

1 property described in a recorded covenant that creates the
2 common interest community.

3 "Department" means the department of health.

4 "Director" means the director of health.

5 "Environmental covenant" means a servitude arising under an
6 environmental response project that imposes activity and use
7 limitations.

8 "Environmental response project" means a plan or work
9 performed for environmental remediation of real property and
10 conducted:

11 (1) Under a federal or state program governing
12 environmental remediation of real property, including
13 chapter 128D;

14 (2) Incident to closure of a solid or hazardous waste
15 management unit, provided that the closure is
16 conducted with approval of an agency; or

17 (3) Under the voluntary response program authorized in
18 part II of chapter 128D.

19 "Holder" means a grantee of an environmental covenant as
20 specified in section -2(a) who, by virtue of the covenant,
21 holds an interest in the real property subject to the covenant,



1 and who accepts certain rights and obligations as stated in the
2 covenant.

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

8 "Record", used as a noun, means information that is
9 inscribed on a tangible medium or that is stored in an
10 electronic or other medium and is retrievable in perceivable
11 form.

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

16 **§ -2 Nature of rights; subordination of interests. (a)**
17 Any person, including a person who owns an interest in the real
18 property, the agency, or a municipality or a county, may be a
19 holder. An environmental covenant may identify more than one
20 holder. The interest of a holder shall be an interest in real
21 property. A covenant shall include at least one holder to be
22 effective under this chapter.



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 is
14 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 owners'
7 association; and

8 (4) An agreement by a person to subordinate a prior
9 interest to an environmental covenant affects 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 **§ -3 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) Identify every holder;



1 (5) Be signed by the agency, every holder, and unless
2 waived by the agency, every owner of the fee simple of
3 the real property subject to the covenant; and

4 (6) Identify the name and location of any administrative
5 record for the environmental response project
6 reflected in the environmental covenant.

7 (b) In addition to the information required by subsection
8 (a), an environmental covenant may contain other information,
9 restrictions, and requirements agreed to by the persons who
10 signed it, including:

11 (1) Requirements for notice following transfer of a
12 specified interest in, or concerning proposed changes
13 in use of, applications for building permits for, or
14 proposals for any site work affecting the
15 contamination on, the property subject to the
16 covenant;

17 (2) Requirements for periodic reporting describing
18 compliance with the covenant;

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

21 (4) A brief narrative description of the contamination and
22 remedy, including the contaminants of concern, the

1 pathways of exposure, limits on exposure, and the
2 location and extent of the contamination;

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

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

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

12 **§ -4 Validity; effect on other instruments.** (a) An
13 environmental covenant that complies with this chapter shall run
14 with the land.

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

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

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

20 (3) It is not of a character that has been recognized
21 traditionally at common law;

22 (4) It imposes a negative burden;



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



1 environmental covenant or other interest that is otherwise
2 enforceable under the law of this State.

3 **§ -5 Relationship to other land use law.** This chapter
4 shall not be interpreted to authorize a use of real property
5 that is otherwise prohibited by zoning, by law other than this
6 chapter regulating use of real property, or by a recorded
7 instrument that has priority over the environmental covenant. An
8 environmental covenant may prohibit or restrict uses of real
9 property that are authorized by zoning or by law other than this
10 chapter.

11 **§ -6 Notice.** (a) A copy of an environmental covenant
12 shall be provided by any person determined by the agency and in
13 the manner required by the agency to:

- 14 (1) Each person that signed the covenant;
- 15 (2) Each person holding a recorded interest in the real
16 property subject to the covenant;
- 17 (3) Each person in possession of the real property subject
18 to the covenant;
- 19 (4) Each county in which real property subject to the
20 covenant is located; and
- 21 (5) Any other person the agency determines should receive
22 notice.



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

4 **§ -7 Recording.** (a) An environmental covenant and any
5 amendment or termination of the covenant shall be recorded by
6 the 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 -8(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 holder shall provide a copy of the final recorded
12 covenant, any amendment made to the covenant, any termination
13 documentation, and documentation of any other matters related to
14 the covenant to the department of health.

15 **§ -8 Duration; amendment by court action.** (a) An
16 environmental covenant shall be considered perpetual unless it
17 is:

- 18 (1) By its terms limited to a specific duration or
19 terminated by the occurrence of a specific event;
20 (2) Terminated by consent pursuant to section -9;
21 (3) Terminated pursuant to subsection (b);

- 1 (4) Terminated by foreclosure of an interest that has
2 priority over the environmental covenant; or
- 3 (5) Terminated or modified in an eminent domain
4 proceeding; provided that:
- 5 (A) The agency that signed the covenant is a party to
6 the proceeding;
- 7 (B) All persons identified in section -9(a) and
8 (b) are given notice of the pendency of the
9 proceeding; and
- 10 (C) The court determines, after hearing, that the
11 termination or modification will not adversely
12 affect human health or the environment.
- 13 (b) If the agency that signed an environmental covenant
14 determines that the intended benefits of the covenant can no
15 longer be realized, a court, under the doctrine of changed
16 circumstances, in an action in which all persons identified in
17 section -9(a) and (b) have been given notice, may terminate
18 the covenant or reduce its burden on the real property subject
19 to the covenant. The agency's determination or its failure to
20 make a determination upon request is subject to review pursuant
21 to chapter 91.



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

7 **§ -9 Amendment or termination by consent.** (a) An
8 environmental covenant may be amended or terminated by consent,
9 provided that the amendment or termination is signed by:

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

21 (b) If an interest in real property is subject to an
22 environmental covenant, an amendment of the covenant shall not



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 shall 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 shall not be responsible for or subject to
12 liability for environmental remediation solely because the
13 person has the right to enforce an environmental covenant.

14 **§ -11 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, which the
19 department considers appropriate. The registry is a public
20 record for purposes of chapter 92F.

21 **§ -12 Relation to electronic signatures in Global and**
22 **National Commerce Act.** This chapter modifies, limits, or

1 supersedes the federal Electronic Signatures in Global and
2 National Commerce Act, 15 U.S.C. section 7001 et seq., provided
3 it shall not modify, limit, or supersede section 101 of that
4 Act, 15 U.S.C. section 7001 (a), or authorize electronic
5 delivery of any of the notices described in section 103 of that
6 Act, 15 U.S.C. section 7003(b)."

7 SECTION 2. There shall be established such positions as
8 are deemed necessary to implement the provisions of this
9 chapter. The director shall appoint these positions without
10 regard to chapters 76 and 77. These positions shall be included
11 in any benefit program generally applicable to the officers and
12 employees of the State.

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

SB2345, SD1

Report Title:

Environmental Contamination; Clean-up

Description:

Provides for "environmental covenants" for contaminated property 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. (SD1)

