingly, the drafters concluded that impairment of those limitations as a consequence of
29 application of tax lien foreclosure or other doctrines would likely result in greater exposure to
30 health risk. Thus termination of that protection to serve other public policies of governments
31 seems inconsistent.

32
33 In contrast, in order to avoid any suggestion of impairment of contract, the Act confirms that
34 prior mortgages and other lien holders, upon foreclosure, may extinguish a subsequent covenant
35 that was not subordinated. The lien holder in that case, of course, would still be faced with the
36 physical condition of the property and the agency would have whatever regulations and rights
37 against such an owner that state and federal law afforded.

38
39 4. Subsection (b) imposes two specific requirements for a judicial change in an
40 environmental covenant by the doctrine of changed circumstances. The first requires agency
41 approval of such an application, for the same reason that agency approval is required for eminent
42 domain. The second requires that all parties to the covenant be given notice of the proceeding.

1 This will allow those parties to protect their interests in the proceeding, including their interests
2 arising from contingent future liability.

3
4 The drafters intend that a court, in considering this section, would apply the doctrine in its
5 traditional sense – that is, as a proposed modification of the covenant to reduce or eliminate its
6 burden. This section does not provide a substitute procedure for modifying a covenant to
7 increase the burden on the real estate. Such an outcome would be antithetical to the careful
8 balancing of interests embedded in the Act. It would also be inconsistent with the expectations
9 of owners and legally liable parties who have entered into the covenant with an expectation that
10 the burden would not be increased except pursuant to the procedures set out in this Act.

11
12 5. While this section imposes statutory constraints on the authority of the court to act in the
13 first instance, the Act does not restrict application of other procedural and administrative law to
14 judicial supervision of agency conduct. Thus, if a court were to determine that an agency has
15 acted in derogation of its statutory obligations in considering whether to approve a modification
16 or termination of an environmental covenant – whatever the appropriate standard in that state
17 might be – that conduct would be itself be subject to judicial scrutiny under other law of that
18 state.

19
20 Where an environmental covenant applies to real property that is otherwise subject to one of
21 the doctrines listed in Subsection (c), circumstances may arise in which the protections of the
22 covenant are not needed. For example, rights gained by adverse possession would be limited by
23 the environmental covenant’s restrictions where a house had been inadvertently placed on real
24 property subject to an environmental covenant that precluded residential use. In a case such as
25 these, modification of the covenant can be sought pursuant to Section 10. Seeking such a
26 modification will ensure that appropriate consideration will be given to residual environmental
27 risks.

28
29 The basic policy of this Act to ensure that environmental covenants survive impairment is
30 consistent with the broad policy articulated in the Restatement of the Law of Property
31 (Servitudes) Third, §7.9.

32
33 In general, restrictions in an environmental covenant are state property law interests that are
34 not extinguishable in bankruptcy.

35
36 States that do not have a Marketable Record Title Act will not need subsection (d). States
37 that do have a Marketable Record Title Act may choose to put this exception in that statute rather
38 than in this Act.

39
40 The exception to the Marketable Record Title statute in optional subsection (d) is analogous
41 to exceptions commonly made for conservation and preservation servitudes. Restatement of the
42 Law of Property Third (Servitudes) § 7.16 (5) (1998). It is based on the public importance of
43 ensuring continued enforcement of environmental covenants to protect human health and the

1 environment. For states adopting the registry of environmental covenants to be kept by the
2 [insert name of state regulatory agency for environmental protection] under Section 12 of this
3 Act, the cost of extending title searches to this registry should be low.
4

5 If there is any question whether a specific environmental covenant is exempt from the
6 requirements of the Marketable Title Act, the agency should comply with that Act by re-
7 recording the covenant within the Marketable Title Act's specified statutory period. This will
8 insure that the covenant is not extinguished under the Marketable Title Act.
9

10 Finally, the fact that the Act specifies that notice of either an eminent domain proceeding or
11 an action to apply the doctrine of changed circumstances be given to persons identified in
12 Section 10 does not mean that other persons might not – under other legal principles – also be
13 entitled to notice of the action or to intervene as parties in the action. Other state law may
14 require such notice and this Act does not affect such other, additional notice requirements.
15
16

17 **SECTION 10. AMENDMENT OR TERMINATION BY CONSENT.**

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

20 (1) the agency;

21 (2) the current owner;

22 (3) each person that originally signed the covenant, unless the person waived the right to
23 consent in a signed record or unless a court finds that the person no longer exists or cannot be
24 located or identified with the exercise of reasonable diligence; and

25 (4) except as otherwise provided in subsection (d), the holder.

26 (b) A person that subordinates its interest to an environmental covenant is not affected by an
27 amendment of the covenant unless the person consents to the amendment or waives the right to
28 consent to future amendments in a signed record.

1 (c) Except for an assignment undertaken pursuant to a governmental reorganization,
2 assignment of an environmental covenant to a new holder is an amendment.

3 (d) Except as otherwise provided in the covenant:

4 (1) a holder may not assign its interest without consent of the other parties;

5 (2) a holder may be removed and replaced by agreement of the other parties specified in
6 subsection (a); and

7 (3) a court of competent jurisdiction may fill a vacancy in the position of holder.

8 **Preliminary Comments**

9
10 A variety of circumstances may lead the parties to wish to amend an environmental covenant
11 to change its activity and use limitations or to terminate the covenant may be necessary.

12
13 Subsection (a) specifies the parties that must consent to the amendment. Subsection (a)(3)
14 reaches a party that originally signed the covenant whether or not it was an owner of the real
15 property. Such parties might typically be ones which were liable for some or all of the
16 environmental remediation specified in the environmental response project, including contingent
17 liability for future remediation. This provision is intended to apply to successors in interest to the
18 party which originally signed the covenant where the successor continues to be subject to the
19 contingent liability under the environmental response project.

20
21 Some of the original parties to the covenant may have signed the covenant because they have
22 contingent liability for future remediation should it become necessary. The extension of that
23 liability to successor businesses is a complex subject controlled by the underlying state or federal
24 environmental law creating the liability. See Blumberg, Strasser and Fowler, The Law of
25 Corporate Groups: Statutory Law, 2002 Annual Supplement, §18.02 and §18.02.4 (Aspen, 2002)
26 and Blumberg and Strasser, The Law of Corporate Groups: Statutory Law—State §§ 15.03.2
27 and 15.03.3 (Aspen, 1995). Where the party that originally signed the covenant has been merged
28 into or otherwise become part of another business entity for purposes of future cleanup liability,
29 subsection (a)(3) is intended to require the consent of that successor entity rather than the consent
30 of the original party.

31
32 1. In considering the potential liability of successor businesses, as discussed above, it is
33 important to understand the dual chains of successors that a particular circumstance presents –
34 (1) successors to ownership of the business that originally caused the contamination; and (2)
35 successors to owners of the contaminated real estate. Particularly when contamination occurred
36 many years ago, those chains of successors may be very different.

1 Consider this hypothetical – although very typical – situation:
2

3 **Real Estate Ownership.** In 1925, Peter Plating, Inc. built a factory on a 3 -acre lot in
4 Hartford, CT and commenced its business, which was to apply chromium plating to coffee pots
5 on that site. Customary business practice at the time was to discharge the exhausted chromium
6 into “sumps” - holes dug in the ground, and filled with large stones. Peter Plating did this for 25
7 years.
8

9 In 1950, Peter Plating closed its Hartford plating operation, and sold the land and factory to
10 Rabbit Warehouses, Inc. Rabbit used the factory for 25 years as a storage facility, then sold the
11 factory in 1975 to Ernie Entrepreneur, an individual, who bought the land with the proceeds of a
12 first mortgage from First Local Bank.
13

14 Ernie used the factory for light manufacturing until 1985. He also leased part of the site to
15 Acme Auto Repair, Inc. Acme dumped used oil and degreasers into its own sump on the lot. At
16 some unknown date, Acme ceased operations.
17

18 In 1985, after Ernie learned of the contamination, he transferred ownership of the land to a
19 corporation – Ernie, Inc. Ernie and his wife owned all the stock of the new corporation. In 1986,
20 Ernie ceased operations, abandoned the factory, and moved with his family to an island off North
21 Carolina. Ernie, Inc. was later administratively dissolved under state law for failure to file its
22 annual reports.
23

24 First Local Bank started foreclosure in 1986, learned of the contamination, and withdrew the
25 foreclosure action because of its reluctance to be in the chain of title. The Bank still holds the
26 mortgage, but long ago wrote off the debt on its books.
27

28 Real estate taxes have not been paid since 1984. City officials started to foreclose for unpaid
29 taxes, but when they learned of the contamination, they - like First Local Bank - decided not to
30 foreclose.
31

32 In 2002, the City demolished the factory as a safety measure, put a fence around it and put a
33 \$200,000 demolition lien on the property. Today, the site is abandoned, and neighborhood
34 children play games on the lot after crawling under the fence. Clean-up costs are estimated at
35 \$1.6 million; a “clean” 1.5 -acre lot in this run-down neighborhood recently sold for \$50,000.
36

37 The traditional “chain of title” doctrine in real estate suggests that successive owners and
38 operators of the real estate, beginning with the original owner or tenant that caused
39 contamination of the real estate, may all have potential liability. In chronological order, they
40 include: (1) Peter Plating, Inc.; (2) Rabbit Warehousing, Inc. (3) Ernie Entrepreneur,
41 individually; (4) Acme Auto Repair, Inc.; and (5) Ernie, Inc.
42

1 **Stock and Asset Ownership.** Aside from the successor real estate ownership, we must also
2 consider the successor ownership of the business that caused the contamination. Assume that
3 100% of Peter Plating's stock was acquired by a publicly- held corporation – Jefferson, Inc. – in
4 1950. The parent corporation moved the plating business to a southern state, which is why the
5 Hartford business closed. In 1970, Jefferson sold off the plating assets – but no stock - to
6 Hiccup, NA, a publicly traded British corporation. Both Jefferson and Hiccup are still in
7 business.

8
9 This chain of stock and asset sales should result in at least one and perhaps two additional
10 “successors” whose role in the transaction may require further analysis.
11

12 Assume this Act had been in effect in 1940, and Peter Plating, Inc. had signed the original
13 environmental covenant. If the agency wishes in 2003 to amend the 1940 covenant, it will be
14 important to determine who must sign on behalf of Peter Plating – the person who originally
15 signed the covenant in 1940 – as required by subsection 10 (a) (3).
16

17 2. Note also that Ernie, Inc. – the current owner – has abandoned the property and moved out
18 of state. Neither this corporation or Ernie Entrepreneur as an individual is likely to cooperate in
19 signing a new covenant today or an amendment to an original covenant that was signed in 1940.
20 This may pose practical difficulties in satisfying the requirements of Section 10)(a)(2).
21

22 3. In order to secure the consents required by this section, it is likely that the agency will
23 require the party seeking the amendment to provide notice to the parties whose consent is
24 required by the statute.
25

26 4. Note that this section does not require the consent of intermediate owners of the real
27 estate – in our example, if the original owner in 1940 was Peter Plating, and the current owner is
28 Ernie, Inc., then Rabbit Warehouses, Inc., would not be required to approve an amendment to the
29 covenant. Rabbit would have been bound by the covenant when it bought the parcel in 1975.
30 Since there is no allegation that Rabbit took any action in violation of the covenant, and Rabbit
31 conveyed the property to Ernie without retention of any interest in the property, Rabbit would not
32 be affected by the covenant and therefore need not sign the amendment.
33

34 5. Finally, the drafters contemplate that the covenant may be amended or terminated with
35 respect to only a portion of the real estate that was originally subject to the covenant. Thus, for
36 example, if a covenant originally covered 100 acres of real estate and as a result of remediation
37 activity, 50 acres of the site eventually became completely free of contamination, the parties
38 might agree to terminate the activity and use limitations on the cleaned up 50 acres while leaving
39 the covenant in place on the remaining land.
40

41 6. As provided in Section 11(b), this Act does not limit the agency's regulatory authority
42 under other law to regulate an environmental response project. Thus, for example, if new science
43 suggested a need for additional monitoring or remediation at a contaminated site beyond that

1 mandated in a recorded environmental covenant applicable to that site, the agency's authority to
2 require that additional work would depend on other law, while its authority to impose the
3 remediation cost on other parties may depend both on that law and on the terms of any prior
4 agreements the agency may have executed with potentially liable parties.
5

6 Under this Act, however, the agency would be prevented from administratively releasing
7 or amending real estate covenants without approval of the parties designated in this section.
8 Given the potential legal liability of the parties in the two chains of title who may be affected by
9 an amendment to or termination of the covenant, this is an appropriate outcome.
10

11 At the same time, the drafters recognize that, over time, it may not be practical to identify
12 the original parties or their successors in order to secure their consent. Section 10(a)(3) provides
13 a judicial mechanism by which the need for absent parties' consent may be avoided.
14

15 The same section highlights the possibility that the agency might seek the consent of
16 original parties to future amendments of the covenant, without the need for consent. Such a
17 waiver might be attractive to original parties, depending on the extent to which the agency was
18 willing to hold original parties harmless from the liability that might otherwise accrue from a
19 claimed injury following a use once prohibited by the original covenant, and on the overall cost
20 of the transaction.
21

22 Where there is a change in either the current knowledge of remaining contamination or
23 the current understanding of the environmental risks it presents, the agency may conclude that the
24 environmental response project may should be changed or new regulatory action taken. The
25 agency's ability to take such action is contemplated by §11(b) but, in the absence of consent, is
26 not governed by this Act.
27

28 The agency may wish to consider whether the following parties have a sufficient interest
29 in a particular proposal to make notice of the proposed amendment to them advisable:
30

- 31 (1) All affected local governments;
- 32 (2) The state regulatory agency for environmental protection if it is not the agency for
33 this environmental response project;
- 34 (3) All persons holding an interest of record in the real property;
- 35 (4) All persons known to have an unrecorded interest in the real property;
- 36 (5) All affected persons in possession of the real property;
- 37 (6) All owners of, and all holders of other interests in, abutting real property and any
38 other property likely to be affected by the proposed modification;
- 39 (7) All persons specifically designated to have enforcement powers in the covenant;
40 and
- 41 (8) The public.
42

1 The agency may also wish to consider whether the notice should include any of the
2 following:

3
4 (1) New information showing that the risks posed by the residual contamination are
5 less or greater than originally thought;

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

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

10
11
12
13 **SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.**

14 (a) A civil action for injunctive or other equitable relief for violation of an
15 environmental covenant may be maintained by:

16 (1) a party to the covenant ;

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

19 (3) any other person to whom the covenant expressly grants power to enforce;

20 (4) a person whose interest in the real property or whose collateral or liability may be
21 affected by the alleged violation of the covenant; and

22 (5) a municipality or other unit of local government in which the real property subject
23 to the covenant is located.

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

27 (c) A person is not subject to liability for environmental remediation solely because it
28 has the right to enforce an environmental covenant.

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

Similarly, the mandated ‘holder’ has a statutory right to enforce the covenant under this section, since the holder must be a party to the covenant. The drafters contemplate that, over time, the holder may come to play a significant role in the monitoring and enforcement process.

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

4. Subsection (b) recognizes that in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement of an environmental covenant in addition to rights specified in the environmental covenant.

(a) The [insert name of state regulatory agency for environmental protection] shall [establish and maintain a] [maintain its currently existing] registry that contains all

1 environmental covenants and any amendment or termination of those covenants. The registry
2 may also contain any other information concerning environmental covenants and the real
3 property subject to them which the [state regulatory agency for environmental protection]
4 considers appropriate. The registry is a public record for purposes of [insert reference to State
5 Freedom of Information Act].

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

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

12 (2) the name and address of the owner of the real property, the agency, and the
13 holder if other than the agency;

14 (3) a statement that the covenant, amendment, or termination is available in a registry
15 at the [insert name and address of state regulatory agency for environmental protection], and
16 disclosing the method of any electronic access; and

17 (4) a statement that the notice is notification of an environmental covenant executed
18 pursuant to [insert statutory reference to this [Act]].

19 (c) A statement in substantially the following form, executed with the same formalities
20 as a deed in this state, satisfies the requirements of subsection (b):

- 21 1. "This notice is filed in the land records of the [political subdivision] of [insert
22 name of jurisdiction in which the real property is located] pursuant to Section 12
23 of the Uniform Environmental Covenants Act, [insert statutory reference].

2. This notice and the covenant, amendment or termination to which it refers may impose significant obligations with respect to the property described below.
3. A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property] [not available].
4. The name and address of the owner of the real property on the date of this notice is [insert name of current legal owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the property is located].
5. The environmental covenant, amendment or termination was signed by [insert name and address of the agency].
6. The environmental covenant, amendment, or termination was filed in the registry on [insert date].
7. The full text of the covenant, amendment, or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the [insert name of state regulatory agency for environmental protection] at [insert address and room of building in which the registry is maintained]. [The covenant, amendment or termination may be found electronically at [insert web address for covenant]."]

Preliminary Comments

1. This section should be used only by states that require creation of a registry of environmental covenants pursuant to this optional Section. At the time this Act was promulgated, Section 101 of CERCLA had recently been amended to encourage states to create registries of sites where remediation work had been completed; *see* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 § 128(b)(1)(C) (2002). The Act anticipates that in those states that choose to create such a registry for federal law purposes, this section would prove useful in integrating local land recording systems with a single, state-wide registry.

2. The notice specified in this Section may be recorded in the land records in lieu of recording the environmental covenant. However, such a notice should only be authorized if the registry is established and the environmental covenant is recorded there. Where there is no separate registry, the environmental covenant must be recorded in the land records and this notice would not be used.

3. A description of the property under subsection (b)(1) may include identification by latitude/longitude coordinates. Note also that a description of the location of the contamination

1 itself on the site may require considerably more detail than the description of the real estate
2 subject to the covenant; *see* the discussion of this subject in the comments to Section 4.
3

4 4. The web address required to be contained in the notice by Para. 7 of the proposed
5 notice form should reflect the most direct means of identifying the full covenant and
6 accompanying information. As appropriate, the address may require a specific internet address,
7 page or name reference, document number or other unique identifying name, number or symbol.]
8

9 There is no reason to believe that a registry created under this optional section would not
10 be self-funding, in the same way that the corporate records departments of most Secretaries of
11 State offices and the land recording offices of most counties and municipalities are self-funding.
12
13
14

15 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

16 applying and construing this uniform act, consideration must be given to the need to promote
17 uniformity of the law with respect to its subject matter among states that enact it.
18

19 **SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
20 **NATIONAL COMMERCE ACT.** This [Act] modifies, limits, or supersedes the federal
21 Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.)
22 but does not modify, limit, or supersede Section 101 of that Act (15 U.S.C. Section 7001(a)) or
23 authorize electronic delivery of any of the notices described in Section 103 of that Act (15 U.S.C.
24 Section 7003(b)).
25

26 **SECTION 15. SEVERABILITY.** If any provision of this [Act] or its application to any
27 person or circumstance is held invalid, the invalidity does not affect other provisions or
28 applications of this [Act] which can be given effect without the invalid provision or application,
29 and to this end the provisions of this [Act] are severable.