

HOUSE JUDICIARY COMMITTEE
LAWRENCE R. KLEMIN, CHAIRMAN
JANUARY 19, 2021

TESTIMONY BY
PARRELL D. GROSSMAN
MEMBER, NORTH DAKOTA COMMISSION ON UNIFORM LAWS
RE: HOUSE BILL NO. 1079

Mr. Chairman and members of the House Judiciary Committee. I am Parrell Grossman, and it is my privilege to be a member of the North Dakota Uniform Law Commission and member of the National Conference of Uniform Law Commissioners. I appear on behalf of the North Dakota Uniform Law Commission in support of House Bill No. 1079.

House Bill 1079 is the Uniform Environmental Covenants Act and was introduced at the request of the Commission on Uniform State Laws and on behalf of the Department of Environmental Quality ("DEQ"). Therefore, after my introductory comments and overview, Dave Glatt, Director of DEQ, will explain the legislation in more detail and may answer some of your particular questions about its purpose, function, impact, *et cetera*.

The National Conference of Commissioners on Uniform State Laws is a nonprofit organization formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners, including legislators, legislative staff, lawyers, judges, law professors, and others work together to draft laws ranging from the Uniform Commercial Code to acts on property, trust and estates, family law, criminal law and other areas where uniformity of state law is desirable.

This uniform act has been enacted by 24 states, including South Dakota, Minnesota, Nebraska and Iowa.

I have attached the full Act for background because it provides important useful comments that, among other things, provide legislators and legislatures information on the purposes of various sections or provisions and how such provisions should be interpreted in the future when a state enacts the Uniform Law. In addition, I have attached a Summary of the Act, which also is too lengthy to discuss in any detail, although you should find it helpful if you have time to review this Summary.

The Uniform Law Commission has provided a list of reasons supporting the adoption of this act and I have attached the same. Therefore, I will share with you a few of the highlights.

The Act allows for the long-term enforcement of clean-up controls (restrictions on certain uses, prohibitions on using wells, protection of concrete “caps,” maintenance of monitoring equipment, etc.) to be contained in a statutorily-defined agreement known as an “environmental covenant” which will be binding on subsequent purchasers of the property and be listed in the local land records.

The Act removes various legal obstacles to the use of such restrictions and lessens liability concerns of sellers and lenders associated with the redevelopment and sale of “brownfields” while at the same time requiring state approval of the remediation and control plan as well as notice to surrounding landowners, local governments, and other parties in interest. In this manner the Act protects public health and ensures the economically viable reuse of the property in question.

- It helps return previously contaminated property to the stream of commerce, by allowing the owners of that property to engage in responsible risk-based cleanups and then transfer or sell the property subject to state-approved controls on its use.
- It provides a broad array of interested parties the ability to enforce the use and activity restrictions contained in an environmental covenant, helping to ensure those controls will remain in place and prevent secondary harms.
- It protects valid environmental covenants from being inadvertently extinguished by application of various common law doctrines, adverse possession, tax lien foreclosures, less-restrictive zoning changes, and marketable title statutes.
- It requires the Department of Environmental Quality to be a signatory to the covenant, and ensures that risk assessments and control mechanisms are based on sound science, adequately protect human health and surrounding properties, and that notice of the covenant and associated controls is provided to affected third parties.
- It **does not** supplant or impose substantive cleanup standards or liability; rather it validates approved site-specific controls resulting from an environmental response project, and makes sure those controls are maintained as long as necessary to meet the approved objectives.

The Act was drafted with the participation of state and federal regulators, public and private landowners, banking interests, environmentalists, and land use experts.

One of the North Dakota Commission members is Law Professor Owen L. Anderson, formerly of the University of North Dakota Law School and the University of Oklahoma Law School, and now a Professor and Distinguished Oil and Gas Scholar at the University of Texas School of Law in the Kay Bailey Hutchinson Center for Energy Law & Business. Professor Anderson noted that the law is designed to protect the integrity of contaminated property and to determine liability for interference with such property and the Uniform Act certainly is superior to existing North Dakota law on such covenants.

Therefore, the Commission and the Department of Environmental Quality will now leave it to the Judiciary Committee to decide whether you support the enactment of this important legislation. With that, unless you have questions I can answer, I will defer to testimony by Director Dave Glatt.

Thank you for your time and consideration.