Aida S. Montano
Bill Rowland
Eric Vendel

Legislative Service Commission

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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 for protection of ecological features associated with real property and conducted in accordance with certain federal or state programs.

- Provides that 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 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

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* *This analysis was prepared before the report of the Senate Energy, Natural Resources and Environment Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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 environmental 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.

- Precludes the bill's provisions from being construed to restrict, affect, or impair any person's statutory or common law rights to enter into or record a restrictive covenant, institutional control, easement, servitude, or other restriction on the use of property that does not satisfy the bill's requirements for the contents of an environmental covenant and does not have the permission, approval, or consent of an agency, political subdivision, regulatory body, or other unit of government.

- 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, or 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 Law.

- Permits an environmental covenant to be amended or terminated by consent only if the amendment or termination is signed by all of the persons listed in the bill, and generally provides that the assignment of an environmental 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 federal Electronic Signatures in Global and National Commerce Act, but do not modify, limit, or supersede certain provisions of that Act.

SOLID, INFECTIOUS, AND HAZARDOUS WASTE LAW

- Modifies certain hazardous waste provisions in the Solid, Infectious, and Hazardous Waste Law as follows:

  (1) Provides that when necessary to protect the public health or safety, the agreement between the Director of Environmental Protection and the owner of land or a facility containing hazardous waste that specifies the clean-up measures to be performed by the Director 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 as in current law;

  (2) Requires the Director, prior to selling a cleaned-up facility that had contained hazardous waste 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 as in current law;

(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 a facility that had contained hazardous waste or with an owner of such a facility other than a political subdivision to provide state funding for a portion of the costs of closing the facility or abating pollution at it 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 as in current law; and

(4) Expands the powers of the Director of Environmental Protection to include entering into environmental covenants under the bill and granting or accepting easements or selling property pursuant to the applicable hazardous waste provisions of the Solid, Infectious, and Hazardous Waste Law.

FIRE MARSHAL LAW

- Authorizes the Fire Marshal to enter into environmental covenants to implement the underground storage tank program and corrective action program for releases from underground petroleum storage tanks.

- Provides that any restrictions on the use of real property for the owner's or operator's achievement of the Fire Marshal's standards for corrective actions for releases of petroleum must be contained in a deed or another instrument signed and acknowledged as a deed as in existing law or an environmental covenant.

- Requires that restrictions on the use of real property for the achievement of applicable standards by a person that is not the owner or operator of an underground storage tank system or by a person undertaking a voluntary action of applicable standards be contained in an environmental covenant.

VOLUNTARY ACTION PROGRAM LAW

- Essentially incorporates the use of environmental covenants into the structure of the Voluntary Action Program Law and, for purposes of that Law, provides that "environmental covenant" and "activity and use

limitations" have the same meanings as in the bill's provisions governing environmental covenants.

- Modifies the rulemaking 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, modifies the types of remedial activities that may be conducted to attain applicable standards, modifies the requirements pertaining to the time frames by which the Director must issue a covenant not to sue, and modifies the Director's recordkeeping duties, to include references to "activity and use limitations" established under an environmental covenant.

- 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 the activity and use limitations have been developed in accordance with the VAP Law and rules and are contained in a proposed environmental covenant that meets the bill's requirements.

- Adds to the general filing for record provision of the VAP Law a requirement that the person to whom a covenant not to sue for a property is issued must file for recording in the office of the county recorder of the county in which the property is located a true and accurate copy of any environmental covenant for the property proposed and executed pursuant to the bill, and specifies that a no further action letter, covenant not to sue, and environmental covenant, if any, run with the property.

MAINTENANCE OF RECORDS BY COUNTY RECORDERS

- Adds environmental covenants and specified property use restrictions that are provided for under the bill to the documents that must be kept by county recorders.

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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 (see "***Definitions***," below, for definitions 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 environmental covenant (hereafter subject real 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 real property;

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

(6) Rights of access to the property granted in connection with the environmental 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 subject real property; and

(8) An identification of the name and location of any administrative "record" for the "environmental response project" pursuant to which the environmental covenant is created (R.C. 5301.82(A)).

Permissive contents

In addition to the required information described above, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed the environmental covenant, including any of the following:

(1) Requirements for periodic reporting describing compliance with the environmental 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 environmental covenant in addition to those established in the bill as described below in "***Duration of environmental covenant***" and "***Amendment or termination of environmental covenant***"; and

(4) Rights of the holder in addition to the right to enforce the environmental covenant as described in "***Remedies for violation of environmental covenant***," below (R.C. 5301.82(B)).

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. Validity of an environmental covenant is not affected by failure to provide a copy of the covenant as required under the bill. (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 an

environmental covenant is bound by the obligations that the person assumes in the environmental covenant, but signing it 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 environmental 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 environmental 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 environmental 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 above 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).)

The bill also specifies that nothing in its provisions governing environmental covenants is to be construed to restrict, affect, or impair the rights of any person under the Revised Code or common law to enter into or record a restrictive covenant, institutional control, easement, servitude, or other restriction on the use of property that does not satisfy the bill's requirements regarding the contents of an environmental covenant and does not have the permission, approval, or consent of an agency, political subdivision, regulatory body, or other unit of government. However, a restrictive covenant, institutional control, easement, servitude, or other restriction on the use of property entered into or recorded without such permission, approval, or consent is not an environmental covenant and is not binding on an agency, political subdivision, regulatory body, or other unit of government. (R.C. 5301.85(E).)

Effect on interests in 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:

(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 environmental 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 common interest community; and

(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 (R.C. 5301.86).

The bill further states 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 environmental 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 subject real property 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 environmental 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 environmental 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 environmental covenant is terminated by consent as described below in "***Amendment or termination of environmental 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 environmental covenant is a party to the proceeding, (b) all persons identified as described in "***Amendment or termination of environmental 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 "***Amendment or termination of environmental covenant***," below, have been given notice, may terminate the covenant or reduce its burden on the real property (R.C. 5301.89(B)).

Nonextinguishment of environmental covenant

Except as otherwise described above in "***Duration of environmental covenant***" and "***Court action***" regarding the termination or modification of an environmental 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 Law (R.C. 5301.47 to 5301.56). (R.C. 5301.89(C) and (D).)

Amendment or termination of environmental covenant

The bill allows an environmental covenant to 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 unless a holder has been removed and replaced by all of the above parties (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 specified above, and a holder may be removed and replaced by agreement of those other parties. 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 environmental 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: (1) a party to the covenant specified in "***Amendment or termination of environmental covenant***," above, that is not otherwise specified in items (2) to (6), below, (2) the Environmental Protection Agency (EPA), (3) the applicable agency if it is other than the EPA, (4) any person to whom the environmental covenant expressly grants the authority to maintain such an action, (5) a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant, or (6) a unit of local government in which the subject real property 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 governing environmental covenants modify, limit, or supersede the federal Electronic Signatures in Global and National Commerce Act, as amended, except that they do not modify, limit, or

supersede section 101 of that Act, as amended,[1] or authorize electronic delivery of any of the notices described in section 103 of that Act, as amended[2] (R.C. 5301.92).

Definitions

The bill defines the following terms as used in its provisions governing environmental covenants:

"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" means a servitude arising under an environmental response project that imposes activity and use limitations and that

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[1] *Section 101 of the Act 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 (15 U.S.C. 7001(a)).*

[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)).*

meets the requirements described above in "***Contents of environmental covenant***."

"Environmental response project" means a plan or work performed for environmental remediation of real property or for protection of ecological features associated with real property and conducted as follows:

(1) Under a federal or state program governing environmental remediation of real property that is subject to agency review or approval, including, but not limited to, property that is subject to any of the following: (a) a corrective action, closure, or post-closure pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, or any regulation adopted under that Act, or the Solid, Infectious, and Hazardous Waste Law or any rule adopted under it, (b) a removal or remedial action pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or any regulation adopted under that Act, or the Solid, Infectious, and Hazardous Waste Law or the Water Pollution Control Law or any rule adopted under those Laws, (c) a no further action letter submitted with a request for a covenant not to sue pursuant to the Voluntary Action Program Law, (d) a no further action letter prepared pursuant to the statute governing the Clean Ohio Council and grants for brownfield cleanup or remediation projects, or (e) a corrective action pursuant to the statutes governing the Fire Marshal's corrective action program for underground storage tanks or any rule adopted under those statutes;

(2) Pursuant to a mitigation requirement associated with the section 401 water quality certification program or the isolated wetland program as required by the Water Pollution Control Law;

(3) Pursuant to a grant commitment or loan agreement entered into pursuant to the statute governing the Water Pollution Control Loan Fund or the statute governing the Nonpoint Source Pollution Management Fund; or

(4) Pursuant to a supplemental environmental project embodied in orders issued by the Director of Environmental Protection pursuant to the Water Pollution Control Law.

"Holder" means a grantee of an environmental covenant as described below. Any person, including a person that owns an interest in the subject real property, may be a holder. An environmental covenant may identify more than one holder. (R.C. 5301.81(A).)

The bill provides that 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(B).)

"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 in current law.[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. (R.C. 5301.80.)

SOLID, INFECTIOUS, AND HAZARDOUS WASTE LAW

The bill modifies several provisions governing hazardous waste in the Solid, Infectious, and Hazardous Waste Law as follows.

Agreement with land or facility owner preceding cleanup

Under the hazardous waste provisions of the Solid, Infectious, and Hazardous Waste Law, before beginning to clean up a facility where hazardous waste is located, 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 EPA, or contractors retained by the Director to enter on the land and perform the specified measures. The agreement may require the owner to execute an easement by which the Director, an authorized employee of the EPA, or a contractor employed by the EPA in accordance with an established bidding procedure may enter on 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 such easements or covenants 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. The bill instead provides that when necessary to protect the public health or safety, the agreement may

[3] *"Person" includes an individual, corporation, business trust, estate, trust, partnership, and association (R.C. 1.59(C), not in the bill).*

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

Current law provides that if the Director determines that any facility that the Director has acquired and cleaned up as discussed above 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. The bill instead requires the Director, prior to selling the cleaned-up facility, when necessary to protect public health or safety, to 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

Current law authorizes the Director to make grants of moneys from the Hazardous Waste Clean-up Fund for payment of up to two-thirds 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 to ensure that the moneys granted are used for the purposes of cleanup under the law and that the measures performed are properly done. The contract must require the municipal corporation, county, or township to execute an easement by which the Director, an authorized employee of the EPA, or a contractor employed by the Director may enter on 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 such easements or covenants 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. The bill 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).

Grants to facility owners

Similarly, current law authorizes the Director to make grants of moneys from the Hazardous Waste Clean-up Fund 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 up to 50% 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 awarded a grant to ensure that the moneys granted are used for the purposes of cleanup under the law and that the measures performed are properly performed. The contract must require the owner to execute an easement by which the Director, an authorized employee of the EPA, or a contractor employed by the EPA may enter on 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 such easements or covenants 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. The bill 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.)

Powers of Director of Environmental Protection

The bill expands the powers of the Director of Environmental Protection to include entering into environmental covenants in accordance with the bill and

granting or accepting easements or selling real property pursuant to the provisions discussed above of the Solid, Infectious, and Hazardous Waste Law, as applicable (R.C. 3745.01(G)).

The bill also provides that current law prescribing the powers of the Department of Administrative Services cannot 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 above (R.C. 123.01(B)(6)).

FIRE MARSHAL LAW

The bill modifies provisions in the Fire Marshal Law governing the implementation of and standards for underground storage tank programs and corrective action programs for releases from underground petroleum storage tanks.

Underground storage tank program and corrective action program for releases from underground petroleum storage tank

Under existing law, the Fire Marshal has responsibility for implementation of the underground storage tank program and corrective action program for releases from underground petroleum storage tanks established by the federal Resource Conservation and Recovery Act of 1976, as amended. To implement the program, the Fire Marshal may adopt, amend, and rescind rules, conduct inspections, require annual registration of underground storage tanks, issue citations and orders to enforce those rules, and perform any other duties that are consistent with those programs. The bill expands the authority of the Fire Marshal to implement those programs by authorizing the Fire Marshal to enter into environmental covenants, in accordance with the bill's provisions governing environmental covenants, that are consistent with those programs. (R.C. 3737.88(A)(1).)

Standards for corrective actions

Existing law requires the Fire Marshal to adopt, and authorizes the Fire Marshal to amend and rescind, rules that the Fire Marshal considers necessary to establish standards for corrective actions for suspected and confirmed releases of petroleum and standards for the recovery of costs incurred for undertaking corrective or enforcement actions with respect to such releases. Any restrictions on the use of real property for the purpose of achieving applicable standards pursuant to those rules must be contained in a deed or in another instrument that is signed and acknowledged by the property owner in the same manner as a deed. The deed or other instrument containing the restrictions must be filed and recorded in the office of the county recorder of the county in which the property is located.

Pursuant to the Land Registration Law, such use restrictions 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. 3737.882(B) and (E).)

The bill modifies existing law by providing that any restrictions on the use of real property for the purpose of the achievement by an owner or operator of applicable standards pursuant to the Fire Marshal's rules must be contained in a deed or in another instrument that is signed and acknowledged by the property owner in the same manner as a deed or an environmental covenant that is entered into in accordance with the bill. The deed, other instrument containing the restrictions, or environmental covenant must be filed and recorded in the office of the county recorder of the county in which the property is located. Pursuant to the Land Registration Law, if the use restrictions or environmental covenant are connected with registered land, the restrictions or environmental covenant must be entered as a memorial on the page of the register where the title of the owner is registered. (R.C. 3737.882(E).)

The bill further provides that any restrictions on the use of real property for the purpose of the achievement by a person that is not a responsible person, that is, the owner or operator of an underground storage tank system, or by a person undertaking a voluntary action of applicable standards pursuant to the Fire Marshal's rules, must be contained in an environmental covenant entered into in accordance with the bill. The environmental covenant must be filed and recorded in the office of the county recorder of the county in which the property is located, and if the environmental covenant is connected with registered land, it must be entered as a memorial on the page of the register where the owner's title is registered. (R.C. 3737.882(F).)

VOLUNTARY ACTION PROGRAM LAW

The bill essentially incorporates the use of environmental covenants into the structure of the Voluntary Action Program (VAP Law). It modifies certain aspects of the rulemaking authority of the Director of Environmental Protection in the implementation of the VAP Law and the provisions in that Law pertaining to the types of remedial activities, no further action letters, issuance of covenants not to sue, and the filing for record and recordkeeping requirements involving property covered by the VAP Law.

Rules

With respect to rulemaking, the bill alters the requirements pertaining to rules governing property-specific risk assessments. Under current law, the rules pertaining to such risk assessments must describe a methodology establishing allowable levels of contamination to remain at a property to ensure protection of

public health and safety and the environment. The methodology must take into account a number of factors, including the existence of institutional controls that eliminate or mitigate exposure to hazardous substances or petroleum through the restriction of access to them. The bill also allows the methodology to take into account the existence of activity and use limitations resulting from an environmental covenant that eliminate or mitigate exposure to hazardous substances or petroleum. (R.C. 3746.04(B)(2)(a)(ii).)

In addition, the bill alters the requirements pertaining to rules governing the selection of no further action letters to be audited under the VAP Law. Under current law, the rules must require the Director of Environmental Protection to establish priorities for auditing no further action letters that meet certain criteria. Those criteria include a requirement that the no further action letter was for a voluntary action that included as remedial activities engineering controls or restrictions on the use of the property to which the no further action letter pertains. The bill instead requires that the no further action letter must have been for a voluntary action that included as remedial activities engineering controls, institutional controls, or activity and use limitations derived from an environmental covenant. (R.C. 3746.04(B)(9)(f).)

Remedial activities

Currently, a remedy or remedial activity conducted under the VAP Law may attain applicable standards established under that Law through the use of institutional controls that restrict the access to or use of a property or through the removal of, treatment of, transportation for treatment or disposal of, disposal of, or use of engineering controls that contain or control the release of hazardous substances or petroleum at or from a property. The bill also allows for the use of activity and use limitations established through an environmental covenant to attain those applicable standards. (R.C. 3746.05.)

Obtaining no further action letters

Current law establishes certain requirements for obtaining a no further action letter, including a requirement that if a remedy relies on restrictions on the use of property to achieve applicable standards, the person seeking the no further action letter must demonstrate that the use restrictions have been properly 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. The bill also requires that any institutional controls also be properly recorded or entered. In addition, the bill specifies that if the person undertaking a voluntary action seeks to obtain a covenant not to sue from the EPA and if the remedy relies on activity and use limitations to achieve applicable standards, the person seeking the no further action letter must demonstrate that the activity and use limitations

have been developed in accordance with the VAP Law and rules adopted under it and are contained in a proposed environmental covenant. (R.C. 3746.10(C)(3).)

Covenants not to sue

Under current law, a person seeking a covenant not to sue must have a certified professional submit the original no further action letter to the Director of Environmental Protection. The bill requires the certified professional also to include any proposed environmental covenant or any proposed operation and maintenance agreement[4] with the no further action letter. (R.C. 3746.11(A).)

Current law also establishes time frames by which the Director must issue a covenant not to sue after receipt of a no further action letter from a certified professional. For property that does not involve the issuance of a consolidated standards permit and where no engineering or institutional controls are used to comply with applicable standards, the Director must issue the covenant not to sue within 30 days. For property that does involve the issuance of a consolidated standards permit or where engineering or institutional controls are used to comply with applicable standards, the Director must issue the covenant not to sue within 90 days. The bill removes the references to engineering and institutional controls and instead refers to remedial activities for which there is a required operation and maintenance agreement or an environmental covenant. (R.C. 3746.13.)

Recording of documents and recordkeeping

Current law requires a no further action letter, a covenant not to sue, and any restrictions on the use of property to be properly filed in the office of the county recorder of the county in which the property that subject to the voluntary action is located or, if the property is registered land, to be entered as a memorial in the proper register. The bill requires that the environmental covenant for a property be recorded or entered instead of any use restrictions. It also states that the no further letter, covenant not to sue, and environmental covenant, if any, run with the property. (R.C. 3746.14.)

The bill also requires the Director of Environmental Protection to maintain a record of properties for which covenants not to sue have been issued and that involve activity and use limitations established under an environmental covenant (R.C. 3746.171).

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[4] *Operation and maintenance agreements are required in a voluntary action under current law when engineering controls are used to contain or control the release of hazardous substances or petroleum (R.C. 3746.12(A)(2), not in the bill.)*

Definitions

The bill incorporates into the VAP Law the definitions of "activity and use limitations" and "environmental covenant" described in "***Definitions***," under "**ENVIRONMENTAL COVENANTS**," above (R.C. 3746.01(A) and (H)).

For purposes of the VAP Law, it defines "covenant not to sue" as a release from liability that is issued by the Director (R.C. 3746.01(G)).

The existing VAP Law defines "remedy" or "remedial activities" as actions that are taken at a property to treat, remove, transport for treatment or disposal, dispose of, contain, or control hazardous substances or petroleum, are protective of public health and safety and the environment, and are consistent with a permanent remedy, including, without limitation, excavation, treatment, off-site disposal, the use of engineering or institutional controls or measures, the issuance and implementation of a consolidated standards permit, and the entering into and implementation of an operation and maintenance agreement. The bill modifies the definition by replacing the use of "measures" with the use of "activity and use limitations." (R.C. 3746.01(O).)

MAINTENANCE OF RECORDS BY COUNTY RECORDERS

Current law requires each county recorder to keep six separate sets of records of specified documents. Included in those documents are no further action letters and covenants not to sue issued under the statutes authorizing grants for brownfield cleanups and the Voluntary Action Program (VAP) Law and restrictions on the use of property contained in a no further action letter issued under the statutes authorizing grants for brownfield cleanups, identified for the purposes of the VAP Law, and contained in a deed or other instrument as provided in the statutes governing the Fire Marshal's underground storage tank and related corrective action programs. The bill adds that a county recorder also must keep six separate sets of records of the following documents: restrictions on the use of property contained in a deed or other instrument as provided in the bill's requirement that certain restrictions imposed under the Fire Marshal's underground storage tank and related corrective action programs be contained in an environmental covenant; any easement that is executed or granted under the hazardous waste clean-up statutes that the bill revises; and any environmental covenant entered into under the bill. (R.C. 317.08(A)(1).)

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	06-03-04	p.	2123
Reported, H. Civil & Commercial Law	12-01-04	pp.	2331-2332
Passed House (88-0)	12-01-04	pp.	2338-2339
Reported, S. Energy, Natural Resources & Environment	---		---

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