

*Uniform Environmental
Covenants Act*



Kurt Strasser, Reporter

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Drafting Process



- NCCUSL
- Advisors
- Process

Environmental Covenants— Interested Parties



- Regulators
- PRP's, owners and operators
- Old Lenders
- Buyers/Developers
- New Lenders
- Local Government
- Citizens Groups and Environmental Organizations

Overview: Four main legal problems the Act resolves.

- Creation of an Environmental Covenant
- Legal Problems in making it valid and permanent
- Changing the Covenant
- Enforcing the Covenant

1. Creation of An Environmental Covenant:

- How clean must the land be?
 - Determined by a cleanup plan under existing environmental law, whether regulatory or supervised voluntary
 - This Act implements that decision

1. Creation: What is required to have a Covenant? §4(a)

- Agreement by the owner, the agency, and the holder
 - Must select and identify the holder
 - Agency can require others to agree, as a condition of its consent
 - e.g. non-owner PRP's
- Describe the land use restrictions and any affirmative requirements

1. Creation: Recording

- Recording the covenant in the land records is not technically required to create it, but is essential for it to be effective. §8
 - Registry system. §12

What else can you put in it?
§4(b) suggests the following:

- Notice of change of ownership or land use
- Periodic reporting on the land use
- Access rights for various parties
- Description of the remaining contaminants
pathways of exposure, exposure limits
location and details of the contamination
- Other rights or duties of the holder

2. Legal Problems in making it valid and permanent

- The Covenant runs with the land and is intended to be perpetual, until terminated under the Act. §5(a) and §9(a)
- The Act takes care of technical common law rules that would present problems §5(b)

2. Legal Problems (cont)

- The Act limits the ability of other kinds of future legal actions to undercut the Covenant
- State tax liens and foreclosures, adverse possession, and similar doctrines do not override the covenant §9(c)
- Marketable Title Act or Dormant Mineral Interests Act §9(d)

2. Legal Problems (cont)

- Eminent domain and the “doctrine of changed circumstances” can override the Covenant only in special situations.
§§9(a)(5) and(b)
- Existing mortgages are not overridden by the Act: e.g. old lenders mortgages.
 - However, the agency will usually require mortgage owner to subordinate its interest.
§3(d)(1)

3. Changing the Covenant: These parties must consent :

- The Agency
- The current owner
- The holder
- Everyone who originally signed, unless a court determines they can't be found

3. Changing the Covenant

(Cont)

- An amendment can affect an interest in the land only if the owner of that interest consents to it
- Special provisions on changing the holder and assigning to a new holder
- Regardless of this Act, the agency can reopen the underlying cleanup plan

4. Enforcing the Covenant §11: Who can enforce?

- The agency
- Any party to the Covenant, and any person expressly granted enforcement rights
- The local government where the land is located
- Any person whose interest or collateral in the property may be affected
- Any person whose liability may be affected.

4. *Enforcing the Covenant* (Cont)

- The Act provides a civil action for an injunction
- Agencies have additional enforcement rights
 - Under other environmental law
 - Under the cleanup remedy

Major Issues in Implementation



- Long term enforcement
- Long term institutional knowledge and memory
- Will the cleanup level be sufficient?
Necessary?
- Technical legal problems in making and enforcing