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BILL ANALYSIS



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Senate Bill 201 (as introduced 2-14-07)
Sponsor: Senator Bruce Patterson
Committee: Natural Resources and Environmental Affairs

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CONTENT

The bill would add Part 207 (Environmental Covenants) to the Natural Resources and Environmental Protection Act to represent the Uniform Environmental Covenants Act. (An environmental covenant essentially is a voluntary agreement to restrict the activities on or uses of contaminated land that is subject to remediation, approved by a regulatory agency. A properly executed environmental covenant is binding on future owners of the property, despite common law doctrines or statutory provisions that could otherwise terminate it.) The bill would do the following:

- Provide that any person could be a grantee or holder of an environmental covenant.**
- Specify that an environmental covenant would run with the land.**
- Authorize a court to terminate a covenant or reduce its burden under the doctrine of changed circumstances.**
- Provide that a covenant could not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or the application of various legal doctrines.**
- Allow a civil action for a violation of a covenant.**
- Require the Department of Environmental Quality (DEQ) to maintain a registry of environmental covenants.**

Additionally, the bill would amend Parts 201 (Environmental Remediation) and 213 (Leaking Underground Storage

Tanks) to specify that various provisions would or would not be subject to Part 207.

The bill is described below in further detail.

Part 207 (Environmental Covenants)

The bill would define "environmental covenant" as a servitude arising under an environmental response project that imposes activity and use limitations. (In real property law, the term "servitude" generally refers to a burden or restriction on the use of land, or a benefit derived from the ownership of land, that passes to successive owners of the property.)

"Activity and use limitations" would mean restrictions or obligations created under Part 207 with respect to real property. "Environmental response project" would mean a plan or work performed for environmental remediation of real property and conducted as provided either under a Federal or state program governing environmental remediation of real property, including Part 201, or incident to closure of a landfill, if the closure is conducted with approval of an agency.

"Agency" would mean the DEQ or any other state or Federal agency that determined or approved the environmental response project pursuant to which the environmental covenant was created. "State" would mean a state of the U.S., the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to the jurisdiction of the U.S.

Any person, including a person who owned an interest in the real property subject to the environmental covenant, the agency, or a municipality or other unit of local government, could be a grantee of a covenant. A covenant could identify more than one holder (grantee of an environmental covenant). The interest of a holder would be an interest in real property.

An agency's right under Part 207 or under a covenant, other than a right as a holder, would not be an interest in real property.

An agency would be bound by any obligation it assumed in an environmental covenant, but would not assume obligations merely by signing one. Any other person who signed a covenant would be bound by the obligations the person assumed in the covenant, but signing it would not change obligations, rights, or protections granted or imposed under law other than Part 207 except as provided in the covenant.

All of the following rules would apply to interests in real property in existence at the time an environmental covenant was created or amended:

- An interest that had priority under other law would not be affected by a covenant unless the person that owned the interest subordinated it to the covenant.
- Part 207 would not require a person who owned a prior interest to subordinate it to a covenant or agree to be bound by the covenant.
- A person's agreement to subordinate a prior interest to a covenant would affect the priority of that person's interest but would not by itself impose any affirmative obligation on the person with respect to the covenant.
- A subordination agreement could be contained in a covenant covering real property or in a separate record.

If the covenant covered commonly owned property in a common interest community, the record could be signed by any person authorized by the governing board of the owners' association. ("Common interest community" would mean 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 created the common interest community.)

An environmental covenant would have to state that the instrument was an environmental covenant executed pursuant to Part 207; contain a legally sufficient description of the real property subject to it; describe the activity and use limitations on the real property; identify every holder; 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 it; and identify the name and location of any administrative record for the environmental response project reflected in it.

Additionally, a covenant could contain other information, restrictions, and requirements agreed to by the people who signed it, including any of the following:

- 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.
- Requirements for periodic reporting describing compliance with the covenant.
- Rights of access to the property granted in connection with implementation or enforcement of the covenant.
- 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.
- Limitations on amendment or termination of the covenant in addition to those contained in Part 207.
- Rights of the holder in addition to its right to enforce the covenant pursuant to Part 207.

In addition to other conditions for the agency's approval of a covenant, the agency could require specified people that had interests in the real property to sign the covenant.

An environmental covenant that complied with Part 207 would run with the land.

A covenant that was otherwise effective would be valid and enforceable even if one or more of the following applied:

- It was not appurtenant to an interest in real property.
- It could be or had been assigned to a person other than the original holder.
- It was not of a character that had been recognized traditionally at common law.
- It imposed a negative burden.
- It imposed an affirmative obligation on a person having an interest in the real property or on the holder.
- The benefit or burden did not touch or concern real property.
- There was no privity of estate or contract.
- The holder died, ceased to exist, resigned, or was replaced.
- The holder was an owner of an interest subject to the covenant.

An instrument that created 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 Part 207 took effect would not be invalid or unenforceable because it was subject to any of the limitations on enforcement of interests described in the bill or because it was identified as an easement, servitude, deed restriction, or other interest. Part 207 would not apply in any other respect to such an instrument.

Part 207 would not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that was otherwise enforceable under Michigan law.

Part 207 would not authorize a use of real property that was otherwise prohibited by zoning, by law other than Part 207 regulating use of real property, or by a recorded instrument that had priority over the covenant. A covenant could prohibit or restrict uses of real property that were authorized by zoning or by law other than Part 207.

A copy of an environmental covenant would have to be provided by the people and in the manner required by the agency to all of the following:

- Each person who signed the covenant.
- Each person holding a recorded interest in the real property subject to the covenant.
- Each person in possession of the real property subject to the covenant.

- Each local unit of government in which real property subject to the covenant was located.
- Any other person the agency required.

The validity of a covenant would not be affected by failure to provide a copy of it as required.

A covenant and any amendment or termination would have to be recorded in each county in which any portion of the real property subject to the covenant was located. For purposes of indexing, a holder would be treated as a grantee. Except as otherwise provided, a covenant would be subject to the laws of Michigan governing recording and priority of interests in real property.

An environmental covenant would be perpetual unless it were any of the following:

- By its terms limited to a specific duration or terminated by the occurrence of a specific event.
- Terminated by consent pursuant to Part 207.
- Terminated under the doctrine of changed circumstances (as described below).
- Terminated by foreclosure of an interest that had priority over the covenant.

An environmental covenant also would not be perpetual if it were terminated or modified in an eminent domain proceeding, but only if the agency that signed the covenant were a party to the proceeding; the agency, the current owner of the fee simple of the real property, each person who originally signed the covenant, the holder, and the current owner of the interest in real property were given notice of the pendency of the proceeding; and the court determined, after hearing, that the termination or modification would not adversely affect human health or the environment.

If the agency that signed a covenant determined that the intended benefits could no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all people required to be notified had been given notice, could terminate the covenant or reduce its burden on the real property subject to the covenant.

The agency's determination or failure to make a determination upon request would be subject to review in a contested case hearing pursuant to the Administrative Procedures Act.

Except as otherwise provided, a covenant could 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.

A covenant also could not be extinguished, limited, or impaired by application of Public Act 200 of 1945 (which governs marketable record title to land interests).

A covenant could be amended or terminated by consent only if the amendment or termination were signed by all of the following:

- The agency.
- Unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant.
- Each person who originally signed the covenant, unless a person waived in a signed record the right to consent or a court found that the person no longer existed or could not be located or identified with the exercise of reasonable diligence.
- The holder (unless the holder were removed or replaced by agreement of the other specified parties).

If an interest in real property were subject to a covenant, the interest would not be affected by an amendment of the covenant unless the current owner consented to the amendment or had waived in a signed record the right to consent to amendments.

Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder would be an amendment.

Except as otherwise provided in an environmental covenant, all of the following would apply:

- A holder could not assign its interest without consent of the other parties.
- A holder could be removed and replaced by agreement of the other parties.

- A court of competent jurisdiction could fill a vacancy in the position of holder.

Any of the following could maintain a civil action for injunctive or other equitable relief for violation of an environmental covenant:

- A party to the covenant.
- The agency or, if it were not the agency, the DEQ.
- Any person to whom the covenant expressly granted power to enforce.
- A person whose interest in the real property or whose collateral or liability could be affected by the alleged violation of the covenant.
- A local unit of government in which the real property subject to the covenant was located.

Part 207 would not limit the regulatory authority of the agency or the DEQ under law other than Part 207 with respect to an environmental response project.

A person would not be responsible for or subject to liability for environmental remediation solely because the person had the right to enforce an environmental covenant.

The DEQ would have to establish a registry that contained all environmental covenants and any amendment or termination of them. The registry also could contain any other information concerning covenants and the real property subject to them that the Department considered appropriate.

After a covenant or amendment or termination of a covenant was filed in the registry, a notice of the covenant, amendment, or termination that complied with the bill's requirements, in lieu of the entire covenant, could be recorded in the office of the register of deeds. The notice would have to contain all of the following:

- A legally sufficient description and any available street address of the real property subject to the covenant.
- The name and address of the owner of the fee simple interest in the real property, the agency, and the holder if other than the agency.
- A statement that the covenant, amendment, or termination was available in a registry at the DEQ and that

disclosed the method of any electronic access.

-- A statement that the notice was notification of an environmental covenant executed pursuant to Part 207.

A statement in substantially the form described in the bill, executed with the same formalities as a deed in Michigan, would satisfy the notice requirements.

In the application and construction of Part 207, consideration would have to be given to the need to promote uniformity of the law with respect to its subject matter among states that enacted the uniform law represented by Part 207.

Part 207 would modify, limit, or supersede the Electronic Signatures in Global and National Commerce Act (15 USC 7001 to 7031), but would not modify, limit, or supersede 15 USC 7001(a). (Under 15 USC 7001(a), notwithstanding any statute, regulation, or other rule of law with respect to any transaction in or affecting interstate or foreign commerce, a signature, contract, or other record relating to the transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and a contract relating to the transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.)

Remedial Action Plan

Under Section 20120b(4), if a remedial action plan relies in whole or in part on cleanup criteria approved under Section 20120a(1)(f) to (j) or 20120a(2), land use or resource restrictions to assure the effectiveness and integrity of any containment, exposure barrier, or other land use or resource use restrictions necessary to assure the effectiveness and integrity of the remedy must be described in a restrictive covenant. The restrictions run with the land and are binding on the property owner's successors, assigns, and lessee, and apply until the DEQ determines that hazardous substances controlled by the barrier or contained no longer present an unacceptable risk to the public health, safety, or welfare, or the environment as defined by the cleanup criteria and exposure control requirements set forth in the remedial action plan.

(Under Section 20120a(1)(f) to (j), the DEQ may establish cleanup criteria and approve of remedial actions in the following categories: limited residential, limited commercial, limited recreational, limited industrial, and other limited categories established by the Department. Under Section 20120(2), the DEQ may approve a remedial action plan based on site-specific criteria that satisfy applicable requirements.)

The restrictive covenant must include a survey and property description that define the areas addressed by the remedial action plan and the scope of any land use or resource use limitations. The form and content of the covenant are subject to approval by the DEQ and must include provisions to accomplish specified goals.

The bill specifies that Section 20120b(4) would not be subject to Part 207, including Section 20704(3) (which provides that an instrument creating 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 Part 207 took effect would not be invalid or unenforceable because it was subject to any of the limitations on enforcement of interests described in the bill or because it was identified as an easement, servitude, deed restriction, or other interest).

Corrective Action

Under Section 21310a(1), if corrective action activities at a site result in a final remedy that relies on tier I commercial or industrial criteria, institutional controls must be implemented as provided. A notice of corrective action must be recorded with the register of deeds for the county in which the site is located before a closure report is submitted. The notice must contain statements described in this subsection.

Under Section 21310a(2), if corrective action activities at a site rely on institutional controls other than as described above, the controls must be implemented as provided in this subsection. The property owner must file the restrictive covenant with the register of deeds within 30 days of submittal by a consultant of the final assessment report required after a release has been discovered, unless otherwise agreed to by the DEQ. The restrictions run with the land

and are binding on the owner's successors, assigns, and lessees. The restrictions apply until the DEQ determines that regulated substances no longer present an unacceptable risk to the public health, safety, or welfare or to the environment. The restrictive covenant must include a survey and property description that define the areas addressed by the corrective action plan and the scope of any land use or resource use limitations. The form and content of the restrictive covenant are subject to approval by the DEQ and must include provisions to accomplish the same goals specified with regard to a remedial action plan.

Under the bill, Section 21310a(2) would be subject to Part 207, including Section 20704(3).

MCL 324.20120b et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would cost the State a small, indeterminate amount for administrative expenses of the Department of Environmental Quality incurred in establishing and maintaining a registry of all environmental covenants. There also could be costs associated with pursuing an environmental covenant for an environmental response project.

Fiscal Analyst: Jessica Runnels

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.