
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 Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 UNIFORM ENVIRONMENTAL COVENANTS ACT (MODIFIED)

6 § -1 **Short title.** This chapter may be cited as the
7 Uniform Environmental Covenants Act.

8 § -2 **Definitions.** In this chapter:

9 "Activity or use limitations, or both" means restrictions or
10 obligations created under this chapter with respect to real
11 property.

12 "Agency" means the department of health or any other state
13 or federal agency that determines or approves the environmental
14 response project pursuant to which the environmental covenant is
15 created.

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

8 "Department" means the department of health.

9 "Director" means the director of the department of health.

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

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

16 (1) Under a federal or state program governing
17 environmental remediation of real property, including,
18 but not limited to, chapter 128D; or

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

1 (3) Under the State voluntary response program authorized
2 in part II of chapter 128D.

3 "Holder" means a grantee of an environmental covenant as
4 specified in section -3(a) who, by virtue of the covenant,
5 holds an interest in the real property subject to the covenant,
6 and who accepts certain rights and obligations as stated in the
7 covenant. A covenant must include at least one holder to be
8 effective under this chapter.

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

14 "Record", used as a noun, means information that is
15 inscribed on a tangible medium or that is stored in an electronic
16 or other medium and is retrievable in perceivable form.

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

21 § -3 **Nature of rights; subordination of interests.** (a)

22 Any person, including a person who owns an interest in the real

1 property, the agency, or a municipality or other unit of local
2 government, may be a holder. An environmental covenant may
3 identify more than one holder. The interest of a holder is an
4 interest in real property.

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

8 (c) An agency is bound by any obligation it assumes in an
9 environmental covenant, but an agency does not assume obligations
10 merely by signing an environmental covenant. Any other person
11 that signs an environmental covenant is bound by the obligations
12 the person assumes in the covenant, but signing the covenant does
13 not change obligations, rights, or protections granted or imposed
14 under law other than this chapter except as provided in the
15 covenant.

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

19 (1) An interest that has priority under other law is not
20 affected by an environmental covenant unless the person
21 that owns the interest subordinates that interest to
22 the covenant.

1 (2) This chapter does not require a person that owns a
2 prior interest to subordinate that interest to an
3 environmental covenant or to agree to be bound by the
4 covenant.

5 (3) A subordination agreement may be contained in an
6 environmental covenant covering real property or in a
7 separate record. If the environmental covenant covers
8 commonly owned property in a common interest community,
9 the record may be signed by any person authorized by
10 the governing board of the owners' association.

11 (4) An agreement by a person to subordinate a prior
12 interest to an environmental covenant affects the
13 priority of that person's interest but does not by
14 itself impose any affirmative obligation on the person
15 with respect to the environmental covenant.

16 § -4 **Contents of environmental covenant.** (a) An
17 environmental covenant must:

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

20 (2) Contain a legally sufficient description of the real
21 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 of
6 the real property subject to the covenant; and
- 7 (6) Identify the name and location of any administrative
8 record for the environmental response project reflected
9 in the environmental covenant.
- 10 (b) In addition to the information required by subsection
11 (a), an environmental covenant may contain other information,
12 restrictions, and requirements agreed to by the persons who
13 signed it, including any:
- 14 (1) Requirements for notice following transfer of a
15 specified interest in, or concerning proposed changes
16 in use of, applications for building permits for, or
17 proposals for any site work affecting the contamination
18 on, the property subject to the covenant;
- 19 (2) Requirements for periodic reporting describing
20 compliance with the covenant;
- 21 (3) Rights of access to the property granted in connection
22 with implementation or enforcement of the covenant;

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

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

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

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

14 § -5 **Validity; effect on other instruments.** (a) An
15 environmental covenant that complies with this chapter runs with
16 the land.

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

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

20 (2) It can be or has been assigned to a person other than
21 the original holder;

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

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

5 § -6 **Relationship to other land use law.** This chapter does
6 not authorize a use of real property that is otherwise prohibited
7 by zoning, by law other than this chapter regulating use of real
8 property, or by a recorded instrument that has priority over the
9 environmental covenant. An environmental covenant may prohibit or
10 restrict uses of real property that are authorized by zoning or
11 by law other than this chapter.

12 § -7 **Notice.** (a) A copy of an environmental covenant
13 shall be provided by the person(s) and in the manner required by
14 the agency to:

- 15 (1) Each person that signed the covenant;
16 (2) Each person holding a recorded interest in the real
17 property subject to the covenant;
18 (3) Each person in possession of the real property subject
19 to the covenant;
20 (4) Each municipality or other unit of local government in
21 which real property subject to the covenant is located;
22 and

1 (5) Any other person the agency requires.

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

4 **§ -8 Recording.** (a) An environmental covenant and any
5 amendment or termination of the covenant must be recorded by the
6 grantor of the covenant with the bureau of conveyances. For
7 purposes of indexing, a holder shall be treated as a grantee.

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

11 (c) A copy of the final recorded covenant, any amendment
12 made to the covenant, any termination documentation, and
13 documentation of any other matters related to the covenant shall
14 be provided to the department of health.

15 **§ -9 Duration; amendment by court action.** (a) An
16 environmental covenant is perpetual unless it is:

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

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

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

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

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

3 (A) The agency that signed the covenant is a party to
4 the proceeding;

5 (B) All persons identified in section -10(a) and
6 (b) are given notice of the pendency of the
7 proceeding; and

8 (C) The court determines, after hearing, that the
9 termination or modification will not adversely
10 affect human health or the environment.

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

20 (c) Except as otherwise provided in subsections (a) and
21 (b), an environmental covenant may not be extinguished, limited,
22 or impaired through issuance of a tax deed, foreclosure of a tax

1 lien, or application of the doctrine of adverse possession,
2 prescription, abandonment, waiver, lack of enforcement, or
3 acquiescence, or a similar doctrine.

4 **§ -10 Amendment or termination by consent.** (a) An
5 environmental covenant may be amended or terminated by consent
6 only if the amendment or termination is signed by:

7 (1) The agency;

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

11 (3) Each person that originally signed the covenant, unless
12 the person waived in a signed record the right to
13 consent or a court finds that the person no longer
14 exists or cannot be located or identified with the
15 exercise of reasonable diligence; and

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

18 (b) If an interest in real property is subject to an
19 environmental covenant, the interest is not affected by an
20 amendment of the covenant unless the current owner of the
21 interest consents to the amendment or has waived in a signed
22 record the right to consent to amendments.

1 (c) Except for an assignment undertaken pursuant to a
2 governmental reorganization, assignment of an environmental
3 covenant to a new holder is an amendment.

4 (d) Except as otherwise provided in an environmental
5 covenant:

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

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

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

12 § -11 **Enforcement of environmental covenant.** (a) A civil
13 action for injunctive or other equitable relief for violation of
14 an environmental covenant may be maintained by:

15 (1) A party to the covenant;

16 (2) The department or any other agency specified in the
17 covenant;

18 (3) Any person to whom the covenant expressly grants power
19 to enforce;

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

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

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

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

9 § -11.1 **Administrative Enforcement.** (a) In addition to
10 the enforcement provided for in section -11, if the director
11 determines that any person has violated or is violating any term
12 or condition of an environmental covenant issued pursuant to this
13 chapter, the director may do one or more of the following:

14 (1) Issue an order assessing an administrative penalty for
15 any past or current violation under section -11.3; or

16 (2) Require compliance immediately or within a specified
17 time.

18 (b) Any order issued under this chapter shall become final,
19 unless not later than twenty days after the order is served, the
20 person or persons named therein request in writing a hearing
21 before the director. Any penalty imposed under this chapter
22 shall become due and payable twenty days after the notice of

1 penalty is served unless the person or persons named therein
2 request in writing a hearing before the director. Whenever a
3 hearing is requested on any penalty imposed under this chapter,
4 the penalty shall become due and payable only upon completion of
5 all review proceedings and the issuance of a final order
6 confirming the penalty in whole or in part. Upon request for a
7 hearing, the director shall require that the alleged violator or
8 violators appear before the director for a hearing at a time and
9 place specified in the notice and answer the charges complained
10 of.

11 (c) Any hearing conducted under this section shall be
12 conducted as a contested case under chapter 91. If after a
13 hearing held pursuant to this section, the director finds that a
14 violation or violations have occurred, the director shall affirm
15 or modify any penalties imposed or shall modify or affirm the
16 order previously issued or issue an appropriate order or orders
17 for the prevention, abatement, or control of the violation
18 involved, or for the taking of such other corrective action or
19 remedial action as may be appropriate. If, after a hearing on an
20 order or penalty contained in a notice, the director finds that
21 no violation has occurred or is occurring, the director shall
22 rescind the order or penalty. Any order issued after a hearing

1 may prescribe the date or dates by which the violation or
2 violations shall cease and may prescribe timetables for necessary
3 action in preventing, abating, or controlling the violation or
4 disposals.

5 (d) If the amount of any penalty is not paid to the
6 department within thirty days after it becomes due and payable,
7 the director may institute a civil action in the name of the
8 State to collect the administrative penalty, which shall be a
9 government realization.

10 In any proceeding to collect the administrative penalty
11 imposed, the director need only show that:

- 12 (1) Notice was given;
- 13 (2) A hearing was held or the time granted for requesting a
14 hearing expired without a request for a hearing;
- 15 (3) The administrative penalty was imposed; and
- 16 (4) The penalty remains unpaid.

17 (e) In connection with any hearing held pursuant to this
18 section, the director shall have the power to subpoena the
19 attendance of witnesses and the production of evidence on behalf
20 of all parties.

21 § -11.2 Penalties. (a) Any person who violates any term
22 or condition of an environmental covenant issued pursuant to this

1 chapter is subject to administrative or civil judicial penalties
2 of not more than \$25,000 for each separate offense. Each day of
3 each violation, including the failure to act after being ordered
4 to take such action, shall constitute a separate offense. Any
5 action taken in court to impose or collect the penalty provided
6 for in this subsection shall be considered a civil action.

7 (b) Any person who denies, obstructs, or hampers the
8 entrance or inspection by any duly authorized representative of
9 the director, or fails to provide relevant information requested
10 by the director or the director's representative is subject to
11 administrative or civil judicial penalties of not more than
12 \$10,000 for each separate offense. Each day of each violation
13 shall constitute a separate offense. Any action taken in court
14 to impose or collect the penalty provided for in this subsection
15 shall be considered a civil action.

16 § -11.3 **Administrative penalties.** (a) In addition to
17 any other administrative or judicial remedy provided by this
18 chapter, the director is authorized to impose by order the
19 penalties specified in sections -11.1(a) and (b) and -11.2.

20 (b) Factors to be considered in imposing an administrative
21 penalty include:

1 (1) The nature and history of the violation and of any
2 prior violations;

3 (2) The economic benefit, if any, resulting from the
4 violation;

5 (3) The opportunity, difficulty, and history of corrective
6 action;

7 (4) Good faith efforts to comply; and

8 (5) Any other matters that justice may require.

9 (c) It is presumed that the violator's economic and
10 financial conditions allow payment of the penalty, and the burden
11 of proof to the contrary shall be on the violator.

12 § -11.4 **Enforcement by state and county authorities.** All
13 state and county health authorities and police officers shall
14 enforce orders of the department.

15 § -11.5 **Inspection of premises.** The director, in
16 accordance with law, may enter and inspect any facility,
17 building, or place to investigate an actual or suspected
18 violation and to make reasonable tests in connection therewith.
19 No confidential information secured pursuant to this section by
20 any official or employee of the department within the scope and
21 course of the official's or employee's employment in the
22 prevention, control, or abatement of pollution shall be disclosed

1 by the official or employee except as it relates directly to
2 pollution and then, only in connection with the official's or
3 employee's official duties and within the scope and course of the
4 official's or employee's employment.

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

12 **§ -13 Relation to electronic signatures in Global and**
13 **National Commerce Act.** This chapter modifies, limits, or
14 supersedes the federal Electronic Signatures in Global and
15 National Commerce Act (15 U.S.C. section 7001 et seq.) but does
16 not modify, limit, or supersede section 101 of that Act (15
17 U.S.C. section 7001 (a)) or authorize electronic delivery of any
18 of the notices described in section 103 of that Act (15 U.S.C.
19 section 7003(b))."

20 SECTION 2. There are established such positions as necessary
21 to implement the provisions of this chapter. These positions
22 shall be appointed by the director without regard to chapters 76

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1 and 77. These positions shall be included in any benefit program
2 generally applicable to the officers and employees of the State.

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

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INTRODUCED BY:

Calvin K. H. Long

BY REQUEST

JAN 23 2006

JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO THE UNIFORM ENVIRONMENTAL COVENANTS ACT.

PURPOSE: The purpose of this bill is to facilitate cleanup and reuse of contaminated property by providing a clear legal framework for valid and enforceable "environmental covenants." These covenants on contaminated property will be used to assure long-term compliance with requirements needed to protect the public and environment when complete removal of contaminants is not feasible, practical, or necessary.

MEANS: Add a new chapter to the Hawaii Revised Statutes.

JUSTIFICATION: Across the country and in Hawaii, there has been a growing reliance on "risk-based" environmental cleanup of contaminated property when removal of contamination to unrestricted levels is not feasible, practical, or necessary. In such cases, certain controls are required to protect the public and the environment from the contamination remaining on the property. Often, these "institutional controls" must be observed in perpetuity as properties change ownership again and again.

Unfortunately, due to the complexities of real property law, there does not currently exist clear authority or a process for assuring that these controls remain valid and enforceable. The Uniform Environmental Covenants Act (Modified) as proposed in this bill will address this issue by providing a clear statutory framework for creating,

enforcing, tracking, modifying, and terminating "environmental covenants."

Additional background information:

In January 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) concluded unanimously that "a consistent national approach to a shared problem" was needed and recommended that the NCCUSL convene a committee to draft a Uniform Environmental Covenants Act with the goal "to provide a clear and certain mechanism for the enforcement of institutional controls." A committee was formed and after two years, a draft Uniform Environmental Covenants Act (UECA) was issued by NCCUSL in August 2003. Since then, NCCUSL has been assisting states that are interested in adopting the UECA.

During the 2005 Hawaii Legislative Session, the UECA was introduced as H.B.#1706 and S.B.#1167. The bills did not pass, in large part because they were not tailored to the specific situation in the State of Hawaii. In August 2005, the Department of Health formed an informal UECA advisory group of potentially interested parties to help the department draft a UECA bill for the State of Hawaii.

Impact on the public: This bill will benefit the public significantly by assuring that necessary controls are properly enforced for as long as they are needed. The public will also benefit from the redevelopment of contaminated property, which will bring new business, new housing, new jobs, and new tax revenues to the State.

Impact on the department and other agencies: This bill requires that DOH create a "registry" of all environmental covenants in the State. Also, the Department of Land and

Natural Resources, bureau of land conveyances will be required to record all environmental covenants on land records. We consider both of these impacts appropriate and relatively minor.

At the same time, the UECA will greatly assist the department and other agencies by providing a framework for valid, enforceable institutional controls. Strong institutional controls will allow the department to apply cost effective, common sense cleanup requirements. Cost effective cleanup of contamination will encourage voluntary cleanup and redevelopment of contaminated property.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: HTH-849.

OTHER AFFECTED
AGENCIES: Potentially, all public or nonprofit agencies that buy, sell, lease, or control the use of real property.

EFFECTIVE DATE: Upon approval.