

# SENATE BILL REPORT

## SB 6517

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As of September 8, 2006

**Title:** An act relating to the uniform environmental covenants act.

**Brief Description:** Creating the uniform environmental covenants act.

**Sponsors:** Senators Fraser, Poulsen, Pridemore, Rockefeller, Regala and Kline.

**Brief History:**

**Committee Activity:** Water, Energy & Environment: 1/18/06.

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### SENATE COMMITTEE ON WATER, ENERGY & ENVIRONMENT

**Staff:** Sam Thompson (786-7413)

**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., to apply to the original covenanting landowner and all succeeding landowners.

Concern has been raised that certain common law restrictions may invalidate environmental covenants when contaminated land is sold. Other concerns have been raised about the adequacy of current legal mechanisms to enforce 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.

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

"Environmental covenant" is defined as a servitude arising under an environmental response project that imposes activity and use limitations.

An environmental covenant:

- must include a description of the property, describe activity and use limitations, and identify each party entitled to enforce its provisions;
- must be signed by the state, local, or federal regulatory agency with jurisdiction over the environmental response project;
- will run with the land and be valid even though it may have specific characteristics that would invalidate it under traditional common law doctrines;

- does not allow land uses prohibited by zoning or other land use laws, but may impose more stringent restraints; and
- must be properly recorded in every county in which any portion of the affected land is located.

The duration of an environmental covenant is perpetual, unless otherwise stated, terminated, or modified pursuant to specified procedures.

The state, local, or federal regulatory agency with jurisdiction, parties to the covenant, and other specified parties are authorized to enforce environmental covenants to obtain specific performance.

The state Department of Ecology (DOE) will establish and maintain a statewide registry of environmental covenants.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill takes effect on July 1, 2006.

**Testimony For:** UECA, which was developed in a lengthy collaborative process involving balancing of interests, is broadly supported by both business and environmental advocates. NCCUSL's objective is enactment of UECA in all US jurisdictions – providing greater certainty nationwide regarding creation, enforcement, amendment, and extinguishment of environmental covenants. The goal is to avoid uncertainty and litigation. UECA, which should be adopted with only minimal changes, is intended to be judicially construed to effect uniformity in application. The provision calling for uniformity in application and construction – which was deleted in this bill – should be reinstated.

DOE supports this legislation, with proposed amendments: (1) authorizing only public agencies to hold an environmental covenant; (2) deleting a provision allowing covenants to be terminated in eminent domain proceedings; (3) simplifying the process for modifying or terminating covenants; (4) making DOE's issuance of an order to enforce a covenant optional, allowing the agency to instead go directly to court for enforcement; and (5) keeping local government property record offices as the primary location for covenants to be recorded, rather than DOE offices.

Environmental groups support the expanded enforcement provisions added to UECA in this legislation. These provisions, which grant enforcement authority to abutting property owners and owners of property affected by a hazardous substance release addressed in a covenant, strengthen the ability of affected local citizens to enforce environmental covenants.

**Testimony Against:** None.

**Testimony Other:** Environmentalists are concerned about cleanups using institutional controls, which can be too "quick and dirty"; a more permanent solution is preferred. Environmentalists are also concerned about potential conflicts with Washington's Model

Toxics Control Act (MTCA) and potential termination of covenants in eminent domain proceedings.

Some businesses generally support the bill but are concerned about the expanded enforcement provisions, which could open the door to third party lawsuits embroiling property owners in expensive litigation over minor or even frivolously alleged violations. Without these provisions – which should be deleted – UECA already grants considerable enforcement rights to parties to the covenants and other parties with well-defined interests in covenant enforcement. The expanded enforcement provisions could have unintended consequences and cause confusion.

**Who Testified:** PRO: Judge Marlin Appelwick, National Conference of Commissioners on Uniform State Laws; Pete Kmet, Department of Ecology.

CON: None.

OTHER: Chris McCabe, Association of Washington Business; Eric D. Johnson, Washington Public Ports Association; Bruce Wishart, People for Puget Sound; Mo McBroom, Washington Environmental Council.