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## Judiciary Committee

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### SB 5421

**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 Summary of Bill

- Adopts the Uniform Environmental Covenants Act, with some adaptations for Washington law.
- Provides that an environmental covenant imposed on contaminated property is perpetual unless it states otherwise and that it will not be invalidated over time by common law doctrines.
- Allows enforcement of an environmental covenant by the state or federal agency with jurisdiction, by the parties to the covenant, or by persons with legal interests in the land.
- Requires the Department of Ecology to maintain an on-line registry of environmental covenants and to review and enforce environmental covenants.

**Hearing Date:** 3/27/07

**Staff:** Bill Perry (786-7123).

#### Background:

Under various state and federal laws, land that has been contaminated by hazardous substances may be subject to cleanup. In some instances, complete remediation of the contamination may be impossible or economically unfeasible. However, the hazard created by the remaining contamination may extend for many years into the future.

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In such cases, "institutional controls" may be imposed to prevent public exposure to remaining pollutants. Under the Model Toxics Control Act, the Department of Ecology (DOE) is responsible for enforcing "permanent and effective institutional controls" to protect human health and the environment. These controls may be physical barriers such as fences, containment facilities, or caps. The controls may also consist of legal restrictions on land. For example, the DOE may impose legal restrictions in the form of environmental covenants on property subject to cleanup under the Model Toxics Control Act. These covenants may prohibit or restrict activities on the land or uses of the land and may purport to bind all current and future owners.

For various reasons, the validity or effectiveness of these institutional controls may diminish over time.

Deterioration of physical barriers, changes in ownership, death or departure of involved individuals, or the restructuring of government agencies may all contribute to the loss of effective control of contaminated land.

With respect to environmental covenants, certain common law doctrines may jeopardize the validity of what purport to be perpetual restrictions. Common law doctrines such as the rule against perpetuities and requirements for privity or appurtenance have been used to defeat covenants in some jurisdictions.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) officially proposed the Uniform Environmental Covenants Act (UECA) in 2003. Since then, at least 15 states have adopted it.

### **Summary of Bill:**

The UECA is adopted, with some modifications.

The act provides the for the perpetual legal survival of environmental covenants. It also provides a system for maintaining permanent public records of covenants.

An environmental covenant is a restriction or obligation that imposes activity or use limitations on land that is the subject of an environmental remediation.

The act applies to environmental remediations undertaken by either the DOE or the federal Environmental Protection Agency (EPA). State laws covered by the act include:

- the State Environmental Policy Act;
- the law on contaminated properties;
- the Solid Waste Management Act;
- the law on nuclear energy and radiation;
- the Hazardous Waste Management Act;
- the Model Toxics Control Act;
- the law on water pollution control; and
- the Pollution Disclosure Act.

An environmental covenant must meet certain formal requirements, including providing a legal description of the property affected, and identifying the parties involved and the nature of the limitations imposed by the covenant. It must be signed by the agency with jurisdiction, all grantees of the covenant, and the property owner. It must also identify the remediation action

with which it is associated. The covenant must be recorded in every county in which any portion of the affected property lies.

An environmental covenant may not allow uses of land otherwise prohibited by zoning regulations, but may restrict uses that are otherwise allowed. Except as provided in the covenant, a covenant does not affect persons' rights or obligations under other laws. An interest in property that has priority under other law is not affected by a subsequent covenant, unless the person with the interest agrees to subordination of the interest.

An environmental covenant "runs with the land," that is, it continues in effect regardless of changes in ownership of the land. A covenant is valid and enforceable even if it is not of a character traditionally recognized by the common law. A covenant is perpetual, unless by its own terms it is specifically limited by time or the occurrence of some event. However, a covenant may be terminated or modified by consent of the agency, the current land owner, the holder of the covenant, and all signers of the covenant. A covenant may also be terminated by court order upon a finding that termination will not adversely affect human health or the environment, or upon determination by the DOE or the EPA that the benefits of the covenant can no longer be realized. A covenant may also be terminated by the foreclosure of an interest with priority over the covenant, or by eminent domain proceedings.

A violation of an environmental covenant may be enjoined through a civil action brought by:

- a party to the covenant;
- the DOE or the EPA;
- a person granted enforcement power by the covenant;
- a person whose interest in the property or whose collateral or liability may be affected by the violation; or
- a local government in which the property is located.

The DOE is required to establish and maintain a registry of environmental covenants. The registry is a public record, but must allow for electronic access without a public records request. The registry is to identify covenants, including the county where the covenant is recorded and the recording number.

The DOE is required to review each covenant at least once every five years. Based on its reviews, the DOE is to take all necessary actions to ensure enforcement of covenants. A review must consist of at least the following:

- determination of whether the covenant was properly recorded;
- physical inspection of the property; and
- determination of the effectiveness of the covenant.

Specific provisions are made for covenants entered into before July 1, 2007. The DOE is required to enter all such covenants into the registry and if a covenant is more than five years old, do an initial review. A schedule is established that requires the DOE to complete all review of such covenants by June 30, 2010.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.