Summary of SB 867 (with -2 Amendments)

Real Property Agreements Implementing Institutional Controls

OREGON LAW COMMISSION; *Executive Director Jeffrey C. Dobbins*

Area of Concern:

If hazardous substances are released on a particular property, current law permits DEQ to limit the risk posed by those substances by implementing "institutional controls" on the property. ORS 465.315. Institutional controls, though not currently defined in the law, are generally understood to include limits on the use of property (i.e., precluding use as a school or park), limits on activities on the property (i.e., no wells for groundwater or disturbing the surface without prior protective action), or requirements regarding the monitoring of, and access to, the property. Over the last 15 years, DEQ has developed a process for implementing these institutional controls called the "Easements & Equitable Servitudes" program. Under that program, DEQ enters into agreements with the property owner that impose institutional controls. These agreements are only effective to the degree that they are enforceable against both present and future owners of the property. Under some traditional property law doctrines, however, the validity of these non-traditional agreements between regulators and property owners might be called into question.

Nature of Law Commission Project:

In 2003 The National Conference of Commissioners on Uniform State Laws proposed a Uniform Environmental Covenants Act, which institutes programs like DEQ's EES program throughout the states. The Commission approved this project in late 2008 to examine whether adoption of UECA made sense in Oregon. The work group (see membership in accompanying report) concluded that a wholesale adoption of UECA was unnecessary because DEQ's existing EES program worked well. The work group believed that UECA did, however, include some useful provisions, and proposed the accompanying bill (with the -2 Amendments), which a) clarifies DEQ's authority to enter into and enforce these agreements, and b) reinforces their long-term validity against future owners, even in light of various common law doctrines regarding the proper scope of these kinds of easements and servitudes.

Proposed Solutions & Key Points in Bill:

- Broadly defines institutional controls to encompass all limitations on and obligations regarding real property that are intended to limit the risk of hazardous substances.
- Permits DEQ to enter into agreements implementing institutional controls, along with other reasonably related obligations connected to those institutional controls.
- Leaves in DEQ's hands the responsibility for determining which parties are necessary grantors of the interests in the property.
- Requires recording of the agreement, like any other interest in real property.
- Provides that agreements are valid and enforceable against initial grantors and subsequent owners of the property, and that traditional common law limits on the validity of this kind of agreement do not apply.
- States that the legislation is not intended to cast doubt on validity of existing agreements, but rather to clarify the validity of these agreements in the future.

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Uniform Environmental Covenants Act /
Easements & Equitable Servitudes Work Group

CLARIFYING AND PROTECTING DEQ AUTHORITY TO ENTER INTO LONG-TERM AGREEMENTS IMPLEMENTING INSTITUTIONAL CONTROLS ON REAL PROPERTY

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Approved by the Oregon Law Commission at its Meeting on
March 28, 2011

I. Introduction and Summary of Legislation

Under current law (ORS 465.200-.545), the Department of Environmental Quality (DEQ) oversees the cleanup of hazardous substances that are released into the environment. DEQ may take any removal or remedial action necessary to protect the public health, safety, welfare, and the environment. Under ORS 465.315, the Department is permitted to use (or require the use of) a wide range of methods to address contamination by hazardous materials, including on-site treatment, excavation and off-site disposal, the use of containment or other engineering controls, or "institutional controls." ORS 465.315(1)(c).

Under current law, "institutional controls" is not defined. The term is generally understood to refer to limits placed on the use of real property in order to reduce the risk of exposure to hazardous substances. For example, DEQ might conclude that it would be extremely expensive to remove or otherwise control contamination of groundwater on a particular site. DEQ might, instead, select as a remedy an "institutional control" on the property under which the owner would agree not to permit water wells to be drilled on the property in the future. Similarly, the owner of an industrial site might agree to limit use of the site to industrial activities in order to avoid the risk of future contamination that might occur if the site were later used for residences or a park. Institutional controls are a valuable additional tool used by DEQ in order to manage contaminated properties, and are useful as well for the owners of these properties, who, through the use of these controls, are able to address contamination on their property to the satisfaction of DEQ and Oregon law in a manner that is economically and ecologically efficient.

The effectiveness of institutional controls turns on their long-term enforceability on the property in question. In light of that need, environmental regulators in Oregon and elsewhere have turned to real property contracts as a mechanism to define and enforce institutional controls at contaminated sites. As in many other states, DEQ has assumed this power (known as the "Easements & Equitable Servitudes" (EES) program), and has entered into over 500 EES agreements on properties throughout the state.

In many other states, however, environmental regulators have concluded that they do not have the ability to enter into agreements regarding real property. In addition, even in states where regulators are able to enter into those agreements, concern remained that these somewhat non-traditional agreements might violate various common law principles that limit the scope of restrictions on real property to conditions that directly affect that property. Because institutional controls are only effective if they are enforced a) on a long-term basis, and b) against subsequent owners of the property, many regulators were concerned that traditional common law principles might undermine the effectiveness of institutional controls. As a result, the National Conference of Commissioners on Uniform State Laws drafted and approved the Uniform Environmental Covenants Act, or UECA. UECA was intended to create a uniform mechanism allowing state governments and other interested parties to enter into "environmental covenants" – grants of long term interests in real property that were explicitly authorized by the legislature to last indefinitely, notwithstanding common law principles of real property.

In 2005, UECA was introduced to the Oregon Legislature (HB 3286). However, since enactment of ORS 465.315 in 1995, DEQ had entered into large numbers of agreements implementing institutional controls on contaminated property throughout the state. (To date, DEQ estimates that approximately 500 such agreements have been entered into.) Because a number of interested parties felt that UECA failed adequately to take into account existing Oregon law and practice regarding the use of institutional controls, the bill did not make it out of committee.

In 2010, the Oregon Law Commission convened this work group in order to take another look at UECA. The work group, the members and meetings of which are set out in further detail below, concluded that Oregon's existing program, known as the "Easements & Equitable Servitudes" ("EES") program, was working well, and that a full-scale adoption of UECA could be disruptive to the existing EES program. At the same time, however, the work group recognized that current law was not as clear as it could be regarding the scope of DEQ's authority to enter into these agreements. In addition, the work group believed, there would be value in adopting a version of UECA's clear statements about the validity of these agreements despite various common law doctrines that might be used to undermine their effectiveness.

As drafted, SB 867 (with the -2 amendments) is intended to support and reinforce DEQ's existing EES program by 1) clarifying the scope of DEQ's authority to enter into these kinds of agreements as a means of implementing a remedial action on a contaminated property, and 2) ensuring that common law doctrines cannot be used to undermine the long-term enforceability of these agreements. While DEQ is confident that its existing agreements are valid and enforceable (and that it would, in any event, have the ability to take necessary action in order to protect public health, safety, welfare, and the environment if the agreements proved unenforceable), the changes proposed by the legislation are intended to reinforce this conclusion for any future agreements. The legislation should not be taken to suggest any skepticism by the work group or Law Commission regarding the validity of existing agreements; this sentiment is reflected in Section 7(2) of the proposed legislation, which emphasizes that the proposed legislation should not be construed to effect the validity of past agreements entered into by DEQ under the authority of ORS 465.315.

SB 867 is intended to enhance the effectiveness of one mechanism that DEQ already uses to address environmental contamination. It does not alter any existing standards regarding unacceptable levels of contamination or the choice between various methods to address contamination. Rather, it simply clarifies and delineates authority to enter into these kinds of agreements in order to implement institutional controls, and it will ensure that these agreements are able to accomplish their purpose of long-term protection of health, welfare, and the environment in Oregon in the most efficient and effective manner possible.

II. History of the Project and Work Group

A. History of UECA and Proposal to the Law Commission

In 2003, the National Conference of Commissioners on Uniform State Laws approved the Uniform Environmental Covenants Act (see Appendix A) in order to provide the states with a model statutory process for forming, amending, enforcing, and terminating real property agreements that implemented institutional controls on contaminated property. In 2005, HB3286 was introduced in order to adopt UECA in Oregon. A number of interested parties intervened, however, expressing concern over the way in which various aspects of UECA would interact with DEQ's existing EES program. The bill did not emerge from the committee, and despite a work group meeting in 2006, sponsored in part by NCCUSL and some of Oregon's Uniform Law Commissioners, no further progress was made toward adopting UECA in Oregon.

In 2008, the Oregon Law Commission staff prepared for the Program Committee of the Commission a project recommendation regarding UECA. The Program Committee forwarded the recommendation to the Law Commission, which approved the project in July 2008, and recommended the formation of a work group to determine whether, and to what extent, UECA should be adopted in Oregon.

The project was put on hold during the 2009 legislative session while commission staff was involved with other significant projects, but in late 2009 and the first half of 2010, work group members were identified and contacted in preparation for the first work group meeting, which was held in July, 2010. (A list of work group members is in part II.B., and a list of meeting dates is in part II.C.). The initial meetings were directed to understanding the scope of UECA as well as the existing Oregon program. The work group concluded that a full-scale adoption of UECA was not called for in Oregon, but that some changes (borrowing, in part, from UECA) should be made to Oregon law.

Because the scope of the project was moving beyond mere adoption of UECA, the work group requested, and the Law Commission approved in December 2010, a change in the scope of the work group's charge. The group was directed to

> review, in light of UECA, Oregon's existing law and policy regarding the use of limits on the use of real property as a mechanism for institutional controls in environmental cleanups, and to suggest changes or additions to such laws in order to further enhance the use of such limits.

With that change, Oregon DEQ, commission staff, and the work group participants reached rapid consensus regarding the appropriate scope of legislation. Because the deadline for introducing legislation through committee was going to pass before the work group completed its work and could make a recommendation to the full commission, the commission authorized staff to submit an early draft of SB 867 for introduction, with the understanding that the work group would continue to work on amendments that would be ultimately recommended to the Law Commission, and by the Law Commission to the full Legislative Assembly. This report accompanies those -2 amendments.

B. Work Group Membership. The following individuals were part of the UECA work group:

Work Group Members	
John DiLorenzo, Jr. (Chair)	Davis Wright Tremaine; Oregon Law Commissioner
Lynne Perry	Asst. Attorney General, DOJ; General Counsel / Natural Resources
Patrick Rowe	Sussman Shank LLP; OSB, Env. and Natural Resources Section
Charles Landman	Legal Analyst, Land Quality - OR Dept. of Environ. Quality
David Ashton	Sr. Asst. Gen. Counsel, Port of Portland; OSB, Env. and Nat. Resources Section
Dominic G. Colletta	Lane Powell PC; OSB, Real Estate and Land Use Section
Christopher D. Crean	Beery Elsner Hammond LLP; OSB, Real Estate and Land Use Section
Joe Willis	Schwabe Williamson & Wyatt; Uniform Law Commissioner
Tom Zelenka	VP of Environmental Affairs, Schnitzer Group
Jeff Dobbins	Work Group Reporter, Professor, Willamette U. College of Law
Cleve Abbe	Lawyers Title Ins. Corp.

Advisors & Interested Parties	
Michael Abendhoff	BP America, Inc.
Jeff Christensen	Oregon DEQ
Lori Cohen	US EPA
Kelly Cole	US EPA
Lori Cora	Asst. Regional Counsel, Region X, US EPA
Kirsten Day	Perkins Coie LLP
Paul Diller	Professor, Willamette U. College of Law
Susan Grabe	Attorney, OSB Public Affairs Attorney
John Ledger	VP of External Affairs, Legislative Rep. (Env't, Energy & Transp.), AOI
James Miles	Attorney-Advisor Office of Site Remediation Enforcement, US EPA
Kenneth Schefski	US EPA
Ken Sherman	Sherman Sherman Johnnie & Hoyt; Bankers Assoc.
Staff	
Wendy Johnson	Deputy Director and General Counsel, Oregon Law Commission
Mark Mayer	Legislative Counsel
Harrison Conley	Legislative Counsel
Kieran Marion	Legislative Counsel for Uniform Law Commission (NCCUSL)

C. *Work Group Meeting Dates.* The work group met on the following dates:
July 14, 2010
September 1, 2010
October 29, 2010
January 28, 2011
March 1, 2011 (teleconference)
March 22, 2011 (teleconference)

III. Statement of the Problem Areas and Proposed Solutions

Whether a given institutional control limits property use to particular purposes, restricts activities on a property, requires the maintenance of engineering controls, or obliges a property owner to monitor (or allow access to monitor) the state of the property, the institutional controls in question are only effective if they apply to the property itself in the long term, binding both current and future owners as long as the risk of hazardous substances continues on the property. Given the inherent connection between property and institutional controls, the chosen mechanism in many jurisdictions for implementing these controls has been through a transfer of interests in real property. While this approach is a natural one, the relevant regulator must have the necessary authority to enter into such transfers. More important, many traditional common law property principles can undermine the ability to impose indefinite limitations on real property, particularly when those limits impose obligations that do not directly benefit the landowner. The proposed legislation is intended to address these areas of concern by emphasizing DEQ's authority to enter into agreements to implement institutional controls, and by ensuring that such agreements are enforceable even if they might run afoul of traditional common law principles.

A. *Long-term effectiveness of institutional controls.* Throughout the work group process, DEQ pointed out that its residual authority to protect health, welfare, and the environment will serve as a backstop in any circumstance in which an institutional control is later found to be ineffective. If a property owner (whether the original or a subsequent owner) is not complying with an institutional control, even if the agreement implementing that control is deemed invalid for some reason, DEQ retains the ability under current law to take any steps necessary to ensure the necessary protections for health, welfare, and the environment. Nothing in the proposed legislation affects DEQ's ongoing authority to take steps necessary to protect against risks posed by hazardous substances. Thus, even if agreements implementing institutional controls were deemed invalid, or interpreted by courts in an excessively narrow manner, human health and the environment might not ultimately suffer in light of DEQ's continuing authority (though there may be short term costs).

At the same time, however, agreements implementing institutional controls are generally entered into only after a substantial investment of time and energy by all involved. Any steps that can be taken to ensure the ongoing effectiveness of these agreements will avoid having to re-open DEQ investigations on those properties, thereby saving the agency and the state money and employee time that would otherwise have to be expended to protect against exposure to hazardous substances on these properties.

1. Protection of institutional controls in light of common law property principles. Under traditional common law, partial grants of interests in land – typically characterized as easements, equitable servitudes, or covenants – may not be enforced unless they fit a number of specific conditions regarding the relationship between the grantor and grantee, and between the property and the burdens and benefits imposed on the property. While many of these common law doctrines have liberalized over time, and will often permit interests in property to bind landowners today in a manner that may have not been permitted in the past, particularly unusual forms of property interests remain subject to challenge under some circumstances, and in particular, the broad public benefits enjoyed by the grantee (DEQ) of agreements implementing institutional controls may present some of those problems.

The agreements at issue in this legislation fit into that category. A property owner who seeks to be freed from obligations under an agreement implementing institutional controls might argue that the agreement did not, in fact, benefit any adjoining property but the public as a whole, making the agreement an easement with accompanying covenants. *See* Oregon State Bar, Principles of Oregon Real Property Law §3.17 (1995). They might then point out that under common law, real covenants could not be formed unless the parties that created the covenant had privity of estate – which DEQ and a private property owner would not have had – and that the only remaining traditional property interest – equitable servitudes – could only be enforced as long as there was a reasonable relationship to the land at issue. *See id.* §4.2. For some kinds of obligations imposed in an agreement implementing institutional controls, a property owner might argue that certain conditions did not, in fact, "touch and concern the land," or that the benefit connected to the agreement was not "reasonably related to the burden and [did not] relate either to the occupation, use, or enjoyment of the promisor's land or the promisee's land." *Id.* at §4.6 (describing need for benefits of the servitude to relate to the land). This might be particularly true for conditions like payment obligations, which are very common in these kinds of agreements given DEQ's obligation to recover costs of remedial actions.

To be sure, these traditional limits on the validity of equitable servitudes have been liberalized over the years, and for that reason, the work group and DEQ were not overly concerned that existing agreements might be suspect. See generally Restatement (Third) Property – Servitudes §2.18, § 8.5. In addition, as noted above, DEQ would always retain authority to protect the public interest in a case where an agreement was deemed unenforceable; any risk to the public or environment would trigger DEQ's statutory obligation to step in and mitigate that risk as appropriate. Nevertheless, the prospect of protracted litigation, and the cost associated with reopening a remedial action on a site where the state believed that it had already been resolved, convinced the work group that some additional statutory protection for these agreements would be useful.

As a result, SB 867 borrows from section 5 of UECA, and provides that an agreement remains valid and enforceable even if it implements institutional controls in a manner that "is not appurtenant to an interest in the real property, imposes a negative burden, creates an affirmative obligation, does not touch or concern the real property, or is not otherwise recognized as valid or enforceable under common law." SB 867-2, Section 6(b)(A). This language is very similar to that under the Uniform Conservation Easements Act, which is already part of Oregon law. See ORS 271.745. It is intended to ensure that courts recognize that these kinds of agreements come with legislative approval, and that, particularly in light of the important public purposes being served by these agreements, traditional common law property doctrines should not be used to undermine their effectiveness and enforceability. The mere failure to fit into traditional pigeonholes of property law should not stand in the way of effective enforcement of these agreements, as long as they meet certain notice requirements and are entered into in order to accomplish their statutory purpose.

2. *Binding effect on future property owners.* The second significant area of concern when implementing institutional controls comes from the need to ensure that future property owners hold land subject to the institutional controls in the relevant agreement. If the initial agreement is viewed simply as a contract, or if terms within the agreement are viewed as primarily contractual, and not tied specifically to the land, there is a risk that subsequent owners may have a claim that they are not obligated to comply with conditions of the agreement.

This problem is substantially addressed by the requirement in SB 867 to include within the agreement a description of the land involved, and to record the agreement with the relevant county clerk. In treating these agreements like traditional interests in real property for purposes of transfers of ownership (but simultaneously excusing them from most common law limits on the creation and enforcement of servitudes), many of the concerns associated with transfers of land will be alleviated. In addition, section 3(6)(a) of the proposed legislation makes it clear that the agreement follows the land, transferring with any conveyance or assignment of the real property that is subject to the agreement. In common law terms, these agreements "run with the land," and should therefore be enforceable against future owners.

The one remaining type of transfer that the legislation is intended to address is acquisition of the property through prescription, adverse possession, eminent domain, or foreclosures arising out of obligations that develop after the agreements are entered into. Thus, if a property subject to an agreement is taken through a process of eminent domain, or by executing on a tax lien foreclosure, the governmental entity taking the property would still be subject to the agreement under Section 6(b), which provides that the agreement is "valid and enforceable against a grantor and against a person that has an interest in the real property that vests after the recording of the agreement." Similarly, a person taking the property through adverse possession would also be subject to the agreement.

The long-term effectiveness of institutional controls turns on the ability to enforce those controls on the property despite changes in ownership. The proposed changes made by SB 867 will guarantee that future changes in ownership will not undermine the effectiveness of those controls.

3. Binding effect on concurrent interest holders. One final area of concern is how these agreements are affected by properties on which many different entities or individuals have property interests at the time the agreement is entered into. The bill does not specifically address this problem, other than by noting that 1) the agreement should be signed by the grantor of the real property interest at issue (which will generally be the owner(s) of the fee interest in the property), and 2) the agreement is valid and enforceable against the grantor of the interest. The legislation therefore leaves to DEQ and those property owners entering into these agreements the ultimate responsibility for identifying all current holders of an interest in the property whose consent will be necessary to grant to DEQ the full scope of the interests it seeks to take under the agreement.

B. *Clarifying scope of statutory authority.* Under existing law, DEQ has the authority to use institutional controls as a means of carrying out removals and remedial actions on contaminated properties. Although ORS 465.315 does not specifically define the nature of "institutional controls," the term has been interpreted by DEQ to permit it to enter into the kind of long-term property arrangements that would be formalized through this legislation. While DEQ believes that it has been working within the scope of its authority to implement institutional controls, the proposed legislation clarifies that DEQ may enter into these real property agreements. As discussed in further detail in the next section, nothing in this provision should be construed as suggesting that DEQ lacked authority to enter into preexisting agreements. The institutional control language in 465.315 leaves the particular mechanism for implementing institutional controls wide open; the proposed legislation merely clarifies the scope of DEQ's associated authority.

C. *Ensuring effectiveness of existing agreements.* A primary concern during the process of drafting SB 867 has been the desire on the part of the work group to ensure that legislation does not in any way cast doubt on the validity and enforceability of the approximately 500 existing agreements between DEQ and owners of contaminated properties. Early in the work group discussions, the group considered the possibility of not recommending any legislation at all, based on the concern that any action clarifying the enforceability of these agreements in the future would necessarily carry with it the implication that existing agreements were in some manner subject to challenge or invalid.

Ultimately, the work group concluded that the benefit of avoiding any risk of future challenge would outweigh any negative implication from legislation, particularly if the legislation and accompanying report made it clear that it was being proposed simply in order to place existing programs on a firmer footing. There was no general sense that existing agreements were likely to be invalid in any way, whether because of a lack of clearly stated DEQ authority or because of the operation of common law doctrines. The work group considered, but rejected, a retroactivity clause that would have sought to make the provisions of SB 867 applicable to preexisting agreements; work group members believed that such a clause would be constitutionally suspect, and that if it were struck down, its absence would cast even more doubt on the validity of existing agreements. The work group concluded, in short, that it was best to let existing agreements stand on their own merits, and to simply make clear that no negative implication should be drawn from the current legislation.

Section 8(2) of the proposed legislation attempts to make this point clear, providing that the legislation "[d]oes not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act." The legislation should have no bearing on any future challenge to whether an interest in real property was granted by an agreement entered into before 2011; if anything, it should emphasize the degree to which the legislature believes that even the preexisting agreements are a valuable part of DEQ's existing regulatory program and should be enforced to the degree possible under current law.

D. *Promotion of uniformity and clarity in law.* The impetus for the work group was consideration of the Uniform Environmental Covenants Act. At this point, the proposed legislation implements UECA in spirit, and borrows some language (particularly provisions in sections 6 and 8 of SB 867), but it is difficult to characterize it as an implementation of UECA itself. There is value in placing a program like this into written law; DEQ's current EES program is not defined by regulations or statute, and so having the program explicit in the Oregon Revised Statutes promotes transparency in the law and notice to regulated parties both in the state, as well as to those outside of Oregon who might be seeking to invest in the state.

Because the work group was formed with UECA in mind, it is worth addressing some significant differences between UECA and the program that would be established under SB 867. First, the provisions of UECA allowed a wide range of regulatory entities (including federal agencies or local governments) to take an interest in an environmental covenant. By contrast, SB 867 is applicable solely to DEQ. In work group discussions on this issue, DEQ reasonably noted that it is, as a statutory matter, involved in some form or another with every contaminated property in the state, and that under current law, it is unlikely to cede control to other entities. Even if a point came in the future where another entity needed authority to enter into this kind of agreement, legislative change would be relatively straightforward.

Second, UECA's enforcement provisions allowed a very broad range of parties to enforce environmental convenants. Under UECA section 11, injunctive relief for violations of the covenants could be sought, for instance, not only by parties to the agreement, but by any person "whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant," or by the local "municipality or other unit of local government." Although the work group acknowledged that having more entities paying attention to enforcement would, in theory, be beneficial to the ultimate success of the agreements, work group members also believed that expanding the scope of statutory enforcers would also risk unnecessarily complicating any enforcement that would occur, and that leaving it in the hands of DEQ would likely be preferable. To the degree that other parties have an interest in benefits arising from these agreements, the legislation is not intended to alter existing law regarding the creation of third party beneficiaries. Under contract law, either explicit language in an agreement, or language along with accompanying circumstances, may create third party beneficiaries who are able to enforce the agreement.

Finally, UECA included relatively detailed processes for the creation, amendment, and termination of environmental covenants. Because work group members and, in particular, DEQ felt that existing informal processes for creating these agreements were working well, the proposed legislation eschewed most of those processes. Instead, SB 867 requires only a few relatively simple preconditions for the creation of an agreement implementing institutional controls, and does not specifically address amending or terminating those agreements. Any changes to an agreement after it has been entered into will need to be addressed through traditional contract law.

IV. Review of legal solutions existing or proposed elsewhere

As of early 2011, UECA had been adopted, largely in its original form, in 23 states (including Washington, Idaho, and Nevada), as well as in the District of Columbia and the U.S. Virgin Islands. In many of those states (such as Washington and Illinois), existing programs were already using real property interests to implement institutional controls, and UECA was perceived as unnecessary in light of existing programs. At the same time, however, several other states (including New Jersey, California, and Colorado) have considered but decided not to adopt UECA, generally because existing programs were perceived as an adequate basis for addressing the problems that UECA was intended to solve. The adoption of SB 867 will bring further detail to Oregon law regarding these state-specific alternatives to environmental covenants, but will not gain any advantage associated with the adoption of a uniform law.

V. Summary of Sections

The following section-by-section analysis should be read in conjunction with the preceding descriptions of the general approach and purpose of SB 867. Because the work group suggested, and the Law Commission recommends, approval of the legislation only with the -2 amendments, this discussion assumes adoption of the -2 amendments, and is numbered based on the amended version of the bill.

Section 1: With the -2 amendments, section one defines "institutional control" for purposes of ORS 465.315. The definition is intended to encompass the wide range of limitations and obligations that DEQ may place on a contaminated property in order to limit the potential for exposure to hazardous substances. It includes any limits or obligations regarding how the property is to be used in the future (such as limits on the ability to use the property for residences, or an obligation to use the property only for industrial purposes), as well as any obligations or restrictions regarding activities on the property (such as a bar on the drilling of wells, or an obligation to maintain an impermeable surface on the property). It also includes obligations regarding the installation, maintenance, and monitoring of a wide range of engineering controls or other remedial actions that might be imposed on a contaminated property, and any requirements regarding access to the property (whether limits on the ability to access the property, or obligations to allow access to the property for monitoring or other purposes).

The work group considered defining institutional control within the broader definitions section of the hazardous substance law (ORS 465.200), but that would have required renumbering a broad swath of commonly-used definitions in the hazardous substance statutes, and risked confusion or costs in making the necessary changes to existing DEQ programs. The alternative in the legislation avoids that problem, though it does require referencing the new definition in any location where it is subsequently used. (See SB 867 §§ 3(1)(b), 4, 5, & 6).

Section 2: Places § 3 in its appropriate place within the Oregon Revised Statutes. The work group discussed whether there might be other entities, or circumstances other than properties contaminated with hazardous waste in which DEQ might need to use agreements implementing institutional controls, and whether the relevant provisions regarding these agreements should be located somewhere other than in the hazardous waste chapters of the ORS. DEQ concluded that the vast majority of these agreements would be entered into in connection with properties contaminated by hazardous waste, and that as a result, this was an appropriate place for the legislation to be codified. Future legislation could always extend the program to other situations or other entities, as the need arises.

Section 3: The most significant section, which grants DEQ the explicit authority to enter into agreements implementing institutional controls.

§ 3(1)(a) & (b): The work group does not intend that these agreements be pigeonholed into a traditional category of a common law property interest. Because the intent of the legislation is to free these agreements from the limitations and restrictions that accompany these common law categories, the legislation simply provides that DEQ may enter into an "agreement" – whether that agreement is deemed an easement, an equitable servitude, or other instrument. The definition in (1)(a) is intended to broadly encompass the full range of agreements to transfer an interest in real property short of a possessory interest, and is not intended to force DEQ to choose among the various categories. Subsection (1)(b) simply carries over the definition of institutional control into this provision.

§ 3(2): Permits DEQ to enter into agreements implementing institutional controls. The legislation makes clear that DEQ is the "grantee" under these agreements of "an enforceable interest in real property."

§ 3(3): As noted in Part III(D), above, the work group believed that DEQ's existing process for negotiating these agreements was working well, and therefore decided to impose very few limitations on the process for entering into these agreements.

The only specific requirements are that the Director of DEQ (or a designee) sign the agreement along with all grantors of the interest in the property. As noted in Part III(A)(3), above, it remains DEQ's responsibility, along with that of the grantors, to identify all concurrent holders of an interest in the real property in order to ensure the effectiveness of the agreement. If, for some reason, a current interest holder believes that there is no need to enter into an agreement, they may choose not to, although DEQ retains other powers regarding the implementation of remedial actions on the property (including direct imposition of institutional controls). It will often be to the benefit of concurrent interest holders (such as mortgage holders) to enter into these agreements in order to clarify the status of the property, but that assessment is left to the individual entities in light of DEQ's other powers.

As discussed in Part III(D) above, the agreements may either explicitly or implicitly create third party beneficiaries entitled to enforce the agreement. This matter is left to DEQ, the grantor, and the operation of the common law of contract regarding third party beneficiaries.

The legislation also requires that the agreement include a description of the real property in order to facilitate the recording of the agreement. See § 3(3)(b) & 4.

§ 3(4): In order to ensure that future owners of the property are on notice of the agreement, the legislation requires that the agreement be filed in the deed records of the county in which the property is located. The default rule is that responsibility for filing is in the hands of the grantor, although this is a point that can be subject to negotiation at the time the parties enter into the agreement.

The recording of these agreements is already done by DEQ as a matter of course; the legislation simply makes clear that such recording is critical to the enforceability of the act against future property owners. See §6(b) (making agreement valid and enforceable against owners taking an interest that vests after the recording of the agreement).

§ 3(5): Of particular importance to DEQ is the ability to recover costs incurred during its work on a parcel of contaminated property. *See, e.g.*, ORS 465.210(b), 465.255-.260, 465.330-.335. Agreements implementing institutional controls will typically include provisions that require the grantor of the agreement to cover costs (whether incurred by the grantor or by DEQ) associated with the limits on the property, and the work group wanted to be sure that these kinds of obligations were explicitly permitted under the legislation.

Because cost recovery requirements are, to some degree, different from the institutional control itself, the provision makes clear that the department may, in an agreement implementing an institutional control, impose other conditions that are reasonably related to carrying out remedial action on the property. This language should make it clear that the agreement can include a wide range of conditions, as long as those conditions are sufficiently connected to remedial actions on the property.

§ 3(6): This section carries into effect the primary focus of the legislation – ensuring that agreements implementing institutional controls survive in the long term, and are enforceable against subsequent owners of the property (however they may come to possess their interest) despite certain common law doctrines that might call the agreements into question. The reader is referred to the discussion in Part III(A), above, regarding the goals of the legislation and the potential problems that it is intended to avoid, as well as to the Commentary for UECA section 5, from which much of the language in 3(6)(b) is drawn. In essence, the section follows UECA's lead by giving a unique status under common law to an "agreement to implement an institutional control," making them separately enforceable even if traditional common law doctrines might call their enforceability or validity into question.

In particular, section 3(6)(b)[1]: (i) Provides that the agreement, the benefit of which is held in gross (i.e., not connected to a particular adjoining property), may be enforced against the grantor or his successors or assigns. By stating that the covenant need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of an easement must own an interest in real property (the "dominant estate") benefitted by the easement. (ii) Provides that the imposition of a "negative burden" – whether novel or otherwise – does not prevent enforceability of the agreement. Some applicable law recognizes only a limited number of "negative easements" – those preventing the owner of the burdened real property from performing acts on his real property that he would be privileged to perform absent the easement – and this provision would eliminate that requirement. (iii) Provides that the opposite problem is also not an issue. Existing law will occasionally call into doubt the enforceability of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Under some existing law, neither of those interests was viewed as a true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an owner of the burdened real property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened real property that the holder would not have been privileged to perform absent the easement.) Because these kinds of obligations are a necessary part of implementing institutional controls on a property, the legislation makes it clear that the agreements are nevertheless enforceable. (iv) Provides that the "touch and concern" limit on the enforceability of servitudes does not apply. (v) Provides that "privity of estate" arguments limiting enforceability of certain property interests where there is not sufficient legal connection between the grantor, the current holder of the subservient property, and DEQ, do not apply. Finally, the legislation (vi) Provides that no other common law doctrines calling the validity of the agreement into question should undermine the validity and enforceability of the act.

[1] The discussion in this paragraph is substantially dependent on, and occasionally quotes verbatim from, the Commentary to UECA section 5 (Appendix A to this report). With that note, we do not separately cite even verbatim provisions of that Commentary.

Section 4, 5 & 6: These are conforming amendments, making clear that the provisions of existing law regarding the inventory of properties on which DEQ has implemented "institutional controls" use the same definition of institutional control that can be found in ORS 465.315 (as amended by this Act).

Sections 7, 8, & 9: Other than the straightforward applicability provision in section 8(1) and the emergency clause of section 9, these provisions are intended to address the problem discussed in Part III(C), above, regarding the effectiveness of prior agreements entered into by DEQ. The reader is referred to that discussion. Section 7 specifically references this report, and is intended to ensure that a reader of the statute is aware of this accompanying legislative history, which represents the sense of the work group and the recommendation of the Law Commission regarding the effect of the bill.

Section 8(2) is a savings clause that is intended to implement the spirit of UECA Sections 5(c) and (d). As noted in Part III(D), above, the work group considered a retroactive provision like the one in UECA section 5(c), which would have either (a) made the provisions of this legislation wholly retroactive, or (b) prohibited the use of common law doctrines to undermine the validity of prior agreements. The work group concluded that explicit language would likely be ineffective, to the degree that it accomplished its purpose, and that the better course would simply be to express the intent of the work group that this legislation is not intended to cast doubt on the validity of prior agreements. If a future case does arise regarding the enforceability of a preexisting agreement, it is the hope of the work group that the court will, in considering the application of common law doctrines, recognize that these kinds of agreements are widely beneficial to the people and environment of the State of Oregon and that relevant law should be construed liberally in order to ensure their effectiveness.

VI. Conclusion

The bill, with the -2 amendments, should be adopted because it places an existing, effective program for the management of hazardous substances on a firmer legal footing, and ensures the long-term effectiveness of measures taken to limit the release of those substances. At the same time, it puts parties on notice of the scope of DEQ's authority in this area and provides some guidance to those seeking to understand the nature of that authority.

VII. Appendix

Appendix A: Text and Official Comments to Uniform Environmental Covenants Act

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UNIFORM ENVIRONMENTAL COVENANTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEARWASHINGTON, DC

AUGUST 1-7, 2003

WITH PREFATORY NOTE AND COMMENTS

October 26, 2004

DRAFTING COMMITTEE ON UNIFORM ENVIRONMENTAL COVENANTS ACT

Copies of this Act may be obtained from:
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UNIFORM ENVIRONMENTAL COVENANTS ACT

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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 by 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 that 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 property 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 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 property and environmental practice bars as well as business and environmental groups. Developing and sharing such implementation tools and the advice of such 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 over environmental covenants on the transferred property where state environmental law so provides.

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, 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 districts or flood plains.

Legislative Notes

Non Participating Owner. 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 owners of appropriate interests in contaminated property will be willing to 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. 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.

<u>"Actual" versus "Constructive" Notice of Contamination</u>. The primary goal of the Act is to present to the states a statute that fully integrates environmental covenants into the traditional real property system. It seeks to ensure the long-term viability of those covenants by, among other means, providing constructive notice of those covenants to the world through resort to the land recording system.

Beyond that goal, it is very important to provide actual knowledge of the remaining contaminated conditions that the environmental covenants are designed to control. A broad range of stakeholders–children and adults that might inadvertently gain access to the contamination, tenants on the property, owners, abutting neighbors, prospective buyers, lenders, government officials, title insurance companies, public health providers and others–will have a real personal and financial stake in knowing what properties in their communities suffer from contamination and the extent of the risks they confront. The fact that this law may provide legally sufficient knowledge of those conditions is no substitute for real information regarding those conditions.

The challenge of providing that information is beyond the scope of this Act. However, in analogous situations–the location of zoning districts, flood plain boundaries, utility easements, and dangerous street conditions, for example–governments have devised techniques to make the public aware of those conditions on a continuing basis. Techniques such as maps in recorders' offices, on-site signage and monuments and, increasingly, computer databases accessible to the public are examples of possible solutions. All such devices have fiscal implications and are best addressed on a local basis. Over the long term, however, the public will likely be well served by innovative solutions to these issues.

Legislative Policy. 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 Colorado Statute, C.S.R.A. §25-15-317, may be an appropriate model.

UNIFORM ENVIRONMENTAL COVENANTS ACT

SECTION 1. SHORT TITLE.

This [act] may be cited as the Uniform Environmental Covenants Act.

SECTION 2. DEFINITIONS.

In this [act]:

(1) "Activity and use limitations" means restrictions or obligations created under this [act] with respect to real property.

(2) "Agency" means the [insert name of state regulatory agency for environmental protection] or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(3) "Common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

(A) under a federal or state program governing environmental remediation of real property, including [insert references to state law governing environmental remediation];

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

(C) under a state voluntary clean-up program authorized in [insert reference to appropriate state law].

(6) "Holder" means the grantee of an environmental covenant as specified in Section 3(a).

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

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

(9) "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.

Comment

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

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

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

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

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

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

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

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

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

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

6. The definition of "environmental covenant" also provides that the servitude 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 impose activity and use limitations to control residual risk that results from contamination remaining in real property. An environmental covenant is then recorded on the land records as required by Section 8 to ensure that the activity and use limitations are both legally and practically enforceable.

7. An "environmental response project" covered by definition (5) may be undertaken pursuant to authorization by one of several different statutes. Definition (5)(a) specifically covers remediation projects required under state law. However, the definition 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", 42 U.S.C. sec. 6972 and 6973, as amended;

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

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

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

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

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

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

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

10. Under definition (5)(C), environmental response projects may include specific agreements between

an owner and the agency for remediation that go beyond prevailing requirements. Alternatively, an owner may choose to contract with a potential purchaser for additional use restrictions in an instrument that does not purport to come within this Act; *see* Section 5(d). Because the owner may have residual liability for the site, even after remediation and transfer to a third party for redevelopment, the owner may require further restrictions as a condition of creating the environmental covenant and eventual reuse of the real property.

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

Section 3(a) makes clear that a holder's interest is an interest in real property. Some environmental enforcement agencies are not authorized by their enabling legislation to own an interest in real property after the environmental remediation is completed. As a consequence, those agencies may not be entitled to serve as holders under the Act. In those cases where an agency wishes to be certain that a viable holder exists, a private entity may serve this purpose, acting, for example by contract, in accordance with the agency's direction.

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

In general, a holder's right to enforce the covenant under Section 11 should be considered comparable to the rights covered in an easement and, thus, should not lead to a determination that the holder is liable as an "owner" under CERCLA. The two cases that have considered this question have found that the parties which held the easements were not CERCLA "owners". Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994); Grand Trunk RR. V. Acme Belt Recoating, 859 F. Supp. 1125 (W.D. MI 1994). In each case, the court reasoned that the circular definition of owner meant that the term's most common meaning would prevail. The common law's distinction between an easement holder and the property owner was then applied to find the easement holder not to be an "owner" for purposes of this statute. In each of these cases, the party that held the easement had not contributed to contamination on the property. The amendments to CERCLA Section 9601(35), Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2360 (2002) (HR 2869, 107th Cong. 1st Session), added the term "easement" to the definition of parties which are in a "contractual relationship" under CERCLA. However, this does not affect whether the easement holder will be held to be a CERCLA "owner".

Where the holder or another person has more extensive rights than enforcement, a careful analysis will be required. The CERCLA liability cases typically emphasize that a party that exercises the degree of control over a site equivalent to the control typically exercised by an owner of the site will be held liable as an "owner". Under this approach, for example, lessees have been held liable as owners when their control over the site approximated that which an owner would have. *See*, e.g., Delaney v. Town of Carmel, 55 F. Supp. 2d 237

(S.D.N.Y. 1999); U.S. v. A & N Cleaners and Launderers, 788 F. Supp. 1317 (S.D.N.Y. 1990); U.S. v. S.C. Dept. of Health and Env. Control, 653 F. Supp. 984 (D.C.S.C. 1984.) Accordingly, a holder contemplating extensive control over the site should consider potential "owner" liability carefully.

CERCLA liability also extends to an "operator" of the site (42 U.S.C.A. 9607(a)(1)), and the case law interpreting this definition emphasizes that a party is liable as an operator if it has a high degree of control over the operating decisions and day to day management at the site. Thus, for example, a party that held an easement could be liable as an operator if its degree of control met this standard. A holder will, in general, have only control authority over the site related to effective enforcement of the environmental covenant and does not typically need more extensive day to day control. However, this will not likely be true in all cases.

SECTION 3. NATURE OF RIGHTS; SUBORDINATION OF INTERESTS.

(a) Any person, including a person that owns an interest in the real property, the agency, or a municipality or other unit of local government, may be a holder. An environmental covenant may identify more than one holder. The interest of a holder is an interest in real property.

(b) A right of an agency under this [act] or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(c) An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this [act] except as provided in the covenant.

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

(1) An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant.

(2) This [act] does not require a person that owns 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. If the environmental covenant covers commonly owned property in a common interest community, the record may be 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.

Comment

Subsection (a) confirms that the holder 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 property 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.

Subsection (a) also makes clear that if the agency chooses to be the holder, the agency will thereby hold an interest in the real property. Otherwise, subsection (b) provides that the agency's interest in the covenant as a consequence of signing the covenant or having a right to enforce it under this Act is not an interest in real property.

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

At the same time, subsection (c) also makes clear that the mere act of signing the covenant in order to signify the agency's 'approval' of the covenant, which is required by the Act as a condition of its effectiveness under this Act, is not an assumption of obligations and the agency has not thereby exposed itself to any liability. The agency manifests its approval of an environmental covenant by signing it.

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

> "A valid foreclosure of a mortgage terminates all interests
> in the foreclosed real estate that are junior [that is, later in time]
> to the mortgage being foreclosed....Foreclosure does not

terminate interests ...that are senior...."

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

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

The impact of the newly recorded environmental covenant on the priorities of other lien holders is sufficiently important that the Act emphasizes this issue both in this section and in Sections 8(b) and 9(c). In all these instances, the Act provides that the usual rules of priorities are preserved, except in the case of foreclosure of tax liens.

Thus, in preparing an environmental covenant, it might be advisable for the agency to identify all prior interests, determine which interests may interfere with the covenant protecting human health and the environment, and then take steps to avoid the possibility of such interference. The agency may do this by , for example, having the parties obtain appropriate subordination of prior interests, as a condition to the agency's approval of the environmental covenant.

The combined effect of Sections 3, 8 and 9 creates a curious "circular" lien problem, where (1) foreclosure of a 2003 municipal tax lien would terminate a 2000 pre-existing mortgage (the usual outcome), but (2) that same foreclosure would not affect the environmental covenant created in 2002 under this Act; while (3) foreclosure of the 2000 pre-existing mortgage would terminate the 2002 environmental covenant (again, the usual rule), but (4) not the 2003 municipal tax lien (also, the usual rule). Circular liens, however, are not unique to this situation.

SECTION 4. CONTENTS OF ENVIRONMENTAL COVENANT.

(a) An environmental covenant must:

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

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

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

(4) identify every holder;

(5) be signed by the agency, every holder, and unless waived by the agency every owner of the fee simple of the real property subject to the covenant; and

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

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

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

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

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

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

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

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

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the covenant.

Comment

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

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

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

In contrast, as described in Comment 11 below, more precise measurements may be very useful for identifying precisely the "geospatial" location of sub-surface contaminants.

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

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

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

2. This Act does not provide the standards for environmental remediation nor the specific activity and use limitations to be used at a particular site. Those will be provided by the state or federal agency based on other state and federal law governing mandatory and voluntary cleanups. This Act contemplates that those standards

will then be incorporated into the environmental response project, which, in turn, will call for activity and use restrictions that can be implemented through creation of an environmental covenant. This section addresses creation of the environmental covenants.

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

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

4. This Act recognizes that there may be situations in which there is more than one fee simple owner. For example, Husband and Wife may own Blackacre as tenants in common, joint tenants, or tenants of the entirety. In all of these configurations of ownership, both Husband and Wife are owners of Blackacre and both must sign an environmental covenant unless the agency waives this requirement.

Similarly, it is common practice in mining states, such as Kentucky, West Virginia, Pennsylvania, for the fee ownership of the mineral interests to be conveyed separate and apart from the fee ownership of the remaining parcel. Thus, under the conventional real property practices of these states, there may be two separate fee ownership interests in the same "parcel" of real property, and each owner must sign the environmental covenant unless this requirement is waived. It may be that those two owners of different interests in the same parcel have an agreement between them prohibiting separate conveyances of interests in the land without permission of the other. However, if that agreement does not appear of record, it would not run with the land, would likely not be binding on the agency [in the absence of the agency's actual knowledge] and thus not affect the validity of a covenant signed by one of the owners with respect to that owner's interest in the real estate.

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

6. Section 4(a)(5) also authorizes the agency to waive the requirement that the covenant be signed by the owner of the fee simple. The Act contemplates that such waivers should be rare because in most situations the covenant can be effective only if the fee owner's interest is subject to the covenant. However, in some circumstances the fee owner may have transferred most or all of the economic value of the property to the holder of another interest, either permanently or for the time period during which the covenant's restrictions are needed.

Consider, for example, the situation in which the contamination remaining presents environmental risks for only twenty years and the property is subject to a ninety-nine year lease. In this case, it is critical that the owner of the leasehold interest be a party to the covenant so its interest will be subject to it. However, in this situation, the fee owner's participation is not essential for the covenant to protect human health and the environment. If the fee owner is unavailable or unwilling to participate, the agency might choose to waive its signature. Of course, such a situation, when the likely duration of the covenant is both short and clearly known, is likely to be exceptional.

7. A holder is the grantee of the environmental covenant and the Act requires that there be a holder for a covenant to be valid and enforceable. Under Section 5(b)(9), the grantee may also be the grantor, who is the owner of the property and who might remain a holder upon sale of the property, or the agency. In addition to enforcement rights, the holder may be given specific rights or obligations with respect to future implementation of the environmental covenant. These could include, for example, the obligation to monitor groundwater or maintain a cap or containment structure on the property. Such rights and obligations will be specified in the environmental covenant and, like any obligations, would be enforceable against the holder if the holder failed to satisfy its obligations.

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

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

Section (4) (b) is a permissive provision intended by the breadth of its provisions ("...may contain other information ...agreed to by the persons who signed it...") to encourage the agency and the other parties to include provisions in the particular covenant that are tailored to the specific needs of that project. This may well be accomplished in order to maximize the likelihood that the covenant, when properly implemented and monitored, will protect human health and the environment.

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

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

11. Section 4(b)(4) also suggests that, in an appropriate case, the agency may require the covenant to contain not only a legally sufficient description of the real property subject to the covenant (as mandated under

section 4(a)(2)) but also the 'location of the contamination."

One way of identifying such location is by the concept of "geospatial" location as defined by the Federal Geographic Data Committee of the U.S. Geological Survey. Such an identification would define the location with geospatial data, which the Committee defines as follows:

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

Depending on the nature of the contamination and the size of the parcel subject to the covenant, a description of the "geospatial location" of the contamination and the legal boundary description of the real property parcel on which those contaminants are located may be very different, and the kinds of information required to usefully describe the "location" of the contamination may also differ. As a simple example, it may be appropriate to use grid coordinates and projected elevations below ground level to define the upper and lower levels of a groundwater contamination plume, together with sensing or other data that projects the mobility of that plume over time, in order to accurately provide useful information that a simple metes and bounds description could not convey.

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

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

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

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

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

Example 3: The agency's policies require that an independent company regularly engaged in the business of monitoring and enforcing environmental covenants on behalf of the agency be named as 'holder' in the covenant. The owner's refusal to agree to such a provision would justify an agency's refusal to approve the covenant.

SECTION 5. VALIDITY; EFFECT ON OTHER INSTRUMENTS.

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

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

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

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

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

(4) it imposes a negative burden;

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

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

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

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

(9) the owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before the effective date of this [act] is not invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) or because it was identified as an easement, servitude, deed restriction, or other interest. This [act] does not apply in any other respect to such an instrument.

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

Comment

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

To be binding on future owners who may not have actual knowledge of the covenant, the Act requires that the covenant comply with all provisions of the Act. Section 8(a) of this Act requires the covenant to be recorded. The Act then states the usual real property rule that a recorded instrument "runs with the land" and binds all who have an interest in it.

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

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

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

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

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

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

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

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

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

Achievement of environmental protection goals may require that affirmative obligations be imposed on the burdened real property owner or on the covenant holder or both. For example, the grantor of an environmental covenant may agree to use restrictions and may also agree to undertake affirmative monitoring or maintenance obligations. In addition, the covenant might impose specific engineering or monitoring obligations on the holder, which may be a for profit corporation, a charitable corporation or trust holder. In all these cases, the environmental covenant would impose affirmative obligations and Subsection (b)(5) makes clear that the covenant would not be unenforceable solely because it is affirmative in nature.

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

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

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

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

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

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

For example, the Act is clear that its requirements apply only to land use restrictions placed on real property pursuant to an "environmental response project" as that term is defined in the Act. If private parties choose to use conventional deed restrictions or other devices to place further activity and use restrictions on a parcel, nothing in this Act would affect that contractual arrangement either to insulate it from attack as invalid under that state's other law or to invalidate it under this law.

SECTION 6. RELATIONSHIP TO OTHER LAND-USE LAW.

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

Comment

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

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

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

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

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

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

SECTION 7. NOTICE.

(a) A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:

(1) each person that signed the covenant;

(2) each person holding a recorded interest in the real property subject to the covenant;

(3) each person in possession of the real property subject to the covenant;

(4) each municipality or other unit of local government in which real property subject to the covenant is located; and

(5) any other person the agency requires.

(b) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.

Comment

This section contemplates that the agency will normally require that the final signed environmental covenant be sent to affected parties. In addition to the obvious persons who should be notified, in an appropriate case, the agency might require notice to abutting property owners. These persons are likely to have been directly involved in any major administrative proceeding, but in other cases, such as a voluntary clean-up, they may have no knowledge of the existing conditions on abutting land.

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

Subsection (b) provides that failure to provide a copy of the covenant does not invalidate the covenant. Such a failure will not prevent the covenant from protecting human health and the environment and thus need not invalidate the covenant. The remedy for such a failure would be provided by other law.

SECTION 8. RECORDING.

(a) An environmental covenant and any amendment or termination of the covenant must be recorded in every [county] in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in Section 9(c), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property.

Comment

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

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

The Act assumes that all parties will wish to record the environmental covenant and accordingly makes the state's recording rules apply. As between the parties, however, the effectiveness of the covenant does not depend on whether the covenant is recorded. A signed but unrecorded covenant, under traditional real property law, binds the parties who sign it and, generally, those who have knowledge of the covenant.

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

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

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

Recording of an environmental covenant pursuant to the law of this state provides the same constructive notice of the covenant as the recording or any other instrument provides of an interest in real property.

SECTION 9. DURATION; AMENDMENT BY COURT ACTION.

(a) An environmental covenant is perpetual unless it is:

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

(2) terminated by consent pursuant to Section 10;

(3) terminated pursuant to subsection (b);

(4) terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) terminated or modified in an eminent domain proceeding, but only if:

(A) the agency that signed the covenant is a party to the proceeding;

(B) all persons identified in Section 10(a) and (b) are given notice of the pendency of the proceeding; and

(C) the court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in Section 10(a) and (b) have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request is subject to review pursuant to [insert reference to appropriate administrative procedure act].

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

(d) An environmental covenant may not be extinguished, limited, or impaired by application of [insert reference to state Marketable Title and Dormant Mineral Interests statutes].

Comment

1. Subject to the other provisions in this Act, environmental covenants are intended to be perpetual, as provided in subsection (a). A covenant may be limited by its terms as provided in this Section, or amended or terminated under Section 10. Alternatively, in the limited circumstances described in this Section it may be modified in an eminent domain proceeding which meets the requirements of Subsection (a)(5). With concurrence of the agency, an environmental covenant may also be terminated in a judicial proceeding asserting "changed circumstances" as provided in Subsection (b).

2. Subsection (a)(5) provides special requirements to modify or terminate an environmental covenant by an exercise of eminent domain. The rationale for these special requirements is that an exercise of eminent domain may result in a change of use for real property. Such a change must ensure that it does not increase environmental risk related to the real property.

The Act does not attempt to resolve all the many complex issues likely to arise when one government agency seeks to condemn an environmental covenant imposed by another agency pursuant to an agreement with a current or former owner of the property. For example, eminent domain may result in a change of use of that property. If the changed use requires termination of the covenant's existing activity and use limitations , and thus additional clean-up of the property, complex questions of liability and financial responsibility may arise. Alternatively, state law may already address questions of which governments have or do not have authority to condemn real property, or who are necessary or indispensable parties. State statutes are also likely to have so-called "quick take" provisions, a well developed Administrative Procedures Act, and other important provisions for aspects of condemnation proceedings beyond the scope of this Act.

Section 9(a)(5) has specific requirements for an exercise of eminent domain that modifies or terminates an environmental covenant. The applicability of this Act's eminent domain requirements to an eminent domain action under federal law will be determined by that law.

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

3. Subsection (b) imposes two specific requirements for a judicial change in an environmental covenant under the doctrine of changed circumstances. The first requires agency approval of such an application. The second requires that all parties to the covenant be given notice of the proceeding. This will allow those parties to protect their interests in the proceeding, including their interests arising from contingent future liability.

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

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

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

5. While this section imposes statutory constraints on the authority of the court to act in the first instance, the Act does not restrict application of other procedural and administrative law to judicial supervision of agency conduct. Thus, if a court were to determine that an agency has acted in violation of its statutory obligations in considering whether to approve a modification or termination of an environmental covenant, that conduct would be itself be subject to judicial scrutiny under other law of that state.

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

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

States that do not have a Marketable Record Title Act or a Dominant Mineral Interests Act will not need subsection (d). States that do have a either or both of these acts may choose to put this exception in the respective statute rather than in this Act.

The exception to the Marketable Record Title Act and the Dormant Mineral Interests Act in optional (d) 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. For states adopting the registry of environmental covenants to be kept by the [insert name of state regulatory agency for environmental protection] under Section 12 of this Act, the cost of extending title searches to this registry should be low.

If there is any question whether a specific environmental covenant is exempt from the requirements of the Marketable Record Title Act or the Dominant Mineral Interests Act, the agency should comply with that Act by re-recording the covenant within the relevant act's specified statutory period. This will ensure that the covenant is not extinguished under either of these acts.

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

SECTION 10. AMENDMENT OR TERMINATION BY CONSENT.

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

(1) the agency;

(2) unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant;

(3) each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or

identified with the exercise of reasonable diligence; and

(4) except as otherwise provided in subsection (d)(2), the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

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

(d) Except as otherwise provided in an environmental covenant:

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

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

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

Comment

1. A variety of circumstances may lead the parties to wish to amend an environmental covenant to change its activity and use limitations or to terminate the covenant.

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

Some of the original parties to the covenant may have signed the covenant because they have contingent liability for future remediation should it become necessary. The extension of that liability to successor businesses is a complex subject controlled by the underlying state or federal environmental law creating the liability. See Blumberg, Strasser and Fowler, The Law of Corporate Groups: Statutory Law, 2002 Annual Supplement, §18.02 and §18.02.4 (Aspen, 2002) and Blumberg and Strasser, The Law of Corporate Groups: Statutory Law–State §§ 15.03.2 and15.03.3 (Aspen, 1995). Where the party that originally signed the covenant has been merged into or otherwise become part of another business entity for purposes of future cleanup liability, subsection (a)(3) is intended to require the consent of that successor entity rather than the consent of the original party.

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

Consider this hypothetical – although very typical – situation:

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

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

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

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

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

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

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

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

(5) Ernie, Inc.

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

This chain of stock and asset sales should result in at least one and perhaps two additional "successors" whose role in the transaction may require further analysis.

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

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

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

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

6. Finally, the covenant may be amended or terminated with respect only to a portion of the real property that was originally subject to the covenant. Thus, for example, if a covenant originally covered 100 acres of real property and as a result of remediation activity, 50 acres of the site eventually became completely free of contamination and pose no further environmental risk, the parties might agree to terminate the activity and use limitations on the cleaned up 50 acres while leaving the covenant in place on the remaining land.

7. As provided in Section 11(b), this Act does not limit the agency's regulatory authority under other law to regulate an environmental response project and the agency may be well advised to consider the implication of this provision in drafting a specific environmental covenant. Thus, for example, if new science suggested a need for additional monitoring or remediation at a contaminated site beyond

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

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

However, over time, it may not be practical to identify the original parties or their corporate successors in order to secure their consent. Section 10(a)(3) provides a judicial mechanism by which the need for absent parties' consent may be avoided.

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

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

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

(1) All affected local governments;
(2) The state regulatory agency for environmental protection if it is not the agency for this environmental response project;
(3) All persons holding an interest of record in the real property;
(4) All persons known to have an unrecorded interest in the real property;
(5) All affected persons in possession of the real property;
(6) All owners of the fee or any other interests in abutting real property and any other property likely to be affected by the proposed modification;
(7) All persons specifically designated to have enforcement powers in the covenant; and
(8) The public.

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

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

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

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

SECTION 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.

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

(1) a party to the covenant;

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

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

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

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

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

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

Comment

1. Subsection (a) specifies which persons may bring an action to enforce an environmental covenant.

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

This Act confers standing to enforce an environmental covenant on persons other than the agency and other parties to the covenant because of the important policies underlying compliance with the terms of the covenant. Thus, for example, in the case of a covenant approved by a federal agency on real property which has been conveyed out of federal ownership, the Act confers standing on a state agency to enforce the covenant, even though the agency may not have signed it. Further, a local affected government is empowered to seek injunctive relief to enforce a covenant to which it may not be a party. In both cases, absent this Act, those state and municipal agencies might not have standing to enforce a covenant, and might simply be relegated to seeking standing under other law.

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. Over time, the holder may come to play a significant role in the monitoring and enforcement process.

On the other hand, the Act does not provide any authority for a citizens' suit to enforce a covenant, although other law may authorize such suits. This Act does not affect that other law.

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.

[SECTION 12. REGISTRY; SUBSTITUTE NOTICE.

(a) The [insert name of state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency] shall [establish and maintain a] [maintain its currently existing] registry that contains all environmental covenants and any amendment or termination of those covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them which the [state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency] considers appropriate. The registry is a public record for purposes of [insert reference to State Freedom of Information Act].

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

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

(2) the name and address of the owner of the fee simple interest in the real property, the agency, and the holder if other than the agency;

(3) a statement that the covenant, amendment, or termination is available in a registry at the [insert name and address of state regulatory agency for environmental protection, secretary of state, or other appropriate state officer or agency], which discloses the method of any electronic access; and

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

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

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

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 fee simple interest in the real property on the date of this notice is [insert name of current 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 of filing].

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]."]

Comment

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 be authorized only 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 itself on the site may require considerably more detail than the description of the real property subject to the covenant; *see* the discussion of this subject in the comments to Section 4.

4. The web address required to be contained in the notice by subsection (c)(7) should reflect the most direct means of identifying the full covenant and accompanying information. As appropriate, the address may require a specific internet address, page or name reference, document number of other unique identifying name, number or symbol.

A registry created under this optional section could be self-funding, in the same way that the corporate records departments of most Secretaries of State offices and the land recording offices of most counties and municipalities are self-funding.]

SECTION 13. 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 14. 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(c) of that Act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that Act, 15 U.S.C. Section 7003(b).

SECTION 15. SEVERABILITY.

If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.