
A BILL FOR AN ACT

RELATING TO THE UNIFORM ENVIRONMENTAL COVENANTS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that there has been a
2 growing reliance on risk-based environmental cleanup of
3 contaminated property when removal of contamination to
4 unrestricted levels is infeasible, impracticable, or
5 unnecessary. In such cases, certain controls are required to
6 protect the public and the environment from the contamination
7 that remains on the property. Currently, there exists no clear
8 authority nor any process for ensuring that these controls
9 remain valid and enforceable as the properties change ownership.

10 The purpose of this Act is to:

- 11 (1) Ensure that land use restrictions, environmental
12 monitoring requirements, and common engineering
13 controls designed to control the potential
14 environmental risk of residual contamination are
15 reflected in the land records and effectively enforced
16 over time as a real property servitude; and
- 17 (2) Encourage the transfer of ownership of contaminated
18 properties, and property re-use, by establishing a



1 clear and objective procedure to create, modify, or
2 terminate environmental covenants and to record these
3 actions in instruments that will be reflected in the
4 title abstract of the contaminated property.

5 SECTION 2. The Hawaii Revised Statutes is amended by
6 adding a new chapter to be appropriately designated and to read
7 as follows:

8 "CHAPTER

9 UNIFORM ENVIRONMENTAL COVENANTS ACT

10 § -1 Short title. This chapter may be cited as the
11 Uniform Environmental Covenants Act.

12 § -2 Definitions. As used in this chapter, unless the
13 context otherwise requires:

14 "Activity or use limitations" means restrictions or
15 obligations created under this chapter with respect to real
16 property.

17 "Agency" means the department of health or any other state
18 or federal agency that determines or approves the environmental
19 response project pursuant to which the environmental covenant is
20 created.

21 "Common interest community" means a condominium property
22 regime, cooperative, planned community association, or other



1 community with respect to which a person, by virtue of the
2 person's ownership of a parcel of real property within the
3 community is obligated to pay property taxes or insurance
4 premiums, or fees for maintenance or improvement of other real
5 property described in a recorded covenant that creates the
6 common interest community.

7 "Department" means the department of health.

8 "Director" means the director of health.

9 "Environmental covenant" means a servitude arising under an
10 environmental response project that imposes activity and use
11 limitations.

12 "Environmental response project" means a plan or work
13 performed for environmental remediation of real property and
14 conducted:

15 (1) Under a federal or state program governing
16 environmental remediation of real property, including
17 chapter 128D;

18 (2) Incident to closure of a solid or hazardous waste
19 management unit; provided that the closure is
20 conducted with approval of an agency; or

21 (3) Under the state voluntary response program authorized
22 in part II of chapter 128D.



1 "Holder" means a grantee of an environmental covenant as
2 specified in section -3(a) who, by virtue of the covenant,
3 holds an interest in the real property subject to the covenant,
4 and who accepts certain rights and obligations as stated in the
5 covenant.

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

11 "Record" means information that is inscribed on a tangible
12 medium or that is stored in any medium and is retrievable in
13 perceivable form.

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

18 § -3 **Nature of rights; subordination of interests.** (a)

19 Any person, the agency, or a county may be a holder. An
20 environmental covenant may identify more than one holder. The
21 interest of a holder shall be an interest in real property.

1 (b) A right of an agency under this chapter or under an
2 environmental covenant, other than a right as a holder, shall
3 not be an interest in real property.

4 (c) An agency shall be bound by any obligation the agency
5 assumes in an environmental covenant; provided that an agency
6 shall not assume obligations merely by signing an environmental
7 covenant. Any other person that signs an environmental covenant
8 shall be bound by the obligations the person assumes in the
9 covenant; provided that signing the covenant shall not change
10 obligations, rights, or protections granted or imposed under law
11 other than this chapter except as provided in the covenant.

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

15 (1) An interest that has priority under other law shall
16 not be affected by an environmental covenant, unless
17 the person that owns the interest subordinates that
18 interest to the covenant;

19 (2) A person that owns a prior interest shall not be
20 required to subordinate that interest to an
21 environmental covenant or to agree to be bound by the
22 covenant;



1 (3) A subordination agreement may be contained in an
2 environmental covenant covering real property or in a
3 separate record. If the environmental covenant covers
4 commonly-owned property in a common interest
5 community, the record may be signed by any person
6 authorized by the governing board of the common
7 interest community; and

8 (4) An agreement by a person to subordinate a prior
9 interest to an environmental covenant shall affect the
10 priority of that person's interest; provided that it
11 shall not by itself impose any affirmative obligation
12 on the person with respect to the environmental
13 covenant.

14 § -4 **Contents of environmental covenant.** (a) An
15 environmental covenant shall:

16 (1) State that the instrument is an environmental covenant
17 executed pursuant to this chapter;

18 (2) Contain a legally sufficient description of the real
19 property subject to the covenant;

20 (3) Describe the activity and use limitations on the real
21 property;

22 (4) Include at least one holder to be effective;

- 1 (5) Identify every holder;
- 2 (6) Be signed by the agency, every holder, and unless
- 3 waived by the agency, every owner of the fee simple
- 4 interest of the real property subject to the covenant;
- 5 and
- 6 (7) Identify the name and location of any administrative
- 7 record for the environmental response project
- 8 reflected in the environmental covenant.
- 9 (b) In addition to the information required by subsection
- 10 (a), an environmental covenant may contain other information,
- 11 restrictions, and requirements agreed to by the persons who
- 12 signed it, including:
 - 13 (1) Requirements for notice:
 - 14 (A) Following transfer of a specified interest in;
 - 15 (B) Concerning proposed changes in use of;
 - 16 (C) Of applications for building permits for; or
 - 17 (D) Of proposals for any site work affecting the
 - 18 contamination on,
 - 19 the property subject to the covenant;
 - 20 (2) Requirements for periodic reporting describing
 - 21 compliance with the covenant;



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

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

7 (5) Limitation on amendment or termination of the covenant
8 in addition to those contained in sections -9 and
9 -10; and

10 (6) Rights of the holder in addition to the right to
11 enforce the covenant pursuant to section -11.

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

16 § -5 **Validity; effect on other instruments.** (a) An
17 environmental covenant that complies with this chapter shall run
18 with the land.

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

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

- 1 (2) It can be or has been assigned to a person other than
- 2 the original holder;
- 3 (3) It is not of a character that has been recognized
- 4 traditionally at common law;
- 5 (4) It imposes a negative burden;
- 6 (5) It imposes an affirmative obligation on a person
- 7 having an interest in the real property or on the
- 8 holder;
- 9 (6) The benefit or burden does not touch or concern real
- 10 property;
- 11 (7) There is no privity of estate or contract;
- 12 (8) The holder dies, ceases to exist, resigns, or is
- 13 replaced; or
- 14 (9) The owner of an interest subject to the environmental
- 15 covenant and the holder are the same person.
- 16 (c) An instrument that creates restrictions or obligations
- 17 with respect to real property that would qualify as activity or
- 18 use limitations except for the fact that the instrument was
- 19 recorded before the effective date of this chapter shall not be
- 20 invalid or unenforceable because of any of the limitations on
- 21 enforcement of interests described in subsection (b), or because
- 22 it was identified as an easement, servitude, deed restriction,

1 or other interest. This chapter shall not apply in any other
2 respect to such an instrument.

3 (d) This chapter shall not invalidate or render
4 unenforceable any interest, whether designated as an
5 environmental covenant or other interest that is otherwise
6 enforceable under the law of this State.

7 § -6 Relationship to other land use law. This chapter
8 shall not authorize a use of real property that is otherwise
9 prohibited by zoning, by law other than this chapter regulating
10 use of real property, or by a recorded instrument that has
11 priority over the environmental covenant. An environmental
12 covenant may prohibit or restrict uses of real property that are
13 authorized by zoning or by law other than this chapter.

14 § -7 Notice. (a) A copy of an environmental covenant
15 shall be provided by the person determined by the agency and in
16 the manner required by the agency to:

- 17 (1) Each person that signed the covenant;
- 18 (2) Each person holding a recorded interest in the real
19 property subject to the covenant;
- 20 (3) Each person in possession of the real property subject
21 to the covenant;



1 (4) Each county or other subdivision of county government
2 in which real property subject to the covenant is
3 located; and

4 (5) Any other person the agency determines should receive
5 notice.

6 (b) The validity of a covenant shall not be affected by
7 failure to provide a copy of the covenant as required under this
8 section.

9 § -8 **Recording.** (a) An environmental covenant and any
10 amendment or termination of the covenant shall be recorded by
11 the grantor of the covenant with the registrar of conveyances.
12 For purposes of indexing, a holder shall be treated as a
13 grantee.

14 (b) Except as otherwise provided in section -9(c), an
15 environmental covenant is subject to the laws of this State
16 governing recording and priority of interests in real property.

17 (c) A holder shall provide a copy of the final recorded
18 covenant, any amendment made to the covenant, any termination
19 documentation, and documentation of any other matters related to
20 the covenant to the department of health.



1 § -9 Duration; amendment by court action. (a) An
2 environmental covenant shall be considered perpetual unless it
3 is:

- 4 (1) By its terms limited to a specific duration or
- 5 terminated by the occurrence of a specific event;
- 6 (2) Terminated by consent pursuant to section -10;
- 7 (3) Terminated pursuant to subsection (b);
- 8 (4) Terminated by foreclosure of an interest that has
- 9 priority over the environmental covenant; or
- 10 (5) Terminated or modified in an eminent domain
- 11 proceeding; provided that:
 - 12 (A) The agency that signed the covenant is a party to
 - 13 the proceeding;
 - 14 (B) All persons identified in section -10(a) and
 - 15 (b) are given notice of the pendency of the
 - 16 proceeding; and
 - 17 (C) The court determines, after hearing, that the
 - 18 termination or modification will not adversely
 - 19 affect human health or the environment.

20 (b) If the agency that signed an environmental covenant
21 determines that the intended benefits of the covenant can no
22 longer be realized, a court, under the doctrine of changed



1 circumstances, in an action in which all persons identified in
2 section -10(a) and (b) have been given notice, may terminate
3 the covenant or reduce its burden on the real property subject
4 to the covenant. The agency's determination or its failure to
5 make a determination upon request is subject to review pursuant
6 to chapter 91.

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

13 § -10 **Amendment or termination by consent.** (a) An
14 environmental covenant may be amended or terminated by consent;
15 provided that the amendment or termination is signed by:

- 16 (1) The agency;
- 17 (2) Unless waived by the agency, the current owner of the
18 fee simple of the real property subject to the
19 covenant;
- 20 (3) Each person that originally signed the covenant,
21 unless the person waived in a signed record the right
22 to consent or a court finds that the person no longer



1 exists or cannot be located or identified with the
2 exercise of reasonable diligence; and

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

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

10 (c) Except for an assignment undertaken pursuant to a
11 governmental reorganization, assignment of an environmental
12 covenant to a new holder shall be considered an amendment.

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

15 (1) A holder may not assign the holder's interest without
16 consent of the other parties specified in subsection
17 (a); and

18 (2) A holder may be removed and replaced by agreement of
19 the other parties specified in subsection (a).

20 (e) A court of competent jurisdiction may fill a vacancy
21 in the position of a holder.



1 § -11 **Enforcement of environmental covenant.** (a) A

2 civil action for injunctive or other equitable relief for
3 violation of an environmental covenant may be maintained by:

4 (1) A party to the covenant;

5 (2) The department or any other agency specified in the
6 covenant;

7 (3) Any person to whom the covenant expressly grants power
8 to enforce;

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

12 (5) A county in which the real property subject to the
13 covenant is located.

14 (b) This chapter shall not limit the regulatory authority
15 of the department or any governmental unit under law other than
16 this chapter with respect to an environmental response project.

17 (c) A person shall not be responsible for or subject to
18 liability for environmental remediation solely because the
19 person has the right to enforce an environmental covenant.

20 § -12 **Registry.** The department shall establish a
21 registry that contains all environmental covenants and any
22 amendment or termination of those covenants. The registry may



1 also contain any other information concerning environmental
2 covenants and the real property subject to them that the
3 department considers appropriate. The department shall make the
4 registry available for public access electronically on its
5 web-site or at another appropriate place. The registry is a
6 public record for purposes of chapter 92F.

7 § -13 **Relation to Electronic Signatures in Global and**
8 **National Commerce Act.** This chapter modifies, limits, or
9 supersedes the federal Electronic Signatures in Global and
10 National Commerce Act, 15 U.S.C. Section 7001 et seq.; provided
11 that it shall not modify, limit, or supersede Section 101 of
12 that Act, 15 U.S.C. Section 7001 (a), or authorize electronic
13 delivery of any of the notices described in Section 103 of that
14 Act, 15 U.S.C. Section 7003(b)."

15 SECTION 3. This Act shall take effect upon its approval.



Report Title:

Environmental Contamination

Description:

Provides for environmental covenants for contaminated property to ensure long-term compliance with requirements needed to protect the public and environment when complete removal of contaminants is not feasible, practical, or necessary. (HB1706 CD1)

