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FISCAL IMPACT REPORT

ORIGINAL DATE 2-15-07
 SPONSOR HENRC LAST UPDATED 3-12-07 HB CS/48/aSCONC
 SHORT TITLE Uniform Covenants Act SB _____
 ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$20.0	\$20.0	\$40.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

No longer duplicates SB279/SCONCS

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Department of Environment (NMED)
 Energy, Minerals and Natural Resources Department (EMNRD)
 State Land Office (SLO)
 Economic Development Department (EDD)

SUMMARY

Synopsis of SCONC Amendment

The Senate Conservation Committee Amendment consists of five primary changes:

1. Simplifies the definition of “environmental covenant” to emphasize that an entity cannot place a covenant restriction on groundwater in the anticipation of being excused from cleaning groundwater to current standards;
2. Defines “State agency” as one under the executive branch of state government and not any other government or quasi-government agency;
3. Clarifies that the NMED approves any environmental response project implemented by a federal agency or its contractors;
4. Clarifies that the Act does not affect the Water Quality Control Commission’s (WQCC) authority under the Water Quality Act, including any authority the WQCC may have to

require a covenant: and

5. Ensures that any disclosures made by a holder of an environmental covenant would include recorded copies of the covenant.

The HENRC Substitute for HB 48 now differs from SB 279/aSCONC by these amendments.

Synopsis of Original Bill

The House Energy and Natural Resources Committee Substitute for House Bill 48 establishes a new state law known as the Uniform Environmental Covenants Act (Act). Its purpose is to allow stakeholders in abandoned, polluted realty to return the land to productive capacity, while providing an enforceable mechanism for the environmental regulatory agency to restrict future use of property that is subject to an environmental cleanup. The Act defines an environmental covenant, provides for its creation, enforcement and amendment, and provides for harmonization with prior, existing, or conflicting laws and property rights. The limitations would be codified in a deed restriction that runs with the land. HB 48/HENRCS establishes a state registry for contaminated sites with attached environmental covenants, and provides for civil and criminal penalties for noncompliance with the Act. The bill does not allow an entity to restrict the use of groundwater “in exchange for” cleaning it up to state water quality standards.

FISCAL IMPLICATIONS

HB 48/HENRCS contains no appropriation. It does, however, require the state to establish and maintain a registry of all the environmental covenants in the state, which would be available to the public. While NMED anticipates that creation and maintenance of this registry will not require additional personnel, some recurring fiscal impact is likely, the amount of which would depend on the size of the database. Also, it is possible that NMED will require additional legal support to participate in the development of environmental covenants.

SIGNIFICANT ISSUES

HB 48/HENRCS follows a model statute developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide a legal mechanism (a valid real property servitude) to allow restricted use of properties that cannot be economically remediated for unrestricted use. The model statute is amended to reflect changes proposed when this bill was presented to the legislature in 2005 (HB889) and 2006 (HB314). The NCCUSL explains the benefits of the model ordinance as follows:

Environmental covenants...are increasingly being used as part of the environmental remediation process for contaminated real property. An environmental covenant typically is used when the real property is to be cleaned up to a level determined by the potential environmental risks posed by a particular use, rather than to unrestricted use standards. Such risk-based remediation is both environmentally and economically preferable in many circumstances, although it will often allow the parties to leave residual contamination in the real property. An environmental covenant is then used to implement this risk-based cleanup by controlling the potential risks presented by that residual contamination.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental

monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be reflected on the land records and effectively enforced over time as a valid real property servitude. This Act addresses a variety of common law doctrines... that cast doubt on such enforceability.

A second important policy served by this Act is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use.

Large numbers of contaminated sites are unlikely to be successfully recycled until regulators, potentially responsible parties, affected communities, prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.

EDD notes that returning polluted sites to a less than pristine condition, or to a condition that requires owners or operators to restrict the use of the property, may be desirable, both from an economic and redevelopment standpoint. If all parties to the covenant are confident that site-appropriate activity and use limitations in the covenant will be enforced, it is more likely that environmental regulators and the owners of contaminated real property will allow those properties to be developed and used with appropriate controls, rather than be abandoned. Development of the property, particularly in current and former industrial areas, could help revitalize those areas and serve the economic and social interests of their residents.

SLO reported that the HB 48/HENRCS effectively exempts the state land office from the provisions of the legislation and, therefore, does not apply nor affect that agency or the lands it manages.

ADMINISTRATIVE IMPLICATIONS

NMED would need to develop systems for tracking contaminated parcels, deed restrictions in counties, and property ownership to ensure covenants pursuant to the Act are enforceable. HB 48/HENRCS contemplates such systems but does not contain an appropriation to establish them.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 48/HENRCS duplicates SB 279CONCS.

OTHER SUBSTANTIVE ISSUES

EMNRD notes that the Act includes a number of provisions that clarifies the scope of the bill and provide additional protections to the public and to people who purchase property with a covenant. For example, the agency points out that Section 2.D. clarifies that covenants are

prohibited from being used for restrictions on the withdrawal or use of groundwater. Additional comments provided by EMNRD regarding the bill are as follows:

- Section 4.A: the required contents of a covenant include statements on ground water contamination, potential penalties, and notice and reporting requirements;
- Section 6.C: restricts an entity from using the Act as leverage with the Water Quality Control Commission to relax cleanup standards, but allows a local zoning authority to impose water use restrictions;
- Section 7.A: notice of the covenant must be provided to each signatory, each person holding a recorded interest in the property, the agency, the state engineer, adjacent property owners, and local government;
- Section 8: provides a notice requirement to any person acquiring an interest in the property and a 10-day contract-rescission provision;
- Sections 13 and 15: provide civil and criminal penalties for anyone who fails to comply with the notice provisions of Section 8. The civil penalties would be issued by the Secretary of NMED; and
- Section 14: provides for appealing decisions of the Secretary of NMED to the court of appeals.

NMED notes that the Act ensures the state approves the covenant in all cases, even if the “agency” is a federal one.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to NMED, owners and operators of contaminated sites would be required to remediate contaminated property to state and federal cleanup standards and establish risk-based cleanup levels based on a stringent residential or other unrestricted land-use scenario. The state would have to develop other means of allowing contaminated sites to be more easily redeveloped. Voluntary remediations through the state “brownfields” program will continue to be hampered by the lack of an enforceable land-use tool.

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