

Environmental Covenants Statement

According to the National Conference of Commissioners on Uniform State Laws, “An environmental covenant is typically used when it is necessary to clean up contaminated property to a level determined by the environmental risks posed, rather than to unrestricted use standards. While the general goal of most cleanups is to return the site to a condition where it can be safely used for any purpose, this is not always technically possible or economically practicable. When a site is not cleaned up completely, use restrictions may be used to supplement cleanup measures.”

Ohio enacted HB 516 in 2004 to establish environmental covenants. An Ohio legislative analysis of HB 516 says the Act:

- 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 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 people 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 people 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 people 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;
- 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;
- 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;
- 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;
- 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;
- Authorizes the state 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;
- Essentially incorporates the use of environmental covenants into the structure of the Voluntary Action Program Law (VAP) 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; and
- 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.

Submitted as:

Ohio

HB 516

Status: Enacted into law in 2004.