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The Uniform Environmental Covenants Act - An Environmental Justice Perspective

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The Uniform Environmental Covenants Act – An Environmental Justice Perspective*

Andrea Ruiz-Esquide**

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INTRODUCTION

In August 2003, the National Conference of Commissioners on Uniform State Laws (NCCSL) adopted the Uniform Environmental Covenants Act (UECA, the Act) and recommended it for adoption in the states. The Act establishes uniform procedures for the creation, amendment, termination, and enforcement of environmental covenants, which are legal instruments widely used to limit exposure to contamination left on site in partial cleanups of contaminated properties. This Comment offers an assessment of UECA’s strengths and weaknesses, from an environmental justice perspective. Part I of this Comment provides necessary context to understand UECA’s goals and policies. It briefly defines brownfields and discusses the current trend to use risk-based analyses and institutional controls in their cleanup. It also summarizes the equity concerns raised by environmental justice advocates regarding the assumptions upon which risk-based analyses rest. Part II describes UECA’s main goals and provisions. Finally, Part III criticizes the Act for its failure to provide meaningful mechanisms for public participation in the creation, implementation, and enforcement of institutional controls.

The Comment concludes that although UECA significantly improves current state laws on institutional controls, it does not fully accomplish its goals because of its failure to provide for public participation. The Act grants owners and potentially liable parties great power to create environmental covenants, to the detriment of the public, which is essentially shut off from the process. Most troubling, however, is UECA’s failure to provide any authority for citizen enforcement of environmental covenants, thereby creating a danger that potentially harmful violations may remain unenforced.

1. BROWNFIELDS, RISK-BASED CORRECTIVE ACTIONS, AND INSTITUTIONAL CONTROLS

A. The Brownfields Problem

The U. S. Environmental Protection Agency (EPA) defines brownfields as “abandoned, idle or underutilized industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”¹ This definition

¹ See U.S. Environmental Protection Agency, Brownfields, at http://www.epa.gov/ebtpages/cleabrownfields.html (last visited Oct. 18, 2004). The definition of brownfields usually excludes sites under CERCLA or state cleanup remediation. See Small Business Liability Relief
reflects the understanding that the real property in question may or may not be contaminated, and that the perception of potential contamination is as significant as actual contamination. The U.S. Office of Technology Assessment (OTA)\(^2\) provides a similar, although broader, definition. OTA defines brownfields as sites whose redevelopment is hindered not only by real or perceived contamination, but also by poor location, old or obsolete infrastructure, and/or other factors often linked to neighborhood decline.\(^3\) Brownfield sites are often associated with distressed urban areas, particularly in inner cities where industry once flourished. Abandoned gas stations, dry cleaners, former industrial facilities, and warehouses are prime examples.\(^4\) Thousands of brownfields exist throughout the United States.\(^5\) Their precise number remains unknown, and estimates vary greatly—ranging from 150,000 to 500,000 sites.\(^6\)

When left undeveloped, brownfield sites exacerbate environmental and social problems. Site contamination poses health risks to neighboring residents and workers; real or perceived pollution decreases property values and leads to lost tax revenues for local governments; abandonment or underutilization of brownfields results in lost employment opportunities for area residents and the perception that the area is dangerous. These problems contribute to disinvestment, infrastructure

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2. The Office of Technology Assessment (OTA), a Congressional agency in operation between 1972 and 1995, was created to “provide [Congress] early indications of the probable beneficial and adverse impacts of the applications of technology and to develop other coordinate information which may assist the Congress.” 2 U.S.C. § 472 (1972). Although now defunct, OTA is said to have been, during its 23 years of existence, “a key resource for Congressional members and staff confronting technological issues in crafting public policy. Its existence brought a healthy balance to the analytical resources available to the executive and legislative branches of government.” See University of North Texas Government Documents Department, About the OTA Legacy, at http://govinfo.library.unt.edu/ota/about-ota.html (last visited Oct. 18, 2004).


5. Although most brownfield initiatives focus on urban areas, many brownfields are found in older rural towns. CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 1-2 (1997).

decay, and urban blight, which in turn prompt developers to favor the open spaces that surround urban areas, known as "greenfields." Development of greenfields then encroaches on natural canyon, coastal, and woodland ecosystems. In a vicious cycle, the problems of urban poverty and decay, suburban sprawl, congestion, pollution, loss of wildlife habitat, and displacement of rural communities build upon themselves.

The emergence of abandoned and underutilized brownfield sites is undoubtedly related to complex, long-term economic and social causes. On the other hand, current decisions on whether to invest in their redevelopment are directly related to the perception that investment in these sites, by subjecting property owners to potentially costly litigation and liability, is risky. Although many factors contribute to this perception, hazardous waste laws, particularly the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, are often cited as the main culprits. CERCLA casts a broad liability net over parties connected to a site containing hazardous wastes. Responsible parties are held strictly liable, regardless of their fault, and courts have construed CERCLA to impose joint, several, and

7. See generally BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND (Michael Gerrard ed., 2003); BROWNFIELDS, supra note 6; About Brownfields, supra note 6.
9. Id.
10. See, e.g., DEINDUSTRIALIZATION AND REGIONAL ECONOMIC TRANSFORMATION: THE EXPERIENCE OF THE UNITED STATES (Lloyd Rodwin & Hidehiko Sazanami eds., 1989); Kibel, supra note 8.
11. BROWNFIELDS LAW AND PRACTICE, supra note 7, at § 1.03(2).
12. In 1997, the U.S. EPA and Department of Housing and Urban Development (HUD) issued a joint report concluding that environmental liability concerns, while important, were not the most critical barrier to brownfields redevelopment. The report examined the view of developers, property sellers, lenders, public agencies, environmental consultants, and others — covering a total of 48 redevelopment projects in 12 cities in four states — and concluded that potential market demand, high costs, availability of greenfields and other local factors also affected cleanup decisions. See THE EFFECTS OF ENVIRONMENTAL HAZARDS AND REGULATION ON URBAN REDEVELOPMENT (1997), available at http://www.epa.gov/brownfields/pdf/hazreg.pdf (last visited Oct. 18, 2004).
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retroactive liability. Other federal statutes may also impact investment decisions at contaminated sites.

State environmental laws and regulations can also create disincentives to redevelopment of abandoned or underutilized urban properties. Many states have adopted parallel “superfund” statutes that mirror CERCLA’s provisions, so even if a site fails to attract federal attention, state regulators may impose similar cleanup obligations. State clean air and water statutes and regulations may also lead to more stringent pollution control requirements. The specter of liability may make it difficult to attract lenders to finance cleanup and redevelopment, and insurance companies may be reluctant to cover the costs of environmental investigation and cleanup. Consequently, “[i]n some instances, letting a site remain untouched or considering site abandonment or bankruptcy may be sound options for a current owner....”

B. Brownfields Redevelopment

In order to return brownfields to productive use and to repair the conditions in neighboring communities, a sustained effort has recently emerged to reform liability laws and to offer incentives for cleanup and redevelopment of these sites. The Superfund Amendments and Reauthorization Act (SARA) of 1986, which created an “innocent landowner defense” for parties that purchased real property after


17. The Resource Conservation and Recovery Act (RCRA) may also create investment disincentives by creating “cradle to grave” regulations for the management of hazardous wastes and corrective actions. Additionally, the Clean Water Act (CWA) and the Clean Air Act (CAA) may impact investment decisions regarding brownfields sites. Both the CWA and the CAA generally create more stringent pollution control requirements for new sources of pollution; such “new sources” can include older facilities that are substantially modified. Urban areas are frequently classified as “non-attainment” areas under the CAA and can be subjected to more rigorous air pollution. Less stringent requirements at nearby greenfields may attract developers wary of incurring these costs. See BROWNFIELDS LAW AND PRACTICE, supra note 7, at § 1.03[2][c].

18. See detailed analyses of state cleanup laws in BROWNFIELDS LAW AND PRACTICE, supra note 7, at vols.2-3; BROWNFIELDS, supra note 6, at 361-1022.

19. BROWNFIELDS LAW AND PRACTICE, supra note 7, at § 1.03(2)(d).


21. BROWNFIELDS LAW AND PRACTICE, supra note 7, at § 1.03[4].
contamination of the property occurred, marked the first significant attempt to reform CERCLA. Inconsistent interpretations of when this defense applies, however, hindered efforts under SARA to promote effective cleanup and redevelopment of brownfields.

The next wave of CERCLA reform started in 1995, when EPA announced its Brownfields Action Agenda, which sought to implement policy reforms that had failed to pass Congress through the regulatory process. The Agenda sought to "reverse the spiral of unaddressed contamination, declining property values, and increased unemployment" associated with brownfields. The Agenda also outlined four key areas of action for returning brownfields to productive use: (1) pilot grant programs, (2) clarification of liability and cleanup uses, (3) partnerships and outreach to brownfields stakeholders, and (4) job training initiatives.

The EPA Brownfields Action Agenda has successfully brought the issue of brownfields redevelopment to the forefront of national environmental concerns. Since 1995, the investment in the program, which amounts to less than $700 million, has leveraged $5 billion in cleanup and redevelopment funding from public and private sources and created more than 24,000 jobs. The Brownfield Pilots program has assessed more than 4,300 properties, one third of which were found to have no significant contamination, or contamination levels so low that the property required no cleanup prior to reuse.

Congressional interest in amending CERCLA has continued in the midst of EPA administrative reform. In 1996, Congress passed the Asset Conservation, Lender Liability and Deposit Insurance Act, which created a new "lender exception" to CERCLA. This exception permits lenders to protect their security interests in a contaminated property without triggering CERCLA liability, as long as they do not become involved in the day-to-day management or decision-making processes at the site.

22. The innocent landowner defense provides that purchasers will not be liable for remediation costs if they can prove that they "did not know and had no reason to know" of the hazardous waste contamination when they acquired the property. 42 U.S.C. § 9601(35)(A)(i) (2004).

23. Kibel, supra note 8, at 603 (citing L. Jager Smith, CERCLA's Innocent Landowner Defense: Oasis or Mirage?, 18 COLUM. J. ENVTL. L. 155 (1993)).

24. Kibel, supra note 8, at 603.


26. Id.


28. Id.

The most recent reform came in 2001, when Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act to exempt contiguous property owners and prospective purchasers from CERCLA liability, expand assistance to states and tribes for their brownfields response programs, and clarify the standard for appropriate inquiry by innocent landowners.30

While the federal government has been active in limiting liability under the nation's hazardous waste laws to promote brownfields redevelopment, the states have arguably made even greater strides towards redevelopment.31 Most states have enacted legislation or promulgated regulations to foster the cleanup and redevelopment of contaminated properties.32 State programs have had far more impact than federal programs for two reasons. First, most sites fall under state jurisdiction because the EPA focuses on National Priorities List (NPL) sites, which make up only a small percentage of all contaminated properties.33 Second, states have generally been far more flexible and more willing than EPA to approve cleanups that leave some residual contamination on-site, thereby encouraging the pace of redevelopment.34

There are several elements common to most state brownfield programs.35 First, all the programs are voluntary and do not require property owners to join.36 Second, most states prohibit voluntary cleanup of federal NPL sites, thus emphasizing the cleanup of smaller, less contaminated sites.37 Third, state voluntary action statutes and programs generally streamline the cleanup approval process.38 Fourth, states usually establish cleanup standards that permit higher levels of contamination risk relative to the Superfund program when a site will be used for

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32. Robertson, supra note 31, at 1-2; Brownfields of Dreams, supra note 6, at 915-92. The latest comprehensive study of cleanup legislation in the states, carried out by Environmental Law Institute (ELI), showed that 49 states (including the District of Columbia and Puerto Rico) have some kind of voluntary cleanup program, and 31 states have formal brownfields programs. See ENVIRONMENTAL LAW INSTITUTE, AN ANALYSIS OF STATE SUPERFUND PROGRAMS 109, 115 (2002) [hereinafter STATE SUPERFUND PROGRAMS].

33. Brownfields of Dreams, supra note 6, at 923.

34. Id. at 909-10.

35. Id. at 915-27.

36. Id. at 920.

37. Id. at 923.

38. Id. at 920.
commercial or industrial rather than residential purposes. Finally, voluntary action statutes and programs typically limit a developer's liability against state enforcement actions through: (1) "no further action" letters, which indicate that the state probably will not pursue further enforcement actions unless new information about contamination is discovered; (2) covenants not to sue, which provide express protection from further state enforcement actions; (3) releases from state CERCLA liability; and (4) certificates of completion indicating that a cleanup meets applicable state standards. By streamlining the administrative process, reducing costs, and limiting the prospect of liability, these elements offer incentives for property owners and developers to clean up contaminated sites.

Many other federal, state, and local programs seek to reclaim underutilized properties. A combination of grants and tax incentives serve to channel public and private investment into projects that would be difficult to finance conventionally. Along with multiple efforts for legislative reform at the state and federal level, these financial and tax incentives have significantly helped to spur brownfields redevelopment.

C. Risk-Based Corrective Actions and Institutional Controls

The question of "how clean is clean" has troubled federal and state legislators and policymakers dealing with the cleanup of contaminated properties for years. Under traditional cleanup programs, remediation of toxic wastes was largely accomplished by removing the wastes from the environment, destroying or reducing their toxicity, or sealing them in place. These methods of treatment emerged as the preferred option because they avoid vicious cycles where inadequate disposal of wastes

39. Id. at 920, 936-49.
40. Id. at 921, 950-65.
41. Other programs include, but are not limited to: Community Development Block Grants (CDBG), Department of Housing and Urban Development (HUD) § 108 Loan Guarantees, Employment Zones and Enterprise Communities (EZ/EC), and Tax Increment Financing. See generally CHARLES BARTSCH ET AL., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DEVELOPMENT OPPORTUNITIES, Appendix C (1996); see also the resources listed at U.S. Environmental Protection Agency, Funding and Financing for Brownfields, at http://www.epa.gov/swerosps/bf/matters.htm (last visited Oct. 18, 2004).
42. See Madeline June Kass et al., Brownfields: Where the Market Makes Green, 13 NAT. RESOURCES & ENV'T 345 (1998) (describing the brownfields movement as "replete with a diverse assemblage of private, governmental, and community stakeholders and an equally diverse set of challenges and opportunities").
43. Robertson, supra note 31, at 9.
from remediated sites lead to newly contaminated ones. These practices also satisfied the goal of making sites available for any purpose upon final cleanup.

However, criticism of these methods has recently increased because of the often exorbitant costs and technological difficulties associated with bringing properties to pristine conditions. Stephen Breyer, then a judge on the First Circuit Court of Appeals, captured much of the criticism in an example from his book on risk-based regulation:

The first [example] comes from a case in my own court... arising out of a ten-year effort to force cleanup of a toxic waste dump in southern New Hampshire. The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of highly diluted PCBs and "volatile organic compounds"... by incinerating the dirt.... [W]ithout the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt daily for 70 days each year without significant harm. Burning the soil would have made it clean enough for the children to eat small amounts daily for 245 days per year without significant harm. But there were no dirt-eating children playing in the area, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely.

Based on such criticism, there has been a general "paradigm shift" away from requiring cleanup to "background standards" towards adopting risk-based corrective actions (RBCAs), either in the form of generic state standards, or in the form of site-specific standards. In this

46. Id.
48. "Background standards" usually mandate the most stringent cleanups by requiring developers to reduce the levels of contamination to conditions present at sites prior to contamination. The definition of the term "background" varies among states, but it can mean the natural or manmade condition of the site, minus the contamination at issue. Because of the high costs and technical difficulties of this approach, some states treat background standards as optional rather mandatory. See John Pendergrass, Use of Institutional Controls as Part of a Superfund Remedy: Lessons from Other Programs, 26 ENVTL. L. REP. 10,109 (1996) [hereinafter Lessons]; Donald A. Brown, EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund, 15 COLUM. J. ENVTL. L. 241 (1990).
49. Generic numeric standards are health-based standards approved by states for various toxic and carcinogenic substances, largely based on EPA standards. While these numeric standards appear to be precise, states vary widely with respect to the assumptions used to measure risk. A state may allow a greater risk level for nonresidential sites, or it may set the same risk level for all sites but allow more contamination at an industrial site based on the assumption that human exposure would be significantly less at such a site. Despite flexibility in

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...
new RBCA paradigm, remediation goals are achieved by limiting exposure to hazardous substances, instead of removing them or decreasing their toxicity. RBCA theory asserts that by limiting exposure, a partial cleanup can achieve the same amount of protection to human health and the environment as a complete cleanup, without incurring often prohibitive removal costs.\(^5\) Risk assessment methods determine the levels of contamination that are acceptable to leave on-site.\(^5\) These analyses take into account several factors, such as the nature and concentration of the contaminants at the site (e.g., the concentration of benzene, lead, arsenic, or PCBs);\(^5\) the existing pathways of exposure by which these contaminants can affect human health or the environment (e.g., inhalation, dermal exposure, ingestion by drinking, or through the food chain);\(^5\) and the potential for actual contact between people and the contaminants (e.g., by children, residents, construction workers, the elderly, etc.).\(^5\)

The devices used to limit exposure to residual contamination and thus ensure the effectiveness of risk-based cleanups are a type of activity and use limitation (AUL) called institutional controls.\(^5\) AULs are "legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern or to prevent activities that would interfere with the effectiveness applicable standards, states argue that they have adhered to standards sufficient to protect public health, particularly from cancer risk. See, e.g., Thomas F. Long et al., The Role of Risk Assessment in Redeveloping Brownfields Sites, in BROWNFIELDS, supra note 6, at 281-326. For examples of these generic numeric standards, see U.S. Environmental Protection Agency, Region 9 Preliminary Remediation Goals (PRGs) Tables, at http://www.epa.gov/region09/waste/sfund/prg/files/02table.pdf (last visited Oct. 18, 2004); California Regional Water Quality Control Board, Screening for Environmental Concerns at Sites with Contaminated Soil and Groundwater (2003).

50. Site-specific, risk-based standards are based upon an individualized risk of each property assessment that considers the future use of the property (i.e., residential, commercial, industrial). A site-specific plan may allow for limited treatment of contamination in conjunction with other protective measures such as institutional or engineering controls. See Joanne R. Denworth, Use Restricted-Use Standards Sparingly, ENVTL. FORUM, May-June 1995, at 30.


54. AMERICAN CHEMICAL SOCIETY, supra note 53, at 9.

55. IMPLEMENTING INSTITUTIONAL CONTROLS, supra note 52, at 5.

56. AMERICAN SOCIETY FOR TESTING AND MATERIALS, STANDARD GUIDE FOR THE USE OF ACTIVITY AND USE LIMITATIONS, INCLUDING INSTITUTIONAL AND ENGINEERING CONTROLS (E 2091-00) (2000).
of a response action." They can take the form of easements, restrictive covenants, equitable servitudes, zoning, building permits, well-drilling prohibitions, contractual agreements (such as permits and consent decrees), informational devices, or other types of controls. AULs provide notice to property owners, lenders, tenants, potential purchasers, and other parties of the presence and location of residual chemicals of concern, and identify uses and activities that are either prohibited or consistent with maintaining a condition of "no significant risk" at the property. Finally, AULs specify ongoing monitoring and maintenance operations necessary to meet the goals of the response action.

These controls are expected to make the property safe for its intended use, despite the remaining contamination. The most common restrictions limit the future use of the land, since different uses of property result in different potential routes and duration of exposure to hazardous wastes. For example, petroleum or lead contamination remaining under a shopping center's parking lot would make that site, although suitable for its current commercial use, inappropriate and dangerous for residential use. With residential use, children may play in the soil over a prolonged period of time and be exposed to contaminants through dermal contact, inhalation, or ingestion. Similarly, agricultural use may result in significant exposure through dermal contact and inhalation when the soil is worked. Industrial use, on the other hand, is unlikely to give rise to the same level of exposure since any contamination will likely be covered, most of the work will be done inside a building, and exposure times would be shorter.

According to the EPA, institutional controls are "generally to be used in conjunction with, rather than in lieu of, engineering measures such as waste treatment or containment." They can be used "during all stages of the cleanup process to accomplish various cleanup-related objectives," and "should be 'layered' (i.e., use multiple [institutional controls]) or implemented in a series to provide overlapping assurances.

57. Id.
58. IMPLEMENTING INSTITUTIONAL CONTROLS, supra note 52, at 5.
59. Id.
60. Id.
63. Id.
65. Id.
of protection from contamination. While in the past institutional controls served as merely interim measures to protect people from exposure until a cleanup was complete, they are now used as an end strategy to provide long-term protection from exposure when total site remediation is not contemplated.

Three types of institutional controls exist: proprietary controls, governmental controls, and informational devices. Proprietary controls rely on traditional common law property doctrines, including restrictive covenants, reversionary interests, easements, and equitable servitudes.

Under a property-based restriction, a private party seeking to enter into a RBCA cleanup that leaves some contamination on-site would enter into an agreement with a third party (e.g., the state environmental agency, a prospective purchaser, or a neighbor) conveying a property right, usually of a non-possessory nature, to that third party. For example, a prospective purchaser may use a restrictive covenant to agree to use the property for industrial purposes only, or he may agree to refrain from using the groundwater. Governmental controls, such as zoning, local ordinances, building permits, and restrictions on well drilling or groundwater activities may also limit future uses of properties with residual contamination. Informational systems include signs, educational materials, site registries, databases, and warnings about the nature of the contamination and consumption of fish or wildlife.

Most states that use institutional controls rely on a combination of the three types, with a preference for proprietary controls. In a study conducted in 2001, all but five of the forty-three states that reported using some form of institutional controls implemented proprietary controls. States also rely on governmental controls. Thirty states reported restricting groundwater and drilling activity, and twenty-nine states reported using other governmental controls. Finally, thirty-three states employed informational devices. All in all, the study showed that states use the different types of institutional controls to cleanup and redevelop contaminated sites.

66. Id.
68. IMPLEMENTING INSTITUTIONAL CONTROLS, supra note 52, at 6-7.
69. Id.
70. Id.
72. Id.
73. STATE SUPERFUND PROGRAMS, supra note 32, at 7.
74. Id. at 47.
75. Id. at 7.
D. Equity Concerns Raised by Redevelopment, Risk-Based Corrective Actions, and Institutional Controls

The environmental justice movement has grown into a major political force in recent decades, as a number of studies have proven that minority groups and low-income individuals are subject to disproportionately high health and environmental risks, while enjoying relatively less environmental protection than people in other sectors of society. The environmental justice movement seeks to ensure that environmental harms are equally distributed and that environmental protections benefit all citizens, regardless of their race or socio-economic background. The movement meets these goals by empowering communities and pressuring government agencies and businesses to change their practices.

Programs allowing less stringent cleanups at brownfield sites may disproportionately affect minority and low-income groups, since most brownfields are concentrated in predominantly minority and low-income inner city neighborhoods. Environmental justice advocates have voiced serious concerns, therefore, regarding brownfields redevelopment, risk-based cleanups, and institutional controls. While redevelopment does provide opportunities to clean up contaminated properties and to improve economic and environmental conditions in poor neighborhoods, these benefits implicate important trade-offs, such as the health risks that lower cleanup standards create for members of poor communities. Many scholars worry that streamlining regulatory processes and relaxing remediation liability standards also threaten community health and safety. Environmental equity advocates have argued that “[d]ifferential cleanup standards, if set at a level lower than some ‘ideal’ standard, can readily be characterized as continuing this discrimination against poor and minority communities, shifting to them part of the costs of cleaning

76. See, e.g., Clifford Rechtschaffen, The Evidence of Environmental Injustice, 12 ENVTLL. L. NEWS 3 (2003) (discussing the state of the research on unequal distribution of environmental harms and benefits).
79. See, e.g., Kibel, supra note 8; Mank, supra note 4.
80. Robertson, supra note 31, at 17; Mank, supra note 4, at 143.
81. See generally Kibel, supra note 8; Mank, supra note 4; Robertson, supra note 31.
up Brownfields (in the sense that a Brownfield does not get completely cleaned up). As a result, these scholars have suggested that redevelopment of these sites leads minority inner-city communities to accept disproportionately higher health risks in exchange for the possibility of jobs and economic development.

In addition, scholars have questioned whether people living in the communities where brownfields are located will actually benefit from redevelopment, by receiving new jobs, tax revenues, or other general economic benefits, or whether middle-class people who do not live in these communities will be the main beneficiaries of such new developments. Commentators suggest that these fears are grounded in past experiences of urban renewal policies, particularly federal and state programs implemented in the 1960s aimed at improving housing and economic development in the inner cities. We now know that these programs were for the most part a failure: public housing projects tended to isolate and stigmatize poor people and minority populations, exacerbating segregation and crime. The renovation of older neighborhoods led to displacement of neighborhood residents and gentrification; and the economic development programs often focused on businesses that, for reasons reflecting both racism and skill levels, did not hire from the community.

Environmental justice advocates also have moral concerns about brownfields redevelopment. Some believe that the entire brownfields agenda stems from a conscious or unconscious desire to keep high-income, suburban areas clean at the expense of low-income and minority


84. Allan Edson, Presentation at the Conference on Community Development and Environmental Restoration: The Language and Practice of Brownfields Redevelopment in San Francisco (May 10, 1997) ("Local communities are concerned that the brownfields movement is really about a 'one shot deal' where minority populations are given jobs to build businesses and housing, and not the jobs to work and live there."); cited in Kibel, supra note 8, at 608 n.109.

85. See, e.g., WITOLD RYBCZYNSKI, CITY LIFE: URBAN EXPECTATIONS IN A NEW WORLD 172 (1995).


87. Id.; Dan Tarlock, City Versus Countryside: Environmental Equity in Context, 21 FORDHAM URB. L. J. 461 (1994); Kibel, supra note 8, at 608.
groups. Additionally, advocates believe that some developers are "bad actors" who will not keep their promises to design their redevelopment plans so that communities benefit, and that regulators often fail to oversee cleanup programs properly. Because of these concerns, community and environmental justice advocates are often far from enthusiastic about the prospect of redevelopment. A resident of Bayview-Hunters Point, a community south of San Francisco, explained that "[f]rom my neighborhood's perspective, brownfields redevelopment means that African-Americans are being passed over and moved out."

Beyond these criticisms aimed at the brownfields agenda generally, environmental justice advocates have expressed particularly poignant concerns regarding the assumptions that underlie risk-based cleanups. First, risk-based analysis fails to account for distributional impacts of contamination and cleanup; i.e., how they affect different sectors of society differently. Prominent environmental scholar Sheila Foster reasoned that "[c]onverting costs, benefits, and risks into a common metric assumes that each is sufficiently fungible as to be compared, traded off, or otherwise aggregated for analysis." She continued: "[a]lthough considering net benefits or risks in isolation of their distribution may satisfy the standard of efficiency, consideration of costs and benefits without considering their distribution surely violates most notions of equity and justice." Thus, for the brownfields redevelopment model to take into account equity concerns, each remediation project should look beyond the amount of contamination remaining on that particular site, and consider the cumulative health effects of the aggregate contamination existing in other neighborhood sites.

A second equity concern raised by risk analysis stems from its inability to deal with the often complex social, political, and ethical issues embedded in environmental decisions. Reliance upon technical decision-making processes grants environmental decision-making an aura of scientific legitimacy. However, most environmental decisions do not

88. See Samara F. Swanston, An Environmental Justice Perspective on Superfund Reauthorization, 9 ST. JOHN'S J. LEGAL COMMENT 565 (1994)
89. Brownfields of Dreams, supra note 6, at 1024-25.
90. See Kibel, supra note 8, at 609 (reporting interview with construction engineer and neighborhood resident Olin Webb).
92. Id.
reduce themselves to matters of impartial assessment but are instead inherently infused with value judgments.\textsuperscript{94}

Third, risk-based cleanups that leave some residual contamination on-site have externalities (i.e., side effects), which are unaccounted for under the current models and have detrimental consequences for others. For example, risk-based standards often allow contaminated groundwater to remain in place. This is problematic because science does not provide precise knowledge of groundwater migration.\textsuperscript{95} Moreover, current landowners' ability to restrict future use of the land shifts much of the cost of remediation and reduced value of the land to future landowners, and even to neighboring future landowners.\textsuperscript{96} In addition, risk-based cleanups limit future potential uses of the land for residential, parkland, or school purposes, interfering with the community's ability to adapt land-use to changing economic conditions and social needs.\textsuperscript{97}

Scholars have also argued that risk-based cleanups rest on two untenable assumptions: (1) that future use of the land can be predicted, and (2) that other uses can be proscribed.\textsuperscript{98} It is impossible, they argue, to predict with certainty what the future use of property will be, because such predictions depend on estimates of future population and employment trends that are highly inexact.\textsuperscript{99} Further exacerbating these information limitations, and perhaps most significant for the purposes of risk-based cleanups, is the long period of time for which such predictions must account. "[T]he further into the future you project, the greater the uncertainties about the factors that will influence future property use become.... The idea that such future use can be accurately predicted for purposes of a use-restricted cleanup is thus simply a myth."\textsuperscript{100}

Just as it is impossible to predict future uses of property, the assumption that alternative uses of property can be forever proscribed is

\textsuperscript{94} Hornstein, supra note 93, at 630 (arguing that "[c]omparative risk analysis gives an undeserved assurance of scientific legitimacy to the inescapably collective (and political) process of establishing social policies and priorities on environmental problems"); Adam Babich, Too Much Science in Environmental Law, 28 COLUM. J. ENVTL. L. 119, 146-57 (arguing that setting rational risk-based standards is not possible because the scientific ability to assess risks is inadequate, society cannot agree on safety levels, and elected leaders are unlikely to make the political decisions necessary to create a rational risk-based system).

\textsuperscript{95} Robertson, supra note 31, at 10.

\textsuperscript{96} See, e.g., Paul S. Kibel, Risk-Based Cleanup Puts Property Values at Peril, EAST BAY BUS. TIMES, Feb. 1, 2002, available at http://eastbay.bizjournals.com/eastbay/stories/2002/02/04/smallb5.html (last visited Oct. 19, 2004); Geisinger, supra note 51, at 369 (arguing that future costs of risk-based cleanups should be internalized before such cleanups are approved).

\textsuperscript{97} Personal communication with Paul S. Kibel, Fitzgerald, Abbott, & Beardsley (May 10, 2004).

\textsuperscript{98} Geisinger, supra note 51, at 377.

\textsuperscript{99} Id. at 380-82 (citing MICHAEL R. GREENBERG ET AL., LOCAL POPULATION AND EMPLOYMENT PROJECTION TECHNIQUES (1978)).

\textsuperscript{100} Geisinger, supra note 51, at 382, 384.
equally illusive. The mechanisms to enforce these prohibitions (governmental and proprietary institutional controls and informational devices) are often insufficient to prevent future changes in the use of a property.\textsuperscript{101} For instance, zoning is insufficient to maintain land-use restrictions in the long term, because it is flexible and can change with changing market conditions. "[T]his potential to allow uses that would not have been allowed under a prior classification presents the possibility of allowing uses that would be incompatible with contaminants left in place at brownfield sites."\textsuperscript{102}

Property law-based controls, such as easements, restrictive covenants, and equitable servitudes, also introduce problems. These doctrines developed historically to serve the interests of property owners, which are different from the governmental interest in reducing exposure to residual contamination. As such, they are often subject to restrictions that limit their validity as tools for environmental protection.\textsuperscript{103} Easements, which are usually cited as the most common means of restricting property uses, are often found invalid and unenforceable after the sale of the property because of courts' general unwillingness to find negative easements to be legally valid.\textsuperscript{104} Additionally, easements are vulnerable to a number of equitable defenses such as laches or estoppel, and may also be extinguished through transfer of the property, particularly through foreclosure.\textsuperscript{105} Restrictive covenants and equitable servitudes suffer similar limitations.\textsuperscript{106} This inability to predict and proscribe future uses has led to the conclusion that "existing use-restricted cleanup programs cannot ensure that property use will not change in a way that will result in exposure routes greater than those anticipated by the cleanup. Existing programs thus fail to ensure that a cleanup will be protective of human health and the environment...."\textsuperscript{107}

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\textsuperscript{101.} Sustainable Redevelopment, supra note 61, at 10,247.
\textsuperscript{102.} Id.
\textsuperscript{103.} Institutional Controls, supra note 71, at 1307.
\textsuperscript{104.} David F. Coursen, Institutional Controls at Superfund Sites, 23 ENVTL. L. REP. 10,279, 10,281; Geisinger, supra note 51, at 389.
\textsuperscript{106.} In the case of restrictive covenants, it is hard to satisfy the requirement that a limitation or restriction in the use of the land "touch and concern" the land, given that the vast majority of states take the position that the benefit of a real covenant must not be in gross to touch and concern the land. Similarly, the requirement of vertical privity may also be problematic. Many of the problems that arise with restrictive covenants, particularly the traditional invalidity of interests held in gross, also apply to equitable servitudes. See generally JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW (1998); Susan C. Borinsky, The Use of Institutional Controls in Superfund and Similar State Laws, 7 FORDHAM ENVTL. L.J. 1, 16-17 (1995).
\textsuperscript{107.} Geisinger, supra note 51, at 393.
Current research into institutional controls suggests that these concerns are well founded. A study of institutional controls conducted in 1995 by the Environmental Law Institute (ELI) concluded that "the most frequently used institutional controls cannot prevent harm," ranging from health effects to property damage, to serious injury or death to humans. ELI has also concluded that, after nearly a decade, this assessment remains valid; institutional controls can reduce the risk of exposure, but cannot eliminate it. Estimated failure rates fluctuate between 0.13-5 percent of attempted cleanups, and this number may approach 100 percent over centuries. Further, data show that some of these failures are likely to remain unaddressed. While most states reserve the right to require additional remediation as necessary at sites that have adopted a risk-based cleanup approach, these "reopeners" seem to be used rarely.

In sum, environmental justice scholars have expressed concerns that brownfield redevelopment may impose undue pollution burdens on poor and minority communities. Redevelopment may exacerbate traditional patterns of unequal exposure to harm without bringing long term, substantial benefits to local communities. Advocates also have denounced the failures and weaknesses of the risk assessment process, mainly its failure to account for distributional effects of risk decisions and its inability to account for complex social, political, and ethical issues. They have further warned that risk-based cleanups rest on two faulty assumptions: (1) that one can predict future use of the land and (2) that

108. ENVIRONMENTAL LAW INSTITUTE, INSTITUTIONAL CONTROLS IN USE 34 (1995); see also Lessons, supra note 48, at 10,123 (arguing that the use of ICs to reduce risk can be effective, as long as ICs are not the sole remedy).
109. Institutional Controls, supra note 71, at 1305.
110. Id. at 1311-12 (citing NATIONAL ACADEMY OF SCIENCES, LONG-TERM INSTITUTIONAL MANAGEMENT OF U.S. DEPARTMENT OF ENERGY LEGACY WASTE SITES 1 (2000)).
111. Situations that may lead to "reopening" the document without requiring further action are: "the owner chooses to remediate the site to meet the residential (unrestricted use) standard; discovery of new contamination; discovery of previously unknown contamination; change in land use; new information; fraud; changes in standards; failure to record proprietary controls in property records; failure to maintain the engineering or institutional controls; off-site migration of contamination; violation of deed restriction or other institutional control; failure of the remedy to protect human health or the environment; and a new release at a non-industrial site where treatment, removal, or destruction has become economically or technologically feasible." Institutional Controls, supra note 71, at 309-10.
112. Failure rates of institutional controls fluctuate between 0.1% and 5% and are estimated to be substantially higher. With twelve sites "reopened" out of a universe of 11,497 closed sites under state voluntary cleanup programs, reopening rates appear much lower, reaching only 0.1%. See Institutional Controls, supra note 71, at 1310 (citing Robert Simons et al., Quantifying Long-Term Environmental Regulatory Risk for Brownfields: Are Reopeners Really an Issue?, 46 ENVTL. PLAN. & MGMT. 259 (2003)).
one can proscribe other uses. As a consequence, risk-based cleanups fail to protect human health and the environment in practice.

To address these problems, environmental justice advocates have persistently called for broad-based public participation in brownfield remediation efforts. “There is a strong sentiment that public participation is the public policy component that most efficiently addresses environmental justice concerns” at brownfield sites. In 1995, EPA and the National Environmental Justice Advisory Council (NEJAC) Waste and Facility Siting Subcommittee sponsored a series of “Public Dialogues” on urban revitalization and brownfields in five cities. These meetings were designed to “provide for the first time an opportunity for environmental justice advocates and residents of impacted communities to systematically provide input regarding issues related to the EPA’s Brownfields Economic Redevelopment Initiative.” The first recommendation that emerged from these meetings was the need for “informed and empowered community involvement”:

Early, ongoing, and meaningful public participation is the hallmark of sound public policy and decision making. The community most directly impacted by a problem or project is inherently qualified to participate in the decision-making process. Mechanisms must be established to ensure their full participation, including training and support for community groups, technical assistance grants, community advisory groups, and others.

Initially many developers, local government officials, and landowners met these demands with resistance, in fear that enhanced public participation requirements at brownfield redevelopment sites would inordinately delay many worthwhile projects, perhaps even leading to their abandonment. Time, however, has indicated that public

114. The National Environmental Justice Advisory Committee (NEJAC) was created in 1995 by President Clinton to provide independent advice, consultations, and recommendations to the EPA Administrator on environmental justice matters. See NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COMMITTEE, U.S. ENVIRONMENTAL PROTECTION AGENCY, MODEL PLAN FOR PUBLIC PARTICIPATION 7 (1996).
116. Id. at es-i.
117. Id. at es-iii.
118. See, e.g., Wolf, supra note 113, at 520-21 (referring to the fear that enhanced public participation requirements would “NEPA-ize” the brownfields reuse process); Eisen, Sustainable Cities, supra note 31, at 224. See also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 814 (2nd ed. 1994) (stating that “[p]ublic participation is a hydra-headed theme of environmental law, and it long has been a conspicuous landmark of the NEPA landscape.”)(citations omitted); Stephen M. Johnson, NEPA and SEPA’s in the Quest for Environmental Justice, 30 LOY. L.A. L. REV. 565 (1997).
participation is essential for projects to succeed. Indeed, observers have concluded that “[c]ommunity relations can make or break a brownfields project.” Including the community in redevelopment projects can help bridge the gap between developers and neighbors, promoting trust in place of long-held suspicions. The community can serve as a catalyst of development, as a partner with private and public entities, and as a monitor of redevelopment activities.

Public participation is certainly no panacea for all environmental justice and public health concerns raised by the redevelopment agenda. The precise contours of appropriate public participation remain subject to debate. Yet it is unquestionable that in the nearly ten years that have elapsed since the NEJAC Public Dialogues, the idea that meaningful public participation is essential to brownfields policies has become widely accepted.

II. THE UNIFORM ENVIRONMENTAL COVENANTS ACT (UECA)

In August 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Environmental Covenants Act (UECA, the Act) and recommended it for adoption in the states. The decision came after a two-year drafting process in which a broad group of stakeholders met biannually to discuss the language of the Act line-by-line and section-by-section.

The Drafting Committee tried

119. Kass, supra note 42, at 347. See also EDITH M. PEPPER, LESSONS FROM THE FIELD: UNLOCKING ECONOMIC POTENTIAL WITH AN ENVIRONMENTAL KEY 22 (1997) (“In almost every case study analyzed, carefully orchestrated public outreach and involvement plans were implemented from the outset. Without this critical community buy-in, many project participants note, their efforts could easily have fallen apart.”).


121. See, e.g., Luke W. Cole, The Theory and Reality of Community-Based Environmental Decision-making: The Failure of California’s Tanner Act and its Implications for Environmental Justice, 25 ECOLOGY L.Q. 733 (1999) (discussing the failure of community advisory committees under California’s Tanner Act due to socio-economic asymmetries between the impacted communities and the committee members); Devolved Collaboration, supra note 91, at 495 (warning of the dangers of devolved collaboration and the need to take into account the political economy of constituencies in participatory processes).

122. See, e.g., Mank, supra note 4, at 162-70, 178-79 (proposing “community impact statements” and “citizen advisory boards”); Kibel, supra note 8, at 617-18 (proposing “restoration advisory boards”); Brownfields of Dreams, supra note 6, at 1017-20 (proposing “community working groups”).

123. See, e.g., Evolving Norms, supra note 93 (discussing recent trends toward community-based environmental decision-making).


125. Personal communication with Kurt A. Strasser, Reporter for UECA Drafting Committee (Feb. 16, 2004).
to reach decisions by consensus and solicited the input of interested individuals, groups, and institutions at all stages.\textsuperscript{126}

UECA provides a legal infrastructure for creating, changing, and enforcing institutional controls. It is designed to address two main policies regarding the validity of institutional controls. First, it seeks to ensure that land use restrictions designed to control the potential environmental risk of residual contamination will be reflected on the land records and effectively enforced over time as real property servitudes. For this purpose, the Act explicitly rejects traditional common law property doctrines that limit enforceability of property covenants over time. Secondly, the Act purports to facilitate the return of brownfields to the stream of commerce by setting a clear, uniform process for creating, recording, enforcing, modifying, or terminating institutional controls at previously contaminated sites.\textsuperscript{127}

The Act provides neither substantive standards for environmental remediation, specific administrative procedures for the creation of environmental standards, nor any activities or use limitations to be used at a particular site. Substantive state or federal law provides these standards. UECA is "but one tool in a larger context of environmental remediation regulation" and is designed merely to supplement these other laws in "suppl[y]ing the legal infrastructure for creating and enforcing... environmental covenant[s]."\textsuperscript{128}

\textbf{A. Creation of Environmental Covenants}

UECA defines environmental covenants, the legal instruments used to limit exposure to residual contamination in risk-based cleanups, as "servitude(s) arising under an environmental response project that imposes activity and use limitations."\textsuperscript{129} By defining environmental covenants as servitudes, the drafters define environmental covenants not "simply [as] a personal common law contract between the agency and the owner of the real property,"\textsuperscript{130} but as "a legal device that creates a right or an obligation that runs with land or an interest in land."\textsuperscript{131}

\textsuperscript{126} Kurt A. Strasser & William Breetz, The Benefits of a Uniform State Law for Institutional Controls, in IMPLEMENTING INSTITUTIONAL CONTROLS, supra note 52, at 32. Personal communication with Kurt A. Strasser (Feb. 16, 2004).

\textsuperscript{127} UECA, supra note 124, at 1.

\textsuperscript{128} UECA, supra note 124, at 2, 3; Personal communication with Kurt A. Strasser (Feb. 16, 2004); personal communication with John Pendergrass, Senior Attorney, Environmental Law Institute (Feb. 26, 2004).

\textsuperscript{129} UECA, supra note 124, at § 2(4).

\textsuperscript{130} Id. at § 2 cmt.5.

\textsuperscript{131} Id. (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.1 (2000)).
Activity and use limitations are defined as "restrictions or obligations... with respect to real property." Some examples of activity and use limitations are: "(1) prohibition or limitation of one or more uses of or activities on the real property, including restrictions on residential use, drilling for or pumping groundwater"; (2) activities "required to be conducted on the real property, including monitoring, reporting, or operating procedures and maintenance for physical controls or devices"; (3) rights of access "necessary to implement the activity and use limitations"; and (4) "any physical structure or device required to be placed on the real property."

Environmental covenants are created between the owner of the real property where the risk-based cleanup is being implemented and the agency that supervises the cleanup. The owner and the agency negotiate the contents of the environmental covenant, and the owner grants the environmental covenant to a holder. A "holder" is defined broadly as "the grantee of an environmental covenant." Anyone can be a holder, including a person that owns an interest in the real property, the agency, a municipality, or other unit of local government. An environmental covenant may have more than one holder. The Act specifies that "[t]he interest of a holder is an interest in real property," thus distinguishing that right from personal or contractual rights that do not run with the land.

UECA authorizes the agency to require other persons "who have interests in the real property" to sign the covenant. According to the comments, this requirement is intended to reach "persons other than the owner [who] may be liable for cleanup of the contamination, including contingent future liability if further cleanup is needed or personal injury claims are brought." The Act lists as examples parties that used the property in the past, or whose waste was disposed of in the property. By signing the covenant, these parties would be informed of future enforcement, modification, or termination of the covenant. The Act further provides that the agency may condition its approval of the covenant on a requirement that designated third parties sign it, or to

132. UECA, supra note 124, at § 2(1).
133. Id. at § 2 cmt.1.
134. Id. at § 4 cmt.3.
135. Id. at § 2(6).
136. Id. at § 3(a).
137. Id.
138. Id.
139. Id. at § 4(e).
140. Id. at § 4 cmt.5.
141. Id.
142. Id. Regarding enforcement, termination or modification, see infra at notes 168-202 and accompanying text.
other requirements at its discretion under other applicable law.\footnote{143} As 
examples, it mentions that the agency may either ask the owner to 
provide an abstract of title of the property, choose to subordinate prior 
interests, or designate a third party as holder of the covenant.\footnote{144}

Section 4 of the Act lists required and suggested contents of 
environmental covenants. Required contents include: (1) a statement 
"that the instrument is an environmental covenant" pursuant to the Act; 
(2) a "legally sufficient description of the real property subject to the 
covenant;" (3) a description of the "activity and use limitations imposed 
on the real property" by the environmental covenant; and (4) a list of 
every holder.\footnote{145}

In addition, environmental covenants under the Act must identify 
the name and location for the environmental response project reflected in 
the environmental covenant, and be signed by the agency, every holder, 
and, unless waived by the agency, every owner of the fee simple of the 
real property subject to the covenant.\footnote{146} The drafters recognize that these 
waivers should be rarely used, since "in most situations the covenant can 
be effective only if the fee owner's interest is subject to the covenant."\footnote{147} 
The provision is intended to reach those rare cases where the fee owner 
may have transferred most of the economic value of the property to the 
owner of another interest, so that the signature of this other holder would 
be in fact more critical for the purposes of guaranteeing the effectiveness 
of the environmental covenant.\footnote{148} Where the owner is unavailable or 
unwilling to participate in the environmental response project, the Act 
contemplates that it may be necessary for the agency to condemn the 
property in question and "take an interest sufficient to record an 
environmental covenant on the property."\footnote{149} UECA does not provide 
specific condemnation authority.

The Act also lists other pieces of information, requirements or 
restrictions that could be contained in environmental covenants at the 
discretion of the persons who sign them. These discretionary elements 
make a covenant more user-friendly. They include elements such as 
otice and a narrative of both problem and solution. Important 
discretionary elements include: (1) requirements for notice following 
transfer, applications for building permits, or proposals for any site work 
affecting the contamination; (2) "requirements for periodic reporting 
describing compliance with the covenant;" (3) "rights of access to the

\footnote{143}{Id. at § 4 cmt.13.} 
\footnote{144}{Id.} 
\footnote{145}{Id. at § 4(a).} 
\footnote{146}{Id.} 
\footnote{147}{Id. at § 4 cmt.6.} 
\footnote{148}{Id.} 
\footnote{149}{Id. at § 4 cmt.3.}
property granted in connection with implementation or enforcement of the covenant;" (4) "a brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;" (5) any limitations on amendment or termination in addition to those provided by the Act; and (6) any rights granted to the holder in addition to its rights under the Act.150

B. Validity of Environmental Covenants

UECA provides that interests in the real property in existence at the time the environmental covenant is created, such as liens or mortgages, are not affected by the covenant unless the person who owns the interest agrees to subordinate it to the covenant.151 Although the Act does not require subordination,152 in its comments it refers to the possibility that the agency negotiating the covenant may condition its approval of the remediation project to the subordination of prior interests.153 The subordination agreement may be contained in the environmental covenant or in a separate instrument.154 A subordination agreement does not impose affirmative obligations or liabilities on the person who is subordinating its interest with respect to the environmental property.155

Section 5 is crucial, for it deals with the validity of environmental covenants created under the Act, vis-à-vis traditional property law doctrines that might limit their enforceability. Subsection (a) states that "[a]n environmental covenant that complies with this [Act] runs with the land,"156 meaning that it will be binding not only upon the parties who negotiate it but upon subsequent owners of the property and others who hold an interest in the property, as long as they have constructive notice of the covenant.157 Subsection (b) states that "[a]n environmental covenant that is otherwise effective is valid and enforceable" even if traditional common law property doctrines would otherwise make it

150. Id. at § 4(b).
151. Id. at § 3(d)(1).
152. Id. at § 3(d)(2).
153. "In preparing an environmental covenant, it might be advisable for the agency to identify all prior interests, determine which interests may interfere with the covenant protecting human health and the environment, and then take steps to avoid the possibility of such interference. The agency may do this by, for example, having the parties obtain appropriate subordination of prior interests, as a condition to the agency's approval of the environmental covenant." Id. at § 3 cmt.
154. Id. at § (3)(d)(3).
155. Id. at § (3)(d)(4).
156. Id. at § (5)(a).
157. Id. at § (5) cmt.1.
Thus, UECA states that an environmental covenant created under it is enforceable even if:

(1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to a person other than the original holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder; (6) the benefit or burden does not touch or concern real property; (7) there is no privity of estate or contract;... (9) the owner of an interest subject to the environmental covenant and the holder are the same person.\(^\text{159}\)

The comments to this section explain that this provision achieves the crucial goal of "remov(ing) common law defenses that could impede the use of environmental covenants.\(^\text{160}\) The comments also suggest that legislators in the individual states may wish to consider whether to add references to other similar statutory or common law limitations to this section.\(^\text{161}\)

C. Notice and Recording

The Act specifies who receives notice of the covenant. Copies of the environmental covenant are to be provided as required by the agency to each person that signed the covenant, each person holding an interest in the real property subject to the covenant, each person in possession of that real property, each unit of local government in which the real property is located, and any other person the agency requires.\(^\text{162}\) As the drafters explain, this section contemplates that the agency will normally require that the final covenant be sent to all affected parties. "[I]n an appropriate case, the agency might require notice to abutting property owners... (who) may have no knowledge of the existing conditions on abutting land."\(^\text{163}\)

Section 8 applies customary recording rules to environmental covenants created pursuant to the Act. This section provides that environmental covenants and any amendments or termination of such documents should be recorded "in every [county] in which any portion of the real property subject to the covenant is located."\(^\text{164}\) It further explains

\(^{158}\) Id. at § 5(b).

\(^{159}\) Id. at § (5)(b)(1)-(9). Further, subsection (c) extends this preclusion of applicability of common law doctrines to instruments creating activity and use limitations that were recorded prior to the Act. Id. at § (5)(c).

\(^{160}\) Id. at § (5) cmt.3.

\(^{161}\) Id.

\(^{162}\) Id. at § 7(a).

\(^{163}\) Id. at § 7 cmt.

\(^{164}\) Id. at § 8(a).
that the efficacy of the covenant does not depend on recording, since "[a] signed but unrecorded covenant, under traditional real property law, binds the parties who signed it and, generally, those who have knowledge of the covenant."165

The recording requirements ensure that all parties with an interest in the real property under the covenant will have constructive notice of the activity and use restrictions imposed upon it by that instrument. UECA's drafters recognized, however, that something more may be necessary to ensure that all interested persons have actual notice of the contamination remaining on the site and the restrictions imposed by the covenant. "The fact that this law may provide legally sufficient knowledge of those conditions is no substitute for real information regarding those conditions."166 Although the drafters stated that the challenge of providing actual notice is beyond the scope of the Act, they did suggest that governments rely on information techniques already in use in analogous situations, such as location of zoning districts and flood plain boundaries, to inform the public of the existence of contamination and environmental covenants.167

D. Amendment and Termination

The Act creates a presumption that environmental covenants are perpetual.168 The only exceptions to this general rule are environmental covenants that: (1) by their terms are limited to a specific duration or meant to terminate by the occurrence of a specific event, (2) are terminated by consent, (3) are terminated or modified by court order under the doctrine of changed circumstances; (4) are terminated by foreclosure of an interest that has priority over the environmental covenant; or (5) are terminated or modified in an eminent domain proceeding.169 In all other cases, environmental covenants are to be considered perpetual, even if they do not expressly refer to duration.170

Due to the UECA's policy of not disturbing prior interests, the termination provisions under section 9 restate that prior mortgages or other lien holders may, in the event of foreclosure, terminate an environmental covenant.171 In contrast, section 9(c) provides that

165. Id. at § 8 cmt.
166. Id. at 5.
167. Id. They give the examples of maps in recorders' offices, on-site signs and monuments, and computer databases accessible to the public.
168. Id. at § 9(a).
169. Id. at § 9(a)(1)-(5).
170. Id. at § 9(a) cmt.1.
171. Id. at § 9 cmt.4 states that the Act follows traditional "first in time, first in right" principles in order "to avoid any suggestion of impairment of contract." The comment restates that the lien holder in a case like this would still face contamination on the site and that the
environmental covenants may not be. "extinguished, limited or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine[s] of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine." The drafters explained that these covenants seek to protect human health and the environment and that the contamination that led to the limitations imposed in the covenants would presumably still be there if the covenants were extinguished. Thus, "the termination of that protection [of the covenant] to serve other public policies of governments seems inconsistent." Likewise, section 9(d) provides that environmental covenants "may not be extinguished, limited or impaired" by applying state marketable title and dormant mineral interests statutes.

Termination or amendment by court order can occur under two circumstances. First, eminent domain proceedings can lead to termination or amendment of environmental covenants, provided that: (1) the agency that signed the covenant is part of such proceedings, (2) all persons who originally signed the covenant, the holder, and the current owner of the property are given notice of the pendency of the proceeding, and (3) "the court determines, after hearing, that the termination or modification will not adversely affect human health or the environment." These requirements seek to ensure that an exercise of eminent domain that may result in a change of use of the property does not increase environmental risks.

Second, the Act provides that a court may terminate an environmental covenant, or lessen its burden, under the doctrine of changed circumstances. This option applies only if "the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized," in an action in which all persons that originally signed the covenant, the holder, and the current owner of the property have been given notice. UECA contemplates that the agency's determination to this respect, or its failure to make such determination upon request, is reviewable pursuant to state administrative procedure acts. The drafters made clear that the changed circumstances provisions are to be used in the traditional sense –

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172. Id. at § 9(c).
173. Id. at § 9 cmt.4.
174. Id. at § 9(d).
175. Id. at § 9(a)(5)(A)-(C).
176. Id. at § 9 cmt.2.
177. Id. at § 9(b).
178. Id.
to lessen or eliminate the burden of environmental covenants. According to them, to invoke this provision to increase the burden imposed by environmental covenants would be "antithetical to the careful balancing of interests embedded in the Act [and] inconsistent with the expectations of owners and legally liable parties who have entered into the covenant with an expectation that the burden would not be increased...." However, the Act does not preclude an agency's authority under substantive environmental law to change the burden of an environmental covenant should the circumstances warrant it under the so-called "reopener" provisions. Likewise, the drafters emphasize that the notice requirements either for an eminent domain proceeding or for an action for changed circumstances are not intended to preclude notice to other persons as required by other laws and regulations.

Termination or amendment of a covenant can also be attained by consent of the parties. Under section 10, such amendments can only be realized if all parties subject to the original covenant sign the amendment or termination. This provision is intended to reach successors in interest to the parties who originally signed the covenant, where they may continue to be subject to contingent liability under the environmental response project. The drafters explained that "[t]he extension of that liability to successor businesses is a complex subject controlled by the underlying state or federal environmental law creating the liability." They also suggested that the consent both of successors to ownership of the business that originally caused the contamination and of successors to owners of the contaminated real property may be necessary. The drafters added that the agency may want to require the party seeking the amendment to provide notice to the parties whose consent is required.

Under section 10(c), a holder's assignment of its interest is an amendment. Thus a holder may not assign its interest without consent

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179. Id. at § 9 cmt.3.
180. Id.
181. The drafters comment that "[w]hile such reopeners are rare, they may be possible to respond either to newly-discovered contamination or new scientific knowledge of the risk posed by existing contamination." Id. at 3. In the event that the agency that signed the covenant sought a reopener, it would negotiate a new covenant with interested parties, rather than invoke the doctrine of changed circumstances to amend the original covenant. Personal communication with Kurt A. Strasser (Feb 16, 2004).
182. Id. at § 9 cmt.5.
183. Id. at § 10(a)(3). Specific exceptions to this general rule, such as waiver by the parties of by the court, are discussed infra at notes 192-193 and accompanying text.
184. Id. at § 10 cmt.1. Regarding the definition of "environmental response project", see id. at § 2(5).
185. Id. at § 10 cmt.1.
186. Id. at § 10 cmt.2.
187. Id. at § 10 cmt.4.
188. Id. at § 10(c).
of the other parties. Moreover, the other parties can agree to remove a holder. A court of competent jurisdiction may also fill vacancies in the position of holders.

The Act contemplates that parties to a covenant can waive their right to consent to termination or amendment of the covenants. This would significantly decrease the agency's cost of amending or terminating environmental covenants and, as the comments indicate, might also be of interest to the original parties, "depending on the extent to which the agency was willing to hold [them] harmless from the liability that might otherwise accrue...." Likewise, a court may waive the need to obtain a party's consent if it "finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence...."

UECA leaves to the agency's discretion the decision whether to give notice of a proposed amendment to other interested parties. However, the drafters commented that it might be "advisable" to give notice to a broad range of potentially interested persons, from affected local governments to the public at large.

**E. Enforcement**

UECA limits relief for a violation of an environmental covenant to injunctive or other equitable relief. It does not authorize money damages, restitution, court or attorney fees, stating that "[s]tanding to bring such claims... must be found, if at all, under other law." The drafters explained the Act's enforcement provisions seek "to distinguish between the expanded rights granted to enforce the covenant in accordance with its terms, and actions for money damages, restitution, tort claims and the like." The Act thus confers standing to enforce an environmental covenant to persons other than the parties to the agreement "because of the important policies underlying compliance with the terms of the covenant." The following persons have the power to enforce environmental covenants under UECA: (1) any party to the covenant; (2) the agency; (3) any person to whom the covenant explicitly grants enforcement power; (4) any person "whose interest in the real property or whose collateral or liability may be affected by the alleged

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189. *Id.* at § 10(d)(1).
190. *Id.* at § 10(d)(2).
191. *Id.* at § 10(e).
192. *Id.* at § 10 cmt.7.
193. *Id.* at § 10(a)(3).
194. *Id.* at § 10 cmt.7.
195. *Id.* at § 11(a).
196. *Id.* at § 11 cmt.3.
197. *Id.* at § 11 cmt.2.
198. *Id.*
violation"; (5) any "municipality or other unit of local government in which the real property subject to the covenant is located."199

UECA does not provide authority for citizens' suits to enforce environmental covenants, although it does not affect other state laws that may authorize such suits.200 Similarly, Section 11(b) states that the Act does not limit agency regulatory authority under other laws,201 in recognition that "in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement... in addition to rights specified in the environmental covenant."202

III. UECA: AN ENVIRONMENTAL JUSTICE CRITIQUE

The Act represents an important step forward from current state brownfields remediation policies. By proposing uniform procedures regarding the recording, creation, amendment, termination, and enforceability of institutional controls, UECA fulfills its purpose of "reducing uncertainty and transaction costs of dealing with fifty different jurisdictions with potentially fifty sets of regulatory outcomes."203 As a consequence, it creates incentives for greater investment and redevelopment of contaminated properties.204 Perhaps most importantly, by creating a uniform recording mechanism and expressly limiting traditional state property law doctrines that preclude enforceability of covenants over time, UECA goes a great length towards its stated goal of assuring that environmental covenants will be valid and enforceable in the long term as real property servitudes.205 Brownfield developers and environmental justice activists alike should welcome this development, since it brings a highly needed sense of certainty to risk-based cleanups.206

While UECA represents a significant improvement over disparate and often unpredictable state remediation programs, it also suffers from a significant failure: the exclusion of the public from the creation, implementation, and enforcement of these instruments. This failure, if not addressed, may hinder the Act's stated goals of assuring effective implementation and enforceability of environmental covenants over time and thereby perpetuate many of the equity concerns that environmental justice advocates have expressed over risk-based cleanups. Legislators and policymakers must therefore be aware of this failure before they

199. Id. at § 11(a)(1)-(5).
200. Id. at § 11 cmt.2.
201. Id. at § 11(b).
202. Id. at § 11 cmt.4.
203. Strasser & Breetz, supra note 126, at 32.
204. Id.
205. Institutional Controls, supra note 71, at 1319.
206. See supra notes 98-112 and accompanying text.
consider UECA for adoption. This section analyzes the Act's shortcomings, briefly proposing necessary changes along the way.

A. Problems in the Provisions Dealing with the Creation of Environmental Covenants

The Act continues the traditional real property treatment of covenants as essentially private instruments subscribed between a property owner and an agency, albeit with important modifications. From an environmental justice perspective, this approach problematically shields the most important components of the cleanup program—the decisions about future site use and acceptable risk—from public deliberation.

Under section 4(c), other "persons... who have interests in the real property" may sign the covenant as it is being created, provided that the agency has invited them to do so. Signing the covenant at this stage would provide these "other persons" with notice of future enforcement, modification, or termination procedures. Interestingly, this section authorizes the government to bring third parties into the negotiations that give birth to an environmental covenant, but is limited to persons who have "interests in the real property." As explained above, this is intended to reach "persons other than the owner [who] may be liable for cleanup of the contamination, including contingent future liability if further cleanup is needed or personal injury claims are brought." Neighbors or community groups who may potentially be affected by the cleanup decision are thus presumptively not included among the persons who may be invited, at the agency's discretion, to sign a covenant.

UECA's drafters and supporters argue that this section does not by itself preclude public involvement in the creation of an environmental covenant. Since the Act is just one piece in a complex regulatory puzzle, it intends to cover only procedural aspects concerning the creation, recording, amendment, termination, and enforcement of covenants, and not all aspects of site remediation. This argument asserts that neighbors, environmental organizations, or other public interest groups that wish to participate in the creation of a covenant and/or sign it, could use other

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207. UECA, at § 4 cmt.3 (stating that "[o]rdinarily, an environmental covenant will be created only by agreement between the agency and the owner").

208. See Kris Wernstedt & Robert Hersh, "Through a Lens Darkly": Superfund Spectacles on Public Participation at Brownfield Sites, 9 RISK: HEALTH, SAFETY AND ENVIRONMENT 153, 161 (1998) (noting that one of the difficulties in promoting effective public participation at brownfield sites is the reliance on institutional controls based on private property laws).

209. UECA, at § 4 cmt.5.

210. Id. This would include parties who used the property in the past or whose waste was disposed of in the property.
state laws (i.e., administrative procedure laws or state remediation laws) to make their voices heard.\textsuperscript{211}

This argument misses the point. True, most states do provide for notice and comment periods in their state-run voluntary cleanup programs, and many call for public hearings at some point in the remediation process.\textsuperscript{212} These requirements vary greatly from state to state, however, and are often the result of ad hoc, not statutorily mandated, policies.\textsuperscript{213} Moreover, commentators have described how traditional “notice and comment” procedures for public participation are lengthy, cumbersome, and often fail to involve the affected public.\textsuperscript{214} For these reasons, environmental justice advocates have consistently demanded that community involvement in brownfield redevelopment projects be “[e]arly, ongoing, and meaningful.”\textsuperscript{215} At a minimum, community participation should take place up-front and not as an afterthought. Communities have insisted that they are “inherently qualified” to be “at the table” during discussions about matters that affect them; they reject traditional approaches that provide for consultation only after a decision has been made.\textsuperscript{216} In other words, “in order for environmental justice concerns to be fully incorporated into the brownfields redevelopment process, the affected community must be a partner, not a mere sounding board.”\textsuperscript{217} Yet provisions for public participation under most state environmental laws fall short of early,

\begin{itemize}
  \item \textsuperscript{211} Personal communication with Kurt A. Strasser (Feb. 16, 2004); personal communication with John Pendergrass (Feb. 26, 2004). Pendergrass also participated in UECA’s drafting sessions.
  \item \textsuperscript{212} \textit{State Superfund Programs}, supra note 32, at 30-31, 100-102 (describing the public notice, comment and hearing requirements imposed by the different states at their state cleanups and voluntary cleanup programs).
  \item \textsuperscript{213} \textit{Id.} at 30.
  \item \textsuperscript{214} \textit{See, e.g., Devolved Collaboration}, supra note 91, at 470 (describing how the notice and comment process is often “manipulated into ‘announce and defend’ decision-making, in which meaningful outside input is effectively stillborn”); Frances Irwin and Charles Bruch, \textit{Information, Public Participation, and Justice}, 32 \textit{Envtl. L. Rep.} 10,784 (discussing new collaborative approaches and stakeholder processes implemented in the 1990s to improve the quality and legitimacy of environmental policy).
  \item \textsuperscript{215} \textit{Authentic Signs of Hope}, supra note 115, at es-iii.
  \item \textsuperscript{216} \textit{Id.} at 20; see also \textit{Report of the Title VI Advisory Committee, Next Steps For EPA, State, and Local Environmental Justice Programs} 19-20 (1999), available at http://www.epa.gov/ocem/nacept/titleVI/titlerpt.html (last visited Oct. 25, 2004) (stating that “early intervention reduces the possibility that delays will cost industry time, money, and even a competitive advantage in the siting or expansion of new and existing facilities.” \textit{Id.} at 33); \textit{Model Plan}, supra note 114, at 15 (proposing that government agencies “[s]olicit stakeholder involvement early in the policymaking process, beginning in the planning and development stages and continuing through implementation and oversight”).
  \item \textsuperscript{217} \textit{Sustainable Cities}, supra note 31, at 226.
\end{itemize}
ongoing, and meaningful involvement.\textsuperscript{218} In sum, opportunities available to the public under traditional administrative and environmental statutes do not compare to the opportunity afforded by the Act to parties with potential liability to receive an agency’s invitation to sign a covenant and thus ensure notice of future enforcement actions and amendment or termination proposals.

From an environmental justice perspective, the UECA also fails to treat the mandatory and discretionary elements in institutional controls appropriately. As summarized above, section 4(a) lists contents required by the Act in all covenants, while section 4(b) lists discretionary contents. Mandatory elements are: a statement that the instrument is an environmental covenant pursuant to the Act, a legally sufficient description of the real property subject to the covenant, a description of the activity and use limitations imposed on the property by the covenant, a list of every holder, and the name and location for the environmental response project reflected in the environmental covenant.\textsuperscript{219} On the other hand, UECA treats the following elements as discretionary: requirements for notice following transfer, applications for permits, or proposals for any site work affecting the contamination; requirements for periodic reporting describing compliance with the covenant; rights of access to the property granted in connection with the covenant; a “brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;” any limitations on amendment or termination in addition to those provided by the Act, and any rights granted to the holder in addition to its rights under the Act.\textsuperscript{220}

Even a cursory reading of these lists shows that the Act’s requirements represent the bare minimum of what these instruments should include in order to be legally enforceable. From the environmental justice viewpoint, many of the discretionary items ought to be mandatory. This is especially true of the “brief narrative description” of the contamination and remedy at issue. The comments to this section acknowledge that such a statement (for example, explaining that “the contaminant might be of danger if it comes in contact with skin, if breathed, or only if ingested”) would be “very useful” from a public health perspective.\textsuperscript{221} Given the importance of making such information available to the public, and the relatively low costs of doing so (once the risk-based remediation has been performed, health risks are presumably

\begin{itemize}
\item \textsuperscript{218} \textit{State Superfund Programs, supra} note 32, at 30-31, 100-102 (describing state public notice, comment and hearing requirements for state cleanups and voluntary cleanup programs).
\item \textsuperscript{219} UECA, at § 4(a)(1)-(6).
\item \textsuperscript{220} \textit{Id.} at § 4(b)(1)-(6).
\item \textsuperscript{221} \textit{Id.} at § 4 cmt.10.
\end{itemize}
well known to regulators), it appears that this should be a mandatory and not discretionary element of environmental covenants.\textsuperscript{222} The comments to the Act offer no explanation as to why it makes such important elements merely discretionary.

For similar reasons, periodic reporting requirements should be included in all covenants. The costs of mandating periodic reporting are minor relative to the harm that could result from their omission. Given the chance that institutional controls could fail to determine future use of a property, periodic reporting seems only necessary.\textsuperscript{223}

\textbf{B. Problems in the Provisions Dealing with Amendment and Termination of Environmental Covenants}

UECA's presumption that environmental covenants, with limited exceptions, are perpetual does much to advance the goals of environmental protection at brownfield sites.\textsuperscript{224} As explained above, the exceptions to this general rule are narrow and generally circumscribed: covenants can be terminated by consent, by foreclosure of an interest that has priority over the environmental covenant, by an eminent domain proceeding, or by a court order under the doctrine of changed circumstances.\textsuperscript{225}

In allowing for termination by foreclosure of a prior interest, UECA follows traditional "first in time, first in right" principles in order "to avoid any suggestion of impairment of contract."\textsuperscript{226} The comments make clear, however, that it may be to the benefit of the owner of such an interest to subordinate its interest to the covenant pursuant to section 3, and that an agency may refuse to agree to a covenant where subordination of prior interests has not been secured.\textsuperscript{227} In contrast, UECA provides that environmental covenants will not be extinguished by other interests in the real property created after the environmental

\textsuperscript{222} Compare \textit{ENVIRONMENTAL LAW INSTITUTE, MODEL BROWNFIELDS LEGISLATION} § 6(l)(1), available at http://www.eli.org/pdf/ModelBrownfieldsLegislation.PDF (last visited Oct. 25, 2004)(mandating that cleanup plans contain "a summary that includes a plain language description of the information in order to enhance the opportunity for public involvement in, and understanding of, the cleanup process"); see also \textit{Institutional Controls, supra} note 71, at 1314 (stating that one of the "essential elements" to ensuring that institutional controls protect human health and the environment is the creation of "[s]ystems capable of providing information about sites and risks to the public in forms and language that can be understood and readily used by the public, particularly those who are likely to be exposed to contaminated sites").

\textsuperscript{223} \textit{Institutional Controls, supra} note 71, at 1308 (noting that one strategy for dealing with the possibility that institutional controls may fail is to "assure that the remedy... remain[s] effective" by establishing periodic auditing and reporting requirements).

\textsuperscript{224} UECA, at § 9(a).

\textsuperscript{225} \textit{Id. at} § 9(a)-(b).

\textsuperscript{226} \textit{Id. at} § 9 cmt.4.

\textsuperscript{227} \textit{Id.; see also} § 3(d).
covenant, such as "issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine[s] of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence...." This distinction between prior and subsequent interests appears to strike the proper balance between two potentially conflicting policies: assuring the long-term duration of institutional controls at brownfield sites, and avoiding impairment of contract.

The Act's provisions for amendment or termination by court order pursuant to an eminent domain proceeding and under the doctrine of changed circumstances are equally narrow and circumscribed. The requirement of notice to all parties who originally subscribed to the covenant, the agency, and the holder helps ensure that these instruments will not be amended or terminated in a manner that might hurt any of these parties. Further, the requirement of court approval in eminent domain proceedings provides a further guarantee that amendments or termination of these covenants will only ensue if there is no actual threat to human health and the environment. It is worth noting that the provision dealing with eminent domain expressly calls for a hearing, while the provision referring to a changed circumstances action does not. Presumably, the right to a hearing in such an action is implied.

Two more issues are worth noting with respect to the section pertaining to the conditions for amendment or termination of environmental covenants under the doctrine of changed circumstances. Under UECA, these proceedings commence when the agency that signed the covenant determines that its intended benefits can no longer be realized. The Act provides expressly that the "agency's determination" in this respect, "or its failure to make such determination upon request, is reviewable" pursuant to state administrative procedure acts. Given the drafters' insistence that it is just "one piece of the puzzle" that leaves undisturbed other state laws, this provision seems unnecessary; agency

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228. UECA, at § 9(c).
229. Id. at § 9(a)(5).
230. Id. at § 9(a)(5)(C), § 9(b).
231. Id. at § 9(a)(5)(C).
232. Id. at § 9(b).
233. Id. at § 9 cmt.3 (stating that the requirement for notice to all parties to the covenant in a changed circumstances judicial proceeding "will allow those parties to protect their interest in the proceeding").
234. Id. at § 9(b).
235. Id. at § 9(b).
236. Both the Act's drafters and proponents describe it as "only a piece in the complex puzzle" of environmental remediation laws. Personal communication with Kurt A. Strasser (Feb. 16, 2004); personal communication with John Pendergrass (Feb. 26, 2004). See also UECA, at 3 (stating that "[t]his Act does not supplant or impose substantive cleanup standards, either generally or in a particular case. The Act assumes those standards will be developed in a prior regulatory proceeding."); id. at § 6 cmt. (stating that "[w]here other law, including either a state
decisions are reviewable pursuant to state administrative norms independent of UECA. Arguably, this redundant provision aims to create a presumption of reviewability. If this were the case, it is both futile and biased. It is futile because state administrative procedure laws, irrespective of the UECA, determine reviewability of agency decisions. On the other hand, the provision would favor parties seeking review of agency action or inaction upon request.\textsuperscript{237}

Second, the Act's drafters explicitly stated that the Act should not be invoked to increase the burden imposed by environmental covenants. In their opinion, this would be "inconsistent with the expectations of owners and legally liable parties who have entered into the covenant with an expectation that the burden would not be increased."\textsuperscript{238} However, the Act does not preclude an agency's authority under substantive environmental law to increase the burden of an environmental covenant should the circumstances warrant it under the so-called "reopener" provisions.\textsuperscript{239} In the event that the discovery of new contamination, changes in scientific knowledge, or other circumstances lead the agency that signed the covenant to seek a "reopener," it would negotiate a new covenant with interested parties, rather than invoke the doctrine of changed circumstances to amend the original covenant.\textsuperscript{240} The drafters' explicit and passionate rejection of the possibility that the doctrine of changed circumstances could be used to increase the burden of environmental covenants seems misplaced, given that these actions appear to offer sufficient procedural safeguards to all parties in a neutral judicial proceeding. In addition, it may serve to discourage agency decisions to increase the burden of environmental covenants because reopeners are rare and potentially more costly and cumbersome than judicial determinations of changed circumstances.\textsuperscript{241}

The most problematic aspects of UECA's amendment and termination procedures, however, are in its section on termination and amendment by consent of the parties. Section 10 provides that amendments can be realized if all parties subject to the original covenant

\begin{itemize}
\item \textsuperscript{237} See discussion of the Act's failure to include authority for citizen suits, infra notes 252-272.
\item \textsuperscript{238} UECA, at § 9 cmt.3.
\item \textsuperscript{239} As noted supra at n.181, the drafters comment that "[w]hile such reopeners are rare, they may be possible to respond either to newly-discovered contamination or new scientific knowledge of the risk posed by existing contamination." UECA, at 3.
\item \textsuperscript{240} Personal communication with Kurt A. Strasser (Feb. 16, 2004).
\item \textsuperscript{241} See supra notes 111-112 and accompanying text.
\end{itemize}
As described more fully above, this provision is intended to reach successors in interest to the parties who originally signed the covenant. UECA contemplates two circumstances in which the signature of the original parties may be waived at the time of amendment. First, parties to a covenant can waive their right to consent. Likewise, a court may waive the need to obtain a party’s consent if it “finds that the person no longer exists or cannot be located or identified with the exercise or reasonable diligence.” Absent these circumstances, an amendment by consent requires the actual consent either of all parties to the original covenant or of their successors in interest. The drafters clearly stated that “[u]nder this Act... the agency would be prevented from administratively releasing or amending real property covenants without approval of the parties” and that “[t]he agency’s ability to take [new regulatory action] is contemplated by [the Act], but, in the absence of consent, is not governed by the Act.”

The Act’s emphasis on consensus creates a valuable tool in achieving the goal of long-term validity of institutional controls. Yet this focus can also give a recalcitrant party the right to stop an amendment unreasonably, thereby discouraging amendments. The Act’s emphasis on consensus may even create disincentives for future additional cleanups. Previous owners have no incentive to consent to a proposed removal of an environmental covenant, even if the removal is intended to facilitate additional cleanup, because they will not benefit in anyway by this termination and may actually face additional liabilities. Under such circumstances, agencies might be forced to yield costly concessions to these previous owners in order to prevent them from exercising the de facto veto power that the Act confers. Alternatively, agencies seeking to amend a covenant’s remedial or monitoring requirements would have to initiate a new proceeding, possibly involving higher time expense and transaction costs. Given problems of agency overload and scarcity of resources and personnel, this is an undesirable rule.

It would have been preferable to expand a court’s ability to waive the signature of an original party not only in the event that it cannot be

242. UECA, at § 10(a)(3).
243. Id. at § 10 cmt.1.
244. Id. at § 10(a)(3).
245. Id. Given the Act’s emphasis on creating mechanisms for the long-term effectiveness and validity of these instruments, however, this provision is presumably not meant to provide a judicial mechanism to overcome an original party’s resistance to amend.
246. Id. at § 10 cmt.7.
247. Id.
248. If a party to the original covenant refuses to agree to an amendment proposed by the agency, the latter would have to “reopen” the document that established the conditions for the site remediation and start a new proceeding. Personal communication with Kurt A. Strasser (Feb. 16, 2004).
found, but also in those circumstances where the agency can show that the amendment is reasonable and necessary, and that the party withholding consent is not acting in good faith. The circumstances under which a court could waive an original party's right to consent to could be drawn narrowly, ensuring that interested persons would not shy away from becoming parties to these agreements while still granting agencies more flexibility than they currently have under the Act.

C. Problems in the Provisions Dealing With Enforcement of Environmental Covenants

UECA's enforcement provisions also suffer from substantial shortcomings. As described in the previous section, the Act restricts damages awards, but it does have a somewhat broad standing provision.\textsuperscript{249} It does not authorize money damages, restitution, court or attorney fees, stating that "[s]tanding to bring such claims... must be found, if at all, under other law."\textsuperscript{250} The Act does confer standing to enforce environmental covenants to persons other than the parties to the original agreements, namely: (1) any party to the covenant, (2) the agency, (3) any person to whom the covenant explicitly grants enforcement power, (4) any person whose interest in the real property or whose collateral or liability may be affected by the alleged violation, and (5) any municipality or other unit of local government in which the real property subject to the covenant is located.\textsuperscript{251}

The drafters stated that the Act confers standing to enforce environmental covenants to this broad category of persons and entities "because of the important policies underlying compliance with the terms of the covenant[s]."\textsuperscript{252} Given these policies and the public interest in the continued validity of institutional controls, UECA's failure to provide for public enforcement of environmental covenants is deeply troubling. Previous versions of the Act, up until December 2002, did include a section providing for broad authority for public enforcement of these covenants. This section, notably absent from the current and final version of the Act, stated that:

any [person] [person aggrieved by an alleged breach of an environmental covenant] may maintain a civil action for injunctive or other equitable relief against a party alleged to be in violation of an environmental covenant.... In any such action the court may award costs of litigation, including reasonable attorney and expert witness

\textsuperscript{249} UECA, at § 11(a).
\textsuperscript{250} Id. at § 11 cmt.3.
\textsuperscript{251} Id. at § 11(a)(1)-(5).
\textsuperscript{252} Id. at § 11 cmt.2.
fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate.\textsuperscript{253}

In line with traditional requirements of citizen suits in environmental enforcement,\textsuperscript{254} the December 2002 version of the Act required a person bringing suit to notify both the agency involved with the covenant in question and the state agency for environmental protection.\textsuperscript{255} These agencies were given a time period of sixty days each to bring suit upon receiving this notice.\textsuperscript{256} Only if both these agencies failed to bring suit within those periods, could the citizen enforcer go forward with his or her own suit.\textsuperscript{257}

The comments to this deleted section of the Act described the benefits of citizen enforcement of environmental covenants. "Local citizen and environmental interests have both the opportunity and the motivation to observe compliance with use restrictions, and to some degree with activity limitations. Thus they will be well positioned to seek enforcement of violations and thereby offer greater assurance of effective implementation of the covenant."\textsuperscript{258} The comments further explained that the provision is drafted in a manner to offer two alternatives for citizen enforcement of environmental covenants: "[t]he first alternative authorizes suit by any person, mirroring provisions of federal law.... The second alternative is more limited, authorizing suit by any person aggrieved by the alleged breach of the environmental covenant."\textsuperscript{259}

These comments suggest several conclusions. First, the benefits of public enforcement of environmental covenants appear to be clear – especially in the context of high uncertainty and deeply controversial decisions that risk-based cleanups entail.\textsuperscript{260} Second, the possibility of

\begin{itemize}
  \item \textsuperscript{253} National Conference of Commissioners on Uniform State Laws, \textit{Uniform Environmental Covenants Act, December 2002 Draft,} at § 10(c), \textit{available at http://www.environmentalcovenants.org (last visited Oct. 24, 2004) [hereinafter December 2002 Draft]. The language in brackets is the original language of that draft version of the Act.}
  \item \textsuperscript{254} See, e.g., Eileen Gauna, \textit{Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice,} 22 ECOLOGY L.Q. 1, 43-44 (1995).
  \item \textsuperscript{255} December 2002 Draft, supra note 253, at § 10(c)(1).
  \item \textsuperscript{256} Id. at § 10(c)(3).
  \item \textsuperscript{257} Id. at § 10(c)(4).
  \item \textsuperscript{258} Id. at § 10(c) cmt.
  \item \textsuperscript{259} Id. The comments further explain that courts apply a two-part test to determine who is a "person aggrieved." The test first asks if the person has suffered an injury in fact and then asks if the person is arguably within the zone of interests sought to be protected by the statute. In contrast, the Model State Administrative Procedure Act uses a three-part analysis: (1) has the agency action prejudiced the person, (2) was the agency required to consider the person's interests in taking the challenged action, and (3) will a judgment in favor of the person substantially eliminate or redress the harm? National Conference of Commissioners on Uniform State Laws, \textit{Model State Administrative Procedure Act} § 5-106(a)(5) (1981), \textit{available at http://www.nmcpr.state.nm.us/acr/presentations/1981MSAPA.htm (last visited Oct. 20, 2004).}
  \item \textsuperscript{260} See supra notes 76-123 and accompanying text. On the benefits of public enforcement of environmental laws and regulations see Gauna, supra note 254; Cassandra Stubbs, \textit{Is the}
using a "person aggrieved" standard, together with the procedural requirements listed above, demonstrates that citizen enforcement can be structured to promote efficiency in environmental enforcement, while deterring frivolous litigation. Public participation promotes efficiency in the enforcement of environmental laws primarily for three reasons. First, by delegating to private citizens authority to perform certain tasks, environmental agencies can relieve some of the burden from their own budgets and concentrate in other areas that require greater expertise. Second, citizens are often in a better position to discover violations and monitor compliance of environmental laws than government officials because they are generally closer to the impact of the alleged violations than regulators are. Third, greater participation and delegation of enforcement can serve to deter violations as would-be polluters realize the likely consequences of their actions.

Moreover, fairness would support including citizen suits in the Act. "Ultimately, environmental protection depends upon enforcement. Thus communities of color and low income communities must have the opportunity and the resources to control private enforcement initiatives in their own communities in order to attain lasting environmental justice." UECA does provide third parties with potential liability broad standing to enforce violations of environmental covenants. It seems counterintuitive that persons whose liability can be affected, but not those whose health may be jeopardized, are authorized to pursue enforcement.


261. Gauna, supra note 254, at 43 (stating that procedural limitations in citizen enforcement provisions do not grant private individuals and environmental groups "carte blanche" to sue for "any reason"). See also Shermer, supra note 260, at 483-87.

262. But see Greve, supra note 260.

263. Shermer, supra note 260, at 468.

264. Id. at 473 (citing Phillip M. Bender, Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act § 404 Permit Violations, 27 ENVTL. L. 245, 281-82 (1997)).

265. Shermer, supra note 260, at 463.

266. Gauna, supra note 254, at 87.

267. UECA, at § 11(a)(4) (authorizing any "person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant" to bring suit).
Public enforcement is necessary for another reason. The Act relies heavily on holders to pursue enforcement. Under the language of the Act, holders have a right, not an obligation, to enforce. The comments, on the other hand, stated that "[i]n addition to enforcement rights, the holder may be given specific rights or obligations with respect to future implementation of the environmental covenant. These could include, for example, the obligation to monitor groundwater or maintain a cap or containment structure on the property. Such rights and obligations will be specified in the environmental covenant and, like any obligations, would be enforceable against the holder if the holder failed to satisfy its obligations." The comments, however, suggested that these holders' "rights and obligations" relate to the implementation of the covenants, not necessarily to their enforcement, and thus do not seem to create mandatory enforcement obligations, particularly given the discretionary language of section 11(a).

Although the Act contemplates that holders will generally be willing to enforce the covenants, there is no reason why this should always be so, particularly because an owner of a contaminated parcel of land can legally designate him or herself as the holder of the environmental covenant. The following question remains: if the holder of an environmental covenant were unwilling to enforce an alleged violation, and the other persons expressly authorized to do so failed to act by neglect or for any other reason, who would have standing to enforce the covenant?

268. *Id.* at § 11(a) states that "[a] civil action ... for violation of an environmental covenant may be maintained by" a listed series of persons with enforcement power (emphasis added).
269. *Id.* at § 4 cmt.7.
270. *Id.* at § 3(a) states that "[a]ny person, including a person that owns an interest in the real property ... may be a holder." § 5(b) provides that "[a]n environmental covenant that is otherwise effective is valid and enforceable even if ... (9) the owner of an interest subject to the environmental covenant and the holder are the same person." Comment 3 to this section explains that allowing the holder and the owner to be the same person permits property owners to undertake the remediation of contaminated sites because the Act requires a holder for covenants to be valid and because owners "may not be inclined to create an interest in a stranger."

271. This is not an unlikely scenario. Suppose a site has been remediated with an environmental covenant restricting future use of the property to industrial uses only, given the potential harmful effects of residual contamination. Also suppose that the owner is the holder of this covenant and that, with time, market conditions in the area change, making it financially desirable for this owner/holder to put the property into residential use. This owner/holder would have no incentive to enforce the covenant. The agency may be overburdened, its scarce resources devoted to more pressing priorities. The municipality where the property is located may not know of the alleged violation of the covenant until the new project is well under way, and may, like the owner/holder, have no interest in enforcing the covenant, given the prospect of receiving substantially higher tax revenues from residential use of the site than from its previous use. UECA's drafters and supporters acknowledge that this is "a legitimate issue" of concern, but that the need to reach a consensus acceptable both to environmentalists and to the real estate community was of foremost importance when deciding whether citizen enforcement
The lack of citizen enforcement under UECA is highly problematic and may lead to underenforcement of institutional controls. Given the uncertainties of risk-based cleanups and the considerable possibility that these instruments will at some point fail to protect human health and the environment, prudence suggests that UECA should authorize some kind of citizen enforcement mechanism.\textsuperscript{272} As discussed above, the Act included such a provision until December 2002. Why did the final version dispense of citizen suits? In an article published prior to completion of the drafting process, the drafters explained that they did debate the role of third parties in enforcement of institutional controls:

The role of third parties, including members of the general public and environmental organizations or their members, in the environmental process has been the subject of discussion. The tradition of real property law is that such enforcement is unwarranted and potentially officious; if the parties to the controls do not seek enforcement, presumably it is not needed. However, the tradition of environmental law is quite different. Modern environmental law generally authorizes enforcement actions by any person, and the tradition of citizens' suits is well established, although sometimes controversial, in federal law. Some accommodation between these two traditions will be necessary, since all interests in this subject will need to be satisfied if the statute is to be widely supported in the states.\textsuperscript{273}

It now appears that the real property attorneys in the committee prevailed, and that the "accommodation" reached was to dispense with any mention of citizen suits in the main text of the Act.\textsuperscript{274} Practical reasons seem to have dictated this result: the committee feared that including such a provision in the Act might have made it "unpalatable" to the many states that do not presently have citizen suits in their general

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\textsuperscript{272} See generally Institutional Controls, supra note 71 (arguing that because institutional controls do fail, using more that one type of control at any site is advisable, as are periodic reporting and auditing schedules, interagency coordination, and an informed public that can oversee such sites).

\textsuperscript{273} Strasser & Breetz, supra note 126, at 35 (discussing alternative approaches like using an "any person" standard, a "person aggrieved" standard, or being silent and relying on state law).

\textsuperscript{274} This was a gradual process. While the December 2002 Draft included the provision analyzed above, the February 2003 and April 2003 Drafts provided that "a person authorized to enforce the environmental covenant by law other than this act" could bring an enforcement suit. The final version of the Act, however, does not mention citizen enforcement in its text, only noting in the comments that "the Act does not provide any authority for a citizens' suit to enforce a covenant, although other law may authorize such suits. This Act does not affect that other law." UECA, at § 11 cmt.2. All versions of UECA are available at the Act's website, http://www.environmentalcovenants.org (last visited Oct. 24, 2004).
remediation laws. Additionally, the drafters did not want to alienate the support of the business community by adding controversial provisions that carry the perception of an increased liability risk. Both these reasons are questionable. First, the committee's deference to states seems to come, at least partly, from an underestimation of the number of states that currently have citizen suits in their cleanup related laws. It is also striking that such deference to states should be shown in this particular respect when UECA is quick in other areas to override state interests if required by the policy goal of achieving sound environmental protection. The committee's reluctance to alienate the business community also seems unwarranted given business leaders' growing recognition that active public involvement in brownfield redevelopment is indeed desirable.

The committee reached a regrettable result in its search for an accommodation between environmental concerns and real property traditions. As discussed above, citizen enforcement of these instruments is not only desirable but also necessary given the Act's reliance on holders for enforcement, and the possible identity between owners and holders. Regardless of property law traditions, in the context of risk-based cleanups and institutional controls, the failure of the parties to the controls to seek enforcement does not mean that enforcement is unnecessary.

CONCLUSION

Given the exorbitant costs and technical difficulties of returning contaminated properties to pristine conditions, risk-based cleanups are being used with increased frequency to return brownfields to productive use. Institutional controls play a fundamental role in these cleanups, and their validity and enforcement over time is crucial if these cleanups are to remain reasonably protective of human health and the environment. By providing a uniform system for creating, recording, amending, and

275. Personal communication with William Breetz, Chair of the Drafting Committee (Feb. 20, 2004).
276. Personal communication with Kurt A. Strasser (Feb. 16, 2004).
277. The comments to the December 2002 Draft state that "approximately 15 states authorize some form of citizen's suits, although the specific provisions are quite varied." See December 2002 Draft, supra note 253, at § 10 cmt. This number seems to be an underestimation; research by the Environmental Law Institute shows that 21 states authorize citizen suits in their general remediation statutes. See STATE SUPERFUND PROGRAMS, supra note 32, at 55-59.
278. See supra notes 226-228 and accompanying text (discussing UECA's distinction between prior interests in the property, which may terminate a covenant, and subsequent interests, which may not).
279. See supra notes 118-120 and accompanying text (describing the growing consensus among activists, government officials and business representatives that "[c]ommunity relations can make or break a brownfields project").
terminating these covenants, and by assuring that traditional property law doctrines will not preclude their enforceability, UECA represents a welcome advance in brownfields development.280

Unfortunately, the Act also has several shortcomings that severely diminish its chances to accomplish its goals. It grants owners and potentially liable parties excessive power in the creation stage of environmental covenants, to the detriment of other parties who might be interested in participating and who are essentially shut off from the process. It affords agencies little flexibility by requiring, with few exceptions, that amendments to these instruments must be adopted by consent of all parties. Most troubling, however, is the Act’s failure to provide any authority for citizen enforcement of these covenants. As demonstrated above, the lack of citizen enforcement creates a clear danger that violations to these covenants may remain unenforced. Despite its major achievements, the Act may be a bit like the cleanups it helps to regulate: an incomplete solution.

280. A prominent expert on institutional controls who supports the Act called it “a major accomplishment” over the “abysmal” state of state laws and regulations regarding institutional controls. Personal communication with John Pendergrass (Feb. 26, 2004).