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Bill Analysis
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Reps. Seitz, McGregor

BILL SUMMARY

ENVIRONMENTAL COVENANTS

- Establishes requirements for an environmental covenant, which is a servitude running with the land and arising under an environmental response project that imposes activity and use limitations with respect to real property.
- Defines an environmental response project as a plan or work performed for environmental remediation of real property or to protect ecological features associated with real property and conducted in accordance with certain federal or state programs.
- Provides that any state or federal agency that determines or approves an environmental response project pursuant to which an environmental covenant was created or any person that owns an interest in the real property that is subject to the covenant may be a holder of an environmental covenant and specifies that a holder's interest is an interest in real property.
- Requires an environmental covenant to contain specified information, including descriptions of the real property involved and the activity and use limitations, names or identities of every holder, requirements for certain notices, rights of access to the property, required signatures, and an administrative record for the environmental response project and permits additional information, restrictions, and requirements to be included in the covenant.
- Lists the persons that must be provided a copy of the covenant by the applicable agency.

- Specifies that an agency is bound by any obligation that it expressly assumes in an environmental covenant and that any other person that signs the covenant is bound by the obligation that the person assumes in the covenant.
- Specifies that an otherwise effective environmental covenant is valid and enforceable even if any of specified limitations on enforcement of interests applies.
- Provides that an interest in real property at the time an environmental covenant is created or amended and that has priority under other law is not affected by the covenant unless the owner of the interest agrees to subordinate that interest to the covenant.
- Generally requires an environmental covenant and any amendment or termination of the covenant to be filed in the office of the county recorder in each county in which the real property is located and recorded in the same manner as a deed to the property.
- Provides that an environmental covenant is perpetual, unless it is limited by its terms to a specific duration or is terminated by its terms upon a specific occurrence, is terminated by consent, by court action, by foreclosure of an interest that has priority over the covenant, or is terminated or modified in an eminent domain proceeding if all of certain conditions exist.
- Generally does not permit the extinguishment, limitation, or impairment of an environmental covenant through the issuance of a tax deed, foreclosure of a tax lien, application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence or a similar doctrine, or application of the Marketable Title Act.
- Permits an environmental covenant to be amended or terminated by consent only if the amendment or termination is signed by all persons listed in the bill and generally provides that the assignment of a covenant to a new holder is an amendment of the covenant.
- Authorizes any of specified persons to seek injunctive or other equitable relief for violation of an environmental covenant.

- Provides that the environmental covenant provisions generally modify, limit, or supersede the Electronic Signatures in Global and National Commerce Act but do not modify, limit, or supercede certain provisions of that act.

SOLID AND HAZARDOUS WASTE LAW

- Modifies certain provisions in the Solid and Hazardous Waste Law in the following manners:
 - (1) Provides that when necessary to protect the public health or safety, the agreement between the Director of Environmental Protection and the owner of the land or facility involved that specifies the cleanup measures to be performed may require the owner to enter into an "environmental covenant" with the Director, instead requiring the owner to execute a "restrictive covenant" to run with the land.
 - (2) Requires the Director, prior to selling a cleaned-up facility and when necessary to protect public health or safety, to enter into an environmental covenant, instead of requiring the Director to execute a restrictive covenant to run with the land.
 - (3) Provides that when necessary to protect public health or safety, a contract entered into by the Director and a municipal corporation, county, or township that owns the facility involved or with an owner of the facility other than a political subdivision to provide funding for a portion of the costs of closing the facility or abating pollution may require that political subdivision or other owner to enter into an environmental covenant with the Director, instead of requiring the execution of a restrictive covenant.
 - (4) Specifically requires any easement executed or granted under the Solid and Hazardous Waste Law and any environmental covenant entered into under the bill to be recorded in the county recorder's record of deeds.
 - (5) Expands the powers of the Environmental Protection Agency to include entering into environmental covenants under the bill and granting or accepting easements or selling property pursuant to

the applicable provisions of the Solid and Hazardous Waste Law.

VOLUNTARY ACTION PROGRAM LAW

- Modifies the rule-making authority of the Director of Environmental Protection regarding elimination or mitigation of exposure to hazardous substances or petroleum or no further action letters subject to audit priorities to include references to "activity and use limitations" as defined in the bill.
- Modifies the information submitted to a certified professional for the purpose of obtaining a no further action letter by providing that if the remedy involved relies on activity and use limitations to achieve applicable standards, the information must include a demonstration that an environmental covenant created in accordance with the bill has been recorded with the county recorder or entered in the appropriate register for registered land.

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VOLUNTARY ACTION PROGRAM LAW

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CONTENT AND OPERATION

ENVIRONMENTAL COVENANTS

The bill establishes requirements for an environmental covenant, which the bill defines as a servitude running with the land and arising under an environmental response project that imposes activity and use limitations with respect to real property.

Contents of environmental covenant

Required contents

The bill requires an "environmental covenant" to contain all of the following (R.C. 5301.82(A)) (see "Definitions," below, of terms that are in quotation marks):

- (1) A statement that the instrument is an environmental covenant executed pursuant to the bill's provisions;
- (2) A legally sufficient description of the real property that is subject to the covenant (hereafter "subject property");
- (3) A description of the "activity and use limitations" on the real property;
- (4) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in the use of, applications for building permits for, or proposals for any site work affecting contamination on, the subject property;



(5) The name or identity of every "holder";

(6) Rights of access to the property granted in connection with the covenant's implementation or enforcement;

(7) The signatures of the applicable "agency," every holder, and, unless waived by the agency, every owner of the fee simple of the real property that is subject to the environmental covenant;

(8) An identification of the name and location of any administrative "record" for the "environmental response project" reflected in the environmental covenant.

Permissive contents of environmental covenant

In addition to the required information as described above, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed the covenant, including any of the following (R.C. 5301.82(B)):

(1) Requirements for periodic reporting describing compliance with the covenant;

(2) A brief narrative description of contamination on the property and its remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(3) Limitations on amendment or termination of the covenant in addition to those established in the bill as described below in **Duration of environmental covenant**" and **Amendment or termination of covenant**";

(4) Rights of the holder in addition to the right to enforce the covenant as described in **Remedies for violation of covenant**," below.

Conditions for agency approval

The bill provides that in addition to other conditions for an agency's approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the subject real property to sign the covenant (R.C. 5301.82(C)).

Recipients of copy of environmental covenant

The bill requires a copy of an environmental covenant to be provided to all of the following in a manner required by the applicable agency: each person that

signed the covenant, holds a recorded interest in the subject real property, or is in possession of the subject real property, each unit of local government in which the subject real property is located, and any other person that the agency requires.

The bill provides that validity of an environmental covenant is not affected by failure to provide a copy of the covenant as required under the preceding paragraph. (R.C. 5301.83.)

Assumption of obligations

The bill specifies that an agency is bound by any obligation that it *expressly* assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs a covenant is bound by the obligations that the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections that are granted or imposed under law other than the bill's provisions, except as provided in the covenant. (R.C. 5301.84.)

Nature and enforceability of environmental covenant

An environmental covenant that complies with the bill's provisions runs with the land. An environmental covenant that is otherwise effective is valid and enforceable *even if* any of the following limitations on enforcement of interests applies: it is not appurtenant to an interest in real property; it can be or has been assigned to a person other than the original holder; it is not of a character that has been recognized traditionally at common law; it imposes a negative burden; it imposes an affirmative obligation on a person having an interest in the real property or on the holder; the benefit or burden of the covenant does not touch or concern real property; there is no privity of estate or contract; the holder dies, ceases to exist, resigns, or is replaced; or the owner of an interest that is subject to the covenant and the holder are the same person. (R.C. 5301.85(A) and (B).)

The bill provides that an instrument that creates restrictions or obligations with respect to real property that would qualify as *activity and use limitations* except for the fact that the instrument was recorded *before* the bill's effective date is not invalid or unenforceable because of any of the limitations on enforcement of interests described in the preceding paragraph or because it was identified as an easement, servitude, deed restriction, or other interest. The bill's provisions do not apply in any other respect to such an instrument. Those provisions do not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the laws of Ohio. (R.C. 5301.85(C) and (D).)

Effect on interests on property; effect on other uses of property

With respect to interests in real property in existence at the time that an environmental covenant is created or amended, all of the following apply (R.C. 5301.86):

(1) An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest agrees to subordinate that interest to the covenant.

(2) The bill's provisions do not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(3) A subordination agreement may be contained in an environmental covenant or in a separate record. If the environmental covenant covers commonly owned property in a "common interest community" (see "Definitions," below), the record may be signed by any person who is authorized by the governing board of the owners' association of the common interest community.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

The bill further provides that its provisions do not authorize a use of real property that is otherwise prohibited by zoning, by law other than the bill's provisions regulating use of real property, or by a recorded instrument that has priority over an environmental covenant. An environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or by law other than the bill's provisions. (R.C. 5301.87.)

Recording of covenant

Generally, an environmental covenant and any amendment or termination of the covenant must be filed in the office of the county recorder of each county in which the real property that is subject to the covenant is located and must be recorded in the same manner as a deed to the property. For purposes of indexing, a holder is treated as a grantee. Pursuant to the Land Registration Law (R.C. Chapter 5309.), an environmental covenant and any amendment or termination of the covenant in connection with *registered land* must be entered as a memorial on the page of the register where the owner's title is registered. (R.C. 5301.88(A) and (B).)

Except as described below in "*Nonextinguishment of covenant*," an environmental covenant is subject to the laws of Ohio governing recording and priority of interest in real property (R.C. 5301.88(C)).

Duration of environmental covenant

The bill provides that an environmental covenant is perpetual *unless* any of the following applies: (1) the covenant is limited by its terms to a specific duration or is terminated by its terms by the occurrence of a specific event, (2) the covenant is terminated by consent as described below in "*Amendment or termination of covenant*," (3) the covenant is terminated as described in "*Court action*," below, (4) the covenant is terminated by foreclosure of an interest that has priority over it, or (5) the covenant is terminated or modified in an eminent domain proceeding, but only if *all* of the following apply: (a) the agency that signed the covenant is a party to the proceeding, (b) all persons identified as described in the first and second paragraphs in "*Amendment or termination of covenant*," below, are given notice of the pendency of the proceeding, and (c) the court determines, after a hearing, that the termination or modification will not adversely affect human health or safety or the environment. (R.C. 5301.89(A).)

Court action

If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified as described in the first and second paragraphs in "*Amendment or termination of covenant*," below, have been given notice, may terminate the covenant or reduce its burden on the real property that is subject to the covenant (R.C. 5301.89(B)).

Nonextinguishment of covenant

Except as otherwise described above in "*Duration of environmental covenant*" and "*Court action*" regarding the termination or modification of a covenant, an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence or a similar doctrine. An environmental covenant may not be extinguished, limited, or impaired by application of the Marketable Title Act (R.C. 5301.47 to 5301.56). (R.C. 5301.89(C) and (D).)

Amendment or termination of covenant

The bill provides that an environmental covenant may be amended or terminated by *consent* only if the amendment or termination is signed by *all* of the

following: the applicable agency; unless waived by that agency, the current owner of the fee simple of the subject real property; each person that originally signed the covenant unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and each holder except as otherwise provided in the second clause, above (R.C. 5301.90(A)).

If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents in writing to the amendment or has waived in a signed record the right to consent to amendments (R.C. 5301.90(B)).

Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment of the covenant. Except as otherwise provided in an environmental covenant, a holder may not assign its interest without consent of the other parties to the covenant, and a holder may be removed and replaced by agreement of the other parties specified in the first paragraph, above. A court of competent jurisdiction may fill a vacancy in the position of holder. (R.C. 5301.90(C), (D), and (E).)

Remedies for violation of covenant

Under the bill, a civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by any of the following: a party to the covenant, the Environmental Protection Agency (EPA), the applicable agency if it is other than the EPA, any person to whom the covenant expressly grants the authority to maintain such an action, a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant, or a unit of local government in which the real property that is subject to the covenant is located (R.C. 5301.91(A)).

The bill's provisions do not limit the regulatory authority of the applicable agency or the EPA if it is not the applicable agency under any law other than those provisions with respect to an environmental response project. A person is not responsible for or subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant. (R.C. 5301.91(B) and (C).)

Effect on federal law

The bill provides that its provisions modify, limit, or supersede the "Electronic Signatures in Global and National Commerce Act," 114 Stat. 464 (2000), 15 U.S.C. 7001 et seq., as amended, except that they do not modify, limit,

or supersede section 101 of that Act, 15 U.S.C. 7001(a), as amended,¹ or authorize electronic delivery of any of the notices described in section 103 of that Act, 15 U.S.C. 7003(b), as amended² (R.C. 5301.92).

Definitions

The bill defines the following terms as used in its provisions governing environmental covenants (R.C. 5301.80):

"Activity and use limitations" means restrictions or obligations created under those provisions with respect to real property.

"Agency" means the EPA or any other state or federal agency that determines or approves the environmental response project pursuant to which an environmental covenant is created.

"Common interest community" means a condominium, a cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums or to pay for maintenance or improvement of other real property described in a recorded covenant that creates the common interest community.

"Environmental covenant" or "covenant" means a servitude arising under an environmental response project that imposes activity and use limitations and that meets the requirements described above in "Contents of environmental covenant."

¹ 15 U.S.C. 7001(a) provides that notwithstanding any statute, regulation, or other rule of law, with respect to any transaction in or affecting interstate or foreign commerce, a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

² These notices are: (1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings, (2) any notice of the cancellation or termination of utility services (including water, heat, and power); default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or recall of a product, or material failure of a product, that risks endangering health or safety, or (3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. (15 U.S.C. 7003(b).)

"Environmental response project" means a plan or work performed for environmental remediation of real property or to protect ecological features associated with real property and conducted in accordance with one of the following: under a federal or state program governing environmental remediation of real property; pursuant to mitigation requirements associated with the 401 water quality certification program or the isolated wetland program as required by the Water Pollution Control Law (R.C. Chapter 6111.); or pursuant to a grant commitment or loan agreement entered into pursuant to R.C. 6111.036 (Water Pollution Control Loan Fund) or R.C. 6111.037 (Nonpoint Source Pollution Management Fund).

"Holder" means an agency or person that may be a holder of an environmental covenant as described in the following paragraph.

Any person, including a person that owns an interest in the real property that is the subject of an environmental covenant, may be a holder. An environmental covenant may identify more than one holder. The interest of a holder is an interest in real property. However, a right of an agency under the bill or under an environmental covenant, other than a right as a holder, is not an interest in real property. (R.C. 5301.81(A).)

"Person" includes the state, a political subdivision, another state or local entity, the United States and any agency or instrumentality of it, and any legal entity defined as a person under R.C. 1.59(C).³

When used as a noun, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

SOLID AND HAZARDOUS WASTE LAW

The bill modifies certain provisions of the Solid and Hazardous Waste Law in the following manners.

Agreement with land or facility owner preceding clean up

Under the continuing Solid and Hazardous Waste Law, before beginning to clean up any facility, the Director of Environmental Protection must endeavor to enter into an agreement with the owner of the land on which the facility is located, or with the owner of the facility, specifying the measures to be performed and authorizing the Director, employees of the agency, or contractors retained by the Director to enter upon the land and perform the specified measures. The

³ "Person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

agreement may require the owner to execute an easement in which the Director, an authorized employee of the agency, or a contractor employed by the agency in accordance with the established bidding procedure may enter upon the facility to sample, repair, or reconstruct air and water quality monitoring equipment constructed under the agreement.

Existing law provides that when necessary to protect the public health or safety, the agreement may require the owner *to execute a restrictive covenant to run with the land that specifies the uses that may be made of the facility after work performed is completed, specifies the period for which the restrictive covenant applies, and provides terms whereby modifications to the restrictive covenant, or other land uses, may be initiated or proposed to the Director by the owner or by subsequent owners of the facility. All easements or covenants required under these provisions must be recorded in the office of the county recorder of the county in which the facility is located, and the Director must pay the recording fees.* (R.C. 3734.22.)

Instead of the above provision in existing law, the bill provides that when necessary to protect the public health or safety, the agreement may require the owner to enter into an environmental covenant with the Director in accordance with the bill's provisions governing environmental covenants (R.C. 3734.22).

Sale of cleaned-up facility

Continuing law provides that if the Director determines that any cleaned up facility is suitable, because of its condition as cleaned up, for restricted or unrestricted use, the Director may, with the approval of the Attorney General, sell the facility if the sale is advantageous to the state. Under existing law, prior to selling the cleaned-up facility, the Director must, when necessary to protect public health or safety, *execute a restrictive covenant to run with the land that specifies the uses that may be made of the facility, specifies the period for which the restrictive covenant applies, and provides terms whereby modifications to the restrictive covenant, or other land uses, may be initiated or proposed to the Director by subsequent owners of the facility.* (R.C. 3734.24.)

The bill replaces the above provision in existing law with a requirement that prior to selling the cleaned-up facility, the Director must, when necessary to protect public health or safety, enter into an environmental covenant in accordance with the bill (R.C. 3734.24).

Grants to political subdivisions to pay portion of costs of closing facility or abating pollution

Continuing law authorizes the Director of Environmental Protection to make grants of moneys for payment of portion of the reasonable and necessary expenses incurred by a municipal corporation, county, or township for the proper closure of or abatement of air or water pollution or soil contamination from a facility in which significant quantities of hazardous waste were disposed of and that the political subdivision owns and once operated. In making a grant, the Director must enter into a contract with the municipal corporation, county, or township that owns the facility to ensure that the moneys granted are used for the purposes of cleanup under the law and that measures performed are properly done. The contract must require the municipal corporation, county, or township to execute an easement in which the director, an authorized employee of the agency, or a contractor employed by the director may enter upon the facility to sample, repair, or reconstruct air and water quality monitoring equipment constructed under the contract.

Existing law provides that when necessary to protect public health or safety, the contract may require the municipal corporation, county, or township *to execute a restrictive covenant to run with the land that specifies the uses that may be made of the facility after work performed under the contract is completed, specifies the period for which the restrictive covenant applies, and provides terms whereby modifications to the restrictive covenant, or other land uses, may be initiated or proposed to the Director by the political subdivision or by subsequent owners of the facility. Any easements or covenants required under these provisions must be recorded in the office of the county recorder of the county in which the facility is located, and the recipient of the grant must pay the recording fees.* (R.C. 3734.25(A) and (C).)

The bill repeals the above provision in existing law and instead provides that when necessary to protect public health or safety, the contract may require the municipal corporation, county, or township to enter into an environmental covenant with the Director in accordance with the bill's provisions governing environmental covenants (R.C. 3734.25(C)).

Grants to facility owners

Continuing law authorizes the Director of Environmental Protection to make grants of moneys to the owner, other than a political subdivision, of a solid waste facility in which significant quantities of hazardous waste were disposed of or a hazardous waste facility for portion of the cost of the reasonable and necessary expenses incurred for the proper closure of or abatement or prevention of air or water pollution or soil contamination from the facility and for developing

the land on which it was located for use in industry, commerce, distribution, or research. In making a grant, the Director must enter into a contract for funding with each applicant-awardee to ensure that the moneys granted are used for the purpose of the cleanup law and that the measures performed are properly performed. The contract must require the owner to execute an easement in which the Director, an authorized employee of the agency, or a contractor employed by the agency may enter upon the facility to sample, repair, or reconstruct air and water quality monitoring equipment constructed under the contract.

Existing law provides that when necessary to protect the public health or safety, the contract may require the owner to *execute a restrictive covenant to run with the land that specifies the uses that may be made of the facility after work performed under the grant is completed, specifies the period for which the restrictive covenant applies, and provides terms whereby modifications to the restrictive covenant, or other land uses, may be initiated or proposed to the Director by the owner or by subsequent owners of the facility. All easements or covenants required under these provisions must be recorded in the office of the county recorder of the county in which the facility is located, and the owner must pay the recording fees.* (R.C. 3734.26(A), (C), and (D).)

The bill eliminates the above provision in existing law and instead provides that when necessary to protect the public health or safety, the contract may require the owner to enter into an environmental covenant with the Director in accordance with the bill (R.C. 3734.26(D)).

Powers of EPA

The bill expands the powers of the EPA to include entering into environmental covenants in accordance with the bill, and granting or accepting easements or selling real property pursuant to the above described provisions of the Solid and Hazardous Waste Law, as applicable (R.C. 3745.01(G)).

The bill also provides that continuing law, which prescribes the powers of the Department of Administrative Services, must not interfere with the power of the Director of Environmental Protection to enter into environmental covenants, to grant and accept easements, or to sell property as described in the preceding paragraph (R.C. 125.01(B)(6)).

County recorder's record of deeds

Under current law, *any restrictions on the use of property identified pursuant to the provision described in the second paragraph in **'Seeking of no further action letter,'** below, pertaining to the changes in the Voluntary Action*

Program Law must be recorded in the record of deeds of the county recorder (R.C. 317.08(A)(1)).

Instead of the above provision, the bill provides that *any easement executed or granted under the Solid and Hazardous Waste Law provisions in the bill (R.C. 3734.22, 3734.24, 3734.25, or 3734.26) and any environmental covenant entered into in accordance with the bill's provisions governing environmental covenants* must be recorded in the record of deeds (R.C. 317.08(A)(1)).

VOLUNTARY ACTION PROGRAM LAW

The bill modifies certain aspects of the rule-making authority of the Director of Environmental Protection in the implementation of the Voluntary Action Program Law and the provisions in that Law pertaining to no further action letters and the filing for record of environmental covenants involving property covered by the Voluntary Action Program Law.

Voluntary action program--adoption of rules

Existing law

The Voluntary Action Program Law requires the Director of Environmental Protection to adopt rules to establish procedures for performing property-specific risk assessments that would take into account all of the following: (1) the implementation of treatment, storage, or disposal, or a combination of them, of hazardous substances or petroleum, (2) the existence of institutional controls that eliminate or mitigate exposure to hazardous substances or petroleum through the restriction of access to *hazardous substances or petroleum*, including, without limitation, *deed and water use restrictions*, and (3) the existence of engineering controls that eliminate or mitigate exposure to hazardous substances or petroleum through containment of, control of, or restrictions of access to hazardous substances or petroleum (R.C. 3746.04(B)(2)(a)(i), (ii), and (iii)).

The rules also would include criteria for selecting the no further action letters issued under continuing law⁴ and the scope and procedures for conducting audits of the letters. Those rules, at a minimum, must require the Director to establish priorities for such audits to which any of specified requirements apply pertaining to the letter. One of those requirements is that the letter was for a voluntary action that included as remedial activities engineering controls that contain or control the release of hazardous substances or petroleum at or from a property as authorized under R.C. 3746.05 or *restrictions on the use of the*

⁴ R.C. 3746.11 specifies the duties of a certified professional in connection with the preparation of a no further action letter.

relevant property identified pursuant to the provision described in the second paragraph in "Seeking of no further action letter," below. (R.C. 3746.04(B)(9)(f).)

Operation of the bill

The bill modifies the requirement that the Director of Environmental Protection adopt rules to establish procedures for performing property-specific risk assessments that would take into account, as described in clause (2) in the first paragraph under "Existing law," above, the existence of institutional controls that eliminate or mitigate exposure to hazardous substances or petroleum through the restriction of access to *or use of a property*, including, without limitation, *activity and use limitations, as defined in the bill* (R.C. 3746.04(B)(2)(a)(ii)).

The bill further modifies the requirement that the Director of Environmental Protection adopt rules requiring the Director to establish priorities for audits of no further action letters to which any of specified requirements apply pertaining to the letter, to provide that one of those requirements is that the letter was for a voluntary action that included as remedial activities engineering controls that contain or control the release of hazardous substances or petroleum at or from a property as authorized under R.C. 3746.05 or *activity and use limitations, as defined in the bill, identified in an environmental covenant that was recorded or entered under the provision described in the second paragraph in "Seeking of no further action letter," below.* (R.C. 3746.04(B)(9)(f).)

Seeking of no further action letter

Under continuing law, when the person undertaking a voluntary action determines that the property meets applicable standards, the person may seek a no further action letter from a certified professional. Existing law provides that in order to obtain a no further action letter, a person undertaking a voluntary action must submit to a certified professional specified information, as applicable, including the following: if the remedy relies on *restrictions on the use of the property* to achieve applicable standards, a demonstration that *the use restrictions have been recorded in the office of the county recorder of the county in which the property is located, or have been entered in the appropriate register for registered land in compliance with R.C. 3746.14 (filing and recording of letters, covenants, and restrictions).* (R.C. 3746.10(A) and (C)(3).)

The bill modifies the provision in existing law pertaining to the information to be submitted to a certified professional, as described above, to provide that if the remedy relies on *activity and use limitations, as defined in the bill*, to achieve applicable standards, a demonstration that *an environmental covenant, created in accordance with the bill's provisions*, has been recorded in the office of the county

recorder of the county in which the property is located, or has been entered in the appropriate register for registered land in compliance with R.C. 3746.14. (R.C. 3746.10(C)(3).)

Filing and recording of covenant

Existing law

Under existing law, except as otherwise described in the following paragraph, a no further action letter issued for a property by a certified professional, a covenant not to sue issued for the property that is named in the letter, and any *restrictions on the use of such property identified pursuant to the provision described in the second paragraph in **'Seeking of no further action letter,'** above*, must be filed in the office of the county recorder of the county in which the property is located by the person to whom the covenant not to sue was issued and must be recorded in the same manner as a deed to the property. The no further action letter, covenant not to sue, and *use restrictions*, if any, must run with the property. No person may fail to comply with this provision.

Pursuant to Land Registration Law, a no further action letter, a covenant not to sue, and, if applicable, any operation and maintenance agreement and *use restrictions* prepared, issued, entered into, or identified under the Voluntary Action Program Law and rules adopted under it, in connection with registered land must be entered as a memorial on the page of the register where the title of the owner is registered. (R.C. 3746.14(A) and (B).)

Operation of the bill

The bill modifies existing law by providing that except as otherwise described in the following paragraph, a no further action letter issued for a property by a certified professional, a covenant not to sue issued for the property that is named in the letter, and any *environmental covenant for the property created in accordance with the bill's provisions on environmental covenants* must be filed in the office of the county recorder of the county in which the property is located by the person to whom the covenant not to sue was issued and must be recorded in the same manner as a deed to the property. The no further action letter, covenant not to sue, and *environmental covenant*, if any, must run with the property. No person may fail to comply with this provision.

Pursuant to the Land Registration Law, a no further action letter, a covenant not to sue, and, if applicable, any operation and maintenance agreement and *environmental covenant* prepared, issued, entered into, or identified under the Voluntary Action Program Law and rules adopted under it, *or created under the bill's provisions, as applicable*, in connection with registered land must be entered

as a memorial on the page of the register where the title of the owner is registered.
(R.C. 3746.14(A) and (B).)

HISTORY

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