
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 on
3 contaminated property when removal of contamination to
4 unrestricted levels is not feasible, practicable, or necessary
5 to put such property in productive use. The legislature also
6 finds that, in such cases, certain controls are required to
7 protect the public and the environment from the contamination
8 that remains on the property. Currently, there does not exist
9 clear authority or a process for ensuring that these controls
10 remain valid and enforceable, sometimes in perpetuity, as
11 properties change ownership again and again.

12 The legislature finds that it is necessary to provide an
13 effective and enforceable means of ensuring the conduct of any
14 required maintenance, monitoring, or operation, and of
15 restricting future uses of the land for as long as any residual
16 contamination remains hazardous. Therefore, the purpose of this
17 Act is to:



1 (1) Ensure that land use restrictions, mandated
 2 environmental monitoring requirements, and a wide
 3 range of common engineering controls designed to
 4 control the potential environmental risk of residual
 5 contamination will be reflected on the land records
 6 and effectively enforced over time as a valid real
 7 property servitude; and

8 (2) Encourage the transfer of ownership and property re-
 9 use by offering a clear and objective process for
 10 creating, modifying, or terminating environmental
 11 covenants and for recording these actions in
 12 instruments that will be reflected in the title
 13 abstract of the contaminated property.

14 SECTION 2. The Hawaii Revised Statutes is amended by
 15 adding a new chapter to be appropriately designated and to read
 16 as follows:

17 **"CHAPTER**

18 **UNIFORM ENVIRONMENTAL COVENANTS ACT (MODIFIED)**

19 § -1 **Short title.** This chapter may be cited as the
 20 Uniform Environmental Covenants Act.

21 § -2 **Definitions.** In this chapter:

1 "Activity or use limitations, or both" means restrictions
2 or obligations created under this chapter with respect to real
3 property.

4 "Agency" means the department of health or any other state
5 or federal agency that determines or approves the environmental
6 response project pursuant to which the environmental covenant is
7 created.

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

15 "Department" means the department of health.

16 "Director" means the director of health.

17 "Environmental covenant" means a servitude arising under an
18 environmental response project that imposes activity and use
19 limitations.

20 "Environmental response project" means a plan or work
21 performed for environmental remediation of real property and
22 conducted:



- 1 (1) Under a federal or state program governing
2 environmental remediation of real property, including,
3 but not limited to, chapter 128D; or
- 4 (2) Incident to closure of a solid or hazardous waste
5 management unit, if the closure is conducted with
6 approval of an agency; or
- 7 (3) Under the state voluntary response program authorized
8 in part II of chapter 128D.

9 "Holder" means a grantee of an environmental covenant as
10 specified in section -3(a) who, by virtue of the covenant,
11 holds an interest in the real property subject to the covenant,
12 and who accepts certain rights and obligations as stated in the
13 covenant. A covenant shall include at least one holder to be
14 effective under this chapter.

15 "Person" means an individual, corporation, business trust,
16 estate, trust, partnership, limited liability company,
17 association, joint venture, public corporation, government,
18 governmental subdivision, agency, or instrumentality, or any
19 other legal or commercial entity.

20 "Record", used as a noun, means information that is
21 inscribed on a tangible medium or that is stored in an



1 electronic or other medium and is retrievable in perceivable
2 form.

3 "State" means a state of the United States, the District of
4 Columbia, Puerto Rico, the United States Virgin Islands, or any
5 territory or insular possession subject to the jurisdiction of
6 the United States.

7 § -3 **Nature of rights; subordination of interests.** (a)

8 Any person, including a person who owns an interest in the real
9 property, the agency, or a municipality or other unit of local
10 government, may be a holder. An environmental covenant may
11 identify more than one holder. The interest of a holder is an
12 interest in real property.

13 (b) A right of an agency under this chapter or under an
14 environmental covenant, other than a right as a holder, is not
15 an interest in real property.

16 (c) An agency is bound by any obligation it assumes in an
17 environmental covenant, but an agency does not assume
18 obligations merely by signing an environmental covenant. Any
19 other person that signs an environmental covenant is bound by
20 the obligations the person assumes in the covenant, but signing
21 the covenant does not change obligations, rights, or protections



1 granted or imposed under law other than this chapter except as
2 provided in the covenant.

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

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

10 (2) This chapter does not require a person that owns a
11 prior interest to subordinate that interest to an
12 environmental covenant or to agree to be bound by the
13 covenant.

14 (3) A subordination agreement may be contained in an
15 environmental covenant covering real property or in a
16 separate record. If the environmental covenant covers
17 commonly owned property in a common interest
18 community, the record may be signed by any person
19 authorized by the governing board of the owners'
20 association.

21 (4) An agreement by a person to subordinate a prior
22 interest to an environmental covenant affects the



1 priority of that person's interest but does not by
2 itself impose any affirmative obligation on the person
3 with respect to the environmental covenant.

- 4 (5) This chapter does not apply to an unrecorded interest
5 in real property owned, operated, or maintained by a
6 public utility or a provider of an essential public
7 service that is in existence at the time the
8 environmental covenant is created or amended, unless
9 the public utility or provider of the essential public
10 service is a grantor or holder of the environmental
11 covenant with respect to the real property subject to
12 the covenant. The exclusion in this paragraph does
13 not relieve the owner or operator of the unrecorded
14 interest in real property of any duty to comply with
15 other applicable environmental and public health and
16 safety laws and regulation.

17 **§ -4 Contents of environmental covenant.** (a) An

18 environmental covenant shall:

- 19 (1) State that the instrument is an environmental covenant
20 executed pursuant to this chapter;
- 21 (2) Contain a legally sufficient description of the real
22 property subject to the covenant;



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

19 (b) An environmental covenant that is otherwise effective
20 is 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 is not
- 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 does not apply in any other
2 respect to such an instrument.

3 (d) This chapter does 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 does 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 and in the manner required by
16 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 agency of county government in
2 which real property subject to the covenant is
3 located; and

4 (5) Any other person the agency requires.

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

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

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

15 (c) A copy of the final recorded covenant, any amendment
16 made to the covenant, any termination documentation, and
17 documentation of any other matters related to the covenant shall
18 be provided to the department of health.

19 § -9 **Duration; amendment by court action.** (a) An
20 environmental covenant is perpetual unless it is:

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

- 1 (2) Terminated by consent pursuant to section -10;
- 2 (3) Terminated pursuant to subsection (b);
- 3 (4) Terminated by foreclosure of an interest that has
- 4 priority over the environmental covenant; or
- 5 (5) Terminated or modified in an eminent domain
- 6 proceeding, but only if:
 - 7 (A) The agency that signed the covenant is a party to
 - 8 the proceeding;
 - 9 (B) All persons identified in section -10(a) and
 - 10 (b) are given notice of the pendency of the
 - 11 proceeding; and
 - 12 (C) The court determines, after hearing, that the
 - 13 termination or modification will not adversely
 - 14 affect human health or the environment.
- 15 (b) If the agency that signed an environmental covenant
- 16 has determined that the intended benefits of the covenant can no
- 17 longer be realized, a court, under the doctrine of changed
- 18 circumstances, in an action in which all persons identified in
- 19 section -10(a) and (b) have been given notice, may terminate
- 20 the covenant or reduce its burden on the real property subject
- 21 to the covenant. The agency's determination or its failure to

1 make a determination upon request is subject to review pursuant
2 to chapter 91.

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

9 § -10 **Amendment or termination by consent.** (a) An
10 environmental covenant may be amended or terminated by consent
11 only if the amendment or termination is signed by:

- 12 (1) The agency;
- 13 (2) Unless waived by the agency, the current owner of the
14 fee simple of the real property subject to the
15 covenant;
- 16 (3) Each person that originally signed the covenant,
17 unless the person waived in a signed record the right
18 to consent or a court finds that the person no longer
19 exists or cannot be located or identified with the
20 exercise of reasonable diligence; and
- 21 (4) Except as otherwise provided in subsection (d)(2), the
22 holder.



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

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

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

11 (1) A holder may not assign its interest without consent
12 of the other parties; and

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

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

17 § -11 **Enforcement of environmental covenant.** (a) A
18 civil action for injunctive or other equitable relief for
19 violation of an environmental covenant may be maintained by:

20 (1) A party to the covenant;

21 (2) The department or any other agency specified in the
22 covenant;



1 (3) Any person to whom the covenant expressly grants power
2 to enforce;

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

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

8 (b) This chapter does not limit the regulatory authority
9 of the department or any agency under law other than this
10 chapter with respect to an environmental response project.

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

14 § -12 **Registry.** The department shall establish a
15 registry that contains all environmental covenants and any
16 amendment or termination of those covenants. The registry may
17 also contain any other information concerning environmental
18 covenants and the real property subject to them that the
19 department considers appropriate. The department shall make the
20 registry available for public access electronically on its web-
21 site or at another appropriate place. The registry is a public
22 record for purposes of chapter 92F.

1 § -13 **Relation to electronic signatures in Global and**
2 **National Commerce Act.** This chapter modifies, limits, or
3 supersedes the federal Electronic Signatures in Global and
4 National Commerce Act (15 U.S.C. section 7001 et seq.) but does
5 not modify, limit, or supersede section 101 of that Act (15
6 U.S.C. section 7001 (a)) or authorize electronic delivery of any
7 of the notices described in section 103 of that Act (15 U.S.C.
8 section 7003(b))."

9 SECTION 3. There are established such positions within the
10 department of health as necessary to implement the provisions of
11 the chapter established in section 2 of this Act. These
12 positions shall be appointed by the director of health without
13 regard to chapters 76 and 77, Hawaii Revised Statutes. These
14 positions shall be included in any benefit program generally
15 applicable to the officers and employees of the State.

16 SECTION 4. This Act shall take effect upon its approval.



HB 1706 HD 1

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 HD1)

