

LEGISLATIVE BILL 298

Approved by the Governor March 22, 2005

Introduced by Landis, 46

AN ACT relating to environmental remediation; to amend section 76-288, Reissue Revised Statutes of Nebraska, and section 66-1510, Revised Statutes Supplement, 2004; to redefine a term under the Petroleum Release Remedial Action Act; to adopt the Uniform Environmental Covenants Act; to harmonize provisions; to provide operative dates; to provide severability; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 66-1510, Revised Statutes Supplement, 2004, is amended to read:

66-1510. Petroleum shall mean:

(1) For purposes of the fee provisions of section 66-1521:

(a) Motor vehicle fuel as defined in section 66-482, except natural gasoline used as a denaturant by an ethanol facility as defined in section 66-1333; and

~~(2)~~ (b) Diesel fuel as defined in section 66-482, including kerosene which has been blended for use as a motor fuel; and

(2) For purposes of all provisions of the Petroleum Release Remedial Action Act other than the fee provisions of section 66-1521:

(a) The fuels defined in subdivision (1) of this section; and

(b) A fraction of crude oil that is liquid at a temperature of sixty degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute, except any such fraction which is regulated as a hazardous substance under section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(14), as such act existed on January 1, 2005.

Sec. 2. Sections 2 to 14 of this act may be cited as the Uniform Environmental Covenants Act.

Sec. 3. In the Uniform Environmental Covenants Act:

(1) Activity and use limitations means restrictions or obligations created under the act with respect to real property.

(2) Agency means the Department of Environmental Quality or any other Nebraska or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(3) Common interest community means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) Environmental covenant means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) Environmental response project means a plan or work performed for environmental remediation of real property and conducted:

(A) Under a federal or state program governing environmental remediation of real property, including the Petroleum Release Remedial Action Act;

(B) Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(C) Under a state voluntary cleanup program authorized by the Remedial Action Plan Monitoring Act.

(6) Holder means the grantee of an environmental covenant as specified in subsection (a) of section 4 of this act.

(7) Person means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) Record, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) State means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Sec. 4. (a) Any person, including a person that owns an interest in the real property, may be a holder, except that the State of Nebraska, a

municipality, or another unit of local government may not be a holder unless it is the owner of the real property. An environmental covenant may identify more than one holder. The interest of a holder is an interest in real property.

(b) A right of an agency under the Uniform Environmental Covenants Act or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(c) An agency is only bound by any obligation it expressly assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than the act except as provided in the covenant.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) A prior interest is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant.

(2) The act does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

Sec. 5. (a) An environmental covenant must:

(1) State that the instrument is an environmental covenant executed pursuant to the Uniform Environmental Covenants Act;

(2) Contain a legally sufficient description of the real property subject to the covenant;

(3) Describe the activity and use limitations on the real property;

(4) Identify every holder;

(5) 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; and

(6) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:

(1) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(2) Requirements for periodic reporting describing compliance with the covenant;

(3) Rights of access to the 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) Limitation on amendment or termination of the covenant in addition to those contained in sections 10 and 11 of this act;

(6) Rights of the holder in addition to its right to enforce the covenant pursuant to section 12 of this act; and

(7) Rights to enforce granted to any person.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require that those persons specified by the agency who have interests in the real property have signed the covenant.

Sec. 6. (a) An environmental covenant that complies with the Uniform Environmental Covenants Act runs with the land.

(b) An environmental covenant that is otherwise effective is valid and 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;

(8) The holder dies, ceases to exist, resigns, or is replaced; or

(9) The owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before the operative date of this section is not invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) of this section or because it was identified as an easement, servitude, deed restriction, or other interest. The act does not apply in any other respect to such an instrument.

(d) The act does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

Sec. 7. The Uniform Environmental Covenants Act does not authorize a use of real property that is otherwise prohibited by zoning, by law other than the act regulating use of real property, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property which are authorized by zoning or by law other than the act.

Sec. 8. (a) A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:

(1) Each person that signed the covenant;

(2) Each person holding a recorded interest in the real property subject to the covenant;

(3) Each person in possession of the real property subject to the covenant;

(4) Each municipality or other unit of local government in which real property subject to the covenant is located; and

(5) Any other person the agency requires.

(b) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.

Sec. 9. (a) An environmental covenant, any amendment or termination of the covenant under section 10 or 11 of this act, and any subordination agreement must be recorded in every county in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in subsection (c) of section 10 of this act, an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property.

(c) A copy of a document recorded under subsection (a) of this section shall also be provided to the Department of Environmental Quality if the department has not signed the covenant.

(d) The department shall make available to the public a listing of all documents under subsection (a) of this section or documents under subsection (c) of this section which have been provided to the department.

Sec. 10. (a) An environmental covenant is perpetual unless it is:

(1) By its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) Terminated by consent pursuant to section 11 of this act;

(3) Terminated pursuant to subsection (b) of this section;

(4) Terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) Terminated or modified in an eminent domain proceeding, but only

if:

(A) The agency that signed the covenant is a party to the proceeding;

(B) All persons identified in subsections (a) and (b) of section 11 of this act are given notice of the pendency of the proceeding; and

(C) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action

in which all persons identified in subsections (a) and (b) of section 11 of this act have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request is subject to review pursuant to the Administrative Procedure Act.

(c) Except as otherwise provided in subsections (a) and (b) of this section, an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(d) An environmental covenant may not be extinguished, limited, or impaired by application of sections 57-227 to 57-239, 72-301 to 72-314, or 76-288 to 76-298.

Sec. 11. (a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) The agency;

(2) Unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant;

(3) Each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) Except as otherwise provided in subdivision (d)(2) of this section, the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) A holder may not assign its interest without consent of the other parties;

(2) A holder may be removed and replaced by agreement of the other parties specified in subsection (a) of this section; and

(e) A court of competent jurisdiction may fill a vacancy in the position of holder.

Sec. 12. (a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(1) A party to the covenant;

(2) The agency;

(3) Any person to whom the covenant expressly grants power to enforce;

(4) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(5) A municipality or other unit of local government in which the real property subject to the covenant is located.

(b) The Uniform Environmental Covenants Act does not limit the regulatory authority of the agency under law other than the Uniform Environmental Covenants Act with respect to an environmental response project.

(c) A person is not responsible for or subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant.

(d) The Uniform Environmental Covenants Act does not limit the right of any person to recover damages under any other provision of law.

Sec. 13. In applying and construing the Uniform Environmental Covenants Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 14. The Uniform Environmental Covenants Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede section 101 of that act, 15 U.S.C. 7001(a), or authorize electronic delivery of any of the notices described in section 103 of that act, 15 U.S.C. 7003(b).

Sec. 15. Section 76-288, Reissue Revised Statutes of Nebraska, is amended to read:

76-288. Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by ~~himself~~ such person and his or her immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto

and defects of title as are not extinguished or barred by the application of the ~~provisions of~~ Uniform Environmental Covenants Act and sections 25-207, 25-213, 40-104, and 76-288 to 76-298, instruments which have been recorded less than twenty-two years, and any encumbrances of record not barred by the statute of limitations.

Sec. 16. Sections 1 and 18 of this act become operative on January 1, 2005. Sections 2 to 15 and 19 of this act become operative three calendar months after adjournment of this legislative session. The other sections of this act become operative on their effective date.

Sec. 17. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 18. Original section 66-1510, Revised Statutes Supplement, 2004, is repealed.

Sec. 19. Original section 76-288, Reissue Revised Statutes of Nebraska, is repealed.

Sec. 20. Since an emergency exists, this act takes effect when passed and approved according to law.