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F I S C A L   I M P A C T   R E P O R T

		ORIGINAL DATE	03/02/15		
SPONSOR	Ivey-Soto	**LAST UPDATED**	03/12/15	**HB**	
SHORT TITLE	Uniform Environmental Covenants Act			**SB**	374/aSCONC
				ANALYST	Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)
Attorney General's Office (AGO)

SUMMARY

Synopsis of SCONC Amendment

The Senate Conservation Committee amendment to Senate Bill 374: 1) removes language allowing the agency (defined in the original bill to mean NMED or another state or federal agency that determines or approves the environmental response project for which the covenant is created) to waive the requirement that every fee simple owner of property subject to the environmental covenant sign the covenant; 2) removes language stating the Act supplements other specific laws, but leaves in language that the Act does not displace those other laws; 3) adds a requirement that any public notices and opportunities for public comments and to request a hearing in connection with an environmental response project identify whether an environmental covenant is proposed; 4) removes Subsection 6(C), which prohibits an agency's approval of an environmental covenant that restricts the use of ground water unless an environmental response project has been approved which the agency has determined will achieve compliance with ground water standards or alternative abatement standards approved pursuant to the Water Quality Act; and 5) removes language clarifying that the Act does not limit the regulatory authority of NMED with respect to an environmental response project that has been determined or approved by another state or federal agency.

AGO comments that the removal of Subsection 6(C) may permit ground water to be subject to an environmental covenant that allows it to become or remain polluted in violation of water quality

standards, including human health-based standards, in apparent conflict with Section 74-6-5(E)(3) of the Water Quality Act, requiring ground water with a present or future use meet water quality standards.

Synopsis of Original Bill

Senate Bill 374 enacts the Uniform Environmental Covenants Act (UCEA), which provides rules for perpetual real property interests in the form of environmental covenants to regulate the use of brownfield land in connection with environmental response projects. Any person, including an owner of an interest in that real property as well as agency or municipality or other unit of local government, may grant an environmental covenant (referred to as a holder) in land which is the subject of an environmental response project. Those projects include plans or work performed to remediate real property that is conducted: 1) pursuant to a federal or state environmental remediation program; 2) incident to approved closure of a solid or hazardous waste management unit; or 3) pursuant to remediation undertaken under the state Voluntary Remediation Act. The bill recognizes prior interests to the real property which is the subject of such an easement, and provides for voluntary subordination of such an interest.

The UCEA contains a list of mandatory information that must be included in an environmental covenant, including the intent to be an environmental covenant pursuant to the UECA, a description of the activity and use limitations, the identity of each holder of the environmental covenant, and approval signature of the government agency overseeing the environmental response project. (Section 4) Additionally, an environmental covenant may include other information, such as additional obligations to which the parties may agree and reporting requirements. Section 4(C).

Under the UECA, environmental covenants would run with the land and remain valid and enforceable even if

- it is not appurtenant to an interest in real property;
- it is/has been assigned to someone other than the original holder;
- it is in a character not traditionally recognized in common law;
- it imposes a negative burden;
- it imposes an affirmative obligation on a person with interest in the real property or a holder of the covenant;
- the benefit or burden does not touch or concern real property;
- there is no privities of estate or contract;
- the holder dies, ceases to exist, resigns or is replaced; or
- the owner of an interest subject to the environmental covenant and the holder are the same person. (Section 5)

The UECA states it does not displace existing zoning or environmental laws but rather supplements that law by allowing additional restrictions and limitations on the use of land within the state. An agency shall not approve an environmental covenant unless the environmental response project has been approved and the agency has determined it will achieve compliance with ground water standards or alternative abatement standards under the Water Quality Act (Section 6).

The UECA requires notice to certain persons and organizations as well as recording of environmental covenants in the counties where the subject property is located. (Sections 7, 8) Environmental covenants do not terminate except by their terms or when certain criteria are met. (Sections 9, 10) SB 374 allows enforcement of an environmental covenant by an agency, a party to the covenant, a person granted such authority in the covenant, a person whose property may be affected by violation of the covenant, or the local government wherein the property is located (Section 11).

The UECA is applicable to environmental covenants arising on or after July 1, 2016, but does not apply to lands held in trust by the state pursuant to the state's enabling act. Its effective date is July 1, 2016.

FISCAL IMPLICATIONS

No fiscal impact on the state is anticipated.

SIGNIFICANT ISSUES

NMED supports SB 374 as proposed because the UECA provides another, streamlined avenue by which NMED can secure long-term compliance across its multiple programs. The UECA also provides a uniform process that would no longer need to necessarily be unique to each program. As background, NMED advises:

> Currently, it oversees abatement or remediation pursuant to the Hazardous Waste Act (NMSA 1978, Sections 74-4-1 to -14), the Voluntary Remediation Act, the Department's Superfund Oversight Section, the Water Quality Act (NMSA 1978, Sections 74-6-1 to -17), the Ground Water Protection Act (NMSA 1978, Sections 74-6b-1 to -14), the Solid Waste Act (NMSA 1978, Sections 74-9-1 to -43), and the Recycling and Illegal Dumping Act (NMSA 1978, Sections 74-13-1 to -20). In administering these programs, it uses a variety of tools to support long-term remediation efforts at contaminated sites. Such tools often include administrative compliance orders issued pursuant to the relevant statutory provisions or settlement agreements reached with various responsible entities. In some circumstances, NMED may be required to resort to injunctive relief through a civil cause of action.
>
> However, the traditional compliance order or settlement agreement models are not always effective in ensuring long-term compliance with the applicable environmental regulations. In some of those instances, NMED and the responsible parties have voluntarily entered into restrictive covenants pursuant to New Mexico property law. Restrictive covenants, recorded in county offices, have the added benefit of providing advance notice of contamination and remediation efforts without requiring the current property owner to provide specific notice to a prospective purchaser. Restrictive covenants can also provide for long-term remediation that has the potential to bring contaminated properties back to marketable status. Still, while NMED has utilized restrictive covenants in the past and there are many benefits to their use, there remains some question about the ongoing legal sufficiency of such arrangements. Specifically, questions remain as to who may or may not enforce and whether the terms of such a covenant would survive legal challenge in a remediation setting.

In light of these questions, NMED explains the benefit of adopting the UECA:

> it would streamline the restrictive covenant process and provide a uniform mechanism across NMED's programs to ensure long-term remediation of contaminated sites across New Mexico. It broadens the scope of individuals who can become "holders" in a covenant, and includes NMED and other relevant agencies as prospective holders. It also resolves legal sufficiency questions by giving effect to environmental covenants that depart from the traditional common law model for restrictive covenants. *See* Section 5. Through SB 374, NMED would gain sure footing moving forward with environmental covenants throughout its remediation programs.

ADMINISTRATIVE IMPLICATIONS

NMED reports there likely would be little to no administrative burden on it. Rather, SB 374 may reduce its administrative burden by providing a statutory method to aid in long-term compliance that has fewer legal uncertainties.

OTHER SUBSTANTIVE ISSUES

The Uniform Laws Commission (ULC) promulgated the UCEA in 2003 to overcome what it found to be inadequate common law rules. It cites two principal policies that 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 recorded in the land records and effectively enforced over time as valid real property servitude. This Act reverses the variety of common law doctrines that cast doubt on such enforceability.
>
> A second important policy served by the UECA 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, often known as brown fields, are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and 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 instruments which will appear in any title abstract for the property in question.

As the ULC notes, the UECA ensures that a covenant will survive despite tax lien foreclosure, adverse possession and marketable title statutes. Additionally, it does not supplant or impose substantive clean-up standards, which it assumes will be developed in the regulatory process. Rather,

> it validates site-specific, environmental use restrictions that result from the environmental response project which an environmental covenant helps implement. Implicit in use controls is the fact that, despite best efforts, total cleanups of many contaminated sites are not possible, but property may be put to limited uses without risk to others, nonetheless. The UECA also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination – instead, it provides a method for minimizing the exposure of third parties to such risks and for owners and responsible parties to engage in long-term cleanup mechanisms.

Twenty-three states have enacted the UECA: Alabama, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, Washington, and West Virginia. The UECA has also been adopted by the District of Colombia and the United States Virgin Islands. New Mexico remains one of 27 states that has not adopted the UECA and must rely on statutory enforcement or traditional restrictive covenants.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMED will continue to utilize a mixture of enforcement action and traditional restrictive covenants, and continue to face uncertainty in pursuing traditional restrictive covenants due to the unique characteristics of each contaminated site.

MD/bb/