MISSISSIPPI LEGISLATURE REGULAR SESSION 2008

By: Senator(s) Moffatt

To: Judiciary, Division A;
Appropriations

COMMITTEE SUBSTITUTE
FOR
SENATE BILL NO. 2382

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

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

SECTION 1. This act may be cited as the Mississippi Uniform Environmental Covenants Act.

SECTION 2. In this act:

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

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

(2A) "Commission" means the Mississippi Commission on Environmental Quality.

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

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

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

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

(i) Subchapter III or IX of the federal Resource Conservation and Recovery Act of 1976, 42 USC Sections 6921 through 6939e and 6991 through 6991i;

(ii) Section 7002 or 7003 of the federal Resource Conservation and Recovery Act of 1976, 42 USC Sections 6972 and 6973;

(iii) The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC Sections 9601 through 9647, as amended;

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

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

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

(vii) Such other laws or regulations as the commission shall enumerate.

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

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

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

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

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

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

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

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

(b) A right of an agency under this act or under an environmental covenant is not an interest in real property. Nothing in this act authorizes the commission to act as a holder.

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

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

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

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

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

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

SECTION 4. (a) An environmental covenant must:

(1) State that the instrument is an environmental covenant executed pursuant to this act;

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

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

(4) Identify every holder;

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

(6) Be signed by the commission, unless the commission waives participation; and

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

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

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

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

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

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

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

(6) Rights of the holder in addition to its right to enforce the covenant pursuant to Section 11.

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

(d) If the commission refuses to sign an environmental covenant, it shall set forth its reasons for refusing to sign in an order and such order may be appealed as provided in Section 49-17-41.

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

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

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

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

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

(4) It imposes a negative burden;

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

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

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

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

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

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before July 1, 2008, is not invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) or because it was identified as an easement, servitude, deed restriction, or other interest. This act does not apply in any other respect to such an instrument.

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

SECTION 6. This act does not authorize a use of real property that is otherwise prohibited by zoning, by law other than this act regulating use of real property, or by a recorded instrument that has priority over the environmental covenant.

An environmental covenant may prohibit or restrict uses of real property which are authorized by zoning or by law other than this act.

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

(1) Each person that signed the covenant;

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

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

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

(5) Any other person the agency requires.

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

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

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

(b) Except as otherwise provided in Section 9(b), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property including, but not limited to, the requirement of providing indexing instructions and preparer data, as set forth in Section 89-5-33(3); and, the requirement to provide an acknowledgment as set forth in Section 89-3-1.

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

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

(2) Terminated by consent pursuant to Section 10;

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

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

(A) The commission and the agency that signed the covenant are parties to the proceeding;

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

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

(5) Terminated or modified by the commission pursuant to the following:

(A) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, the commission, by an order in which all persons identified in Section 10(a) and (b) have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant.

(B) The commission's order shall be subject to review as provided in Section 49-17-41. Failure by the commission to make a determination within one hundred twenty (120) days of a request to terminate the covenant or reduce its burden on the real property subject to the covenant shall be deemed a decision that the environmental covenant should not be terminated or modified and parties listed in Section 11 may request a hearing before the commission in accordance with Section 49-17-41.

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

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

(1) The agency;

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

(3) The commission, unless it waives its participation;

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

(5) Except as otherwise provided in subsection (d)(2), the holder.

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

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

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

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

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

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

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

(1) A party to the covenant;

(2) The agency;

(3) The commission;

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

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

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

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

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

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

SECTION 13. This act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 USCS Section 7001 et seq.) but does not modify, limit, or supersede Section 101 of that act (15 USCS Section 7001(a)) or

authorize electronic delivery of any of the notices described in Section 103 of that act (15 USCS Section 7003(b)).

SECTION 14. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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

27-35-1. (1) Taxes (state, county and municipal) assessed upon lands or personal property, excepting motor vehicles as defined by the Motor Vehicle Ad Valorem Tax Law of 1958, Sections 27-51-1 through 27-51-49, shall bind the same and, except for environmental covenants created pursuant to the Mississippi Environmental Covenants Act, shall be entitled to preference over all judgments, executions, encumbrances or liens whensoever created; and all such taxes assessed shall be a lien upon and bind the property assessed. Except as provided in subsection (3) of this section, the aforesaid tax lien shall attach to all land situated within this state on January 1 of each year, and upon any personal property so situated or brought into this state at any time prior to March 1 of each year except as hereinafter provided. A tax lien shall attach to that personal property listed in an ordinance duly adopted by a county or municipality and to all heavy duty equipment at any time of the year such property is brought into or situated in this state. Such personal property shall not be subject to tax in more than one (1) county; and such county in which said property was located at the earliest taxable date shall have priority in the collection of such taxes. All taxes assessed on stock of goods or merchandise shall be based on the value of the inventory on January 1 of the tax year or the average monthly inventory during the preceding twelve (12) months from January 1 of each year and are specifically made a lien

thereon regardless of changes in the items of which it may be composed; and no such property shall be exempt from distress or sale for taxes. It shall not be necessary to the validity of any assessment or of a sale of land for taxes that it shall be assessed to its true owner, but the taxes shall be a charge upon the land or personal property taxed and the sale shall be a proceeding against the thing sold and shall vest title in the purchaser without regard to who may own the land or other property when assessed, or when sold, or whether wrongfully assessed either to a person or to the state or any county, city, town or village, or subdivision of either. Provided, however, that the lien for municipal taxes shall be secondary and subordinate to the lien for state and county taxes.

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

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

SECTION 16. This act shall take effect and be in force from and after July 1, 2008.