

By: Senator(s) Doxey

To: Judiciary, Division A

SENATE BILL NO. 2864

1 AN ACT TO CREATE THE UNIFORM ENVIRONMENTAL COVENANTS ACT; TO
 2 DEFINE CERTAIN TERMS; TO PROVIDE FOR THE NATURE OF RIGHTS AND THE
 3 SUBORDINATION OF RIGHTS; TO SPECIFY THE CONTENTS OF ENVIRONMENTAL
 4 COVENANTS; TO ADDRESS THE VALIDITY OF AN ENVIRONMENTAL COVENANT
 5 AND THE EFFECT ON OTHER INSTRUMENTS; TO ADDRESS THE RELATIONSHIP
 6 TO OTHER LAND-USE LAW; TO REQUIRE NOTICE; TO REQUIRE RECORDING; TO
 7 PROVIDE FOR THE DURATION OF AN ENVIRONMENTAL COVENANT; TO PROVIDE
 8 FOR AMENDMENT OR TERMINATION OF ENVIRONMENTAL COVENANTS BY
 9 CONSENT; TO PROVIDE FOR ENFORCEMENT; TO PROVIDE FOR UNIFORMITY OF
 10 APPLICATION; TO AMEND SECTION 27-35-1, MISSISSIPPI CODE OF 1972,
 11 IN CONFORMITY THERETO; AND FOR RELATED PURPOSES.

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

13 **SECTION 1.** This act may be cited as the Uniform
 14 Environmental Covenants Act.

15 **SECTION 2.** In this act:

16 (1) "Activity and use limitations" means restrictions
 17 or obligations created under this act with respect to real
 18 property.

19 (2) "Agency" means the Mississippi Commission on
 20 Environmental Quality or any other state or federal agency that
 21 determines or approves the environmental response project pursuant
 22 to which the environmental covenant is created.

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

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

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

36 (A) Under a federal or state program governing
37 environmental remediation of real property, including:

38 (i) Subchapter III or IX of the Federal
39 Resource Conservation and Recovery Act, 42 USCS Sections
40 6921-6939e, 6991-6991i;

41 (ii) Sections 7002 or 7003 of the Federal
42 Resource Conservation and Recovery Act, 42 USCS Sections 6972,
43 6973;

44 (iii) The Federal Comprehensive Environmental
45 Response Compensation, and Liability Act, 42 USCS Section 7901 et
46 seq.;

47 (iv) The Mississippi Air and Water Pollution
48 Control Law, Section 49-17-1 et seq.;

49 (v) The Mississippi Solid Wastes Disposal Law
50 of 1974, Section 17-17-1 et seq.;

51 (vi) The Mississippi Underground Storage Tank
52 Act of 1988, Section 49-17-401 et seq.;

53 (vii) Such other laws or regulations as the
54 Commission on Environmental Quality shall enumerate.

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

58 (C) Under a state voluntary clean-up program
59 authorized in the Mississippi Brownfields Voluntary Cleanup and
60 Redevelopment Act, Section 49-35-1 et seq.

61 (6) "Holder" means the grantee of an environmental
62 covenant as specified in Section 3(a).

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

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

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

75 (10) "Servitude" means a covenant, profit, easement in
76 gross, or easement appurtenant.

77 **SECTION 3.** (a) Any person, including a person that owns an
78 interest in the real property, a municipality or other unit of
79 local government, may be a holder. An environmental covenant may
80 identify more than one (1) holder. The interest of a holder is an
81 interest in real property.

82 (b) A right of an agency under this act or under an
83 environmental covenant is not an interest in real property.

84 (c) An agency is bound by any obligation it assumes in an
85 environmental covenant, but an agency does not assume obligations
86 merely by signing or approving an environmental covenant. Any
87 other person that signs an environmental covenant is bound by the
88 obligations the person assumes in the covenant, but signing the
89 covenant does not change obligations, rights, or protections
90 granted or imposed under law other than this act except as
91 provided in the covenant.

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

95 (1) An interest that has priority under other law is
96 not affected by an environmental covenant unless the person that
97 owns the interest subordinates that interest to the covenant.

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

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

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

112 **SECTION 4.** (a) An environmental covenant must:

113 (1) State that the instrument is an environmental
114 covenant executed pursuant to the Mississippi Environmental
115 Covenants Act;

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

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

120 (4) Identify every holder;

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

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

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

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

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

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

140 (4) A brief narrative description of the contamination
141 and remedy, including the contaminants of concern, the pathways of
142 exposure, limits on exposure, and the location and extent of the
143 contamination;

144 (5) Limitation on amendment or termination of the
145 covenant in addition to those contained in Sections 9 and 10;

146 (6) Rights of the holder in addition to its right to
147 enforce the covenant pursuant to Section 11; and

148 (7) A requirement that the grantor of the covenant
149 furnish financial documentation to assure adequate funds exist for
150 the maintenance and upkeep of institutional controls.

151 (c) In addition to other conditions for its approval of an
152 environmental covenant, the agency may refuse to sign an
153 environmental covenant for any reason. If the commission refuses
154 to sign an environmental covenant it shall set forth its reasons
155 for refusing to sign in an order and such order may be appealed as
156 allowed for in Section 49-17-41.

157 **SECTION 5.** (a) An environmental covenant that complies with
158 this act runs with the land.

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

161 (1) It is not appurtenant to an interest in real
162 property;

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

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

167 (4) It imposes a negative burden;

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

170 (6) The benefit or burden does not touch or concern
171 real property;

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

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

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

177 (c) An instrument that creates restrictions or obligations
178 with respect to real property that would qualify as activity and
179 use limitations except for the fact that the instrument was
180 recorded before July 1, 2006, is not invalid or unenforceable
181 because of any of the limitations on enforcement of interests
182 described in subsection (b) or because it was identified as an
183 easement, servitude, deed restriction, or other interest. This
184 act does not apply in any other respect to such an instrument.

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

189 **SECTION 6.** This act does not authorize a use of real
190 property that is otherwise prohibited by zoning, by law other than

191 this act regulating use of real property, or by a recorded
192 instrument that has priority over the environmental covenant.
193 An environmental covenant may prohibit or restrict uses of real
194 property which are authorized by zoning or by law other than this
195 act.

196 **SECTION 7.** (a) A copy of an environmental covenant shall be
197 provided by the persons and in the manner required by the agency
198 to:

199 (1) Each person that signed the covenant;

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

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

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

206 (5) Any other person the agency requires.

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

209 (c) Failure by any person to provide a copy of the covenant
210 in the manner required by the agency shall be punishable by a
211 civil fine in an amount to be determined by the Commission on
212 Environmental Quality consistent with the terms and provisions of
213 Section 49-17-43.

214 **SECTION 8.** (a) An environmental covenant and any amendment
215 or termination of the covenant must be recorded in every county in
216 which any portion of the real property subject to the covenant is
217 located. For purposes of indexing, a holder shall be treated as a
218 grantee.

219 (b) Except as otherwise provided in Section 9(c), an
220 environmental covenant is subject to the laws of this state
221 governing recording and priority of interests in real property
222 including, but not limited to, the requirement of providing
223 indexing instructions and preparer data, as set forth in Section

224 89-5-33(3); and, the requirement to provide an acknowledgment as
225 set forth in Section 89-3-1.

226 **SECTION 9.** (a) An environmental covenant is perpetual
227 unless it is:

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

230 (2) Terminated by consent pursuant to Section 10;

231 (3) Terminated pursuant to subsection (b);

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

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

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

238 (B) All persons identified in Section 10(a) and
239 (b) are given notice of the pendency of the proceeding; and

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

243 (b) If the agency that signed an environmental covenant has
244 determined that the intended benefits of the covenant can no
245 longer be realized, a court, under the doctrine of changed
246 circumstances, in an action in which all persons identified in
247 Section 10(a) and (b) have been given notice, may terminate the
248 covenant or reduce its burden on the real property subject to the
249 covenant. The agency's determination shall be set forth in an
250 order and such order shall be subject to review as provided in
251 Section 49-17-41. Failure by the agency to make a determination
252 within one hundred twenty (120) days of a request shall be deemed
253 a decision that the environmental covenant should not be
254 terminated and such decision is appealable as an order issued by
255 the commission under Section 49-17-41.

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

262 **SECTION 10.** (a) An environmental covenant may be amended or
263 terminated by consent only if the amendment or termination is
264 signed by:

265 (1) The agency;

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

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

273 (4) Except as otherwise provided in subsection (d)(2),
274 the holder.

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

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

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

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

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

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

291 **SECTION 11.** (a) A civil action for injunctive or other
292 equitable relief for violation of an environmental covenant may be
293 maintained by:

294 (1) A party to the covenant;

295 (2) The agency;

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

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

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

303 (b) This act does not limit the regulatory authority of the
304 agency or the Mississippi Commission on Environmental Quality
305 under law other than this act with respect to an environmental
306 response project.

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

310 **SECTION 12.** In applying and construing this uniform act,
311 consideration must be given to the need to promote uniformity of
312 the law with respect to its subject matter among states that enact
313 it.

314 **SECTION 13.** This act modifies, limits, or supersedes the
315 federal Electronic Signatures in Global and National Commerce Act
316 (15 USCS Section 7001 et seq.) but does not modify, limit, or
317 supersede Section 101 of that act (15 USCS Section 7001(a)) or
318 authorize electronic delivery of any of the notices described in
319 Section 103 of that act (15 USCS Section 7003(b)).

320 **SECTION 14.** If any provision of this act or its application
321 to any person or circumstance is held invalid, the invalidity does

322 not affect other provisions or applications of this act which can
323 be given effect without the invalid provision or application, and
324 to this end the provisions of this act are severable.

325 **SECTION 15.** Section 27-35-1, Mississippi Code of 1972, is
326 amended as follows:

327 27-35-1. (1) Taxes (state, county and municipal) assessed
328 upon lands or personal property, excepting motor vehicles as
329 defined by the Motor Vehicle Ad Valorem Tax Law of 1958, Sections
330 27-51-1 through 27-51-49, shall bind the same and, except for
331 environmental covenants created pursuant to the Mississippi
332 Environmental Covenants Act, shall be entitled to preference over
333 all judgments, executions, encumbrances or liens whensoever
334 created; and all such taxes assessed shall be a lien upon and bind
335 the property assessed. Except as provided in subsection (3) of
336 this section, the aforesaid tax lien shall attach to all land
337 situated within this state on January 1 of each year, and upon any
338 personal property so situated or brought into this state at any
339 time prior to March 1 of each year except as hereinafter provided.
340 A tax lien shall attach to that personal property listed in an
341 ordinance duly adopted by a county or municipality and to all
342 heavy duty equipment at any time of the year such property is
343 brought into or situated in this state. Such personal property
344 shall not be subject to tax in more than one (1) county; and such
345 county in which said property was located at the earliest taxable
346 date shall have priority in the collection of such taxes. All
347 taxes assessed on stock of goods or merchandise shall be based on
348 the value of the inventory on January 1 of the tax year or the
349 average monthly inventory during the preceding twelve (12) months
350 from January 1 of each year and are specifically made a lien
351 thereon regardless of changes in the items of which it may be
352 composed; and no such property shall be exempt from distress or
353 sale for taxes. It shall not be necessary to the validity of any
354 assessment or of a sale of land for taxes that it shall be

355 assessed to its true owner, but the taxes shall be a charge upon
356 the land or personal property taxed and the sale shall be a
357 proceeding against the thing sold and shall vest title in the
358 purchaser without regard to who may own the land or other property
359 when assessed, or when sold, or whether wrongfully assessed either
360 to a person or to the state or any county, city, town or village,
361 or subdivision of either. Provided, however, that the lien for
362 municipal taxes shall be secondary and subordinate to the lien for
363 state and county taxes.

364 (2) Heavy duty equipment shall mean any motor vehicle used
365 primarily off the road for construction purposes whose gross
366 weight exceeds sixteen thousand (16,000) pounds but shall not
367 include inventory on hand for sale by duly licensed heavy
368 equipment dealers.

369 (3) With respect to lands owned by the state, which lands
370 are leased to private agricultural enterprises and taxable under
371 Section 47-5-66, the tax lien provided for in this section shall
372 attach and be enforceable in the same manner as are other tax
373 liens at the time the crop is harvested.

374 **SECTION 16.** This act shall take effect and be in force from
375 and after July 1, 2006.