

# UNIFORM ENVIRONMENTAL COVENANTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

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IN ALL THE STATES

at its

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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# UNIFORM ENVIRONMENTAL COVENANTS ACT

## Prefatory Note

Environmental covenants - whether called “institutional controls”, “land use controls” or some other term - are increasingly being used as part of the environmental remediation process for contaminated real property. An environmental covenant typically is used when the real property is to be cleaned up to a level determined by the potential environmental risks posed 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.

“Actual” versus “Constructive” Notice of Contamination. 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































































