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# THE UNIFORM ENVIRONMENTAL COVENANTS ACT: WHY, HOW, AND WHETHER

KURT A. STRASSER\*

**Abstract:** With contaminated land, it sometimes makes sense to do a partial cleanup, rather than a complete one, and combine the cleanup with land use restrictions and continuing obligations to monitor the land. The Uniform Environmental Covenants Act creates a new state law property interest to make these restrictions and obligations permanent and enforceable. It addresses issues created by traditional common law doctrines that were hostile to permanent land restrictions, as well as more contemporary problems presented by tax liens, eminent domain, and adverse possession. This Article reviews the Act's legal infrastructure for creating, enforcing, and modifying the terms of the land use restrictions and monitoring obligations. The Article argues that the Act's legal infrastructure provides parties with the legal certainty needed to encourage future cleanups, while also protecting against environmental risks that the residual contamination could otherwise pose. These cleanups, often financed as part of the property's redevelopment, are particularly useful because they are a way to return blighted properties to the stream of commerce. The Act has drawn some criticism, primarily for not going further with its protections, and these are reviewed at the end of the Article.

## INTRODUCTION

What is an environmental covenant? Why use it? Answers to these questions form the core of this Article. An environmental covenant is a specialized bit of legal infrastructure that has been created to solve some specific legal problems presented by environmental cleanups of contaminated property. Part I of this Article will discuss these problems. Part II will detail the solution offered by the Uniform Environmental Covenant Act (UECA), and Part III will review criticisms of the UECA.

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## I. THE PROBLEM

With environmental cleanups of real property, it is sometimes desirable to stabilize some of the contamination and leave it in the ground. Yet that contamination could present some residual risk to human health or the environment if certain uses of the property are not restricted, or if the contamination is not monitored to be sure it is permanently stabilized. The Uniform Environmental Covenants Act<sup>1</sup> provides a legal tool to create and enforce property use restrictions and monitoring, or other requirements. But why leave any contamination in the ground at all? Cleanups that do so are called risk-based cleanups; is there any good reason for not cleaning up completely to avoid this risk altogether? In many regulatory situations, both state and federal regulators have answered yes. Risk-based cleanups are one of the regularly used tools in the regulators' kit.<sup>2</sup>

In some situations, the contamination may simply be beyond the capacity of current cleanup technology to clean it completely. The contaminants may be too hard to remove, separating the contaminants from the background material may not be possible, dispersal may be too wide, or accurately locating all the contamination may not be possible. Further, there are some situations in which cleaning up the known contaminant completely will cause other environmental harm that is, on balance, even worse. In these kinds of cases, regulators may reasonably decide that complete cleanup will not be required if other controls can protect the public and the environment.

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<sup>1</sup> UNIF. ENVTL. COVENANTS ACT (2003), available at <http://www.law.upenn.edu/bll/ulc/ueca/2003final.pdf>. The Uniform Environmental Covenants Act (UECA) was drafted by the National Conference of Commissioners on Uniform State Laws, and has been adopted by fourteen states as well as the Virgin Islands and the District of Columbia. See National Conference of Commissioners on Uniform State Laws, UECA State Activity Map, [http://www.environmentalcovenants.org/ueca/UECAnews/UECA\\_colormap.pdf](http://www.environmentalcovenants.org/ueca/UECAnews/UECA_colormap.pdf) (last updated Oct. 31, 2006). The UECA was introduced for adoption in nine additional states in 2006, and these states anticipate reintroduction in 2007. Twelve other states also expect to introduce it in 2007. National Conference of Commissioners on Uniform State Laws, 2006 UECA Legislative Update, [http://www.environmentalcovenants.org/ueca/uploads/UECA\\_Chart.pdf](http://www.environmentalcovenants.org/ueca/uploads/UECA_Chart.pdf) (last updated Aug. 18, 2006). Three states currently have study commissions and also contemplate introduction. *Id.*

<sup>2</sup> For critical scholarly discussion, see generally Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity*, 13 J. NAT. RES. & ENVTL. L. 317 (1998); Victor B. Flatt, "[H]e Should at His Peril Keep It There . . .": *How the Common Law Tells Us That Risk Based Corrective Action Is Wrong*, 76 NOTRE DAME L. REV. 341 (2001); Alex Geisinger, *Rethinking Risk-Based Environmental Cleanup*, 76 IND. L.J. 367 (2001); Larry Schnapf, *Protecting Health and Safety with Institutional Controls*, 14 NAT. RESOURCES & ENV'T 251 (2000). Specific criticisms of the UECA will be discussed *infra* Part III.

Risk-based cleanups are also used when the cleanup is technically possible but not sensible. Suppose a contaminated property's most likely use is for a factory, and that a partial cleanup will protect against residual risk presented by that use if there are appropriate use controls and monitoring requirements. Here, a regulator might quite reasonably decide not to insist on the expense and delay of a complete cleanup when it is not required to protect the public and environment in the property's contemplated use. Of course, such a regulatory decision is controversial because it is an overt acknowledgment that the complete cleanup, while possible, is not worth doing.<sup>3</sup> This scenario is less than perfect environmental protection and some will simply disagree with the policy decision to do it. However, regulators might also consider two other practical factors in deciding to use a risk-based cleanup.

First, there are many contaminated properties.<sup>4</sup> The U.S. Environmental Protection Agency (EPA) estimates there are 450,000 brownfields in the United States.<sup>5</sup> Complete cleanups are slow as well as expensive, and given the high number of properties, it will be a long time before all have been remediated. At this point, a second practical factor comes into consideration. Not only are resources for cleanups finite, but so are the enforcement resources needed to get them done. Most cleanups are done by private parties, or at least paid for by them, under some prospect of legal enforcement action.<sup>6</sup> Enforcement resources are also needed to determine what type of cleanup is appropriate, as well as to supervise that cleanup. Regulators have only limited resources, and getting around to all the contaminated properties will be a time-consuming process. In the meantime, these properties are likely to sit untouched, presenting some undetermined and unregulated level of environmental risks.

Further, to compound the problem, while the contaminated properties sit, they are not in productive use, providing jobs and economic support for their communities. The community impact of this loss of economic activity from the property can be severe, particularly so because many contaminated properties were formerly productive operations but their surrounding communities may now be blighted by the property's combination of the loss of earning power and the presence

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<sup>3</sup> See Geisinger, *supra* note 2, at 370–71; *infra* Part III.

<sup>4</sup> See U.S. Environmental Protection Agency, Brownfield Cleanup and Redevelopment, <http://www.epa.gov/brownfields/about.htm> (last visited Mar. 25, 2007).

<sup>5</sup> *Id.*

<sup>6</sup> See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f) (2000).

of contamination.<sup>7</sup> Of course, the properties are also not providing income for their owners while sitting, but in many cases the owners may have simply decided that the property is no longer of real value to them and they may not be expecting a return, nor paying taxes on the property. Indeed, during our work in drafting the UECA, the Drafting Committee was told more than once that the cheapest thing for an owner of a contaminated property is to pave it, put a fence around it, and hire a guard service to check on it. This solution does not return it to the local economy or support the local community. A less responsible owner might simply abandon the property and leave, adding to the environmental risk and not addressing the level of blight.

Regulators today are using risk-based cleanups, typically negotiating them with property owners or other liable parties.<sup>8</sup> When risk-based cleanups are used, two kinds of restrictions are typically required. First, it is often necessary to restrict the use of the property.<sup>9</sup> For example, a factory might be permitted, but a day care center or a public park prohibited. Excavation below a depth of ten feet might be restricted, as might the use of well water. Second, a risk-based cleanup often requires that containment structures continue to be maintained and that the groundwater continue to be monitored.<sup>10</sup> The difficulty is how to make both kinds of restrictions permanent, enforceable, and actually enforced in a property law system that is not generally hospitable to such long-term restrictions on real property. This is the problem that the UECA solves.

## II. THE SOLUTION: THE FOUR CENTRAL TASKS OF THE UNIFORM ENVIRONMENTAL COVENANTS ACT

The Uniform Environmental Covenants Act (UECA) creates a state-law property interest that attaches use restrictions and monitoring

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<sup>7</sup> Professor Engel correctly points out that this issue may be a more complex question. See Engel, *supra* note 2, at 317–21. The current and previous industrial uses of brownfield properties may have exposed nearby residents to a higher degree of environmental risk, and those nearby residents are more likely to be members of minority and low-income groups. *Id.* at 317–18. A full environmental justice evaluation must consider the environmental risks posed to the community by returning the property to the stream of commerce, as well as the economic gains to the community in doing so. See *id.* at 317–21. A perfectly functioning regulatory system will always control the risks of the new operation, but the real world system has had trouble with exactly this issue in environmental justice situations. See *id.*

<sup>8</sup> See Geisinger, *supra* note 2, at 368–69.

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* at 371–72.

and other requirements to the land.<sup>11</sup> At first blush, this task appears simple; wouldn't a common law servitude do the trick? The short answer is that it won't do the job well enough. There are questions about the creation of this kind of servitude<sup>12</sup> and its long term viability in the face of common law that is hostile to permanent land restrictions,<sup>13</sup> as well as questions about how such a covenant can be modified,<sup>14</sup> and about achieving a level of legal enforceability and real practical enforcement required to protect the public health and the environment.<sup>15</sup> Further, with each of these areas, a great deal of certainty is needed so that commercial parties can make deals and redevelop properties, and lenders can supply financing, knowing their legal responsibilities and rights. Without this certainty, redevelopment and the cleanup it can realistically finance will be less likely to take place. Yet this certainty is difficult to achieve, and to predict, with the common law. The UECA aims to answer these questions, and to do so with enough clarity to provide the needed certainty.

#### A. *What Is Required to Create an Environmental Covenant?*

The core requirement for the creation of an environmental covenant is that it must state all the restrictions on the property, both the use restrictions and any monitoring and other obligations of the owner and others.<sup>16</sup> These restrictions and requirements form the core of the covenant. Of course, this requirement would not mean much if the covenant were not discoverable by interested parties, and the UECA addresses this in two ways. First, it requires that the covenant be recorded in the land records of the state.<sup>17</sup> This record gives legal notice of the covenant and makes it realistically available to all parties with the knowledge and skills to search the land records. In addition, an op-

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<sup>11</sup> UNIF. ENVTL. COVENANTS ACT, Prefatory Note (2003).

<sup>12</sup> See *id.* § 5 cmt. 3; Kurt A. Strasser & William Breetz, *The Benefit of a Uniform State Law for Institutional Controls*, in IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES 31, 31–33 (Amy L. Edwards, ed., 2003), available at <http://www.law.upenn.edu/bll/ulc/ueca/benefits02.pdf> [hereinafter IMPLEMENTING INSTITUTIONAL CONTROLS].

<sup>13</sup> See UNIF. ENVTL. COVENANTS ACT § 5 cmt. 3; Strasser & Breetz, *supra* note 12.

<sup>14</sup> See UNIF. ENVTL. COVENANTS ACT § 5 cmt. 3; Strasser & Breetz, *supra* note 12.

<sup>15</sup> See UNIF. ENVTL. COVENANTS ACT § 5 cmt. 3; Strasser & Breetz, *supra* note 12.

<sup>16</sup> UECA section 4(a)(3) requires the covenant to state the “activity and use” limitations on the property. UNIF. ENVTL. COVENANTS ACT § 4(a)(3). These are defined in section 2(1) as the “restrictions or obligations created under this [Act] with respect to real property.” *Id.* § 2(1).

<sup>17</sup> *Id.* § 8(a).

tional section provides for creation of a registry of environmental covenants,<sup>18</sup> with a further option that the registry be electronically searchable.<sup>19</sup> In the age of the Internet, such a registry is certainly feasible and desirable. It would in fact make environmental covenants more realistically accessible to parties that may not have the resources or expertise needed to deal with the land records, including environmental and citizens' groups as well as interested individuals and local government officials. However, the registry was made optional in the UECA because some jurisdictions may not be willing to invest the resources needed to create and maintain it, and the other benefits of the UECA should still be available to them.<sup>20</sup>

The second core requirement for creating a covenant is that it must be agreed to by the agency supervising the cleanup, and by the property owner.<sup>21</sup> The agency's agreement is required to ensure that the covenant will in fact protect the public health and environment.<sup>22</sup> As drafted, the UECA allows either a state or a federal agency to approve a covenant if that agency is handling the underlying cleanup.<sup>23</sup> However, Kentucky and Delaware have made non-uniform changes to provide that only a state agency may approve covenants, presumably making the policy decision to retain this degree of control at the state

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<sup>18</sup> *Id.* § 12.

<sup>19</sup> *Id.* § 12(c)(7).

<sup>20</sup> *See id.* § 12. Eight of the adopting states to date have not included this optional provision: Iowa, Maine, Maryland, Nebraska, Nevada, Ohio, Utah and West Virginia. Kentucky omitted part of it, including the requirement of an electronically searchable registry. *See* 2005 Ky. Acts ch. 92 (H.B. 472), available at <http://lrc.ky.gov/Statrev/ACTS2005/0092.pdf>.

<sup>21</sup> UNIF. ENVTL. COVENANTS ACT § 4(a)(5). The covenant is also required to identify the administrative record for the cleanup project ("environmental response project") and its location. *Id.* § 4(a)(6). This requirement will allow parties to learn more about the underlying cleanup decision of which the covenant is a part. This section also allows the agency to waive a signature by the owner, although Delaware, Maine and South Dakota have removed or modified this provision. *Id.*; DEL. CODE ANN. tit. 7, § 7909(a)(5) (Supp. 2006); ME. REV. STAT. ANN. tit. 38, § 3004(1)(E) (Supp. 2006); S.D. CODIFIED LAWS § 34A-17-4 (Supp. 2006). Maine, for example, states that an environmental covenant must:

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, except that the agency may not waive signature by an owner of the fee simple who is the current occupant of the real estate, if any.

ME. REV. STAT. ANN. tit. 38, § 3004(1)(E).

<sup>22</sup> *See* UNIF. ENVTL. COVENANTS ACT § 4, cmt. 2, 3.

<sup>23</sup> *Id.* § 2(2) ("Agency" means the [. . . state regulatory agency for environmental protection] or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.")

level.<sup>24</sup> As a result, in those states, federally supervised cleanups that use environmental covenants will have to seek state level approval for the covenant.<sup>25</sup> This restriction raises the question of whether it will serve to complicate risk-based cleanup implementation—only experience can give us an accurate answer. It is true that the restriction increases the state agency's workload.

The third requirement for a covenant is that it identify a holder.<sup>26</sup> The concept of a holder is borrowed from the Uniform Conservation Easements Act.<sup>27</sup> While the idea of identifying a party to hold the covenant interest fits comfortably within traditional property law, its use here is more functional. A holder can be given supervisory responsibilities for the enforcement of the covenant, and can even be given operating responsibilities for monitoring and maintenance.<sup>28</sup> The UECA specifies that any person agreed to by the parties may be a holder.<sup>29</sup> As experience with brownfield cleanups grows, some analysts predict that commercial entities may emerge that wish to specialize both in performing cleanups and in the ongoing enforcement.<sup>30</sup> In this situation, these groups would be holders under the UECA and their rights and responsibilities could be those specified in each particular covenant. However, the UECA preserves a great deal of flexibility by providing that the owner or the agency may serve as a holder—assuming other state law allows—and this provision should afford parties needed flexibility to meet the requirements of the UECA without mandating a third-party holder if they do not wish to use one.<sup>31</sup> Of course, local citizens' or environmental groups could serve as holders—if the parties agree to this—although these groups would want to consider carefully whether they were equipped to perform the responsibilities given them under a specific covenant.

The UECA also contains several formal requirements for a covenant, including a requirement that it state that it is an environmental

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<sup>24</sup> See DEL. CODE ANN. tit. 7, §§ 7907(3), 7909(a)(5); KY. REV. STAT. ANN. § 224.80-100(3), .80-110(2) (2006).

<sup>25</sup> DEL. CODE ANN. tit. 7, §§ 7907(3), 7909(a)(5); KY. REV. STAT. ANN. § 224.80-100(3), .80-110(2) (Supp. 2006).

<sup>26</sup> UNIF. ENVTL. COVENANTS ACT § 4(a)(4).

<sup>27</sup> See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM CONSERVATION EASEMENT ACT 1 (Aug. 1981), available at <http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf>.

<sup>28</sup> UNIF. ENVTL. COVENANTS ACT § 4 cmt. 7.

<sup>29</sup> *Id.* § 3(a).

<sup>30</sup> See Daniel A. Alper & Bruce-Sean Reshen, *The GuardianTrust*, in IMPLEMENTING INSTITUTIONAL CONTROLS, *supra* note 12, at 39, 42–47.

<sup>31</sup> See UNIF. ENVTL. COVENANTS ACT § 4 cmt. 5.



covenant under the UECA, and that it contain a legally sufficient description of the property.<sup>32</sup> Beyond these, the UECA suggests a number of specific provisions that could be included in a covenant.<sup>33</sup> This form of drafting was used to suggest elements that could well be important in specific instances but that, in the judgment of the drafting committee, would not necessarily be required in all covenants.<sup>34</sup> For example, the covenant might have specific notice provisions prior to transfer of the property or a change in its use; it might require periodic reporting on compliance; it might give a narrative description of the contamination and the cleanup remedy; or it could contain specific limits on amendment or termination beyond those specified in the UECA. In specific state variations, Iowa and Ohio have made the suggested statement of access rights mandatory, while Kentucky has dropped the suggestion.<sup>35</sup>

Taken together, these requirements for creating an environmental covenant are straightforward and should not present any particular problems. Their specificity should provide certainty that all parties will need. As will be discussed further in Part III, where these parts of the UECA have been criticized, it is not for what they require, but for not requiring more. After the covenant is created, the second task of the UECA is to make it valid and enforceable in the face of other existing law.

#### B. *Making the Covenant Valid and Enforceable*

An environmental covenant exists in the context of much other real property law, and related law, that could threaten its validity or permanence. Specifically, the covenant must contend with a group of traditional common law rules that were hostile to long term or permanent restrictions on real property, as well as with modern law on tax liens, eminent domain, and existing interests that predate the covenant.<sup>36</sup> The UECA seeks to remedy these problems so that environmental covenants can be valid and permanent enough to protect the public health and environment.<sup>37</sup>

The common law has a number of doctrines that favor free alienability of property and disfavor long-term restrictions on land, and these

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<sup>32</sup> *Id.* § 4(a)(1), (2).

<sup>33</sup> *Id.* § 4(b)(1)–(6), cmt. 9–12.

<sup>34</sup> *Id.* § 4 cmt. 9–12.

<sup>35</sup> IOWA CODE § 455I.4(1)(g) (Supp. 2006); KY. REV. STAT. ANN. § 224.80–.130 (2006); OHIO REV. CODE ANN. § 5301.82(A)(6) (Supp. 2006).

<sup>36</sup> UNIF. ENVTL. COVENANTS ACT § 5 cmt. 3.

<sup>37</sup> *Id.*

doctrines would undercut covenants.<sup>38</sup> The UECA responds in two ways. First, it provides that a covenant runs with the land and is intended to be perpetual until terminated under the procedures and provisions of the UECA or by the covenant's own terms.<sup>39</sup> Second, the UECA specifies that a covenant is valid and enforceable even if it runs afoul of any of nine enumerated common law doctrines that might otherwise apply.<sup>40</sup> For example, the covenant is not invalid even if: it is not appurtenant to an interest in real property; it is of a character not recognized traditionally at common law; it imposes a negative burden; or its benefit or burden does not touch and concern real property. Readers who do not find these common law rules of intrinsic interest may not recall them in precise detail, and indeed that is the point. Many of these are older doctrines and their contemporary application is often uncertain in specific jurisdictions. Further, whatever their contemporary policy merits in other circumstances, they should not invalidate environmental covenants. Overruling these doctrines in clear terms removes any potential uncertainty they could present. This is also true of adverse possession, which is otherwise of more contemporary relevance; the UECA provides that it may not invalidate a covenant.<sup>41</sup>

In addition to the traditional common law doctrines that the UECA overrides, the UECA also provides that a covenant will not be limited or extinguished by a tax foreclosure sale.<sup>42</sup> This reflects the policy decision that the environmental protection mission of the covenant must override the priority of a tax foreclosure and sale if the two come into conflict.<sup>43</sup> This provision is needed because tax liens and foreclosures are often present with contaminated properties.<sup>44</sup> Contaminated properties are often ones that are underperforming economically—indeed, they may be of little or no value as current income producers. Many properties in this situation will be delinquent in their taxes.<sup>45</sup> For the covenant to provide real protection—as well as real assurance to commercial parties performing the cleanup and re-using the property—it must not be vulnerable to a tax sale. Without this protection,

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* §§ 5(a), 9(a).

<sup>40</sup> *Id.* § 5(b).

<sup>41</sup> *Id.* § 9(c).

<sup>42</sup> UNIF. ENVTL. COVENANTS ACT § 9(c).

<sup>43</sup> *Id.* § 9 cmt. 4.

<sup>44</sup> See Carrie Watkins, *Not My Brownfield: Municipal Liability for Acquiring Title to Brownfields at the Federal and New York State Level*, 9 ALB. L. ENVTL. OUTLOOK J. 275, 277 (2004).

<sup>45</sup> Of course, these properties may also command a poor price in a tax foreclosure sale.

the commercial realities of contaminated properties would make many covenants uncertain and unable to protect against environmental risk.

Beyond common law doctrines and tax liens, the UECA also deals with the question of existing mortgages and other prior interests in the real property.<sup>46</sup> Its basic provision is that the covenant does not override these interests, so the holders of mortgages and other interests must agree to subordinate them if they are to be subject to the covenant.<sup>47</sup> This strategy is consistent with the traditional property law rule that interests which are first in time are also first in right.<sup>48</sup> While this factor makes the UECA's provisions compatible with widely accepted property law policies and doctrines, it does raise a question of whether the covenant and its obligations will be enforceable as long as needed to protect against environmental risk. The UECA's response to this question is to encourage subordination of the prior interests, including mortgages, to the covenant.<sup>49</sup>

Subordination of interests in real estate to rearrange the priorities is common in many property transactions. In the specific situation involving contaminated property, the realities of contamination's effect on property values should often motivate a mortgage holder to agree to the subordination. Contaminated property that has no cleanup prospect enjoys greatly reduced market value, or even little or no value, and the mortgage on that property is practically devalued as well. If a risk-based cleanup and subsequent re-use of the property can be accomplished, the property value will likely increase, thereby increasing the real value of the mortgage as well. In this situation, one can well imagine that the mortgage holder would agree to subordinate the mortgage to the environmental covenant in order to get the cleanup done, the property re-used, and the value increased. Further, the UECA gives the agency power to disapprove any proposed covenant, and this disapproval could be based on a failure to secure subordination of existing mortgages or other prior interests.<sup>50</sup> In this way the agency can insure that the covenant is not vulnerable to an existing mortgage.<sup>51</sup> Yet one critical point must be emphasized here. The agency can only insist on

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<sup>46</sup> See UNIF. ENVTL. COVENANTS ACT § 3(d).

<sup>47</sup> *Id.* The UECA does specify that an agreement to subordinate does not create any other obligation on the subordinating party. *Id.* § 3(d)(4). This requirement should provide reassurance to subordinating parties that they are not thereby otherwise committing themselves to perform the covenant.

<sup>48</sup> RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.1 (1997).

<sup>49</sup> See UNIF. ENVTL. COVENANTS ACT § 3(d).

<sup>50</sup> *Id.* §§ 3 cmt., 4(a)(5).

<sup>51</sup> See *id.*

subordination of interests that it knows about, and it will only know about interests if it bothers to ask.<sup>52</sup> As a practical matter, the agency can require the owner to check for prior interests and secure subordinations.<sup>53</sup> But it must remember to do so.

The UECA also has special provisions for two other legal risks to the covenant: eminent domain and judicial modification of the covenant because of changed circumstances.<sup>54</sup> Under the UECA, an environmental covenant can be modified or terminated in an eminent domain proceeding only if two special requirements are met.<sup>55</sup> First, the agency must be a party to the proceedings.<sup>56</sup> Second, the court in the eminent domain proceeding must hold a hearing and determine that the termination or modification “will not adversely affect human health or the environment.”<sup>57</sup> Agency approval is required before a court can terminate or modify a covenant under the doctrine of changed circumstances, effectively giving it the power to stop such a change in the covenant.<sup>58</sup> The policy behind each of these provisions is to limit a court’s power to change a covenant without hearing from the agency because a generalist common law court may not properly appreciate the covenant’s importance in protecting public health and the environment without the agency’s guidance.<sup>59</sup> Of course, the protections require a different level of agency involvement. Agency approval is required for application of the doctrine of changed circumstances, while only agency participation in the proceeding is required in eminent

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<sup>52</sup> See *id.* § 3 cmt. The comment to section 3 states:

Thus, 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.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* § 9(a)(5).

<sup>55</sup> UNIF. ENVTL. COVENANTS ACT § 9(a)(5).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* § 9(a)(5)(C). The UECA also requires that notice be given to all parties who would have to consent to a voluntary modification or termination, as well as all parties who have an interest in the property. *Id.* §§ 9(a)(5)(B), 10(a)–(b).

<sup>58</sup> *Id.* § 9(b). In addition, the same parties are required to be given notice of the proceeding. *Id.*

<sup>59</sup> *Id.* § 9 cmt. 2.

domain.<sup>60</sup> This difference was based on the drafting committee's conclusion that eminent domain is a process that includes the participation of other public actors, specifically the party seeking to take the property, each of which has its own public mission.<sup>61</sup> There may be situations in which those actors and missions could present a compelling case for changing the covenant even if the agency was not satisfied that its environmental risk protection mission was accomplished. Some of the approving states have enacted modifications to these provisions.<sup>62</sup>

### C. *Modifying or Terminating the Covenant*

The specific use restrictions and monitoring obligations in any particular covenant are site and use specific; they are the restrictions determined to be necessary to protect the public and the environment from the risks posed by this contamination at this site.<sup>63</sup> Over time, these risks can change, either because the use of the property changes, the nature of the contamination changes, or the science on which our understanding of the risk is based changes. For example, it may be that the covenant's terms were sufficient to protect against the risks posed by the particular residual contaminant if the property is used for industrial manufacturing. If that use changes to residential condominiums, then the ways in which people using the property may be exposed to the contamination also change, and it will not be surprising if the risk posed by the contamination does, as well. In this situation, it is quite likely that the property will require more cleanup before the use change can be allowed, and the agency will insist on this cleanup as a condition of agreeing to the change in the covenant.<sup>64</sup> For this reason, the UECA specifies requirements for amending or terminating a covenant.<sup>65</sup>

However, as a preliminary point, it should be noted that amending the covenant is not the only way to change the real regulatory require-

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<sup>60</sup> *Id.* § 9(a)(5)(A), (b).

<sup>61</sup> See UNIF. ENVTL. COVENANTS ACT § 9 cmt. 2.

<sup>62</sup> See DEL. CODE ANN. tit. 7 § 7914(a), (c) (Supp. 2006); IOWA CODE § 455I.9(2) (Supp. 2006). Delaware and Iowa give the agency, rather than the court, the power to make the initial decision on application of the doctrine of changed circumstances, although Iowa specifies a right to judicial review. DEL. CODE ANN. tit. 7 § 7914(a), (c); IOWA CODE § 455I.9(2).

<sup>63</sup> UNIF. ENVTL. COVENANTS ACT § 2 cmt. 1.

<sup>64</sup> An amendment might also be needed if the actual contamination is more or less significant than originally thought, or if scientific advancements show that the risks posed by a predicted exposure level are greater or less than originally thought.

<sup>65</sup> See UNIF. ENVTL. COVENANTS ACT § 10(a).

ments on the property and those liable for it. There is, of course, a quite substantial body of both state and federal law regulating cleanup of contaminated property, and that law has requirements that extend beyond the covenant. Specifically, when the covenant is part of a regulatory determination of the extent and scope of cleanup required, that regulatory law continues to apply to the property outside the covenant.<sup>66</sup> That law typically provides that the regulatory agency approving the cleanup has the power to re-open the remedy determined if protection of the public health of the environment so requires.<sup>67</sup> The UECA does not strip that power from state environmental regulatory agencies and, of course, could not do so with respect to federal agencies.<sup>68</sup> While such regulatory re-openings of a concluded cleanup determination are in fact rare,<sup>69</sup> they are possible where protection from environmental risk requires them.

Under the UECA, the covenant can be amended or terminated with the consent of specified parties and it will be helpful to review the motives and interests of those parties in the process or working out a change.<sup>70</sup> First, agreement of the regulatory agency is required in order to insure that the changed covenant, or the termination, continues to provide protection from the environmental risk posed by the contaminants.<sup>71</sup> In addition, the change must be agreed to by the current owner of the fee simple interest in the property.<sup>72</sup> This is not surprising for, as discussed above, this party is bound by the terms of the covenant.<sup>73</sup> Where a change of use is contemplated, this party is presumably either the one making the change, or selling to the party who wishes to

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<sup>66</sup> *Id.* § 10 cmt. 7.

<sup>67</sup> See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604 (2000); UNIF. ENVTL. COVENANTS ACT § 10 cmt. 7.

<sup>68</sup> See UNIF. ENVTL. COVENANTS ACT § 11(b).

<sup>69</sup> Daniel P. Selmi and Kenneth A. Manaster discuss the various mechanisms states use to assure parties that reopeners will not be used often. 1 DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 9:57 (2006); see MATTHEW BENDER, ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 32.10[2] (2006).

<sup>70</sup> See UNIF. ENVTL. COVENANTS ACT § 10(a).

<sup>71</sup> See *id.* § 10(a)(1). Comment 7 of section 10 notes that the agency may wish to require notice to a much larger group of potentially interested parties, and also provides some specific matters the notice might be required to contain, as a condition of its approval of the settlement. *Id.* § 10 cmt. 7.

<sup>72</sup> *Id.* § 10(a)(2).

<sup>73</sup> See *id.* § 4. The UECA does give the agency the power to waive this agreement, which might be necessary if the property has been abandoned and the owner of the fee can no longer be located. See *id.* § 10(a)(2). Delaware and South Dakota have removed this waiver power. DEL. CODE ANN. tit. 7, § 7915(a)(2) (Supp. 2006); S.D. CODIFIED LAWS § 34A-17-10(a)(2) (Supp. 2006).

make the change. In addition, the UECA requires that the change be agreed to by the holder.<sup>74</sup>

The third party, or parties, who must consent are all those who originally signed the covenant, unless they either waived this right in the original covenant, or a court determines they can no longer be located or identified in “the exercise of reasonable diligence.”<sup>75</sup> Two kinds of parties are the most likely to be present in this group. First are local citizens’ groups, environmental groups, or local governments which were signatories to the original agreement because they had a strong interest in the cleanup and the agency insisted that they be party to the covenant.<sup>76</sup> If their interest was so recognized in the covenant, then the interest is presumably still strong and they should be part of the decision to change the covenant.

The second group are non-owner parties who were part of the original covenant because they were liable for the cleanup under background federal or state law.<sup>77</sup> The cleanup liability of these parties for the property typically continues under Superfund and analogous state law even after the cleanup has been determined and the covenant implemented.<sup>78</sup> In addition, they are potentially at risk for common law liability if personal or property injury results from exposure to the contamination. While one may question whether this continuing liability exposure after a regulated cleanup is good policy, there appears to be limited political movement to change existing law. Because these parties have a continuing risk of liability, they will only agree to settlements, including those with covenants, in which they feel they have enough control over future use of the property to protect against their liability exposure. These parties will insist on having a say in amendments and terminations of the covenant, or they will not agree to the covenant—and the rest of the cleanup settlement—in the first place. By requiring their consent to the amendment or termination, the UECA

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<sup>74</sup> UNIF. ENVTL. COVENANTS ACT § 10(a)(4).

<sup>75</sup> *Id.* § 10(a)(3). Iowa has given the waiver power to the agency, rather than a court, and Utah gives the power to either the court or the agency. IOWA CODE § 4551.10(1)(C) (Supp. 2006); UTAH CODE ANN. § 57-25-110(1)(c) (Supp. 2006).

<sup>76</sup> UNIF. ENVTL. COVENANTS ACT § 10(a)(4).

<sup>77</sup> This group includes Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) parties.

<sup>78</sup> Federal regulators and some state regulators have the power to limit the end of such liability, but the realities of the regulatory process are that this rarely happens. *See generally* BENDER, *supra* note 69; SELMI & MANASTER, *supra* note 69. These could be, for example, parties whose liability is based on use of the property during the period when some of the contamination occurred.

gives them a means to protect this interest and thus seeks to encourage them to agree to the cleanup and the covenant in the first place.

What of the owners of other interests in the property, such as a mortgage holder or tenant? The UECA does not require that these parties agree to the amendment, but it does specify that their interest is not affected by the amendment unless they agree to the change, or waive the right to agree in the original covenant.<sup>79</sup> Why might a mortgage holder, for example, agree to this? The optimistic scenario is that the property is being changed to a more highly valued use, so the mortgage interest is more valuable or at least more secure. The factory is converted to residential condos, for example, because condos in this location are something that the relevant property users value more highly. In this happy situation, the mortgage is even more secure. But suppose we have a less optimistic scenario, in which the use restrictions are being tightened in response to a greater risk from the contamination than was originally thought. Here the mortgage holder has no obvious motivation to agree to the change because it is likely restricting the property, or requiring further cleanup, that is making the property less valuable in fact. However, this is not changing the nature of the mortgage holder's interest and thus should not be seen as "affecting" it.<sup>80</sup> Finally, many of these interests can be ones that are not much impacted by the covenant at all, such as utility rights of way, for example.

The UECA seeks to provide a reasonable and workable method for changing covenants, but one which also protects the important interests of all parties. Finding the best balance between these objectives is difficult. The UECA's requirements do a good job of protecting those interests, and thus encouraging formation of the covenants in the first place. However, providing that protection comes at some cost, for the UECA's requirements for changing or terminating a covenant are demanding and such changes will not be easily made.

#### D. *Enforcing the Covenant*

The UECA provides for enforcement of a covenant by a civil action for injunctive or other equitable relief and authorizes a number of parties to bring an enforcement action.<sup>81</sup> It authorizes an enforcement ac-

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<sup>79</sup> UNIF. ENVTL. COVENANTS ACT § 10(b).

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* § 11(a).



tion by the agency that approved the covenant and also by the state regulatory agency if it was not the approving agency.<sup>82</sup>

The UECA gives all parties to the covenant the right to bring an enforcement action, partially overlapping with this provision.<sup>83</sup> This right will include the owner of the property at the time the covenant was created, as well as the holder if this is a different party, but it will also reach others. For instance, a party who was responsible for the cleanup costs, even if it was not the owner, would likely have been a party to the covenant. This could be, for example, an industrial company that leased and operated the property at the time the contamination was disposed of or one which used the property solely for waste disposal. As discussed above, such a potentially responsible party (PRP) has a strong interest in ensuring that the covenant is enforced because the regulatory liability for the cleanup often continues after the cleanup, and it may have potential toxic tort liability as well.<sup>84</sup> Enforcement power for this party will be crucial to getting it to enter the covenant in the first place. In addition, citizens' groups or environmental groups may have been parties to the covenant, and if they were, they will have enforcement power to protect their interest in seeing that the covenant is obeyed and the community thus protected.<sup>85</sup> These groups are well located to learn of violations and likely to be motivated to address them. The UECA provides that the covenant itself can grant enforcement authority to any specific party, and these groups might also be covered here even if they are not parties to the covenant.<sup>86</sup> The UECA extends enforcement authority more broadly to include the local municipal government where the property is located.<sup>87</sup> The local government's interest in enforcing the covenant to protect its citizens is obvious, and it is also well positioned to learn of violations and be motivated to protect them.

Finally, the UECA reaches out to authorize covenant enforcement by people whose interest is in the property rather than in the covenant

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<sup>82</sup> *Id.* § 11(a)(2). The District of Columbia gives the Attorney General, not the agency, the power to bring a civil action. D.C. CODE ANN. § 8-671.10(a)(2) (2006).

<sup>83</sup> UNIF. ENVTL. COVENANTS ACT § 11(a)(1).

<sup>84</sup> *See supra* text accompanying notes 44–47.

<sup>85</sup> *See* UNIF. ENVTL. COVENANTS ACT § 11(a)(1).

<sup>86</sup> *Id.* § 11(a)(3). The UECA does specify that simply being given enforcement power in the covenant will not give rise to liability for the cleanup. *Id.* § 11(c). Cleanup liability under both state and federal law has proven to be so expansive that parties are understandably nervous to avoid any activity that might generate liability.

<sup>87</sup> *Id.* § 11(a)(5).

as such.<sup>88</sup> Thus, the covenant can be enforced by anyone whose interest in the property or whose collateral or liability “may be affected by the alleged violation of the covenant.”<sup>89</sup> This is potentially a broad group, and also one that may not be easily defined short of litigation. Authorizing enforcement power will enable parties with these interests in the property or related legal involvement to be able to protect their interests through enforcing the covenant, and is comprehensible policy at this level. It does introduce some potential uncertainty into some enforcement actions. However, the uncertainty, while real, should prove manageable because it will only be at the margin in determining the group of parties who can sue.

The specific provisions of the UECA do not determine all enforcement actions. As discussed above, covenants are entered into as part of a larger resolution of an environmental cleanup that is, typically, done under broader regulatory mandates and authorizations.<sup>90</sup> Those regulatory regimes include their own enforcement provisions and those provisions will also apply to the covenant. Thus, for example, in a covenant approved by EPA, the Agency would have the authority to enforce the covenant under federal regulatory law rather than under the UECA.<sup>91</sup> This would also be true for state regulators acting under a state regulatory system.<sup>92</sup> However, the UECA does not provide for citizen suits generally, and, as will be discussed below, has received substantial criticism for this.<sup>93</sup>

### III. CRITICISM OF THE UNIFORM ENVIRONMENTAL COVENANTS ACT

Several substantial criticisms have been made of specific portions of the Uniform Environmental Covenants Act (UECA).<sup>94</sup> These criti-

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<sup>88</sup> *Id.* § 11(a)(4).

<sup>89</sup> *Id.*

<sup>90</sup> See *supra* text accompanying notes 66–68.

<sup>91</sup> See UNIF. ENVTL. COVENANTS ACT, Prefatory Note.

<sup>92</sup> *Id.* § 11(b). The UECA specifically provides that it does not limit the state regulator’s authority in this regard. *Id.*

<sup>93</sup> A covenant entered into pursuant to a cleanup undertaken under federal law, such as CERCLA, could be enforced under that law, including its citizen suit provisions. 42 U.S.C. § 9659 (2004). However, this action would be a citizen suit under CERCLA, for example, not under the UECA. See *id.* This issue is discussed further, *infra* Part III.

<sup>94</sup> See ASS’N OF STATE AND TERRITORIAL SOLID WASTE MGMT. OFFICIALS (ASTSWMO), INFORMATION PAPER ON THE UNIFORM ENVIRONMENTAL COVENANTS ACT (UECA) (April 19, 2006), available at <http://www.astswmo.org> (follow “Publications” hyperlink; then follow “Federal Facilities Research Center” hyperlink; then follow “Uniform Environmental Covenants Act (UECA) (April 2006)” hyperlink) [hereinafter ASTSWMO]; Paul Stanton Kibel, *A Shallow Fix: The Uniform Environmental Covenants Act Leaves Hard Brownfield Ques-*

cisms generally accept the basic proposition that legal infrastructure is needed for environmental covenants, and appear to agree with much of the infrastructure the UECA offers.<sup>95</sup> The criticisms fall into three groups. First, the UECA is criticized for not requiring more in creating environmental covenants, specifically for not providing sufficient public participation in their creation and enforcement.<sup>96</sup> The second criticism is that the UECA interferes with local zoning in inappropriate ways.<sup>97</sup> Third is the claim that the UECA's reliance on a state law property interest, rather than a state law police power, as the basis for the covenant's restrictions leads to a number of bad policy choices.<sup>98</sup>

#### A. *Creating and Enforcing the Covenant*

The first group of criticisms focuses on the creation of environmental covenants, and to a lesser extent on the lack of citizen suits for enforcement. The UECA does not give any criteria for when an environmental covenant should be used, nor does it have an explicit regulatory "trigger" requiring one in specified circumstances.<sup>99</sup> The claim here is that without such standards or such a trigger, environmental covenants may be used when they shouldn't, or not used when they should.<sup>100</sup> A related criticism is that the UECA does not mandate a specific process of public involvement in the decision to use a covenant, or

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*tions Unanswered*, 57 PLANNING & ENVTL. L. 3, 4 (Feb. 2005); Andrea Ruiz-Esquide, Comment, *The Uniform Environmental Covenants Act—An Environmental Justice Perspective*, 31 ECOLOGY L.Q. 1007, 1036–49 (2004); Andrea Ruiz-Esquide, *Directions to Solutions: Why UECA Is Incomplete—A Reply to Professors Breetz and Strasser* 2–4 (2005), <http://lucs.org/news.cfm?id=279> [hereinafter Ruiz-Esquide Reply]; Dan Miller, Colo. Dep't of Law, Presentation at ASTSWMO Annual Meeting: The Uniform Environmental Covenant Act: Issues for States (Oct. 27, 2005). Professor Miller gave a similar Powerpoint presentation at the EPA's Institutional Controls Roundtable and Training on April 4–6, 2006. That presentation is available at [http://www.epa.gov/superfund/action/ic/pdfs/miller\\_ueca.pdf](http://www.epa.gov/superfund/action/ic/pdfs/miller_ueca.pdf).

<sup>95</sup> See Kibel, *supra* note 94, at 6 ("When judged by the limited parameters and goals adopted as part of the UECA drafting process, the NCCUSL was by and large successful. The UECA includes many provisions that do in fact help reconcile the use of environmental covenants . . .").

<sup>96</sup> See Kibel, *supra* note 94, at 7; Miller, *supra* note 94.

<sup>97</sup> See Kibel, *supra* note 94, at 4–5; Miller, *supra* note 94.

<sup>98</sup> See Kibel, *supra* note 94 at 6–8 (criticizing the UECA's drafting process). The basic claim is that, because the U.S. Department of Defense supplied part of the funding for the UECA's preparation, the UECA is skewed in its emphasis and results. *Id.* The claim is addressed by Professors Strasser and Breetz and will not be further considered here. See Kurt A. Strasser & William Breetz, *Why the Uniform Environmental Covenants Act Makes Sense. A Reply to Paul Kibel*, 57 PLANNING & ENVTL. L. 7, 9 (2006).

<sup>99</sup> See Kibel, *supra* note 94, at 4; Miller, *supra* note 94.

<sup>100</sup> See Kibel, *supra* note 94, at 4; Miller, *supra* note 94.

the decisions about specific provisions to include.<sup>101</sup> Such public involvement should be part of the process of establishing an environmental covenant and, it is claimed, should be mandated in the UECA.

While this description of the UECA is accurate, the criticism misunderstands the UECA's role in a larger legal/regulatory tableau. These criticisms are unfortunate because they ignore the regulatory context in which environmental covenants are used and risk-based remedies are determined. Environmental covenants are used to implement the land use restrictions and ongoing maintenance requirements of risk-based cleanups.<sup>102</sup> As such, they are implemented only at the end of the decision-making process which determines all aspects of the remedy. Good decisions are essential in that process if the public is to be protected from environmental risks that the contamination offers. But the decision to use a risk-based cleanup together with an environmental covenant—rather than imposing a cleanup to background, residential or unrestricted use—is part of a larger determination of the remedy.<sup>103</sup> It does not make sense to require standards or processes only for use of environmental covenants. Any effective standards or processes must apply throughout the entire remedy determining procedure. The remedy specification process already has both standards and processes.

There is a large body of federal and state law that articulates the standards for environmental cleanups, as well as the notice and consultation requirements in the process.<sup>104</sup> Federal cleanup standards are extensive and detailed.<sup>105</sup> Similarly, federal procedures require extensive notice and opportunity to comment in the remedy selection process.<sup>106</sup> Many states have similar laws. For example, in California, there are extensive environmental statutes and regulations governing both the substantive cleanup decision, as well as the notice and comment process for making it.<sup>107</sup> While California's are perhaps more detailed

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<sup>101</sup> Kibel, *supra* note 94, at 7; Ruiz-Esquide Reply, *supra* note 94, at 2–3. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) makes the related criticism that private cleanups not done under regulatory statutes will not have public involvement unless the agency approving them requires otherwise. *See* ASTSWMO, *supra* note 94. Of course, private cleanups that do not gain regulatory approval will not give rise to environmental covenants that enjoy the provisions of the UECA, as agency approval is a condition of the UECA's coverage. *See* UNIF. ENVTL. COVENANTS ACT § 4(a)(5) (2003).

<sup>102</sup> *See* UNIF. ENVTL. COVENANTS ACT § 2.

<sup>103</sup> *See id.* at Prefatory Note.

<sup>104</sup> *See id.*

<sup>105</sup> *See* CERCLA, 42 U.S.C. § 9621 (2004).

<sup>106</sup> *See id.* § 9617.

<sup>107</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25356, 25356.1, 25358.7 (2000).

than many, such provisions are typical of state cleanup laws.<sup>108</sup> The leading multi-state study concludes:

Forty-six (46) states provide public notice at state cleanup sites—29 based on statute or regulation, and 17 by policy or on an ad hoc basis . . . . Forty-five (45) states receive public comment at state cleanup sites—31 based on statute or regulation, and 14 by policy or on an ad hoc basis . . . . Forty-three (43) states hold hearings or meetings at state cleanup sites—26 based on statute or regulation, and 17 based on policy or on an ad hoc basis.<sup>109</sup>

Specific standards for covenants and specific procedural requirements for their adoption would be seriously incomplete if they did not address other aspects of the remedy. There are standards for remedies, both procedural and substantive. If these standards are inadequate, then they should be revised and improved for the whole remedy process, not just for this piece of it. To this point, none of the critics have argued that the existing requirements are inadequate or even considered these requirements.

Commentators criticized the UECA for not providing greater public involvement in the form of citizen suits.<sup>110</sup> An earlier draft of the UECA did provide such a remedy.<sup>111</sup> The argument for them here is substantial. Local citizens' groups, including environmental groups, are quite concerned that use restrictions and other requirements of an environmental covenant be enforced, and these groups are likely to be well positioned to observe activity on the property and respond with an enforcement action. This fact was much of the reason that the UECA Drafting Committee originally considered them. Citizen suits are a very common feature of federal environmental law.<sup>112</sup> However, their use by states is much more mixed; fifteen states have some form of citizen

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<sup>108</sup> See ENVTL. L. INST., ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE 100, 102 (2002).

<sup>109</sup>*Id.* at 100. Many states have enacted statutes on cleanup policies and criteria, as well as public participation requirements. See CONN. GEN. STAT. § 22a-133k (2006); ME. REV. STAT. ANN. tit. 38, § 343-E (Supp. 2006); MD. CODE ANN., ENVIR. §§ 7-509, 7-510 (Supp. 2006); N.J. STAT. ANN. § 58:10B-12 (2006); 35 PA. STAT. ANN. §§ 6020.504, 6020.1115 (2003); R.I. GEN. LAWS § 23-19.1-6 (2001); VT. STAT. ANN. tit. 10, §§ 6615a, 6615b (2006); W. VA. CODE § 22-22-4 (2002).

<sup>110</sup> See Ruiz-Esquide Reply, *supra* note 94, at 4–6.

<sup>111</sup> *Id.* at 4.

<sup>112</sup> See 2 DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 16:52 (2006); Ruiz-Esquide Reply, *supra* note 94, at 5.

suits, although the details are widely varied.<sup>113</sup> In the end, the Drafting Committee was more persuaded by this lack of uniformity on the state level. With state practice here so non-uniform, this UECA did not appear to be the proper vehicle to address the question of citizen suits under state law. This is a difficult policy decision and there is room for reasonable people to disagree. Some states have authorized citizen suits for environmental law broadly—in these states there will also be citizen suits to enforce environmental covenants.<sup>114</sup> The Drafting Committee ultimately determined that this matter should be resolved on a state-by-state basis with reference to broader state policy than that for environmental covenants.<sup>115</sup>

### B. *Interference with Local Zoning*

While the UECA is clear that it does not authorize a use of real property that is otherwise prohibited by zoning,<sup>116</sup> an environmental covenant could impose restrictions that prohibit a use allowed by zoning. The question is whether this is an improper interference with local zoning.<sup>117</sup> The use restrictions validated by the UECA are entirely consistent with other kinds of use restrictions often included in privately recorded covenants that have nothing to do with contamination, and these restrictions often have the identical effect of denying future owners the right to develop the property for uses permitted by zoning but inconsistent with the agreement of that buyer and seller.<sup>118</sup>

The interrelationship of zoning ordinances and restrictive covenants is dealt with extensively in the legal literature and poses no special legal challenge. Consider, for example, this conclusion from Anderson's *American Law of Zoning*:

The existence of restrictive covenants does not reduce the power of local legislative bodies to impose zoning regulations

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<sup>113</sup> See generally SELMI & MANASTER, *supra* note 112; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. ENVTL. COVENANTS ACT § 10 (Feb. 28, 2003), available at <http://www.law.upenn.edu/bll/ulc/ueca/feb2003comparedraft.pdf> [hereinafter DRAFT UECA].

<sup>114</sup> See SELMI & MANASTER, *supra* note 69, at § 9.32–.37.

<sup>115</sup> See DRAFT UECA, *supra* note 113, § 10.

<sup>116</sup> UNIF. ENVTL. COVENANTS ACT § 6 (2003).

<sup>117</sup> Kibel, *supra* note 94, at 4–5, 7 (arguing that the use of environmental covenants to impose restrictions that prohibit a use allowed by zoning is an improper interference with local zoning).

<sup>118</sup> See UNIF. ENVTL. COVENANTS ACT § 6 cmt.

on lands subject to such covenants, nor does the adoption of such ordinance destroy the effectiveness of such covenants.<sup>119</sup>

The general law of zoning is that the more restrictive provision governing the parcel applies.

If regulators and the owners agree on a risk-based cleanup remedy, land use restrictions will presumably be needed to protect the public and the environment. The uses to be prohibited are presumably ones that must be restricted for the health of the community or protection of the environment, and the fact that local zoning might otherwise authorize a “higher and better” use that presents a greater health risk does not make it wise public policy.<sup>120</sup> In addition, such a specific, covenanted restriction is not generally considered to be inconsistent with general zoning restrictions.<sup>121</sup>

### C. *Property Law or Police Power?*

The UECA implements a basic policy choice to use state property law to create durable and enforceable restrictions, and this choice leads to a number of specific provisions and related policy choices that have been critically noted.<sup>122</sup> The alternative approach would base environmental covenant restrictions and requirements on state police power, rather than on property law. Under such an approach, its supporters claim, state regulators would have more control over the covenants and

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<sup>119</sup> 1 PATRICIA E. STALKIN, *ANDERSON’S AMERICAN LAW OF ZONING* § 3:4, at 88 (4th ed. 1995). Another treatise concurs:

Property may be subject to private restrictions and zoning controls that differ in the uses they allow. For example, a prior covenant may restrict property to a residential use while a subsequent zoning ordinance allows a business use. In that event, courts universally hold that the ordinance does not abrogate the restrictive covenant. A would-be violator of a covenant cannot seek refuge behind the permission of zoning authorities.

JULIAN CONRAD JUERGENSMAYER & THOMAS L. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 15.14, at 775 (2003).

<sup>120</sup> See Strasser & Breetz, *supra* note 98, at 7–9 (providing further discussion of this issue).

<sup>121</sup> *Id.* at 8–9.

<sup>122</sup> See ASTSWMO, *supra* note 94, at 1–4; Miller, *supra* note 94. Mr. Miller is the Assistant Attorney General for Environmental Matters in Colorado and was a primary drafter of the Colorado statute which bases its environmental covenants on the police power. He served ably and effectively as an advisor to UECA. ASTSWMO is a primary national organization of state environmental regulatory officials.

this would lead to important differences in formation, modification, and enforcement of the covenants.<sup>123</sup>

Using a police power approach is consistent with requiring the approval of state regulators to create a covenant, regardless of whether the state regulator was in charge of the underlying cleanup operation.<sup>124</sup> This use will certainly give state regulators more control over all covenants, as federal regulators will have to obtain state consent before creating a covenant on federally supervised projects. While the rationale is not fully explained, supporters of this approach note that federal regulators may resist state property law interests.<sup>125</sup> To the extent that state and federal regulators disagree on the appropriate level of required cleanup and the necessary restrictions to protect against the risks posed by residual contamination, state views on these questions would prevail in the covenant. However, as the covenant is part of a larger remedy determination, this change alone will not insure that state views will be respected in the rest of a determination where a federal agency is supervising a cleanup under federal law.<sup>126</sup> Presumably, this requirement will necessitate the use of state supervisory resources on federal cleanups, potentially slowing down approvals or redirecting those resources from other state efforts. Beyond this necessity, a final evaluation of the merits of this requirement depends on one's view of the merits of the respective opinions of state and federal regulators when they differ.

When a covenant is adopted as an exercise of state police power, it is argued, modification with only the approval of the state agency is justified and appropriate.<sup>127</sup> Such a modification is easier to accomplish than one under the UECA because the consent of other parties is not required.<sup>128</sup> The difference comes in a situation in which the agency wishes to make a modification when some or all of the other parties do not. Under the UECA, the agency's consent is required for a modification, so there is no question of approving modifications the agency opposes.<sup>129</sup> Yet requiring the consent of the parties in order to modify a

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<sup>123</sup> See ASTSWMO, *supra* note 94, at 2–3; Miller, *supra* note 94.

<sup>124</sup> This requirement has been added by two jurisdictions which have adopted the UECA. See *supra* notes 24–25 and accompanying text.

<sup>125</sup> See ASTSWMO, *supra* note 94, at 2–3; Miller, *supra* note 94.

<sup>126</sup> State views have some status in federal cleanups, but this extent varies with different regulatory regimes and situations.

<sup>127</sup> See ASTSWMO, *supra* note 94, at 2–4; Miller, *supra* note 94.

<sup>128</sup> See UNIF. ENVTL. COVENANTS ACT § 10 (2003).

<sup>129</sup> See *id.* § 10(a)(1). However, under the UECA the approving agency might be a federal agency if it supervised the remedy, rather than the state agency. *Id.* § 2(2). This fact is



covenant, the argument runs, gives those parties an effective “veto” over modifications which they might exercise for reasons unrelated to the merits of the modification. This effect is described as creating in the parties a “property right in pollution,” although the nature and extent of the property right are not explored.<sup>130</sup> As discussed above, the covenant exists as part of a larger remedy determination and there are procedures for changing that determination outside the covenant.<sup>131</sup>

This is a genuine disagreement with the policy of the UECA. The UECA determines to live with a protective and potentially complicated modification process to encourage parties to enter into covenants.<sup>132</sup> Parties will be hesitant to enter covenants if they do not feel certain that their interests will be taken into account in subsequent modifications. The UECA’s concern is that fewer covenants will be used, and thus their environmental and other benefits will not be achieved. The response of these critics is, presumably, that party consent will not be necessary to create covenants, so there will be no discouraging effect. One concern is with the real world effectiveness of police power-based covenants requiring land use and other restrictions when the owner of the property and other interested parties have not agreed to them. A state can mandate the existence of such restrictions, but without participation by the interested parties, there is a real prospect that it will not be effectively implemented.

Finally, proponents of basing covenants on state police power favor allowing administrative enforcement of covenants in addition to judicial enforcement.<sup>133</sup> The argument is that administrative enforcement is cheaper and more efficient, thus avoiding a drain on agency resources.<sup>134</sup> Of course, administrative enforcement could be authorized for a covenant created as a state law property interest although the UECA does not do so. However, it would presumably have to allow all parties—rather than just the agency—to initiate enforcement actions and participate in them. This broad allowance could lead to a full blow multi-party proceeding that would look much like conventional litigation and one which is not obviously cheaper or easier than conven-

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similar to the issue presented above in formation of a covenant and will not be separately discussed here.

<sup>130</sup> See ASTSWMO, *supra* note 94, at 3.

<sup>131</sup> See discussion *supra* Part II.C.

<sup>132</sup> See UNIF. ENVTL. COVENANTS ACT § 10.

<sup>133</sup> See ASTSWMO, *supra* note 94, at 2; Miller, *supra* note 94.

<sup>134</sup> This concern about a drain on agency resources is not discussed in the provision to require state agency approval of all covenants.

tional litigation. The key question appears to be whether parties other than the agency can initiate enforcement or participate in it.<sup>135</sup> If the answer is no, then a substantial justification for restricting other obviously interested parties is necessary. If the answer is yes, then the efficiencies are far from certain. On this point, the critics' arguments require further development.

There are two further concerns with covenants based on police power. First, some provision must be made for recording them in the land records or otherwise integrating them into the property law notification system. Otherwise, they run a great risk of being forgotten over time and overlooked in future land use decisions, ultimately exposing the public and the environment to risk from the residual contamination. While this is conceptually possible, and such integration is accomplished with other kinds of land use restrictions, it is a question that must be addressed. The second concern is more fundamental. What treatment will such regulatory covenants give to existing interests in the real property, such as existing mortgages or easements? To simply override them would present a substantial takings claim. To ignore them would run a serious risk of making the covenant ineffective because those interests could override its restrictions. This problem must be dealt with, and with certainty, to have an effective covenant system.<sup>136</sup>

#### CONCLUSION

The Uniform Environmental Covenants Act (UECA) offers the legal infrastructure needed to implement risk-based cleanups of property in which some contamination is left in the ground and the risks are managed through land use and other arrangements. On examination, one sees that a substantial amount of infrastructure is needed to take care of the problems of creating the covenant, making it durable, and providing for modification and enforcement. Most of the criticism of the UECA is for not doing more, rather than for what it does, with the exception of the fundamental objection of critics who prefer covenants based on state police power rather than state property law. On balance the UECA offers a thorough and plausible solution to the problems it addresses.

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<sup>135</sup> Colorado authorizes suit by the grantor, specifically named third-party beneficiaries, and an affected local government. COLO. REV. STAT. § 25-15-322(4)-(5) (2001).

<sup>136</sup> The covenant systems based on police power have not addressed this question. *See, e.g.*, COLO. REV. STAT. § 25-15-317.

The UECA is important because it provides a mechanism to protect the public and the environment from a continuing risk. What then are the continuing concerns with whether the UECA will in fact do its job? At least two are evident. First, will the UECA work out as planned, over the long term? Covenants impose restrictions that may be needed for a long time, and institutional memory and the existing enforcement mechanisms may not be adequate to insure implementation of the restrictions over the long term. The UECA has mechanisms, but they are only as good as the memories and energies of the humans who must implement them. Twenty-five, fifty, or one hundred years or longer is a long time for fallible humans and imperfect institutions to remember that this land use is restricted for an important reason. Recording of the covenant in the land records will help focus attention, but some concerns remain. Second, will we have the technical and scientific knowledge to accurately determine the level of risk posed by residual contamination, both when the covenant is formed and over time? As a society, we have been serious about the business of cleaning up contaminated property for about twenty-five years, and have learned a great deal about what is needed and how to do it. We think we know enough, but we will surely continue to learn more; therefore, we must remember to revise and incorporate new knowledge.