

DRAFT

DOD-NASA-DOE NEW MEXICO TASK FORCE

INITIAL COMMENTS ON

NMED WORKING DRAFT (2/28/01)

ENVIRONMENTAL COVENANT ACT

This group speaks for only a portion of the impacted regulated community in New Mexico. Other impacted groups may include: Department of the Interior, BLM, USDA, private industry, State Land Office, local governmental agencies, Forest Service, BIA, Park Service, natural resources trustees, and others.

Threshold Issues for Federal Agencies

1. Limited applicability of draft bill. Section 6.A. The covenants must be available in situations other than those where “attainment of the appropriate standard is not feasible by the maximum use of technology.” This limitation contained in the current draft would render the covenant bill applicable to very few sites. Other states that have adopted similar legislation or regulations have not restricted the use of covenants as severely as proposed in this working draft.
2. Property Rights. No state is empowered to create a property right in federal property. Federal entities cannot support a bill in which a state proposes to create such rights. This is an extremely significant issue for property that remains in federal ownership. Options that would meet the State's goal of ensuring the long-term integrity of land use controls without creating a property right in federal land must be discussed and an alternative chosen and implemented. Some of those options include:
 - Adding a waiver provision that would allow the State to waive the requirement for an environmental covenant when the property owner implements procedures that will protect the public and the long-term integrity of land use controls.
 - Creating a separate agreement such as a Voluntary Cleanup Agreement or other document that would enumerate the long-term stewardship requirements for federal land. The agreement would be used in lieu of the property right scheme envisioned in the draft bill.
3. Appeal Rights. Section 9. Appeal rights for denials of requests to create, terminate, or modify a covenant must be included.

Tier One (Critical) Issues (assuming the Threshold Issue Items are resolved)

4. Applicability. Section 2. The working draft is unclear about which properties would be affected. For example, would owners of properties now listed on Table

A-2 (**NEED SHORT DESCRIPTION OF THE TABLE**) be required to comply with the proposed bill?

- If passed, would the bill apply to properties that may contain some contamination but that will not be remediated because there is no risk?
 - Section 14. Language in the first sentence of this section is unclear as to who is affected and who is excluded from the jurisdiction of the proposed bill.
5. Enforcement.
- Section 11. Who would be primarily responsible for any breach of the covenant requirements? Would it be the original grantor of the covenant to the State or the current landowner?
 - Section 11.A. Who would be responsible for any "reopen[ing] of the remediation project" if a covenant is deemed unenforceable? The party responsible for the future remediation should be determined on a case by case basis.
 - Section 11.B. The right to bring suit to enforce an environmental covenant should vest in all who own or owned a property after a land use control was placed on the property. The right should not be limited to the grantor of the covenant. Is it the responsibility of the original property owner to forever insure the enforcement of the property restrictions?
 - Section 11. B. Clarification is needed for the definition of "[a]ny party having an interest in the covenant" Who are/could be the parties with an interest?
6. CERCLA. Would the bill be an ARAR under CERCLA?

Tier Two Issues (assuming the Threshold and Tier One Issues are resolved)

7. Effective date. What would be the effective date of the draft bill if it were to pass?
8. Deed Issues. Does the term "Deed Notice" have any legal meaning in the State of New Mexico? If a "Deed Notice" is required and means a notice attached to a deed, then this device will not work for us because the Federal Government often does not have deeds for its property.
9. Relation with other Requirements. How does the covenant bill relate to Post Closure Care and other regulatory plans/permits under RCRA? Is this a duplication?
10. Definition. A definition is required for "hazardous."
11. Notice. Section 7. E. The owner of property subject to an environmental covenant must be required to notify the original grantor and all subsequent owners of the property of all notices required by subsections 7.D and 7.E of the covenant bill.
12. Timing of State Review. Section 8.F. The timing of review by NMED should be consistent with similar provisions in the Hazardous Waste Act, 74-4-4.3.
13. Section 8.A. Replace the word "may" in the phrase "may only be created" with "can."
14. Section 8. D. & E. Clarity should be provided in section 8 by adding after the first use of the word "covenant," the phrase " pursuant to Sections 8. A. or 9. of this Act." A corresponding change in Section 8.A. is to add a period after the word "property." and then add a new sentence that would begin with "Such a

- covenant can only be created” and end with the remainder of the existing sentence.
15. Reporting. Consider adding a requirement for annual reporting to the State Legislature and others regarding the status of the implementation of this act.
 16. Purpose. Incorporate language [*from 25-15-317 of the Colorado statute*] into Section 2 of the New Mexico draft bill.
 17. Note to self: Check the definition of “contaminant” in the Voluntary Remediation Act, Section 74-4G-3.C NMSA 1978 to insure it is sufficient for this proposed bill.