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FOR DISCUSSION ONLY

UNIFORM ENVIRONMENTAL COVENANTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Discussion Draft for Drafting Committee Meeting December 6-8, 2002

UNIFORM ENVIRONMENTAL COVENANTS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ENVIRONMENTAL COVENANTS ACT

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UNIFORM ENVIRONMENTAL COVENANTS ACT

Prefatory Note

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

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

A second important policy served by this Act is the return previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties remain vacant, dangerous and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use. This Act should significantly aid in that effort by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.

Of course, risk based remediation must be used carefully so that it actually controls the risk presented by the residual contamination which remains in the real property and thereby protects human health and the environment. When risk based remediation imposes restrictions on how the property may be used after the cleanup, requires continued monitoring of the site, or requires construction of permanent containment or other remedial structures on the site, environmental covenants are a crucial tools to make these restrictions and requirements effective. Yet environmental covenants can do so only if their legal status under state property law and their practical enforceability are assured, as this proposed [Uniform Act] seeks to do.

It is important to emphasize that environmental covenants exist in a larger context of environmental remediation regulation, and they must be considered within that larger context. Thus environmental remediation is usually based on a statutory command, overseen by a public

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

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

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

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

Legislative Notes

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

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

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

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

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

Policy and Legislative Findings.

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

1 **UNIFORM ENVIRONMENTAL COVENANTS ACT**

2

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

4 [Act].

5

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

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

8 property contained in an environmental covenant.

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

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

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

12 the environmental response project requiring creation of an environmental covenant. The term

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

14 (4) “Environmental covenant” means a servitude that imposes specified activity and

15 use limitations on real property described in the servitude to implement an environmental

16 response project, and satisfies the requirements of Section 3 of this [Act].

17 (5) “Environmental response project” means environmental remediation of real property,

18 conducted under:

19 (a) a governmental program requiring environmental remediation of real property,

20 including [insert references to state law requiring environmental remediation], or

21 (b) a program to do voluntary remediation of real property, by owners of real property

22 or other persons, subject to approval and supervision by a governmental body or by a person

1 authorized by a governmental body or by statute.

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

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

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

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

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

15 (a) creates activity and use limitations with respect to real property;

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

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

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

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

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

Reporter's Notes

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

- (1) a prohibition or limitation of one or more uses of or activities on the real property, including restrictions on residential use, drilling for or pumping groundwater, or interference with activity and use limitations or other remedies,
- (2) an activity required to be conducted on the real property, including monitoring, reporting, or operating procedures and maintenance for physical controls or devices,
- (3) any right of access necessary to implement the activity and use limitations, and
- (4) any physical structure or device required to be placed on the real property.

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

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

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

- (1) Subchapter III or IX of the federal "Resource Conservation and Recovery Act of 1976", 42 U.S.C. sec. 6921 to 6939e and 6991 to 6991i, as amended;
- (2) Section 7002 or 7003 of the federal "Resource Conservation and Recovery Act of 1976",

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

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

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

6
7 Subsection (5)(b) extends the Act's coverage to voluntary remediation projects that are
8 undertaken with approval and supervision by a governmental body. Environmental covenants
9 that are part of voluntary remediation projects may serve both the goal of environmental
10 protection and the goal of facilitating reuse of the real property. However, supervision of these
11 projects by a governmental body or other authorized party is essential to insure that these goals
12 are served. This Act is intended to apply only to environmental covenants that are part of such
13 publicly supervised remediation projects.

14
15 An owner may wish to provide for remediation of the real property beyond the requirements
16 of minimum applicable regulatory standards, to protect against possible future liability for further
17 remediation. Such provision can be part of the environmental response project if the
18 requirements of governmental approval and supervision are satisfied.

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

27
28 Subsection (5)(b) also includes within environmental response projects specific agreements
29 between the owner and the agency for remediation that goes beyond prevailing requirements.
30 Because the owner may have residual liability for the site, even after remediation and transfer to
31 a third party for redevelopment, the owner may require further restrictions as a condition of
32 creating the environmental covenant and eventual reuse of the real property. The agency's
33 approval and supervision will be sufficient to ensure that any further restriction is in the public
34 interest.

35
36 The definition of "holder" is in Subsection (6). As the practice of using environmental
37 covenants continues to grow, new entities may emerge to serve as holders, and one purpose of
38 the Act is to avoid limiting this process. A holder may be the agency, a governmental body, or a
39 person under the broad definition of this Act. The identity of an individual holder must be
40 approved by the agency and the owner as part of the process of creating an environmental
41 covenant, as specified in Section 3 of this Act. Section 4(f) contains an additional provision
42 concerning whether a holder's power to enforce the covenant is an interest in real property.

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

13 **SECTION 3. CREATION OF ENVIRONMENTAL COVENANTS.**

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

- 15 (1) contain a legally sufficient description of the real property subject to the covenant;
- 16 (2) describe the activity and use limitations on the real property, including any rights
17 of access or other rights granted to a person in connection with enforcement of the covenant; and
- 18 (3) be signed by:
- 19 (A) the agency;
- 20 (B) a holder if other than the agency; and
- 21 (C) each owner and interested party whose interest in the real property will be
22 subordinated to the covenant.

23 (b) The agency may require an owner of real property and any interested party to obtain
24 written subordination of prior interests in the real property subject to an environmental covenant
25 as a condition to signing the covenant.

26 **Reporter’s Notes**

27 This Act does not provide the standards for environmental remediation nor the specific
28 activity and use limitations to be used at a particular site. Those will be provided by other state
29 and federal law governing mandatory and voluntary cleanups. Those standards will then be

1 incorporated into the environmental response project, which, in turn, calls for activity and use
2 restrictions that can be implemented through creation of an environmental covenant. This
3 section addresses creation of the environmental covenants.
4

5 An environmental covenant can be created only by agreement between the agency and the
6 owner or an interested party which owns an interest which includes the right to create the
7 covenant. If there is a holder other than the agency, both the agency and the owner must approve
8 the identity of the holder, and the holder must agree to the terms of the covenant. The agency
9 may refuse to agree to an environmental covenant if it does not effectively implement the
10 activity and use limitations specified in the environmental response project.
11

12 This Act recognizes that there may be parties which own different interests in real property,
13 other than the fee simple interest, and these are defined as “interested parties” under Section 2 (9)
14 of this Act. Examples include an interest in mineral rights may be owned separately from
15 surface rights, long term leases, mortgages and liens. Subsection (a)(3)(C) requires that the
16 interested party which owns such an interest to be affected by the environmental covenant must
17 agree to the covenant.
18

19 Subsection (b) is concerned with prior interests in the real property. If a prior interest is
20 not subordinated to the environmental covenant, and then is foreclosed at some later time, under
21 traditional real property law, that foreclosure would extinguish or limit an environmental
22 covenant. Since such an outcome is antithetical to the policies underlying this Act, the Act
23 contemplates that the agency may, before agreeing to the covenant, require subordination of these
24 interests. At the time of creation of the environmental covenant, the agency must determine
25 whether the prior interest presents a realistic threat to the covenant’s ability to accomplish its
26 purpose to protect the environment protection and human health.
27
28

29 **SECTION 4. VALIDITY.**

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

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

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

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

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

1 (4) it imposes a negative burden;

2 (5) it imposes affirmative obligations upon the owner of an interest in the burdened
3 real property or upon the holder;

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

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

6 (c) An environmental covenant is not invalid or unenforceable because it is identified as
7 an easement, covenant, servitude, deed restriction, or other interest.

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

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

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

18 **Reporter's Notes**

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

22
23 Subsection (b) and its comments are modeled on Section 4 of the Uniform Conservation
24 Easement Act. One of the Environmental Covenant Act's basic goals is to remove common law
25 defenses that could impede the use of environmental covenants. This section addresses that goal

1 by comprehensively identifying these defenses and negating their applicability to environmental
2 covenants.

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

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

16
17 Subsection (b)(2) also clarifies common law by providing that a covenant may be enforced by
18 an assignee of the holder. Section 9(e) of this Act specifies that assignment to a new holder will
19 be treated as a modification and Section 9 governs modification of environmental covenants.

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

27
28 Subsection (b)(4) deals with a variant of the foregoing problem. The common law
29 recognized only a limited number of "negative easements" – those preventing the owner of the
30 burdened real property from performing acts on his real property that he would be privileged to
31 perform absent the easement. Because a far wider range of negative burdens than those
32 recognized at common law might be imposed by environmental covenants, subsection (b)(4)
33 modifies the common law by eliminating the defense that an environmental covenant imposes a
34 "novel" negative burden.

35
36 Subsection (b)(5) addresses the opposite problem – the potential unenforceability at common
37 law of an easement that imposes affirmative obligations upon either the owner of the burdened
38 real property or upon the holder. Neither of those interests was viewed by the common law as a
39 true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an
40 owner of the burdened real property to perform affirmative acts. (The spurious easement was
41 distinguished from an affirmative easement, illustrated by a right of way, which empowered the
42 easement's holder to perform acts on the burdened real property that the holder would not have
43 been privileged to perform absent the easement.)

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

9
10 Subsections (b)(6) and (b)(7) preclude the touch and concern and privity of estate or contract
11 defenses, respectively. They have traditionally been asserted as defenses against the enforcement
12 of covenants and equitable servitudes.

13
14 Subsection (d) has further provisions for covenants created prior to the date of this Act. It
15 specifies that the common law defenses covered in subsection (b) will not make prior covenants
16 unenforceable, and that the identification of a prior covenant with one name or another will not
17 make it unenforceable. Beyond negating these specific defenses, this Act does not apply to prior
18 covenants. If the parties to a prior covenant wish to have the benefits of this Act for that
19 covenant, they will have to re-execute the covenant in a manner which satisfies the requirements
20 of this Act.

21
22 Section (e) disavows the intent to invalidate any interest created either before or after the Act
23 which does not comply with the Act but which is otherwise valid under the state's law.

24
25 Subsection (f) provides that a holder's right to enforce an environmental covenant is not an
26 interest in real property. This provision is included for two reasons. First, some environmental
27 enforcement agencies are not authorized to own an interest in real property and this provision
28 will enable those agencies to serve as a holder under the Act.

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

36
37 In general, a holder's right to enforce the covenant should be considered comparable to the
38 rights covered in an easement and, thus, should not lead to CERCLA liability. The two cases
39 that have considered this question have found that the parties which held the easements were not
40 CERCLA "owners". Long Beach Unified School District v. Dorothy B. Godwin California
41 Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk R.R. v. Acme Belt Recoating, 859 F.
42 Supp. 1125 (W.D.MI, 1994). In each case, the court reasoned that the circular definition of
43 owner meant that the term's most common meaning would prevail. The common law's

1 distinction between an easement holder and the property owner was then applied to find the
2 easement holder not to be an “owner” for purposes of this statute.
3

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

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

21 22 23 24 **SECTION 5. OTHER LAW REGULATING USE OF REAL PROPERTY.**

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

27 (b) Activity and use limitations in an environmental covenant may prohibit or restrict real
28 property uses that are authorized by zoning or other law.

29 **Reporter’s Notes**

30
31 Subsection (a) clarifies that this Act does not displace other restrictions on land use,
32 including zoning law. Restrictions under that law apply unchanged to real property covered by
33 an environmental covenant.
34

35 Where the environmental covenant’s activity and use limitations prohibit or restrict uses of
36 real property, those prohibitions are necessary to protect human health and the environment.
37 Thus, pursuant to subsection (b), the prohibitions or restrictions in an environmental covenant
38 will apply even if other real property law, including local zoning, would authorize the use. This

1 section provides needed clarity where the environmental covenant is implementing an
2 environmental response project done under state law. Where the environmental covenant is
3 implementing an environmental response project under federal CERLCA law, the federal law
4 authorizing the environmental response project preempts a conflicting city ordinance. U.S. v.
5 City and County of Denver, 100 F.3d 1509 (10th Cir. 1996).
6
7
8

9 **SECTION 6. AGENCY CONTROLS FOR ENVIRONMENTAL COVENANTS.**

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

11 (1) provide to the agency information regarding title to real property that will be
12 subject to the covenant, as well as information regarding the interested parties and the interests
13 they own,

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

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

18 (b) An environmental covenant may require the owner, any interested party, and their
19 successors and assigns, to notify promptly the agency, the holder, and the [insert name of state
20 regulatory agency for environmental protection] if it is not the agency, of:

21 (1) an application to a local government for a building permit or authorization for a
22 change in real property use; and

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

25 (c) In addition to other rights described in an environmental covenant or otherwise
26 granted by law, the agency, the [insert name of state regulatory agency for environmental

1 protection] if it is not the agency, and a holder may enter real property subject to the covenant at
2 reasonable times and with reasonable advance notice for the purpose of determining compliance
3 with the terms of the covenant.

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

8 (e) An environmental covenant is not invalid or otherwise affected merely because a
9 person fails to comply with any of the requirements of this section or with the requirements of a
10 regulation implementing this section.

11 **Reporter's Notes**

12
13 Subsection (a) authorizes the agency to require any party to an environmental covenant to
14 furnish the agency with title information as well as the names and addresses of the holders of all
15 interests of record. It also authorizes the agency to require information on abutting or other
16 affected property. The subsection also authorizes the agency to require the owner to give notice
17 of the proposal to create an environmental covenant to all parties it specifies. While this
18 specification will be within the agency's discretion, notice to at least the following will normally
19 be appropriate:

- 20 1. All persons holding an interest of record in the real property.
- 21 2. All persons known to have an unrecorded interest in the real property.
- 22 3. All persons in possession of the real property.
- 23 4. All persons holding an interest of record in abutting real property and all persons holding
24 an interest of record in other real property likely to be affected by contamination remaining on
25 the real property subject to the covenant.
- 26 5. The [insert name of state regulatory agency for environmental protection] if it is not the
27 agency.
- 28 6. Any affected local government.

29
30 Subsection (b) authorizes the agency to require notice of a transfer of an interest in the
31 real property subject to an environmental covenant. This notice will facilitate enforcement of the
32 covenant. However, not all transfers of interests in the real property will implicate enforcement
33 of the covenant and, for those that do not, the agency need not require notification. Similarly,

1 subsection (b) also authorizes the agency to require notice of an application for a building permit
2 or change of use of the real property subject to an environmental covenant. Here again, such a
3 notice will facilitate enforcement of the covenant when it is required, although it may not be
4 needed for every building permit or land use change. In both situations, the agency may specify
5 when notice is required.
6

7 Subsection (d) authorizes the agency to require incorporation of the terms of the
8 environmental covenant in any instrument granting an interest in the real property. Such
9 incorporation should be required in most substantial conveyances to ensure effective enforcement
10 of the covenant, although it will likely not be needed in all instruments.
11
12
13

14 **[SECTION 7. RECORDING. Alternative A.]**

15 (a) An environmental covenant is effective only if the covenant, or a notice of the
16 covenant that complies with the notice provisions specified in Section 13, is recorded in the land
17 records for every [county] in which land subject to the environmental covenant is located. A
18 modification or termination of a covenant is effective only if it, or a notice of it that complies
19 with the notice provisions specified in Section 13, is recorded in the land records for every
20 [county] in which land subject to the environmental covenant is located. This section shall not
21 apply to the parties to the covenant, or modification or termination of it, or to other persons
22 having actual notice of the covenant, or modification or termination of it.

23 (b) The [insert name of state regulatory agency for environmental protection] shall create
24 and maintain a registry that contains all environmental covenants, any modification or
25 termination of those covenants, and any recorded notices of covenants. The registry may also
26 contain any other information concerning environmental covenants and the real property subject
27 to them which the agency considers appropriate. The registry is a public record for purposes of
28 [insert reference to State Freedom of Information Act].]

1 **SECTION 7. RECORDING. Alternative B**

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

7 **Reporter's Notes**

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

15
16
17 **Reporter's Notes, Alternative A**

18
19 Subsection (a) requires that either a notice of the environmental covenant or the complete
20 covenant must be recorded in the land records to alert all interested parties to the existence of the
21 covenant. While a standard form of the notice is not required, Official Form 1 is adopted with
22 the text of this Act for use by those parties who wish to use it. Section 13 provides that use of
23 this Form will comply with the Act's notice requirements.

24
25 Subsection (b) requires creation of a new registry of environmental covenants by the [insert
26 name of state regulatory agency for environmental protection]. This registry may be combined
27 with the new state registry of brownfield sites specified in the Small Business Liability Relief
28 and Brownfields Revitalization Act §128(b)(1)(C), Pub. L. No. 107-118, ** Stat. ** (2002) (HR
29 2869, 107th Cong. 1st Session), although this [Uniform Environmental Covenants Act] calls for
30 recording more extensive information.

31
32 The full environmental covenant must be recorded in the registry in the [insert name of state
33 regulatory agency for environmental protection]. In addition, the agency may require recording
34 of additional information about each covenant and the real property subject to it. The agency
35 may choose to require a description of the issues presented by the residual contamination that
36 give rise to an environmental covenant. The description will be much more accessible to non

1 specialists, including local government and community interests, than the full covenant
2 This description may, at a minimum, identify the constituents of concern that have been left
3 in the real property, their location, the potential human and environmental exposure pathways
4 and receptors for those chemicals, and the permissible exposure limits.
5

6 Creation of a specialized registry should improve access to this information by local
7 governments, citizens groups, and environmental interests, as well as real property professionals.
8
9

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

12 This Section requires recording of the entire covenant, and any modification or termination,
13 in the land records.]
14
15

16 **SECTION 8. DURATION.**

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

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

23 **Reporter's Notes**

24 Subsection (a) is needed to ensure that the environmental covenant's protections continue as
25 long as needed. Subsection (b) makes environmental covenants survive later tax foreclosure
26 sales, and also survive potential common law impairments. These covenants seek to protect
27 human health and the environment as part of the environmental response project, beyond
28 reflecting the results of private bargaining between contracting private parties in specific private
29 transactions. To do so, environmental covenants must survive impairments arising from these
30 sources. However, this subsection does not restrict application of other environmental and
31 administrative law to judicial supervision of agency conduct.
32

33 Where an environmental covenant applies to real property that would otherwise be subject to

1 one of the doctrines listed in Subsection (b) situations may arise in which the protections of the
2 covenant are not needed in the particular circumstance. For example, the relevant transportation
3 authority might need to place a bridge support on real property where the environmental covenant
4 precluded digging, and eminent domain would not be available to displace the environmental
5 covenant. Similarly, adverse possession would not be available to perform its remedial function
6 where, again for example, a house had been inadvertently placed on real property subject to an
7 environmental covenant that precluded residential use. In cases such as these, modification of the
8 covenant can be sought pursuant to Section 9. Seeking such a modification will ensure that
9 appropriate consideration will be given to residual environmental risks.

10
11 The basic policy of this Act to ensure that environmental covenants survive impairment is
12 consistent with the broad policy articulated in the Restatement of the Law of Property (Servitudes)
13 Third, §7.9. In general, restrictions in an environmental covenant are state property law interests
14 that are not extinguishable in bankruptcy.

15
16
17
18 **SECTION 9. MODIFICATION OR TERMINATION.**

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

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

23 (2) each current owner or interested party whose interest will be affected by the
24 modification or termination.

25 (b) A proposal to modify or terminate an environmental covenant must be accompanied
26 by all information required by the agency.

27 (c) A party that proposes to modify or terminate an environmental covenant shall give
28 notice of the proposal and the information required under subsection (b) to all parties whose
29 consent is required for the modification or termination and to other persons as required by the
30 agency.

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

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

6 **Reporter's Notes**

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

14
15 Subsection (b) authorizes the agency to require information to support a request for
16 modification or termination. The agency may wish to require one or more of the following:

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

19 (2) Information demonstrating that the amount of residual contamination has
20 diminished;

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

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

28 (1) All affected local governments;

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

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

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

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

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

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

1 (8) The public.

2
3 Subsection (d) contemplates that the environmental covenant may impose additional
4 restrictions on modification or termination beyond those required by this Act. In some
5 circumstances the owner or another party may have contingent residual liability for further
6 cleanup of the real property subject to the environmental covenant and may seek further
7 restrictions in the covenant to protect against this contingent liability.
8

9
10
11 **SECTION 10. ENFORCEMENT.**

12 (a) This [Act] does not limit the authority of the agency,[the insert name of state
13 regulatory agency for environmental protection,] or any other person to enforce an environmental
14 response project under other law.

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

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

19 (2) the [insert name of state regulatory agency for environmental protection] if it is not
20 the agency, or another state official authorized by state law to bring an action on behalf of the
21 [insert name of state regulatory agency for environmental protection];

22 (3) a current or former owner or interested party whose interest in the real property
23 may be affected by violation of the covenant, or that may be liable under the environmental
24 response project;

25 (4) an affected local government;

26 (5) a person the environmental covenant expressly grants power to enforce;

27 [(c) In addition to the persons listed in subsection (b), any [person] [person aggrieved by

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

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

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

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

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

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

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

Reporter's Notes

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

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

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

The first alternative authorizes suit by any person, mirroring the provisions of federal law discussed above. The second alternative is more limited, authorizing suit by any person aggrieved by the alleged breach of the environmental covenant. “Person (or party) aggrieved” is used in both federal and state administrative law. The federal courts, and some state courts, apply a two part test in determining who is a “person aggrieved”, asking first if the person has suffered an injury in fact, and second, if the person is arguably within the zone of interests sought to be protected by the statute. See, e.g., *National Credit Union Administration v. First Nat’l Bank and Trust Co.*, 522 U.S. 479 (1998). The Model State Administrative Procedure Act, §5-106(a)(5)

1 uses a three part analysis: (i) has the agency action prejudiced the person, (ii) was the agency
2 required to consider the person's interests in taking the challenged action, and (iii) will a judgment
3 in favor of the person substantially eliminate or redress the harm.
4

5 Subsection (c) also establishes enforcement priority for such citizen suits. The agency has the
6 first opportunity. If the [insert name of state regulatory agency for environmental protection] is
7 not the agency which approved the environmental covenant, it has the second opportunity. If
8 either of these brings an action within its specified 60 day time period, that precludes a citizen suit
9 to enforce the covenant so long as the action is being diligently prosecuted. This provision is
10 based on the citizen's suit provisions common in many federal environmental regulatory statutes.]
11

12 The five year reporting period of subsection (e) mirrors the review requirements for an
13 environmental cleanup remedy that does not provide for unrestricted use under the federal
14 superfund program
15

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

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

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

26 **Reporter's Notes**

27 Effective implementation of environmental covenants will require cooperation between
28 the agency and the affected local government which has jurisdiction over building permits and
29 local land use decisions. Section 5 of this Act provides that an environmental covenant cannot
30 authorize a land use that is prohibited by local law, and that an environmental covenant may
31 restrict a land use that is authorized by local law. In subsection (a) this Section requires the

1 agency to notify all affected local governments of the creation, modification or termination of an
2 environmental covenant. Section 6 (b) authorizes an environmental covenant to require notice of
3 applications for building permits or land use changes to be given to the agency. In this way, both
4 the affected local government and the agency will have the information needed to coordinate their
5 efforts and each avoid action which conflicts with action by the other.

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

12 **SECTION 12. MARKETABLE TITLE.**

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

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

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

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

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

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

Reporter's Notes

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

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

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

[SECTION 13. NOTICE.

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

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

(2) the name and address of:

(A) the owner of the real property;

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

1 (C) any other person identified in the covenant that is specifically authorized to
2 enforce the covenant;

3 (3) a statement that:

4 (A) the covenant imposes significant restrictions and obligations with regard to
5 permissible activities on and uses of the real property; and

6 (B) the restrictions and obligations [are likely to] affect all persons having an
7 interest in the real property.

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

11 (A) the environmental covenant as executed; and

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

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

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

15 **Reporter's Notes**

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

18
19 This section and the following one should be used only by states that require creation of a
20 registry of environmental covenants pursuant to Section 7(b) of this Act. The notice specified in
21 this Section may be recorded in the land records in lieu of recording the environmental covenant.
22 However, such a notice should only be authorized if the registry is established and the
23 environmental covenant is recorded there. Where there is no separate registry, then the
24 environmental covenant should be recorded in the land records and this notice should not be
25 used.]
26
27
28

1 **[SECTION 14. OFFICIAL FORM : NOTICE OF ENVIRONMENTAL COVENANT.**

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

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

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

1 protection] at [insert address and room of building in which the registry is maintained]. [The
2 covenant may be found electronically at [insert web address for Covenant]].
3

4 Dated at _____, _____ this ____ day of _____, _____.
5
6
7

8
9 Witness as to Owner

NAME OF OWNER

10
11
12 _____
13 By _____
14
15 _____
16
17

18 Witness as to Agency

NAME OF AGENCY

19
20
21 _____
22 By _____
23
24 _____
25
26

27 Witness as to Other Parties

NAME OF OTHER PARTIES

28
29
30 _____
31 By _____
32
33 _____
34
35

36 **ACKNOWLEDGMENTS**

37
38 [INSERT STANDARD FORM OF ACKNOWLEDGMENT IN STATE]
39

40 [ATTACH PROPERTY DESCRIPTION AS EXHIBIT A]
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SECTION 15. REGULATIONS.

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

Reporter's Notes

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

SECTION 16. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 17. SUPPLEMENTAL PRINCIPLES OF LAW APPLICABLE.

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

SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the

1 notices described in Section 103 of that Act.

2 **Reporter's Notes**

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