
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 (MODIFIED)**

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, or both" means restrictions
15 or 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 but not limited to chapter 128D;

18 (2) Incident to closure of a solid or hazardous waste
19 management unit, if the closure is conducted with
20 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 municipality or other unit of local
20 government, may be a holder. An environmental covenant may
21 identify more than one holder. The interest of a holder is an
22 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, is not
3 an interest in real property.

4 (c) An agency is bound by any obligation it assumes in an
5 environmental covenant, but an agency does not assume
6 obligations merely by signing an environmental covenant. Any
7 other person that signs an environmental covenant is bound by
8 the obligations the person assumes in the covenant, but signing
9 the covenant does not change obligations, rights, or protections
10 granted or imposed under law other than this chapter except as
11 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 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) This chapter shall not require a person that owns a
20 prior interest 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;
- 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 but shall not by
11 itself impose any affirmative obligation on the person
12 with respect to the environmental covenant; and
- 13 (5) This chapter shall not apply to an unrecorded interest
14 in real property owned, operated, or maintained by a
15 public utility or a provider of an essential public
16 service that is in existence at the time the
17 environmental covenant is created or amended, unless
18 the public utility or provider of the essential public
19 service is a grantor or holder of the environmental
20 covenant with respect to the real property subject to
21 the covenant. The exclusion in this paragraph shall
22 not relieve the owner or operator of the unrecorded



1 interest in real property of any duty to comply with
2 other applicable environmental and public health and
3 safety laws and regulation.

4 § -4 Contents of environmental covenant. (a) An
5 environmental covenant shall:

- 6 (1) State that the instrument is an environmental covenant
7 executed pursuant to this chapter;
- 8 (2) Contain a legally sufficient description of the real
9 property subject to the covenant;
- 10 (3) Describe the activity and use limitations on the real
11 property;
- 12 (4) Include at least one holder to be effective;
- 13 (5) Identify every holder;
- 14 (6) Be signed by the agency, every holder, and unless
15 waived by the agency, every owner of the fee simple
16 interest of the real property subject to the covenant;
17 and
- 18 (7) Identify the name and location of any administrative
19 record for the environmental response project
20 reflected in the environmental covenant.

21 (b) In addition to the information required by subsection
22 (a), an environmental covenant may contain other information,



1 restrictions, and requirements agreed to by the persons who
2 signed it, including any:

3 (1) Requirements for notice:

4 (A) Following transfer of a specified interest in;

5 (B) Concerning proposed changes in use of;

6 (C) Of applications for building permits for; or

7 (D) Of proposals for any site work affecting the

8 contamination on,

9 the property subject to the covenant;

10 (2) Requirements for periodic reporting describing

11 compliance with the covenant;

12 (3) Rights of access to the property granted in connection

13 with implementation or enforcement of the covenant;

14 (4) A brief narrative description of the contamination and

15 remedy, including the contaminants of concern, the

16 pathways of exposure, limits on exposure, and the

17 location and extent of the contamination;

18 (5) Limitation on amendment or termination of the covenant

19 in addition to those contained in sections -9 and

20 -10; and

21 (6) Rights of the holder in addition to its right to

22 enforce the covenant pursuant to section -11.



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

5 § -5 **Validity; effect on other instruments.** (a) An
6 environmental covenant that complies with this chapter runs with
7 the land.

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

- 10 (1) It is not appurtenant to an interest in real property;
- 11 (2) It can be or has been assigned to a person other than
12 the original holder;
- 13 (3) It is not of a character that has been recognized
14 traditionally at common law;
- 15 (4) It imposes a negative burden;
- 16 (5) It imposes an affirmative obligation on a person
17 having an interest in the real property or on the
18 holder;
- 19 (6) The benefit or burden does not touch or concern real
20 property;
- 21 (7) There is no privity of estate or contract;



1 (8) The holder dies, ceases to exist, resigns, or is
2 replaced; or

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

5 (c) An instrument that creates restrictions or obligations
6 with respect to real property that would qualify as activity or
7 use limitations except for the fact that the instrument was
8 recorded before the effective date of this chapter shall not be
9 invalid or unenforceable because of any of the limitations on
10 enforcement of interests described in subsection (b), or because
11 it was identified as an easement, servitude, deed restriction,
12 or other interest. This chapter shall not apply in any other
13 respect to such an instrument.

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

18 § -6 **Relationship to other land use law.** This chapter
19 shall not authorize a use of real property that is otherwise
20 prohibited by zoning, by law other than this chapter regulating
21 use of real property, or by a recorded instrument that has
22 priority over the environmental covenant. An environmental



1 covenant may prohibit or restrict uses of real property that are
2 authorized by zoning or by law other than this chapter.

3 **§ -7 Notice.** (a) A copy of an environmental covenant
4 shall be provided by the person and in the manner required by
5 the agency to:

6 (1) Each person that signed the covenant;

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

9 (3) Each person in possession of the real property subject
10 to the covenant;

11 (4) Each county or other subdivision of county government
12 in which real property subject to the covenant is
13 located; and

14 (5) Any other person the agency requires.

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

18 **§ -8 Recording.** (a) An environmental covenant and any
19 amendment or termination of the covenant shall be recorded by
20 the grantor of the covenant with the registrar of conveyances.
21 For purposes of indexing, a holder shall be treated as a
22 grantee.



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

4 (c) A copy of the final recorded covenant, any amendment
5 made to the covenant, any termination documentation, and
6 documentation of any other matters related to the covenant shall
7 be provided to the department of health.

8 § -9 Duration; amendment by court action. (a) An
9 environmental covenant is perpetual unless it is:

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

12 (2) Terminated by consent pursuant to section -10;

13 (3) Terminated pursuant to subsection (b);

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

16 (5) Terminated or modified in an eminent domain
17 proceeding, but only if:

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

20 (B) All persons identified in section -10(a) and
21 (b) are given notice of the pendency of the
22 proceeding; and



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

4 (b) If the agency that signed an environmental covenant
5 has determined that the intended benefits of the covenant can no
6 longer be realized, a court, under the doctrine of changed
7 circumstances, in an action in which all persons identified in
8 section -10(a) and (b) have been given notice, may terminate
9 the covenant or reduce its burden on the real property subject
10 to the covenant. The agency's determination or its failure to
11 make a determination upon request is subject to review pursuant
12 to chapter 91.

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

19 **§ -10 Amendment or termination by consent.** (a) An
20 environmental covenant may be amended or terminated by consent
21 only if the amendment or termination is signed by:

22 (1) The agency;



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

4 (3) Each person that originally signed the covenant,
5 unless the person waived in a signed record the right
6 to consent or a court finds that the person no longer
7 exists or cannot be located or identified with the
8 exercise of reasonable diligence; and

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

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

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

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

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



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

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

5 § -11 **Enforcement of environmental covenant.** (a) A
6 civil action for injunctive or other equitable relief for
7 violation of an environmental covenant may be maintained by:

8 (1) A party to the covenant;

9 (2) The department or any other agency specified in the
10 covenant;

11 (3) Any person to whom the covenant expressly grants power
12 to enforce;

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

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

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



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

4 § -12 **Registry.** The department shall establish a
5 registry that contains all environmental covenants and any
6 amendment or termination of those covenants. The registry may
7 also contain any other information concerning environmental
8 covenants and the real property subject to them that the
9 department considers appropriate. The department shall make the
10 registry available for public access electronically on its web-
11 site or at another appropriate place. The registry is a public
12 record for purposes of chapter 92F.

13 § -13 **Relation to Electronic Signatures in Global and**
14 **National Commerce Act.** This chapter modifies, limits, or
15 supersedes the federal Electronic Signatures in Global and
16 National Commerce Act (15 U.S.C. Section 7001 et seq.) but shall
17 not modify, limit, or supersede Section 101 of that Act (15
18 U.S.C. Section 7001 (a)) or authorize electronic delivery of any
19 of the notices described in Section 103 of that Act (15 U.S.C.
20 Section 7003(b))."

21 SECTION 3. This Act shall take effect on July 1, 2050.



HB 1706 HD 3

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 HD3)

