

LEGISLATURE OF NEBRASKA
NINETY-NINTH LEGISLATURE
FIRST SESSION
LEGISLATIVE BILL 298
FINAL READING

Introduced by Landis, 46

Read first time January 10, 2005

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to environmental remediation; to amend section
2 76-288, Reissue Revised Statutes of Nebraska, and section
3 66-1510, Revised Statutes Supplement, 2004; to redefine a
4 term under the Petroleum Release Remedial Action Act; to
5 adopt the Uniform Environmental Covenants Act; to
6 harmonize provisions; to provide operative dates; to
7 provide severability; to repeal the original sections;
8 and to declare an emergency.
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 66-1510, Revised Statutes Supplement,
2 2004, is amended to read:

3 66-1510. Petroleum shall mean:

4 (1) For purposes of the fee provisions of section
5 66-1521:

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

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

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

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

17 (b) A fraction of crude oil that is liquid at a
18 temperature of sixty degrees Fahrenheit and a pressure of fourteen
19 and seven-tenths pounds per square inch absolute, except any such
20 fraction which is regulated as a hazardous substance under section
21 101(14) of the federal Comprehensive Environmental Response,
22 Compensation, and Liability Act of 1980, 42 U.S.C. 9601(14), as
23 such act existed on January 1, 2005.

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

26 Sec. 3. In the Uniform Environmental Covenants Act:

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

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

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

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

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

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

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

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

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

27 (7) Person means an individual, corporation, business
28 trust, estate, trust, partnership, limited liability company,

1 association, joint venture, public corporation, government,
2 governmental subdivision, agency, or instrumentality, or any other
3 legal or commercial entity.

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

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

11 Sec. 4. (a) Any person, including a person that owns an
12 interest in the real property, may be a holder, except that the
13 State of Nebraska, a municipality, or another unit of local
14 government may not be a holder unless it is the owner of the real
15 property. An environmental covenant may identify more than one
16 holder. The interest of a holder is an interest in real property.

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

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

28 (d) The following rules apply to interests in real

1 property in existence at the time an environmental covenant is
2 created or amended:

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

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

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

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

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

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

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

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

28 (4) Identify every holder;

1 (5) Be signed by the agency, every holder, and unless
2 waived by the agency every owner of the fee simple of the real
3 property subject to the covenant; and

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

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

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

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

18 (3) Rights of access to the property granted in
19 connection with implementation or enforcement of the covenant;

20 (4) A brief narrative description of the contamination
21 and remedy, including the contaminants of concern, the pathways of
22 exposure, limits on exposure, and the location and extent of the
23 contamination;

24 (5) Limitation on amendment or termination of the
25 covenant in addition to those contained in sections 10 and 11 of
26 this act;

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

1 (7) Rights to enforce granted to any person.

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

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

8 (b) An environmental covenant that is otherwise effective
9 is valid and enforceable even if:

10 (1) It is not appurtenant to an interest in real
11 property;

12 (2) It can be or has been assigned to a person other than
13 the original holder;

14 (3) It is not of a character that has been recognized
15 traditionally at common law;

16 (4) It imposes a negative burden;

17 (5) It imposes an affirmative obligation on a person
18 having an interest in the real property or on the holder;

19 (6) The benefit or burden does not touch or concern real
20 property;

21 (7) There is no privity of estate or contract;

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

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

26 (c) An instrument that creates restrictions or
27 obligations with respect to real property that would qualify as
28 activity and use limitations except for the fact that the

1 instrument was recorded before the operative date of this section
2 is not invalid or unenforceable because of any of the limitations
3 on enforcement of interests described in subsection (b) of this
4 section or because it was identified as an easement, servitude,
5 deed restriction, or other interest. The act does not apply in any
6 other respect to such an instrument.

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

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

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

21 (1) Each person that signed the covenant;

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

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

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

28 (5) Any other person the agency requires.

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

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

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

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

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

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

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

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

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

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

3 (5) Terminated or modified in an eminent domain
4 proceeding, but only if:

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

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

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

13 (b) If the agency that signed an environmental covenant
14 has determined that the intended benefits of the covenant can no
15 longer be realized, a court, under the doctrine of changed
16 circumstances, in an action in which all persons identified in
17 subsections (a) and (b) of section 11 of this act have been given
18 notice, may terminate the covenant or reduce its burden on the real
19 property subject to the covenant. The agency's determination or
20 its failure to make a determination upon request is subject to
21 review pursuant to the Administrative Procedure Act.

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

28 (d) An environmental covenant may not be extinguished,

1 limited, or impaired by application of sections 57-227 to 57-239,
2 72-301 to 72-314, or 76-288 to 76-298.

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

6 (1) The agency;

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

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

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

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

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

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

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

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

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

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

6 (1) A party to the covenant;

7 (2) The agency;

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

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

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

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

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

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

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

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

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

9 76-288. Any person having the legal capacity to own real
10 estate in this state, who has an unbroken chain of title to any
11 interest in real estate by ~~himself~~ such person and his or her
12 immediate or remote grantors under a deed of conveyance which has
13 been recorded for a period of twenty-two years or longer, and is in
14 possession of such real estate, shall be deemed to have a
15 marketable record title to such interest, subject only to such
16 claims thereto and defects of title as are not extinguished or
17 barred by the application of the ~~provisions~~ of Uniform
18 Environmental Covenants Act and sections 25-207, 25-213, 40-104,
19 and 76-288 to 76-298, instruments which have been recorded less
20 than twenty-two years, and any encumbrances of record not barred by
21 the statute of limitations.

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

27 Sec. 17. If any section in this act or any part of any
28 section is declared invalid or unconstitutional, the declaration

1 shall not affect the validity or constitutionality of the remaining
2 portions.

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

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

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