

SENATE BILL REPORT

SB 5421

As Passed Senate, March 10, 2007

Title: An act relating to environmental covenants.

Brief Description: Concerning environmental covenants.

Sponsors: Senators Fraser, Morton, Poulsen, Swecker, Marr, Regala, Rockefeller, Pridemore, Oemig, Honeyford, Rasmussen, Shin, Kohl-Welles and Kline.

Brief History:

Committee Activity: Water, Energy & Telecommunications: 1/31/07, 2/13/07 [DP-WM].
Ways & Means: 2/21/07, 2/27/07 [DP].
Passed Senate: 3/10/07, 46-1.

SENATE COMMITTEE ON WATER, ENERGY & TELECOMMUNICATIONS

Majority Report: Do pass and be referred to Committee on Ways & Means.

Signed by Senators Poulsen, Chair; Rockefeller, Vice Chair; Honeyford, Ranking Minority Member; Delvin, Fraser, Marr, Morton, Oemig, Pridemore and Regala.

Staff: Sam Thompson (786-7413)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass.

Signed by Senators Prentice, Chair; Fraser, Vice Chair, Capital Budget Chair; Pridemore, Vice Chair, Operating Budget; Zarelli, Ranking Minority Member; Brandland, Fairley, Hatfield, Hewitt, Hobbs, Honeyford, Keiser, Kohl-Welles, Oemig, Parlette, Rasmussen, Regala, Roach, Rockefeller, Schoesler and Tom.

Staff: Kirstan Arestad (786-7708)

Background: Following cleanup operations, federal and state toxic cleanup agencies sometimes impose "institutional controls" upon contaminated land to protect people and the environment from exposure to residual contamination. One type of institutional control, an "environmental covenant," is a legally-enforceable land use restriction that is intended to "run with the land"— i.e., apply to the original covenanting landowner and all succeeding landowners. The Department of Ecology (DOE) has imposed environmental covenants in its cleanups of contaminated land pursuant to the state Model Toxics Control Act.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Concern has been raised that certain common law restrictions may invalidate environmental covenants when contaminated land is sold. Other concerns have been raised about enforcement of environmental covenants.

In 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL), an advisory body made up of legal experts in various fields, proposed a uniform state law, the Uniform Environmental Covenants Act (UECA), to address these concerns and clarify current law. As of January 2007, 15 states have enacted UECA.

Summary of Bill: The Uniform Environmental Covenants Act (UECA) is enacted, with modifications and adaptations to Washington law. UECA establishes requirements for a land use restriction or control, an "environmental covenant," to control future use of contaminated land.

Under UECA, environmental covenants:

- are defined as restrictions under environmental response projects that impose activity and use limitations;
- must include property descriptions, use limitations, and parties with enforcement authority, and be recorded in county recording offices;
- must be signed by the state DOE or federal Environmental Protection Agency (EPA), whichever has jurisdiction;
- will "run with the land" and remain valid, protected from possible invalidation under common law doctrines;
- may not allow uses prohibited by zoning or other land use laws—they may, however, impose more stringent restraints;
- are perpetual in duration unless otherwise stated in the covenant, or unless terminated or modified pursuant to specified procedures;
- may be enforced by DOE or EPA (whichever has jurisdiction), parties to the covenant and other specified parties;
- will be individually identified in an on-line covenant registry maintained by DOE, with information about where to find complete texts in county recording offices.

DOE will periodically review and, if necessary, enforce the environmental covenants it imposes as part of its cleanups of contaminated land under the state Model Toxics Control Act.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony (Water, Energy & Telecommunications): PRO: This bill ensures that environmental covenants remain legally valid over the long term. It also recognizes the need for DOE to monitor and enforce the controls it has imposed in environmental covenants. This is essential because the controls fail over time. This bill is a carefully crafted compromise involving diverse stakeholders. NCCUSL promulgated UECA following active participation of a varied group of land use experts. Uniform acts proposed by

NCCUSL keep the state role in the federal system "active," guarding against federal government "creep" into state authority.

OTHER: DOE, which has imposed approximately 300 environmental covenants as a "last resort" in sites that cannot be completely cleaned up, may need extra funding to take on the duties mandated in this bill, some of which are already required in administrative rules. Tracking of controls imposed in environmental covenants should be made a priority and adequately funded.

Persons Testifying (Water, Energy & Telecommunications): PRO: Dennis Cooper, Uniform Law Commission; Bruce Wishart, People for Puget Sound.

OTHER: Jim Pendowski, Department of Ecology; Eric D. Johnson, Washington Public Ports Association.

Staff Summary of Public Testimony (Ways & Means): PRO: Environmental covenants are agreements put into place after land has been cleaned up. I learned that institutional controls are neither institutional or controlled. The fiscal impact covers cost to record covenants and to conduct periodic review of facilities where environmental covenants have been required.

Persons Testifying (Ways & Means): PRO: Senator Fraser, prime sponsor.