

Virginia's Uniform Environmental Covenants Act

A Solution in Search of a Problem

by Channing J. Martin



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The 2010 Virginia General Assembly enacted legislation creating the Virginia Uniform Environmental Covenants Act.¹ The act was effective on July 1, 2010, and the Virginia Department of Environmental Quality (DEQ) is drafting regulations and guidance to implement it.

In most respects, the act is identical to the Uniform Environmental Covenants Act (UECA) drafted by the National Conference of Commissioners on Uniform State Laws. As with UECA, the Virginia act establishes how an environmental covenant — often a restrictive covenant governing use of contaminated property after cleanup — is drafted, reviewed, and recorded under governmental oversight. The Virginia act also sets notice requirements, rules regarding the priority and subordination of prior interests, and procedures to enforce, amend, or terminate environmental covenants.

This article is not a primer on the act. Instead, it describes and analyzes legal and practical problems that practitioners, regulators, and courts will face as the act is implemented. Many of the act's provisions will not work and may trap the unwary. So, considering that Virginia's existing procedures for recording and enforcing restrictive covenants appear to work just fine, one might ask, "If it ain't broke, why fix it?"

Background

Restrictive covenants have long been used to implement federal and state environmental programs throughout Virginia. They are often required as a condition of wetland permits and are used in connection with hazardous waste and hazardous substance laws. Perhaps the most frequent use of environmental restrictive covenants has been in connection with Virginia's Voluntary Remediation Program (VRP).²

Enacted in 1995, the VRP allows persons to voluntarily clean up contaminated property if

cleanup is not clearly mandated by the U.S. Environmental Protection Agency (EPA), the DEQ, or a court pursuant to certain enumerated laws.³ The person performing the cleanup is often given a choice by DEQ: Clean up the site to stringent residential standards or impose restrictive covenants on the property and use more lenient nonresidential standards. The most common restrictive covenants required by DEQ prohibit use of the property for residential purposes and use of groundwater for potable purposes. These restrictions are found in a Certificate of Satisfactory Completion issued by DEQ at the end of the remediation.

Similar procedures have been employed by other state and federal environmental agencies in Virginia when restrictive covenants are required. Essentially, the regulated party and the agency negotiate the language, and a declaration of restrictive covenants is then drafted and recorded. This system has worked well for years. There are no cases challenging the validity or enforceability of environmental restrictive covenants in Virginia.

Legislative History of the Act

In 2006, a resident of Virginia who is a former president of the National Council of Commissioners on Uniform State Laws, sought to have UECA enacted by the Virginia General Assembly. The bill never cleared committee. Another effort was made in 2007, but again the bill was tabled. In 2010, the proponent of the bill gathered other supporters and argued the legislation was necessary to facilitate brownfields redevelopment. The bill was enacted. The DEQ is now

drafting regulations and guidance to implement the act. The regulations will include fees to be paid for each environmental covenant recorded and will provide a model template. Most of the program will be implemented by guidance for the time, being so that DEQ can gain experience before issuing additional regulations.

Is Use of the Act Mandatory?

The act can be used only if the environmental covenant is imposed in an “environmental response project” overseen by a federal or state agency that determines or approves the response action under which the covenant is created. Covenants imposed in connection with cleanups not conducted under agency oversight are not subject to the act. The overwhelming majority of covenants will be imposed in connection with an environmental response project overseen by an agency. Is use of the act mandatory in those circumstances?

This question arose when the bill was debated in the General Assembly. Supporters insisted use of the act was not mandatory. They cite Va. Code § 10.1-1241.D. that states, “This chapter 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 the Commonwealth.” They said this meant that environmental covenants need not comply with the act, and that use of the act was voluntary. It’s debatable whether this interpretation is correct — one could argue that if use of the act is not mandatory, it would have been easy enough for the General Assembly to say just that.

But even if the act is voluntary, it may be difficult for persons to avoid using it. The DEQ is required to collect fees to administer the act, and if the program is little used, then fees will dwindle and the uniformity that the act is intended to promote will not occur. Thus, DEQ personnel are likely to promote the act’s use in their administration of the Voluntary Remediation Plan and other environmental programs. EPA personnel overseeing environmental response projects in Virginia are likely to conclude that since the act is Virginia law, it should be used even if it is voluntary.

All of this illustrates why it may be difficult for lawyers to convince clients and regulators that recording a restrictive covenant outside of the act may be a better alternative than recording an environmental covenant under the act. Nevertheless, there are compelling legal and practical reasons why use of the act should be avoided

Contents of an Environmental Covenant

The act requires that an environmental covenant include a number of elements, including a description of the property, activity and use restrictions, the name and location of any administrative record concerning the environmental response project, and the identity of every “holder” (a person entitled to enforce the environmental covenant⁴). In addition, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it.⁵

The environmental covenant must be signed by the agency, every holder, and — unless waived by the agency — every owner of the fee simple title to the real property subject to the covenant. The agency may require anyone who has an interest in the real property to sign the covenant as a condition for approval of the covenant.⁶ This means, for example, that the agency could insist that a lender with a prior deed of trust on the property subordinate its interest as a condition for approval of the covenant.

The signature requirements for an environmental covenant raise a number of troubling issues. First, each environmental covenant must be signed by an agency. An agency is defined to mean the DEQ “or any other state *or federal* agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.”⁷ If a federal agency is overseeing the project, it’s usually the EPA. Traditionally, the EPA has not signed or been a party to environmental covenants. Instead, the property owner signs and records the covenant at the EPA’s direction, while giving the EPA or state agency the right to enforce it. That being the case, what happens if the EPA or other applicable federal agency refuses to sign the environmental covenant on the ground that no federal environmental law authorizes or compels it to do so? What happens if the EPA says it doesn’t have the personnel or resources to review the covenant for compliance under the act and, accordingly, won’t sign it? If the EPA does sign, the reviews and delay inherent in the EPA’s consideration of the covenant could result in significant delays in completing the project. Time is often critical in brownfield redevelopment projects⁸ and in sales of industrial or commercial property. Requiring a federal agency to sign the covenant could hinder brownfield redevelopment.

Second, the act requires every fee simple owner of the real property subject to the covenant to sign the covenant “unless waived by the

Agency.”⁹ If property is jointly owned and one of the owners refuses to sign or can't be found, the agency can waive the requirement and allow the covenant to become effective without that owner's signature and consent. Is this provision constitutional? Imposing use restrictions on property without consent is a taking under the Fifth Amendment, particularly when a more stringent cleanup could be accomplished — although at greater cost — that would not require an environmental covenant. Note that the act says that an amendment of an environmental covenant is not effective against an owner unless the owner consents to it or has waived the right to consent.¹⁰ However, no such protection is provided by the act when the covenant is first imposed.

Third, there is a concern that banks and other lenders with recorded deeds of trust could insist on their right not to subordinate their lien. The act does not allow the agency to trump a previously recorded lien, but it gives the agency authority to refuse to approve an environmental covenant if it is not signed by the lender. This means the party remediating the property may have to use stricter and more costly cleanup standards than would have been the case if a risk-based cleanup combined with an environmental covenant had been approved by the agency. This person would then be caught in the middle, with the agency refusing to agree to a more lenient cleanup unless the lender subordinates and the lender taking the position that it has no obligation to subordinate and will not do so.

Notice of an Environmental Covenant

A copy of the environmental covenant is to be provided “in the manner required by the Agency” to certain persons enumerated in the act and to each locality where the property is located.¹¹ Despite this requirement, the act states that “[t]he validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.”¹²

That's helpful, because otherwise there could be a problem for any person remediating property under the auspices of the EPA or another federal agency. The reason is that notice is to be provided “in the manner required by the Agency,” meaning — in the context of a federal environmental response project — the EPA or some other federal agency. The difficulty is that while the DEQ's regulations and guidance will describe how notice must be provided for *state* environmental response projects, there are no such regulations or guidance for *federal* environmental response pro-

jects overseen by the EPA or other federal agencies. So, how do persons provide notice when they are conducting federal environmental response projects? That question is left unanswered by the act.

Amendment or Termination by Court Order

An environmental covenant is perpetual unless it is:

- by its terms, limited to a specific duration or is terminated by the occurrence of a specified event;
- terminated by consent in the manner described in the act;
- terminated or modified by court order under the doctrine of changed circumstances in the manner described in the act;
- terminated by foreclosure of an interest that has priority over the environmental covenant; or
- terminated or modified in an eminent domain proceeding in the manner described in the act.¹³

The procedures for termination or modification by court order should not pose any complications when the agency overseeing the cleanup is a state agency, but they will not work when the agency overseeing the cleanup is a federal agency. Here's why: The act sets an administrative procedure that must be followed prior to filing an action in court. The agency that signed the covenant must be petitioned to make a determination “that the intended benefits of the covenant can no longer be realized.”¹⁴ If the agency makes that determination, then the act authorizes a court, under the doctrine of changed circumstances, to terminate the covenant or reduce its burdens. The agency's determination, or its failure to make a determination, is subject to review by a court pursuant to the Virginia Administrative Process Act.

The problem is that this procedure will not work with federal agencies. The actions of federal agencies in administering federal environmental laws are not subject to review under state law. An example illustrates the problem: A property owner one hundred years from now petitions the EPA to determine that an environmental covenant on her property is no longer needed because the contaminants have degraded below levels of concern. The EPA delays for months, declines outright, or says it just doesn't have the time or resources to do it. The owner will have no ability under the act to ask a Virginia court to terminate the covenant, because the EPA's actions are

not reviewable under the Virginia Administrative Process Act. The act provides no remedy when federal agencies decline or don't act on a petition to terminate or modify a covenant. The property owner will then be stuck with a "Hotel California" environmental covenant — one that no longer makes sense, but never leaves.

Amendment or Termination by Consent

An environmental covenant may be amended or terminated by consent, but only if the amendment or termination is signed by the agency; the holder; unless waived by the agency, the current owner of the fee simple title; and each person that originally signed the covenant, unless the person waived in a writing 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.¹⁵ This means persons have the ability to veto the termination or amendment of an environmental covenant for any reason or no reason, even if the environmental condition of the property no longer presents a threat to human health or the environment. All they have to do is refuse to sign. Moreover, if each person that originally signed the covenant cannot be found, filing an action in court will be necessary to have the court declare that those persons no longer exist or cannot be located or identified with the exercise of reasonable diligence. Considering our shifting population and the limited human lifespan, filing an action in court is sure to become the norm for amending or terminating covenants ten to twenty years from the date they were recorded.

Buyers of property whose sellers have imposed an environmental covenant can avoid having to find the seller and obtain its signature by requiring the seller to waive its right to consent in the real estate contract. On the other hand, the seller may insist the covenant be kept in place under all circumstances and, accordingly, will not waive. Buyers will be well served to address the issue of waiver with their seller before the transaction closes.

Removal of Holders

The act allows a holder to be removed and replaced by agreement of the other parties to the environmental covenant.¹⁶ This provision is arguably unconstitutional, because the act states that "[t]he interest of a holder is an interest in real property."¹⁷ The act appears to allow a property interest to be invalidated and "taken" merely by agreement of the other parties to the covenant.

Enforcement

The act provides ammunition to those that wish to stop redevelopment projects. A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by a party to the covenant, if applicable; the federal agency overseeing the cleanup; the DEQ; any person to whom the covenant expressly grants power to enforce it; any person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; and any locality in which the real property subject to the covenant is located.¹⁸ Moreover, the act grants standing to persons that did not previously have it under state law. Such persons include, for example, adjacent property owners who contend their liability has been affected by the alleged violation. Localities can also enforce the covenant. In short, the number of persons who can sue to enforce environmental covenants has been greatly expanded under the act.

Policy Challenges in Implementation

The act presents a number of policy challenges in its implementation. First, the act gives localities the right to review, oversee, and enforce environmental covenants that are subject to the act. Few local jurisdictions appear to have the expertise or funding available to participate in this process, but the act now gives them authority to do so. Most localities will probably defer to the DEQ and EPA, but some localities — particularly larger localities with environmental staff — may exercise their rights. Because localities must now be notified of environmental covenants under the act, many of them are likely to contact the DEQ for support and to answer technical questions. DEQ will need to anticipate the expectations of these localities and budget for the assistance they will require.

Second, the DEQ will need to ensure the program is implemented uniformly among its programs with oversight from the DEQ's legal staff or the Virginia attorney general's office. Without legal oversight, significant errors affecting property rights could be made.

Third, the in-perpetuity aspect of environmental covenants makes administering the program a challenge. Few environmental covenants will be written to terminate of their own accord or on the happening of specified events. That means covenants recorded in 2011 will still be effective a thousand years from now unless action has been taken to amend or terminate them. The timeless nature of these instruments points out

the need for the long-term management of information resources using a reliable archive system. As with any government agency, record retention is a challenge, and a reliable system must be put in place to ensure records are retained and available in the distant future to respond to questions about site conditions, exposures, and restrictions. Perhaps an even bigger challenge will be to ensure that the EPA and other federal agencies also maintain these records. There is no mechanism under state law to make them do so.

Finally, the act could lead to redevelopment projects being slowed or derailed because a landowner or other party given rights under the act refuses to agree to or amend an environmental covenant, even if the DEQ, the EPA, or another federal agency agrees with the proposed action. Thus, rather than facilitating the redevelopment of brownfield properties, the act has the potential to hinder it through misuse of the act's provisions by parties opposed to a project.

Why was a legislative fix necessary when the existing system was not broken? How is the redevelopment and reuse of contaminated property facilitated by more bureaucracy, fees, and the uncertainty inherent in the act? Why are procedures specified and fees charged for environmental covenants, but not for other types of restrictive covenants recorded under Virginia law?

The act is a minefield. Smart practitioners will tread warily or, better yet, take another path.

Endnotes:

- 1 Va. Code §§ 10.1-1238, et seq.
- 2 Va. Code § 10.1-1232.
- 3 Va. Code § 10.1-1232.A.
- 4 Va. Code § 10.1-1240.A.
- 5 Va. Code § 10.1-1240.B.
- 6 Va. Code § 10.1-1240.A. and C.
- 7 Va. Code § 10.1-1238 (emphasis added).
- 8 A "brownfield" is any "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Va. Code § 10.1-1230.
- 9 Va. Code § 10.1-1240.A.5.
- 10 Va. Code § 10.1-1246.B.
- 11 Va. Code § 10.1-1243.A.
- 12 Va. Code § 10.1-1243.B.
- 13 Va. Code § 10.1-1245.A.
- 14 Va. Code § 10.1-1245.B.
- 15 Va. Code § 10.1-1246.A.
- 16 Va. Code § 10.1-1246.D.1.
- 17 Va. Code § 10.1-1239.A.
- 18 Va. Code § 10.1-1247.A.