

Environmental Covenants

Section 324.XXXXX Environmental covenants; nature of rights; subordination of interests; contents; validity; effect on other instruments; relationship to other land use law; notice; recording; duration; amendment by court or department action; amendment or termination by consent; enforcement; registry;

- (1) When it is necessary pursuant to this part to place activity and use limitations on real property to protect the public health, safety, or welfare, or the environment, or to assure the effectiveness and integrity of any response activity performed pursuant to this part, the activity and use limitations shall be described in an environmental covenant subject to this section.
- (2) Any person, including a person that owns an interest in the real property subject to an environmental covenant, the department, or a municipality or other unit of local government, may be a holder of an environmental covenant. An environmental covenant may identify more than one holder. The interest of a holder is an interest in real property.
- (3) A right of the department under this section or under an environmental covenant, other than a right as a holder, is not an interest in real property.
- (4) The department is bound by any obligation it assumes in an environmental covenant, but the department does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the environmental covenant, but signing the environmental covenant does not change obligations, rights, or protections granted or imposed under law other than this section except as provided in the environmental covenant.
- (5) All of the following apply to interests in real property in existence at the time an environmental covenant is created or amended:
 - (a) 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 environmental covenant.
 - (b) This section 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 environmental covenant.
 - (c) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record that is also recorded on the property subject to the environmental covenant. 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.
 - (d) 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.
- (6) An environmental covenant shall do all of the following:
 - (a) State that the instrument is an environmental covenant executed pursuant to section xxxxx of part XXX, [***new part title for redesigned statute***], of the natural

resources and environmental protection act, 1994 PA 451, MCL 324.xxxxx to 324.xxxxx, as amended.

- (b) Contain a legally sufficient description and survey of the real property subject to the environmental covenant to define the area addressed by the response activity and the limits of any activity and use limitations. The survey shall be performed by a registered professional surveyor and contain the legal description of the property that is based upon the surveyor's actual measurements of the property. The survey shall include a scaled map that is prepared based upon the written legal description that graphically depicts the boundaries of the property and shows precise distance and bearing indicators in reference to a known, reproducible point of commencement. If there are areas of the property that are subject to additional restrictions that do not apply to the entire property, these areas shall be surveyed separately and the environmental covenant shall contain separate legal descriptions for these areas. These areas shall also be included on a scaled map of the property and depicted in a manner that clearly identifies the areas and precisely portrays the areas' location in relation to the property boundaries.
 - (c) Contain a brief narrative description of the contamination and response activities performed, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination.
 - (d) Describe the activity and use limitations on the real property necessary to:
 - (i) Prohibit uses of the property that are not consistent with the categorical cleanup criteria and limitations proposed as part of the response activity.
 - (ii) Restrict activities that may result in exposure to hazardous substances above levels established for the response activity.
 - (iii) Restrict activities that that may interfere with the response activity, operation and maintenance, monitoring, or other measure necessary to assure the integrity and effectiveness of the response activity.
 - (e) Identify every holder.
 - (f) Be approved in form and content by the department.
 - (g) Be signed by the department.
 - (h) Be signed by every holder, and, unless waived by the department every owner of the fee simple of the real property subject to the environmental covenant.
 - (i) Identify the name and location of any administrative record for the response activity reflected in the environmental covenant.
 - (j) Contain rights of access to the property granted in connection with implementation or enforcement of the environmental covenant. This shall include the department's right to enter the property at reasonable times for the purpose of determining and monitoring compliance with the response activity, including the right to take samples, inspect the operation of the response activity measures, and inspect records.
 - (k) Require notice to the department of the property owner's intent to convey any interest in the property 14 days prior to consummating the conveyance.
 - (l) Require notice to the department of the commencement of a voluntary or involuntary bankruptcy proceeding within 10 days after the filing of a bankruptcy petition that names the property owner as debtor in the bankruptcy.
- (7) In addition to the information required by subsection (6), an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons that signed it, including any of the following:
- (a) 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 environmental covenant.
- (b) Requirements for periodic reporting describing compliance with the environmental covenant.
 - (c) Limitations on amendment or termination of the environmental covenant in addition to those contained in subsections (20) through (27).
 - (d) Rights of the holder in addition to its right to enforce the environmental covenant pursuant to subsection (28).
- (8) A person seeking department approval of an environmental covenant pursuant to subsection (6)(f) shall identify all prior interests in the property and the nature of those interests to determine which interests may interfere with the environmental covenant's ability to assure the integrity and effectiveness of the activity and use limitations or to protect public health, safety, or welfare or, the environment.
- (9) The department may require, as a condition for department approval of an environmental covenant under subsection (6)(f), that a person seeking to place an environmental covenant seek and obtain subordination of a prior interest from those interests the department has determined may interfere with the environmental covenant's ability to assure the integrity and effectiveness of the activity and use limitations or to protect public health, safety, or welfare, or the environment.
- (10) In addition to other conditions for the department's approval of an environmental covenant, the department may require those persons specified by the department that have interests in the real property to sign the environmental covenant.
- (11) An environmental covenant that complies with this section runs with the land.
- (12) An environmental covenant that is otherwise effective is valid and enforceable even if 1 or more of the following apply:
- (a) It is not appurtenant to an interest in real property.
 - (b) It can be or has been assigned to a person other than the original holder.
 - (c) It is not of a character that has been recognized traditionally at common law.
 - (d) It imposes a negative burden.
 - (e) It imposes an affirmative obligation on a person having an interest in the real property or on the holder.
 - (f) The benefit or burden does not touch or concern real property.
 - (g) There is no privity of estate or contract.
 - (h) A holder dies, ceases to exist, resigns, or is replaced.
 - (i) A holder is an owner of an interest subject to the environmental covenant.
- (13) 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 the effective date of this part is not invalid or unenforceable because it is subject to any of the limitations on enforcement of interests described in subsection (12) or because it was identified as an easement, servitude, deed restriction, restrictive covenant, notice, or other interest. This section does not apply in any other respect to such an instrument.

- (14) This section 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.
- (15) This section does not authorize a use of real property that is otherwise prohibited by zoning, by law other than this part 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 that are authorized by zoning or by law other than this part.
- (16) A copy of an environmental covenant shall be provided by the persons and in the manner required by the department to all of the following:
 - (a) Each person that signed the environmental covenant.
 - (b) Each person holding a recorded interest in the real property subject to the environmental covenant.
 - (c) Each person in possession of the real property subject to the environmental covenant.
 - (d) Each local unit of government in which real property subject to the environmental covenant is located.
 - (e) Any other person the department requires.
- (17) The validity of an environmental covenant is not affected by failure to provide a copy of the environmental covenant as required under this section.
- (18) An environmental covenant and any amendment or termination of the environmental covenant shall be recorded in each county in which any portion of the real property subject to the environmental covenant is located. For purposes of indexing, a holder shall be treated as a grantee.
- (19) Except as otherwise provided in subsection (22), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property.
- (20) An environmental covenant is perpetual unless it is any of the following:
 - (a) By its terms limited to a specific duration or terminated by the occurrence of a specific event.
 - (b) Terminated by consent pursuant to subsection (24).
 - (c) Terminated pursuant to subsection (21).
 - (d) Terminated by foreclosure of an interest that has priority over the environmental covenant.
 - (e) Terminated or modified in an eminent domain proceeding, but only if:
 - (i) The department is a party to the proceeding.
 - (ii) All persons identified in subsections (24) and (25) are given notice of the pendency of the proceeding.
 - (iii) The department has determined that the termination or modification will not adversely affect public health, safety, or welfare, or the environment.
- (21) If the department signed an environmental covenant and has determined that the intended benefits of the environmental covenant can no longer be realized or that the terms of the environmental covenant are no longer needed to protect public, health, safety, or welfare, or the environment, the department may terminate the environmental covenant or reduce its burden on the real property subject to the environmental covenant. Before making

such a determination, the department shall make reasonable efforts to notify the persons identified in subsections (24) and (25) and shall consider any comments timely received. All information necessary for the department to make its determination shall be provided by the person requesting the termination or modification of the environmental covenant. The department's determination or its failure to make a determination upon request may be appealed pursuant to section 631 of the revised judicature act of 1961, 1961 PA 236, as amended, MCL 600.631, subject to any other applicable limitations on judicial review, including subsections xxxxx (*Civil Actions – State*).

- (22) Except as otherwise provided in subsections (20) and (21), 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.
- (23) An environmental covenant may not be extinguished, limited, or impaired by application of marketable record title, 1945 PA 200, MCL 565.101 to 565.109; or termination of oil or gas interests in land, 1963 PA 42, MCL 554.291 to 554.294.
- (24) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by all of the following:
 - (a) The department.
 - (b) Unless waived by the department, the current owner of the fee simple of the real property subject to the environmental covenant.
 - (c) Each person that originally signed the environmental covenant, unless the person waived in a signed record the right to consent or the department finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence.
 - (d) Except as otherwise provided in subsection (24)(b), the holder or holders.
- (25) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the environmental 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.
- (26) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.
- (27) Except as otherwise provided in an environmental covenant, all of the following apply:
 - (a) A holder may not assign its interest without consent of the other parties.
 - (b) A holder may be removed and replaced by agreement of the other parties specified in subsection (24).
 - (c) A court of competent jurisdiction may fill a vacancy in the position of holder.
- (28) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by any of the following:
 - (a) A party to the environmental covenant.
 - (b) The department.
 - (c) Any person to whom the environmental covenant expressly grants power to enforce.
 - (d) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant.

- (e) A local unit of government in which the real property subject to the environmental covenant is located.
- (29) This section does not limit the regulatory authority of the department under law other than this part with respect to response activities under this part.
- (30) A person is not responsible for or subject to liability for response activity solely because the person has the right to enforce an environmental covenant.
- (31) The department may establish and maintain, directly or by contract with another entity, a registry that contains all environmental covenants and any amendment or termination of those environmental covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them that the department considers appropriate.
- (32) The environmental covenant, amendment, or termination that complies with this section shall be recorded in the office of the register of deeds for the county in which the property subject to the environmental covenant is located within 21 days of the department's approval of the environmental covenant, amendment, or termination; or within 21 days of the completion of construction of any engineering controls that are part of the response activity, as appropriate to the circumstances. A true copy of the recorded environmental covenant shall be submitted to the department within 14 days of receiving the true recorded copy back from the register of deeds.
- (33) This section modifies, limits, or supersedes the electronic signatures in global and national commerce act, 15 U.S.C. sections 7001 to 7031, but does not modify, limit, or supersede 15 U.S.C. section 7001(a).
- (34) In applying and construing this section, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the uniform law represented by this section.