

The Uniform Environmental Covenants Act

By: Linda M. Bullen and Gregory J. Walch

Environmental covenants, also called “institutional controls” or “land use controls,” can be used for a variety of purposes by the owners of contaminated land, the agencies which regulate such matters, and by persons involved in transactions involving contaminated land. Historically, environmental covenants entered into by a current owner and recorded against the property were not always enforceable against successors because of common law limitations placed on such covenants. In an effort to eliminate these limitations, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Environmental Covenants Act (“UECA”) in August, 2003. In 2005, the UECA was adopted by the Nevada legislature and is codified at NRS 445D.010 – 445D.220.

The UECA’s primary purpose is to confirm the validity of environmental covenants made pursuant to the UECA by giving effect to releases, indemnities, land use restrictions, agency notification requirements, contaminated soil and groundwater handling plans, and promises by the responsible party to conduct further cleanup as may be required by government agencies. Each of these mechanisms may have been unenforceable at common law, but became enforceable under the UECA.

Typically, environmental covenants are used when a contaminated site is cleaned to the point where the governing environmental agency allows for a “risk-based” closure based upon specified, limited, future uses. Because the reviewing agency believes the threat to human health is insignificant, it will allow a certain amount of pollutants to remain in place, provided the site is used only for certain purposes (i.e., industrial, not residential purposes) or construction occurs only in prescribed ways (i.e., with vapor intrusion barriers). In addition to the specified land use

restriction, the owner must record a covenant enforceable against successors setting forth such use or construction limitations.

Historically, one of the challenges faced by property owners undertaking risk-based clean-ups was how to make certain that successor owners of the property would abide by the use limitations and ongoing clean-up or monitoring requirements. The UECA aims to eliminate the impediments to the enforceability of environmental covenants created by the common law with the following language:

2. An environmental covenant that is otherwise effective is valid and enforceable even if:
 - (a) It is not appurtenant to an interest in real property;
 - (b) It can be or has been assigned to a person other than the original holder;
 - (c) It is not of a character that has been recognized traditionally at common law;
 - (d) It imposes a negative burden;
 - (e) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;
 - (f) The benefit or burden does not touch or concern real property;
 - (g) There is no privity of estate or contract;
 - (h) The holder dies, ceases to exist, resigns or is replaced; or
 - (i) The owner of an interest subject to the environmental covenant and the holder are the same person.

NRS 445D.140 (2) (a)-(i).

As a result of the increased certainty that environmental covenants are enforceable against successors, property owners are more likely to undertake risk-based clean ups and return the impacted properties to the stream of commerce. Equally importantly, and perhaps more so based upon our experience with covenants negotiated under UECA to date, the covenants themselves significantly reduce the uncertainty a buyer faces in several ways. First, the remaining contamination – its location, how it's fixed in soil or groundwater, and amount, – is

usually described in some detail, allowing the prospective buyer to evaluate potential impacts on a project. Second, depending on the notice provisions, regulators may only become involved in a project if certain events (e.g. excavation of contaminated soils) occur, thus allowing a buyer to more or less control whether there will be additional remediation costs incurred. Third, the covenant can clarify that the seller/grantor will be responsible for any costs that are incurred relative to remaining contamination.

BIOGRAPHIES

Linda M. Bullen is a shareholder in Lionel Sawyer & Collins, and her practice includes environmental law. Ms. Bullen first developed an environmental law practice with the U.S. Environmental Protection Agency as Assistant Regional Counsel, Region V, Chicago from 1986 to 1988 and as a litigation partner in the Chicago-based international law firm of McDermott, Will & Emery from 1988 to 1994. Ms. Bullen was the Assistant Attorney General in Minnesota from 1994 to 1997, where she prosecuted environmental crimes and counseled the Minnesota Department of Natural Resources and the Minnesota Department of Transportation. Ms. Bullen advises the firm's clients on complex state and federal environmental matters, specializing in solid and hazardous waste, water, air, mining, and renewable energy issues.

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