

NMED WORKING DRAFT

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AN ACT

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act [Section 74-4H-1 to 74-4H-16 NMSA 1978] may be cited as the “Environmental Covenant Act.”

Section 2. PURPOSE. -- While it is in the public interest to ensure that environmental remediation projects protect human health and the environment, environmental remediation projects may leave residual soil and vadose zone contamination at levels that have been determined to be safe for a specific use, but not all uses, and may incorporate engineered structures that must be maintained or protected against damage to remain effective. In such cases, it

is necessary to provide an effective and enforceable means of ensuring any required maintenance, monitoring or operation is conducted; and of restricting future uses of the land for as long as any residual soil or vadose zone contamination remains hazardous. This act is not intended to change, amend or affect in any way any standards, schedules, technology, or other remediation requirements included in any statute in state or federal law. Additionally, this law is not intended to change, amend, apply to or affect in any way any environmental remediation project already approved by the department.

Section 3. DEFINITIONS. -- As used in the Environmental Covenant Act [74-4H-1 to 74-4H-16 NMSA 1978]:

A. "Affected local government" means every county, city, or municipality in which land subject to an environmental covenant is located.

B. "Contaminant" means contaminant as defined in Section 74-4G-3.C NMSA 1978, the Voluntary Remediation Act.

C. "Department" means the department of environment;

D. "Environmental covenant" means the instrument containing environmental use restrictions that is created pursuant to Section 74-4H-10 NMSA 1978.

E. "Environmental remediation project" means a remediation of soil or vadose zone environmental contamination that is conducted under any of the following:

(1) Chapter 74, Article 4 NMSA 1978, the Hazardous Waste Act;

(2) Chapter 74, Article 4G NMSA 1978, the Voluntary Remediation Act;

(3) Chapter 74, Article 6B NMSA 1978, the Ground Water Protection Act;

(4) Chapter 74, Article 9 NMSA 1978 the Solid Waste Act;

(5) the federal Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund”), 42 U.S.C. Section 9601 et seq.; or

(6) the federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq.

F. “Environmental use restriction” means a prohibition of one or more uses of or activities on specified real property; a requirement to perform certain activities, including requirements for maintenance, operation, or monitoring necessary to preserve such prohibition of uses or activities; or both, where such prohibitions or requirements are imposed as a condition of an environmental remediation project for the purpose of protecting human health or the environment.

G. “Owner” as used in this section means the record owner of real property and, if any other person or entity otherwise legally authorized to

make decisions regarding the transfer of the subject property, or placement of encumbrances on the subject property, other than through the exercise of eminent domain.

Section 4. REGULATIONS.--The department shall adopt and promulgate regulations necessary to implement the provisions of the Environmental Covenant Act [74-4H-1 to 74-4H-16 NMSA 1978], which may include standard form covenants to be used by owners.

Section 5. NATURE OF ENVIRONMENTAL COVENANTS.

A. An environmental covenant shall be perpetual, unless by its terms it is limited to a specific duration, or unless the department approves a request to terminate or modify it pursuant to Section 74-4H-9 NMSA 1978, or unless it is terminated by a court of competent jurisdiction. An environmental covenant may not be extinguished, limited nor impaired through issuance of a tax deed or through adverse possession, nor may an environmental covenant be extinguished, limited or impaired by reason of the doctrines of abandonment, waiver, lack of enforcement or other common law principles relating to covenants, or by the exercise of eminent domain.

B. Notwithstanding any other provision of law, including any common law requirement for privity of estate, an environmental covenant shall run with the land and shall bind the owner of the land, the owner's successors and assigns, and any person using the land. An environmental covenant shall

likewise be enforceable against the owner of the land and his successors and assigns.

C. The requirements and restrictions of an environmental covenant may only be enforced as provided in Section 74-4H-11 NMSA 1978.

D. The department shall not acquire any liability under state law by virtue of accepting an environmental covenant.

Section 6. ENVIRONMENTAL COVENANTS: APPLICABILITY.—

A. An environmental covenant may only be created if the property owner has demonstrated to the satisfaction of department that attainment of the appropriate standard is not feasible, by the maximum use of technology.

B. No environmental covenant is required for any environmental remediation project that results in residual soil or vadose zone contaminant levels that have been determined to be safe for all uses, and that does not incorporate any engineered feature or structure or require any monitoring, maintenance or operation.

C. An environmental covenant is required for any environmental remediation project when the project will result in either or both of the following:

(1) residual contaminants at levels that have been determined to be safe for one or more specific uses, but not all uses; or

(2) an engineered feature or structure that requires monitoring, maintenance or operation, or that will not function as intended if it is disturbed.

Section 7. CONTENTS OF ENVIRONMENTAL COVENANTS.--An environmental covenant shall include provisions regarding:

A. A legal description of the property subject to the covenant.
B. Its duration and any conditions under which it may be modified or terminated.

C. Any environmental use restrictions required as part of the environmental remediation project for the subject property.

D. A requirement that the owner of the property subject to the environmental covenant notify the department at least fifteen days in advance of any transfer of ownership of some or all of the real property subject to the environmental covenant.

E. A requirement that the owner of the property subject to the environmental covenant notify the department at least fifteen days prior to submitting any application to a local government for a building permit or change in land use.

F. A requirement to allow the department right of entry at reasonable times with prior notice for the purpose of determining compliance with the terms of the environmental covenant. Nothing in this section shall

impair any other authority the department may otherwise have to enter and inspect property subject to the environmental covenant.

G. Inclusion of the following statement on the first page of the instrument creating the environmental covenant in fifteen-point bold-faced type:

“This property is subject to an environmental covenant held by the New Mexico Environment Department pursuant to Section 74-4H-1 NMSA 1978.”

H. An agreement to incorporate the environmental covenant either in full or by reference in any leases, licenses, or other instruments granting a right to use the property that may be affected by the environmental covenant.

Section 8. GENERAL REQUIREMENTS FOR CREATION, MODIFICATION, AND TERMINATION OF ENVIRONMENTAL COVENANTS.--

A. An environmental covenant under this part may only be created by the owner of the property through a written grant to the department by a deed or other instrument of conveyance, specifically stating the intention of the grantor to create such a restriction under this article.

B. The department is authorized to accept, refuse to accept, conditionally accept, modify and terminate environmental covenants.

C. Instruments creating, modifying, or terminating an environmental covenant shall be recorded as any other instrument affecting title to and interests in real property.

D. Persons proposing to create, modify, or terminate an environmental covenant shall provide written notice of their intention to all persons holding an interest of record in the real property that will be subject to the environmental covenant, to all persons known to them to have an unrecorded interest in the property, and to all affected persons in possession of the property, and shall provide the department with:

(1) a copy of the notice(s) provided;

(2) a sworn affidavit stating that such notice(s) has been given in accordance with this section; and

(3) a list of the persons to whom notice was given and the address or other location to which the notice was directed.

E. Persons proposing to create, modify or terminate an environmental covenant shall also provide such title information as the department may require.

F. The department shall review and make a determination regarding all applications for creating, modifying, or terminating an environmental covenant within sixty days after receipt.

Section 9. MODIFICATION OR TERMINATION OF ENVIRONMENTAL COVENANTS.--The owner of land subject to an environmental covenant may request that the department approve modification or termination of the covenant.

A. The request shall contain information showing that the proposed modification or termination shall, if implemented, remain protective of human health and the environment. Such information may include one or more of the following:

- (1) A proposal to perform additional remedial work;
- (2) New information regarding the risks posed by the residual contamination;
- (3) Information demonstrating that residual contamination has diminished;
- (4) Information demonstrating that an engineered feature or structure is no longer necessary;
- (5) Information demonstrating that the proposed modification would not adversely impact the remedy and is protective of human health and the environment; or
- (6) Other appropriate supporting information.

B. The department shall review any submitted information, and may request additional information. If the department determines that the proposal to modify or terminate the environmental covenant will ensure protection of human health and the environment, it shall approve the proposal. No modification or termination of an environmental covenant shall be effective unless it has been approved in writing by the department.

Section 10. PUBLIC PARTICIPATION.--Any environmental covenant proposed as a part of any environmental remediation project, or any proposed modification or termination of an environmental covenant, shall be made available to the public for review and comment, as provided in the statute under which the environmental remediation project was submitted. The Environmental Covenant Act shall neither increase nor decrease public participation in, nor the public's right to comment on, any environmental remediation project.

Section 11. ENFORCEMENT AND REMEDIES.--In the event of an actual or threatened failure to comply with an environmental covenant, the department may commence a civil action in district court for appropriate relief, including injunctive relief.

A. If a court of competent jurisdiction determines that an environmental covenant is void or otherwise unenforceable, the department may reopen the remediation project to address the contaminants.

B. The grantor of an environmental covenant may file suit in district court to enjoin actual or threatened violations of the covenant. Any party having an interest in the covenant may file suit in district court to enjoin actual or threatened violations of the covenant.

C. An affected local government may file suit in district court to enjoin actual or threatened violations of any environmental covenant that applies to land within its jurisdiction.

D. No environmental covenant shall be unenforceable by reason of lack of privity of contract, lack of benefit to a particular land, because the environmental covenant does not expressly state that it runs with the land, because the environmental covenant does not touch or concern the land, or because the environmental covenant is not appurtenant to an interest in real property.

Section 12. REGISTRY OF ENVIRONMENTAL COVENANTS.--The department shall create and maintain a registry of all environmental covenants, including any modification or termination thereof.

Section 13. COORDINATION WITH AFFECTED LOCAL GOVERNMENTS.--

A. The department shall provide each affected local government with a copy of every environmental covenant within such local government's jurisdiction and shall also provide a copy of any documents modifying or terminating such restriction.

B. Whenever an affected local government receives an application affecting land use or development of land that is subject to an environmental covenant, the affected local government shall notify the department of the application. The department shall evaluate whether the application is consistent with the environmental covenant and shall notify the affected local government of the department's determination.

Section 14. OTHER INTERESTS NOT IMPAIRED.--Except as specifically provided in an environmental covenant, no interest in real property cognizable under statute, common law, or custom in effect in this state prior to the effective date of this act, nor any lease or sublease thereof at any time shall be impaired, invalidated, or in any way affected by this act. All interests not transferred or conveyed in the environmental covenant shall remain in the grantor of the environmental covenant, including the right to engage in all uses of the lands affected by the environmental covenant that are not inconsistent with the environmental covenant and not expressly prohibited by the environmental covenant or by law. Nothing in this act shall be construed to limit in any way the authority of the department or the energy, minerals and natural resources department to take any action that may be authorized by any other law.

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