INSTITUTIONAL CONTROLS AND THE EFFECTIVE REUSE OF CONTAMINATED PROPERTIES IN OREGON: A REVIEW OF THE OREGON LAW COMMISSION'S PROPOSED LEGISLATION

Jeff Dobbins, Willamette U. College of Law*

In both urban and rural areas throughout the nation, environmental contamination can interfere with the effective use of real property. Given the risk of environmental liability connected with the cleanup of contamination and the limited resources available to most regulatory agencies charged with initiating and overseeing such cleanup, many contaminated properties stay contaminated, and largely untouched, for years. Even when properties draw the attention of regulators, the financial and technical difficulty of accomplishing that cleanup can often slow or ultimately prevent restoring property to its pre-contamination state. Investors and subsequent owners often fear investment because of the perceived

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**The editorial team at the *Willamette University Environmental Law Journal* is proud to present this inaugural Issue. Many months have passed since we first advertised and promised this Issue. As with all new ventures, many unexpected complications, in addition to the usual ones, delayed us. As a result, some of this Issue's articles were authored in the fall 2011 and spring 2012. I nonetheless believe this Issue's articles remain highly relevant and further the mission of this Journal—*viz*: to encourage those interested in environmental law issues to publish the results of their research, express their ideas, and stimulate ongoing discussion and research. We hope that you find this Issue of the Environmental Law Journal a valuable legal resource.

This article is based, in substantial part, on the 2011 Report of the Oregon Law Commission to the Oregon Legislative Assembly, "Clarifying and Protecting DEQ Authority to Enter Into Long-Term Agreements Implementing Institutional Controls on Real Property," approved March 28, 2011. The author was the reporter for the Law Commission work group that developed the proposed legislation accompanying the report, S.B. 867, 76th Leg. (Or. 2011). That said, this article should not be read to necessarily express the views of the Law Commission or its related bodies, or of Willamette University.

At the Senate Judiciary Committee hearing regarding the bill, no testimony was offered in objection to the bill, and witnesses testified that the bill simply codified DEQ's existing program. Hearing of the Oregon Senate Judiciary Committee, March 31, 2011 (time stamp 55:40-1:04:05), *available at* http://www.leg.state.or.us/listn/. Senator Whitsett (R-Klamath Falls) expressed concern regarding the scope of DEQ's authority to persuade landowners to enter into these agreements. The Bill passed out of the Senate Judiciary Committee with a "do pass" recommendation, but a minority report was filed by Senators Whitsett and Kruse, and this opposition led the bill to be referred back to committee, where it received no further action in the 2011 session. S.B. 867 (Or. 2011).

This author believes that the underlying rationale for the bill – to ensure that institutional controls are effective well into the future – remains valid. If anything, current law does not significantly limit the scope of DEQ's authority to create and enforce institutional controls, and the proposed legislation would impose such limits. The proposed legislation would enhance the value of these alternative mechanisms for managing hazardous properties – and that would benefit current and future owners of contaminated properties, as well as the broader public and the overall environment. While the author recognizes the nature of Senator's Whitsett's concerns regarding the scope of DEQ authority, this bill amounts to a rare win-win for all parties associated with contaminated properties. The author hopes that the Law Commission will one day reintroduce the statute to the legislature.

risk of future liability, and these properties are left to languish without any significant attention. The result is a blighted "brownfield."[1]

A significant effort has been made over the last fifteen years to help ensure that brownfields can be converted to productive use.[2] One of the more important mechanisms for achieving this goal has been the use of risk-based cleanup practices in which some residual contamination is left on the property, but public health and the environment are protected through the use of "institutional controls."

Institutional controls generally take the form of legal limitations on the ability of a property owner to use a contaminated property.[3] The controls might bar an owner from using the property for residential purposes, for instance, or require that regulators be permitted to access monitoring wells installed on a property. Properly implemented, these controls can provide a basis for further investment in a contaminated property. Even where technical or fiscal difficulties mean that residual contamination remains, institutional controls help the public, regulators, and potential investors by providing a way to protect public health and the environment well into the future.

Since 1995, Oregon law has permitted the Director of the Oregon Department of Environmental Quality ("DEQ") to use institutional controls as part of a remedial action addressing a contaminated property. The DEQ has implemented this authority, found under section 465.315(b) of the Oregon Revised

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[1] A brownfield is a "a vacant or underused property where actual or perceived environmental contamination complicates its expansion or redevelopment." Oregon Department of Environmental Quality (DEQ) Fact Sheet, *Brownfields in Oregon* (Dec. 2010), http://www.deq.state.or.us/lq/pubs/factsheets/cu/Brownfields.pdf.

[2] John Pendergrass, *Institutional Controls In The States: What Is And Can Be Done To Protect Public Health at Brownfields*, 35 CONN. L. REV. 1303, 1305 (2003) (noting the "virtual explosion" in the use of institutional controls since 1995); Patricia J. Winmill & Hal J. Pos, *Use and Enforceability of Institutional Controls in Risk-Based Environmental Cleanups: They're Cheap and Good Looking, But Will They Last?*, 49 ROCKY MTN. MIN. L. INST. 23-1, n. 9 (2003) (noting that while only 14% of EPA cleanups in first 12 years of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") used institutional controls, 60% of all cleanups have used them since the 1990s).

[3] According to the EPA's interim final guidance on the use of institutional controls, they are

> "nonengineered instruments, such as administrative and legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a response action. ICs are typically designed to work by limiting land or resource use or by providing information that helps modify or guide human behavior at a site. Some common examples of ICs include zoning restrictions, or excavation permits, well drilling prohibitions, easements, and covenants."

ENVIRONMENTAL PROTECTION AGENCY, OSWER 9355.0-89, INSTITUTIONAL CONTROLS: A GUIDE TO PLANNING, IMPLEMENTING, MAINTAINING, AND ENFORCING INSTITUTIONAL CONTROLS AT CONTAMINATED SITES, 2 (2010), *available at* http://www.epa.gov/superfund/policy/ic/pdfs/PIME-IC-Guidance-Interim.pdf.

The Oregon DEQ defines an institutional control as "a legal or administrative tool or action taken to reduce the potential for exposure to hazardous substances. Institutional controls may include, but are not limited to, use restrictions, environmental monitoring requirements, and site access and security measures." *Final Guidance for the Use of Environmental Controls*, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, 1 (Apr. 20, 1998), http://www.deq.state.or.us/lq/pubs/docs/cu/GuidanceUseofInstitutionalControls.pdf [hereinafter DEQ 1998 GUIDANCE] (citing OR. ADMIN. R. 340-122-0115(32)).

Statutes ("ORS"), through its "Easements and Equitable Servitudes" ("EES") program.[4] As of 2011, the Oregon Environmental Cleanup Site Information Database ("ECSI") reflected 292 properties on which Oregon has approved engineering or institutional controls.[5]

The problem, however, is that these agreements are only effective if they stay in place well into the future. Because these agreements are implemented in order to control residual contamination, a failure of an institutional control will likely lead to a further release of contamination into the environment. And, unfortunately, there is a likelihood that these kinds of controls will fail. Property owners can ultimately ignore the controls; the property can be sold (or taken, via adverse possession, eminent domain, or foreclosures); or limits can simply be forgotten over time, even when property owners act with the best possible intentions.

Even when parties are alert to the possible failure of an institutional control, certain common law principles may interfere with their effectiveness. For instance, common law frowns upon indefinite burdens on property when those burdens are not directly connected to the land.[6] In particular, when a limitation on the use of property is intended to benefit mot merely an adjoining landowner, but instead the public at large, serious questions may arise about the enforceability of those property interests, and the degree to which they pass from owner to owner. Even DEQ has acknowledged the potential risks associated with common law principles; in its 1998 Guidance Document regarding the use of institutional controls, DEQ noted that there is "[s]ome uncertainty regarding [their] enforceability under common law."[7]

Before 2003, very few states had effectively managed these uncertainties arising out of the common law. In that year, however, the National Conference of Commissioners on Uniform State Laws completed the Uniform Environmental Covenants Act ("UECA"), which provides a model for states seeking to clarify the position of these kinds of agreements under state law. Since 2003, twenty-six states have enacted UECA, and many have done so despite the presence of equivalent existing programs like the DEQ's EES program.

In 2009, Oregon's official law reform body, the Oregon Law Commission ("OLC"), approved a project to examine whether UECA should be adopted in Oregon. A group of ten individuals with knowledge about Oregon's existing program, real property law, and the law of titling and financing were appointed as voting members of the UECA Work Group. Over the course of a year, the Work

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[4] OR.REV.STAT. § 465.315(b) (2011); *Environmental Cleanup Institutional and Engineering Controls,* OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, http://www.deq.state.or.us/lq/cu/controls.htm (last visited Dec. 27, 2012).

[5] *Environmental Cleanup Site Information (ECSI) Database*, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, http://www.deq.state.or.us/lq/ecsi/ecsi.htm (last visited Dec. 27, 2012).

[6] In the language of first-year real property classes, property law frowns upon "restraints on alienation of property." 61 Am. Jur. 2d Perpetuities, Etc. § 90 (2012).

[7] DEQ 1998 GUIDANCE, *supra* note 3, at 6.

Group developed proposed legislation that would have incorporated many of the most important ideas from UECA into Oregon law. While the bill implementing these ideas moved out of the Senate Judiciary committee, where it was introduced, it did not come to a vote on the floor in the 2011 legislative session.

This article briefly reviews the benefits and problems associated with limits on the use of real property as a tool for managing contaminated properties, and addresses the mechanisms that UECA and the OLC-proposed legislation would have used to improve the effectiveness of that tool. It focuses particularly on the proposed legislation from 2011, concluding that the legislation would benefit regulated parties, DEQ, and the general public, and therefore merits reconsideration in a future legislative session.

I. Institutional Controls as an Economically Efficient Alternative to Comprehensive Cleanup

Under current law, DEQ oversees the cleanup of hazardous substances that are released into the environment.[8] DEQ may take any removal or remedial action necessary to protect the public health, safety, welfare, and the environment.[9] Additionally, DEQ is permitted to use (or require the use of) a wide range of methods to address contamination by hazardous materials, including on-site treatment, excavation and off-site disposal, the use of containment or other engineering controls, or "institutional controls."[10]

At present, "institutional controls" is not defined. The term is generally understood to refer to limits placed on the use of real property in order to reduce the risk of exposure to hazardous substances. For example, DEQ might conclude that it would be extremely expensive to remove or otherwise control the contamination of groundwater on a particular site. DEQ might, instead, select as a remedy an "institutional control" on the property under which the owner would agree not to permit water wells to be drilled on the property in the future. Similarly, the owner of an industrial site might agree to limit use of the site to industrial activities in order to avoid the risk of future contamination that might occur if the site were later used for residences or a park. Institutional controls are a valuable additional tool used by DEQ in order to manage contaminated properties, and are useful as well for the owners of these properties, who, through the use of these controls, are able to address contamination on their property to the satisfaction of DEQ and Oregon law in a manner that is economically and ecologically efficient.

Institutional controls are an important part of a risk-based management of contaminated properties. This approach to contamination permits residual contamination to remain in the ground, significantly reducing the cost of cleanup, so long as the risks associated with that contamination could be minimized

[8] OR. REV. STAT. §§ 465.200-.545 (2011).
[9] *Id. at* § 465.315.
[10] *Id.* at § 465.315(1)(c).

through the use of engineering and institutional controls, as well as other mechanisms.[11] In the period before hazardous waste management statutes allowed this kind of risk-based management analysis, property had to be cleaned to near-pristine standards – a level of cleanliness that was not merely expensive, but often impossible. Institutional controls avoid this burdensome cost, and allow the regulator and the regulated to take a middle pathway that lets landowners avoid expensive cleanup while still protecting public health and the environment.

Whether a given institutional control limits property use to particular purposes, restricts activities on a property, requires the maintenance of engineering controls, or obliges a property owner to monitor (or allow access to monitor) the state of the property, the institutional controls in question are only effective if they apply to the property itself in the long term, binding both current and future owners as long as the risk of hazardous substances continues on the property. Given the inherent connection between property and institutional controls, the chosen mechanism in many jurisdictions for implementing these controls has been through a transfer of interests in real property. While this approach is a natural one, it poses two problems. First, the relevant regulator must have the necessary authority to enter into such transfers. Second, and more important for purposes of this article, many traditional common law property principles can undermine the ability to impose indefinite limitations on real property, particularly when those limits impose obligations that do not directly benefit the landowner. Because institutional controls are only effective if they are enforced a) on a long-term basis, and b) against subsequent owners of the property, many regulators were concerned that traditional common law principles might undermine the effectiveness of institutional controls. In 2003, in response to this concern, the National Conference of Commissioners on Uniform State Laws drafted and approved the Uniform Environmental Covenants Act.

UECA provided states with a model statutory process for forming, amending, enforcing, and terminating real property agreements that implemented institutional controls on contaminated property. If it was adopted throughout the nation, states would have a uniform mechanism allowing state agencies and other regulatory bodies to enter into "environmental covenants" – grants of long term interests in real property that were explicitly authorized by the legislature to last indefinitely, notwithstanding common law principles of real property. UECA clearly set forth the mechanism and authority for entering into these agreements; it explicitly provided for the survival of these agreements in the face of common law

[11] *See generally id*. (outlining risk-based management of contaminated properties); OR. REV. STAT. § 465.315(a)(1) (requiring that DEQ-approved plans for cleaning up hazardous waste shall merely "attain a degree of cleanup of the hazardous substance and control of further release of the hazardous substance that assures protection of present and future public health, safety and welfare and of the environment"); OR. ADMIN. R. § 340-122-0084(4)(a), (b) (requiring, in design and evaluation of scope of risk from residual contamination, an examination into protection that institutional controls can provide).

challenges; and it granted enforcement under the covenants to regulators, parties, and even some third parties.

As of early 2011, UECA had been adopted, largely in its original form, in 23 states (including Washington, Idaho, and Nevada), as well as in the District of Columbia and the U.S. Virgin Islands. In many of those states (such as Washington and Illinois), existing programs were already using real property interests to implement institutional controls, and UECA was perceived as unnecessary in light of existing programs. At the same time, however, several other states (including New Jersey, California, and Colorado) have considered but decided not to adopt UECA, generally because existing programs were perceived as an adequate basis for addressing the problems that UECA was intended to solve.

Similarly, in Oregon, the Law Commission Work Group did not have a *tabula rasa* upon which UECA could be imposed without change. Although there was very little statutory language regarding the use of institutional controls in Oregon, there was an extensive existing program that DEQ and many regulated parties viewed as more than sufficient for Oregon's needs. The Work Group, the members and meetings of which are set out in further detail below, concluded that Oregon's existing program, the EES program, was working well, and that a full-scale adoption of UECA could be disruptive to the existing EES program.

The Work Group concluded, however, that there was room for improvement in the current program. The Group recognized that current law was not as clear as it could be regarding the scope of DEQ's authority to enter into these agreements. In addition, the Work Group believed, there would be value in adopting a version of UECA's clear statements about the validity of these agreements despite various common law doctrines that might be used to undermine their effectiveness.

The Work Group therefore concluded that legislation could be valuable if it (a) protected the validity of existing EES agreements, (b) clarified DEQ's authority to enter into this kind of agreement, (c) defined the necessary content of future agreements, and (d) defined how courts should manage these agreements in the future, if they were to ever be challenged under common law principles.

In cooperation with the drafting experts in the Office of Legislative Counsel, the Work Group developed what would become (after recommendation and forwarding by the full Law Commission) Oregon Senate Bill 867.[12] The text of the bill as recommended by the commission, and as initially approved by a majority of the Senate Judiciary Committee in 2011, is reproduced in the appendix to this Article. It addresses a number of important concerns associated with the continuing use of institutional controls in Oregon.

[12] S.B. 867, 76th Leg. (Or. 2011).

A. *Long-term effectiveness of institutional controls*. Throughout the Work Group process, DEQ pointed out that its residual authority to protect health, welfare, and the environment would serve as a backstop in any circumstance in which an institutional control is later found to be ineffective. If a property owner (whether the original or a subsequent owner) is not complying with an institutional control, even if the agreement implementing that control is deemed invalid for some reason, DEQ retains the ability under current law to take any steps necessary to ensure the necessary protections for health, welfare, and the environment. Nothing in the proposed legislation affects DEQ's ongoing authority to take steps necessary to protect against risks posed by hazardous substances. Thus, even if agreements implementing institutional controls were deemed invalid, or interpreted by courts in an excessively narrow manner, human health and the environment might not ultimately suffer in light of DEQ's continuing authority – though there may be short term costs.

At the same time, however, agreements implementing institutional controls are generally entered into only after a substantial investment of time and energy by all involved. Similarly, any challenges to the validity of EES agreements would certainly require a substantial investment of judicial resources in evaluating those challenges. Any steps that can be taken to ensure the ongoing effectiveness of these agreements, therefore, will avoid having to re-open DEQ investigations on those properties, thereby saving the agency and the state money and employee time that would otherwise have to be expended to protect against exposure to hazardous substances on these properties.

1. Protection of institutional controls in light of common law property principles. Under traditional common law, partial grants of interests in land – typically characterized as easements, equitable servitudes, or covenants – may not be enforced unless they fit a number of specific conditions regarding the relationship between the grantor and grantee, and between the property and the burdens and benefits imposed on the property. While many of these common law doctrines have liberalized over time, and will often permit interests in property to bind landowners today in a manner that may have not been permitted in the past, particularly unusual forms of property interests remain subject to challenge under some circumstances, and in particular, the broad public benefits enjoyed by the grantee (DEQ) of agreements implementing institutional controls may present some of those problems.

The agreements at issue in this legislation fit into that category. A property owner who seeks to be freed from obligations under an agreement implementing institutional controls might argue that the agreement did not, in fact, benefit any adjoining property but the public as a whole, making the agreement an easement with accompanying covenants.[13] They might then point out that under common

[13] *See* OREGON STATE BAR, PRINCIPLES OF OREGON ESTATE PROPERTY LAW §3.17 (1995).

law, real covenants could not be formed unless the parties that created the covenant had privity of estate – which DEQ and a private property owner would not have had – and that the only remaining traditional property interest – equitable servitudes – could only be enforced as long as there was a reasonable relationship to the land at issue.[14] For some kinds of obligations imposed in an agreement implementing institutional controls, a property owner might argue that certain conditions did not, in fact, "touch and concern the land," or that the benefit connected to the agreement was not "reasonably related to the burden and [did not] relates either to the occupation, use, or enjoyment of the promisor's land or the promisee's land."[15] This might be particularly true for conditions like payment obligations, which are very common in these kinds of agreements given DEQ's obligation to recover costs of remedial actions.

To be sure, these traditional limits on the validity of equitable servitudes have been liberalized over the years, and for that reason, the Work Group and DEQ were not overly concerned that existing agreements might be suspect.[16] In addition, as noted above, DEQ would always retain authority to protect the public interest in a case where an agreement was deemed unenforceable; any risk to the public or environment would trigger DEQ's statutory obligation to step in and mitigate that risk as appropriate. Nevertheless, the prospect of protracted litigation, and the cost associated with reopening a remedial action on a site where the state believed that it had already been resolved, convinced the work group that some additional statutory protection for these agreements would be useful.

As a result, Or. S.B. 867[17] borrows from section 5 of UECA, and provides that an agreement remains valid and enforceable even if it implements institutional controls in a manner that "is not appurtenant to an interest in the real property… imposes a negative burden… creates an affirmative obligation… does not touch or concern the real property… [or] is not otherwise recognized [as valid or enforceable] under common law."[18] This language is very similar to that under the Uniform Conservation Easements Act, which is already part of Oregon law.[19] It is intended to ensure that courts recognize that these kinds of agreements come with legislative approval, and that, particularly in light of the important public purposes being served by these agreements, traditional common law property doctrines should not be used to undermine their effectiveness and enforceability. The mere failure to fit into traditional pigeonholes of property law should not stand in the way of effective enforcement of these agreements, as long as they meet certain notice requirements and are entered into in order to accomplish their statutory purpose.

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[14] *See id.* §4.2.
[15] *Id.* at §4.6 (describing need for benefits of the servitude to relate to the land).
[16] *See generally* Restatement (Third) Property – Servitudes §2.18, § 8.5.
[17] S.B. 867, 76th Leg. (Or. 2011).
[18] *Id.* at § 3(6)(b)(A)-(E).
[19] *See* ORS 271.745.

2. Binding effect on future property owners. The second significant area of concern when implementing institutional controls comes from the need to ensure that future property owners hold land subject to the institutional controls in the relevant agreement. If the initial agreement is viewed simply as a contract, or if terms within the agreement are viewed as primarily contractual, and not tied specifically to the land, there is a risk that subsequent owners may have a claim that they are not obligated to comply with conditions of the agreement.

This problem is substantially addressed by the requirement in Or. S.B. 867 to include within the agreement a description of the land involved, and to record the agreement with the relevant county clerk. In treating these agreements like traditional interests in real property for purposes of transfers of ownership (but simultaneously excusing them from most common law limits on the creation and enforcement of servitudes), many of the concerns associated with transfers of land will be alleviated. In addition, section 3(6)(a) of the proposed legislation makes it clear that the agreement follows the land, transferring with any conveyance or assignment of the real property that is subject to the agreement. In common law terms, these agreements "run with the land," and should therefore be enforceable against future owners.

The one remaining type of transfer that the legislation is intended to address is acquisition of the property through prescription, adverse possession, eminent domain, or foreclosures arising out of obligations that develop after the agreements are entered into. Thus, if a property subject to an agreement is taken through a process of eminent domain, or by executing on a tax lien foreclosure, the governmental entity taking the property would still be subject to the agreement under Section 6(b), which provides that the agreement is "valid and enforceable against a grantor and against a person that has an interest in the real property that vests after the recording of the agreement." Similarly, a person taking the property through adverse possession would also be subject to the agreement.

The long-term effectiveness of institutional controls turns on the ability to enforce those controls on the property despite changes in ownership. The proposed changes made by Or. S.B. 867 would guarantee that future changes in ownership would not undermine the effectiveness of those controls.

3. Binding effect on concurrent interest holders. One final area of concern is how these agreements are affected by properties on which many different entities or individuals have property interests at the time the agreement is entered into. The bill does not specifically address this problem, other than by noting that: 1) the agreement should be signed by the grantor of the real property interest at issue (which will generally be the owner(s) of the fee interest in the property), and 2) the agreement is valid and enforceable against the grantor of the interest.[20] The

[20] See Or. S.B. 867 at §3(3) & (6)(b).

legislation therefore leaves to DEQ and those property owners entering into these agreements the ultimate responsibility for identifying all current holders of an interest in the property whose consent will be necessary to grant to DEQ the full scope of the interests it seeks to take under the agreement.

B. *Clarifying scope of statutory authority.* Under existing law, DEQ has the authority to use institutional controls as a means of carrying out removals and remedial actions on contaminated properties. Although ORS 465.315 does not specifically define the nature of "institutional controls," the term has been interpreted by DEQ to permit it to enter into the kind of long-term property arrangements that would be formalized through this legislation. While DEQ believed that it had been working within the scope of its authority to implement institutional controls, the proposed legislation clarifies that DEQ may enter into these real property agreements. As discussed in further detail in the next section, the work group was particularly concerned that nothing in the legislation would be construed as suggesting that DEQ lacked authority to enter into preexisting agreements. The institutional control language in 465.315 left the mechanism for implementing institutional controls wide open; the proposed legislation merely clarifies the scope of DEQ's associated authority.

C. *Ensuring effectiveness of existing agreements.* A primary concern during the process of drafting Or. S.B. 867 was the desire on the part of the Work Group to ensure that the legislation did not in any way cast doubt on the validity and enforceability of the hundreds of existing agreements between DEQ and owners of contaminated properties. Early in the Work Group discussions, the group considered the possibility of not recommending any legislation at all, based on the concern that any action clarifying the enforceability of these agreements in the future would necessarily carry with it the implication that existing agreements were in some manner subject to challenge or invalid.

Ultimately, the Work Group concluded that the benefit of avoiding any risk of future challenge would outweigh any negative implication from legislation – particularly if the legislation and accompanying report made it clear that it was being proposed simply to place existing programs on a firmer footing. There was no general sense that existing agreements were likely to be invalid in any way, whether because of a lack of clearly stated DEQ authority or because of the operation of common law doctrines. The work group considered a retroactivity clause that would have sought to make the provisions of Or. S.B. 867 applicable to preexisting agreements; work group members believed, however, that such a clause would be constitutionally suspect, and that if it were struck down, its absence would cast even more doubt on the validity of existing agreements. The work group concluded, in short, that it was best to let existing agreements stand on their own merits, and to simply make clear that no negative implication should be drawn from the current legislation.

Section 8(2) of the proposed legislation attempted to make this point clear, providing that the legislation "[d]oes not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act." The legislation should have no bearing on any future challenge to whether an interest in real property was granted by an agreement entered into before 2011; if anything, it should emphasize the degree to which the legislature believes that even the preexisting agreements are a valuable part of DEQ's existing regulatory program and should be enforced to the degree possible under current law.

D. *Promotion of uniformity and clarity in law.* The impetus for the work group was consideration of the Uniform Environmental Covenants Act. Because of Oregon's well-established EES program, however, the proposed legislation did not adopt UECA in significant part. It would, however, implement UECA in spirit, and borrows some language (particularly provisions in sections 6 and 8 of Or. S.B. 867). It is, therefore, difficult to characterize the statute as an implementation of UECA itself. There is value in placing a program like this into written law. DEQ's current EES program is not defined by regulations or statute, and so having the program explicit in the Oregon Revised Statutes promotes transparency in the law and notice to regulated parties both in the state, as well as to those outside of Oregon who might be seeking to invest in the state.

Because the Work Group was formed with UECA in mind, it is worth addressing some significant differences between UECA and the program that would be established under Or. S.B. 867. First, the provisions of UECA allowed a wide range of regulatory entities (including federal agencies or local governments) to take an interest in an environmental covenant. By contrast, Or. S.B. 867 is applicable solely to DEQ. In work group discussions on this issue, DEQ reasonably noted that it is, as a statutory matter, involved in some form or another with every contaminated property in the state, and that under current law, it is unlikely to cede control to other entities. Even if a point came in the future where another entity needed authority to enter into this kind of agreement, legislative change would be relatively straightforward.

Second, UECA's enforcement provisions intentionally allowed a very broad range of parties to enforce environmental convenants. Under UECA section 11, injunctive relief for violations of the covenants could be sought, for instance, not only by parties to the agreement, but by any person "whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant," or by the local "municipality or other unit of local government." Although the Work Group acknowledged that having more entities paying attention to enforcement would, in theory, be beneficial to the ultimate success of the agreements, Work Group members also believed that expanding the scope of statutory enforcers would also risk unnecessarily complicating any enforcement that would occur, and that leaving it in the hands of DEQ would be preferable.

Notably, Washington State reached the same conclusion when it adopted UECA in 2007.[21]

This does not mean that third parties are irrelevant to enforcement. To the degree that other parties have an interest in benefits arising from these agreements, the legislation is not intended to alter existing law regarding the creation of third party beneficiaries. Under contract law, either explicit language in an agreement, or language along with accompanying circumstances, may create third party beneficiaries who are able to enforce the agreement.

Finally, UECA included relatively detailed processes for the creation, amendment, and termination of environmental covenants. Because Work Group members and, in particular, DEQ, felt that existing informal processes for creating these agreements were working well, the proposed legislation eschewed most of those processes. Instead, Or. S.B. 867 requires only a few relatively simple preconditions for the creation of an agreement implementing institutional controls, and does not specifically address amending or terminating those agreements. Any changes to an agreement after it has been entered into will need to be addressed through traditional contract law.

II. Summary of Or. S.B. 867; Borrowing from Uniform Law to Make A Unique Summary of Sections

The following section-by-section analysis should be read in conjunction with the preceding descriptions of the general approach and purpose of Or. S.B. 867.[22]

Section 1: Section one defines "institutional control" for purposes of ORS 465.315 (2011). The definition is intended to encompass the wide range of limitations and obligations that DEQ may place on a contaminated property in order to limit the potential for exposure to hazardous substances. It includes any limits or obligations regarding how the property is to be used in the future (such as limits on the ability to use the property for residences, or an obligation to use the property only for industrial purposes), as well as any obligations or restrictions regarding activities on the property (such as a bar on the drilling of wells, or an obligation to maintain an impermeable surface on the property). It also includes obligations regarding the installation, maintenance, and monitoring of a wide range of engineering controls or other remedial actions that might be imposed on a contaminated property, and any requirements regarding access to the property (whether limits on the ability to access the property, or obligations to allow access to the property for monitoring or other purposes).

[21] Under H.B. 5421, 74th Leg. (Or. 2007), only government regulators can enforce environmental covenants.

[22] The critical text of the proposed legislation is reproduced in the Appendix. *See infra*.

The Work Group considered defining institutional control within the broader definitions section of the hazardous substance law, but that would have required renumbering a broad swath of commonly-used definitions in the hazardous substance statutes, and risked confusion or costs in making the necessary changes to existing DEQ programs. The alternative in the legislation avoids that problem, though it does require referencing the new definition in any location where it is subsequently used. ORS § 465.200 (2011); S.B. 867 § 3(1)(b), 4–6.

Section 2: Places Section three in its appropriate place within the Oregon Revised Statutes. The Work Group discussed whether there might be other entities, or circumstances other than properties contaminated with hazardous waste in which DEQ might need to use agreements implementing institutional controls, and whether the relevant provisions regarding these agreements should be located somewhere other than in the hazardous waste chapters of the ORS. DEQ concluded that the vast majority of these agreements would be entered into in connection with properties contaminated by hazardous waste, and that as a result this was an appropriate place for the legislation to be codified. Future legislation could always extend the program to other situations or other entities, as the need arises.

Section 3: The most significant section, which grants DEQ the explicit authority to enter into agreements implementing institutional controls.

§ 3(1)(a) & (b): The Work Group did not intend that these agreements be pigeonholed into a traditional category of a common law property interest. Because the intent of the legislation is to free these agreements from the limitations and restrictions that accompany these common law categories, the legislation simply provides that DEQ may enter into an "agreement" – whether that agreement is deemed an easement, an equitable servitude, or other instrument. The definition in section (1)(a) is intended to broadly encompass the full range of agreements to transfer an interest in real property short of a possessory interest, and is not intended to force DEQ to choose among the various categories. Subsection (1)(b) simply carries over the definition of institutional control into this provision.

§ 3(2): Permits DEQ to enter into agreements implementing institutional controls. The legislation makes clear that DEQ is the "grantee" under these agreements of "an enforceable interest in real property."

§ 3(3): As noted in Part I(D) above, the Work Group believed that DEQ's existing process for negotiating these agreements was working well, and therefore decided to impose very few limitations on the process for entering into these

agreements. The only specific requirements are that the Director of DEQ (or a designee) sign the agreement along with all grantors of the interest in the property. As noted in Part I(A)(3) above, it remains DEQ's responsibility, along with that of the grantors, to identify all concurrent holders of an interest in the real property in order to ensure the effectiveness of the agreement. If, for some reason, a current interest holder believes that there is no need to enter into an agreement, they may choose not to, although DEQ retains other powers regarding the implementation of remedial actions on the property (including direct imposition of institutional controls). It will often be to the benefit of concurrent interest holders (such as mortgage holders) to enter into these agreements in order to clarify the status of the property, but that assessment is left to the individual entities in light of DEQ's other powers.

As discussed *supra*, the agreements may either explicitly or implicitly create third party beneficiaries entitled to enforce the agreement. This matter is left to DEQ, the grantor, and the operation of the common law of contract regarding third party beneficiaries.

The legislation also requires that the agreement include a description of the real property in order to facilitate the recording of the agreement.[23]

§ 3(4): In order to ensure that future owners of the property are on notice of the agreement, the legislation requires that the agreement be filed in the deed records of the county in which the property is located. The default rule is that responsibility for filing is in the hands of the grantor, although this is a point that can be subject to negotiation at the time the parties enter into the agreement.

The recording of these agreements is already done by DEQ as a matter of course; the legislation simply makes clear that such recording is critical to the enforceability of the act against future property owners. *See* Section 6(b) (making agreement valid and enforceable against owners taking an interest that vests after the recording of the agreement).

§ 3(5): Of particular importance to DEQ is the ability to recover costs incurred during its work on a parcel of contaminated property. *See, e.g.*, ORS §§ 465.210(b), .255–.260, .330–.335 (2011). Agreements implementing institutional controls will typically include provisions that require the grantor of the agreement to cover costs (whether incurred by the grantor or by DEQ) associated with the limits on the property, and the Work Group wanted to be sure that these kinds of obligations were explicitly permitted under the legislation.

[23]S.B. 867 at § 3(3)(b), 4, 76th Leg. (Or. 2011).

Because cost recovery requirements are, to some degree, different from the institutional control itself, the provision makes clear that the department may, in an agreement implementing an institutional control, impose other conditions that are reasonably related to carrying out remedial action on the property. This language should make it clear that the agreement can include a wide range of conditions, as long as those conditions are sufficiently connected to remedial actions on the property.

§ 3(6): This section carries into effect the primary focus of the legislation – ensuring that agreements implementing institutional controls survive in the long term, and are enforceable against subsequent owners of the property (however they may come to possess their interest) despite certain common law doctrines that might call the agreements into question. The reader is referred to the discussion above, regarding the goals of the legislation and the potential problems that it is intended to avoid, as well as to the Commentary for UECA section five, from which much of the language in section 3(6)(b) is drawn. In essence, the section follows UECA's lead by giving a unique status under common law to an "agreement to implement an institutional control," making them separately enforceable even if traditional common law doctrines might call their enforceability or validity into question.

In particular, section 3(6)(b)[24]: (i) Provides that the agreement, the benefit of which is held in gross (i.e., not connected to a particular adjoining property), may be enforced against the grantor or his successors or assigns. By stating that the covenant need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of an easement must own an interest in real property (the "dominant estate") benefitted by the easement. (ii) Provides that the imposition of a "negative burden" – whether novel or otherwise – does not prevent enforceability of the agreement. Some applicable law recognizes only a limited number of "negative easements" – those preventing the owner of the burdened real property from performing acts on his real property that he would be privileged to perform absent the easement – and this provision would eliminate that requirement. (iii) Provides that the opposite problem is also not an issue. Existing law will occasionally call into doubt the enforceability of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Under some existing law, neither of those interests was viewed as a true easement at all. The first, in fact, was labeled a "spurious" easement because it obligated an owner of the burdened real property to perform affirmative acts. (The spurious easement was distinguished from an

[24] The discussion in this paragraph is substantially dependent on, and occasionally quotes verbatim from, the Commentary to UECA section 5. With that note, I do not separately cite even verbatim provisions of that Commentary.

affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened real property that the holder would not have been privileged to perform absent the easement.) Because these kinds of obligations are a necessary part of implementing institutional controls on a property, the legislation makes it clear that the agreements are nevertheless enforceable. (iv) Provides that the "touch and concern" limit on the enforceability of servitudes does not apply. (v) Provides that "privity of estate" arguments limiting enforceability of certain property interests where there is not sufficient legal connection between the grantor, the current holder of the subservient property, and DEQ, do not apply. Finally, the legislation (vi) provides that no other common law doctrines calling the validity of the agreement into question should undermine the validity and enforceability of the Act.

Sections 4, 5, & 6: These are conforming amendments, making clear that the provisions of existing law regarding the inventory of properties on which DEQ has implemented "institutional controls" use the same definition of institutional control that can be found in ORS 465.315 (2011) (as amended by this Act).

Sections 7, 8, & 9: Other than the straightforward applicability provision in section 8(1) and the emergency clause of section nine, these provisions are intended to address the problem discussed in Part I(C) above, regarding the effectiveness of prior agreements entered into by DEQ. The reader is referred to that discussion. Section seven specifically references this report, and is intended to ensure that a reader of the statute is aware of this accompanying legislative history, which represents the sense of the work group and the recommendation of the Law Commission regarding the effect of the bill.

Section 8(2) is a savings clause that is intended to implement the spirit of UECA sections 5(c) and (d). As noted in Part I(D) above, the Work Group considered a retroactive provision like the one in UECA section 5(c), which would have either (a) made the provisions of this legislation wholly retroactive, or (b) prohibited the use of common law doctrines to undermine the validity of prior agreements. The Work Group concluded that explicit language would likely be ineffective, to the degree that it accomplished its purpose, and that the better course would simply be to express the intent of the work group that this legislation is not intended to cast doubt on the validity of prior agreements. If a future case does arise regarding the enforceability of a preexisting agreement, it was the hope of the work group that the court would, in considering the application of common law doctrines, recognize that these kinds of agreements are widely beneficial to the people and environment of the State of Oregon and that relevant law should be construed liberally in order to ensure their effectiveness.

III. Conclusion

Although Or. S.B. 867 did not pass in the 2011 Legislative Session, the bill, as engrossed in the Senate, should be resubmitted to a future Legislative Assembly and enacted by the Legislature. Although it is of modest scope, the bill promises to provide a useful service to DEQ, property owners, and the general public in Oregon. If enacted, the proposed legislation would place an existing, effective program for the management of hazardous substances on a firmer legal footing while ensuring the long-term effectiveness of measures taken to limit the release of those substances. Because these kinds of agreements have proven to be an extremely efficient way of managing residual risk on contaminated properties, any proposal that limits the risk of confusion about the scope of DEQ's authority, or that eliminates uncertainty about the use of these institutional controls, will save money, time, and resources. The bill puts parties on notice of the scope of DEQ's authority in this area and provides some guidance to those seeking to understand the nature of that authority.

Enactment of Or. S.B. 876 is not necessary to ensure survival of the EES program. DEQ is confident that its existing agreements are valid and enforceable (and that it would, in any event, have the ability to take necessary action in order to protect public health, safety, welfare, and the environment if the agreements proved unenforceable). The changes proposed by the legislation are intended to reinforce this conclusion for any future agreements. The legislation should not be taken to suggest any skepticism by the work group or Law Commission regarding the validity of existing agreements; this sentiment is reflected in section 7(2) of the proposed legislation, which emphasizes that the proposed legislation should not be construed to effect the validity of past agreements entered into by DEQ under the authority of ORS 465.315 (2011).

Despite its relatively modest purposes, Or. S.B. 867 would nevertheless be a useful addition to Oregon law, clarifying and delineating DEQ's authority to enter into these kinds of agreements in order to implement institutional controls, while helping to ensure that these agreements are able to accomplish their purpose of long-term protection of health, welfare, and the environment in Oregon in the most efficient and effective manner possible. The bill, as engrossed in the Senate, should be resubmitted to a future Legislative Assembly and enacted by the Legislature.

Appendix A

76th OREGON LEGISLATIVE ASSEMBLY – 2011 Regular Session

A-Engrossed

Senate Bill 867
Ordered by the Senate April 21
Including Senate Amendments dated April 21

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)

SUMMARY

Specifies that Department of Environmental Quality may enter into agreements to implement institutional controls for purposes related to reducing exposure to hazardous substances. Makes all conditions imposed under those agreements valid and enforceable against grantor and against person that has interest in real property that vests after recording of agreement.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to agreements that implement institutional controls on real property; creating new provisions; amending ORS 465.225, 465.230, 465.235 and 465.315; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 465.315 is amended to [add the following subsection (h)]:
(h) As used in this subsection, 'institutional control ' includes any of the following that is implemented to reduce the potential of exposure to hazardous substances:

(A) A prohibition, restriction or limitation on the use of real property.
(B) The installation, maintenance or monitoring of any remedial action on real property.
(C) A restriction on access to real property.
(D) Any other prohibition, restriction or obligation relating to access to, activities on or the use of real property.
(E) Allowance of access to real property for the purpose of installing, maintaining or monitoring a control described in subparagraphs (A) to (D) of this paragraph.

SECTION 2. Section 3 of this 2011 Act is added to and made a part of ORS 465.200 to 465.545.

SECTION 3.

(1) As used in this section:

(a) 'Agreement' means an easement, equitable servitude, covenant, condition, restriction or similar instrument, or any combination thereof.

(b) 'Institutional control' has the meaning given that term in ORS 465.315 (1)(h).

(2) The Department of Environmental Quality may enter into an agreement, as guarantee of an enforceable interest in real property, to implement an institutional control.

(3) An agreement that implements an institutional control must:

(a) Be signed by the Director of the Department of Environmental Quality or the director's designee and all grantors of the enforceable interest; and

(b) Contain a description of the real property that is subject to the agreement.

(4) Unless otherwise specified in the agreement, a designated grantor shall file an agreement entered into under this section in the deed records of every county within which a portion of the real property that is subject to the agreement is located.

(5) The department may require such conditions in an agreement as the department determines are reasonably related to carrying out any remedial action on the real property, including but not limited to payment of the department's costs for monitoring and enforcing an institutional control.

(6) An agreement entered into by the department for the purpose of implementing an institutional control:

(a) Transfers with any conveyance or assignment of real property subject to the agreement; and

(b) Is valid and enforceable against a grantor and against a person that has an interest in the real property that vests after the recording of the agreement, even if:

(A) The agreement implements an institutional control in a manner that is not appurtenant to an interest in real property, imposes a negative burden, creates an affirmative obligation, does not touch or concern the real property or is not otherwise recognized as valid or enforceable under common law; or

(B) There is no privity of estate or contract between the department and the grantor or the person who has the interest in the real property that vested after the recording of the agreement.

[SECTIONS 4-6 were conforming amendments making clear that the above definition of "institutional control" applied in other appropriate contexts.]

SECTION 7. The Oregon Law Commission shall post on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of sections 3 and 8 of this 2011 Act and the amendments to ORS 465.315 by section 1 of this 2011 Act.

SECTION 8. Section 3 of this 2011 Act:

(1) Applies to any agreement entered into on or after the effective date of this 2011 Act; and

(2) Does not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act.

SECTION 9. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.