

House Civil and Commercial Law Committee
Proponent Testimony by Ohio EPA
HB 516 (Uniform Environmental Covenants Act)

November 17, 2004

Good morning Chairman Seitz and members of the committee, my name is Jennifer Klein and I am a legislative liaison for Ohio EPA. I appreciate the opportunity to testify today in support of House Bill 516, which would enact the Uniform Environmental Covenants Act.

The Uniform Environmental Covenants Act (UECA) provides a framework for establishing and enforcing future environmental land use restrictions. House Bill 516 would authorize Ohio EPA and other applicable agencies to enter into environmental covenants for environmental response projects that are subject to the agency's review and approval. The purpose of an environmental covenant is to minimize the risk of human exposure to pollutants and hazards to the environment by preventing specific uses or activities at a property or a portion of a property. Environmental covenants would be recorded in the deed records of the County Recorder and would therefore bind present and future owners and occupants of the property unless a release from the environmental covenant was approved.

Ideally, all contaminated properties would be cleaned up to unrestricted land use. However, the effort to redevelop brownfields in Ohio and throughout the nation has succeeded in part because regulators, property owners and communities have generally accepted that contamination can be left in place under certain circumstances without presenting an unacceptable risk to human health or the environment. For brownfield redevelopment to achieve continued success, there is a need for better legal tools to ensure that future generations understand the reasons for specific restrictions on certain land uses and the need for certain long-term monitoring and maintenance obligations. In addition, regulatory agencies, responsible parties and communities need to have confidence that these environmental land use restrictions will be enforced over time.

A 2002 study of all 50 states by the Environmental Law Institute found that 41 states have one or more environmental cleanup programs based on the concept of “long term stewardship”. They encompass a broad range of activities at sites where clean up has left contamination in place at levels that do not meet unrestricted use standards. The 2002 study also found that 26 states have specific statutory authority for “long term stewardship” programs or for tools such as “institutional controls.”

At Ohio EPA, four programs utilize institutional controls: the remedial response program; the hazardous waste closure, post-closure and corrective action program; the Voluntary Action Program (VAP) (including the Clean Ohio Fund projects that use VAP standards); and the wetlands mitigation and related clean water programs. VAP includes

“institutional controls” and “use restrictions” as part of the voluntary cleanup remedies Ohio EPA may approve when the property owner or volunteer requests a liability release. While the VAP statute, and in some circumstances, the hazardous waste law, authorize Ohio EPA to accept “institutional controls” or “restrictive covenants” in those cleanup programs, these statutes do not establish a uniform, comprehensive legislative approach to restricted land use.

The remedial response and wetlands mitigation programs rely on the “common law” of real property. Under the “common law,” Ohio EPA and other state regulatory agencies may not be able to enforce deed restrictions, environmental easements and other forms of land use restrictions because they usually have no legal interest in the property itself or in an adjoining property. This makes it difficult to promote economic redevelopment and protect the community because the environmental agency may have no reliable way to ensure that the restrictions will remain in place and be enforced into the future.

Adopting HB 516 would strengthen practices and procedures that involve both real estate and environmental law. The uniform law would establish a process for creating, modifying and enforcing environmental covenants and, thus eliminate some of the common law barriers that have prevented land use restrictions from enduring over time, such as foreclosure, bankruptcy, and eminent domain. HB 516 would guarantee that state and local governments have clear rights to enforce land use restrictions.

HB 516 would allow a measure of comfort to owners that sell their property. Since the environmental covenant “runs with the land” previous owners are not held liable for

current owners environmental violations. Buyers are also made aware of the restriction in the deed up front so they are knowledgeable about the condition of the property they purchasing.

Interests such as easements and mortgages that predate environmental covenants under the UECA would not be subject to the environmental covenants unless the owner of that property interest subordinates their interest to a new environmental covenant. However, enactment of the uniform law would establish clear authority to implement, monitor, modify and enforce environmental covenants. It would also give designated parties the right to monitor and enforce these restrictions. Given the importance of these institutional controls to the success of Ohio's brownfields redevelopment programs, it is important to ensure that land use restrictions are reliable and enforceable in the future.

Thank you for the opportunity to provide proponent testimony on HB 516 and we look forward to continue working with all interested parties to assist this effort. I will be happy to respond to any questions you may have.