MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON NATURAL RESOURCES, AGRICULTURE, AND MINING

Seventy-Third Session
May 4, 2005

The Committee on Natural Resources, Agriculture, and Mining was called to order at 1:40 p.m., on Wednesday, May 4, 2005. Chairman Jerry D. Claborn presided in Room 3161 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Jerry D. Claborn, Chairman
Mr. Kelvin Atkinson, Vice Chairman
Mr. John C. Carpenter
Mr. Mo Denis
Mr. Pete Goicoechea
Mr. Tom Grady
Mr. Joseph M. Hogan
Mrs. Marilyn Kirkpatrick
Mr. John Marvel
Ms. Genie Ohrenschall
Mrs. Debbie Smith

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Terry Care, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Amber Joiner, Committee Policy Analyst
Sarah Gibson, Committee Attaché

OTHERS PRESENT:

- Michael Kerr, Deputy Executive Director, National Conference of Commissioners on Uniform State Laws, Chicago, Illinois
- Renny Ashleman, Legislative Advocate, representing the City of Henderson, Nevada
- Barry Duncan, Government Relations Manager, Southern Nevada Home Builders Association, Las Vegas, Nevada
- Leo Drozdoff, Administrator, Division of Environmental Protection, Nevada Department of Conservation and Natural Resources
- Kaitlin Backlund, Political Director, Nevada Conservation League
- Joe Johnson, Legislative Advocate, representing the Toiyabe Chapter of the Sierra Club
- Dennis Colling, Chief, Administrative Services Division, Nevada Department of Motor Vehicles
- Troy Dillard, Administrator, Compliance Enforcement Division, Nevada Department of Motor Vehicles

Chairman Claborn:
[Meeting called to order. Roll called.] Today we're going to hear two bills, S.B. 26 and S.B. 263. I'd like to start out with S.B. 263.

Senate Bill 263 (1st Reprint): Adopts Uniform Environmental Covenants Act. (BDR 40-359)

Senator Terry Care, Clark County Senatorial District No. 7:
I'd like to take a few moments to explain exactly what the National Conference of Commissioners on Uniform State Laws (NCCUSL) does. It is an organization that has been around for 114 years. It consists of the 50 states, the Virgin Islands, Puerto Rico, and Washington, D.C.

We've all seen, at some point in our legislative careers, uniform acts such as the Uniform Arbitration Act of 2000 and the Uniform Partnership Act, and they come from someplace. The Commissioners of the National Conference meet once a year in a city somewhere, usually for 8 days, to adopt or not adopt certain uniform acts. If an act is adopted, then the charge is for the Commissioners to go back and attempt to get those uniform acts adopted by their respective home states so that, ultimately, we have a body of laws that are pretty much the same in all 50 states. The best example I can think of is the Uniform Commercial Code (UCC). Many of you never have to deal with it.

Maybe on occasion you have had to file a financing statement. The Uniform Commercial Code gives the 50 states a uniform way of conducting business so that when you cross state lines, everybody is playing by the same rules.

[Senator Care, continued.] The National Conference is not limited to the UCC. We often go into other areas, and that has given birth to what is before you now in S.B. 263, the Uniform Environmental Covenants Act (UECA). Our uniform acts always go before a drafting committee. These committees are comprised of state and federal trial and appellate court judges, law school professors, practitioners, and legislators. They get a very thorough going-over before the National Conference ever adopts any one of them.

Senate Bill 263 was actually the product of a three-year process. A lot of good legal minds went over this before it ever was adopted by the National Conference. So far, the act has been adopted in five states this year. We hope that before the year is over, that figure will go to about nine, including Nevada.

The best example I can use to illustrate the basis of S.B. 263, the Uniform Environmental Covenants Act, is that old gas station that has been vacated. It has a chain-link fence around it and political signs on it. After a couple of years, you begin to ask yourself if someone couldn't do something with the property. Maybe you have constituents call to ask why that gas station has sat there for so long without anyone doing anything with it. It isn't always a gas station; it can be something else.

The intent of S.B. 263, or UECA, is to come up with a device that allows lenders to be comfortable, developers to be comfortable, and landowners to be comfortable in going ahead and, to an extent, redeveloping that land, understanding that it is perhaps not completely remediated, that it might pose some environmental risk, but not a risk to the partial use that somebody wants to put it to. That way the property gets back into use, maybe for something different.

To provide the reassurance for everybody, especially those who live anywhere near the property, we have come up with a mechanism that gives you recorded covenants, environmental monitoring along the way. Certain instruments get recorded, so there is no question about what covenants govern this land and the way this property is supposed to be used along the way. This puts the property back into circulation and, at the same time, erases the concerns that many people might have about doing something with that land other than just having it simply sit there. That's the basis of the bill.

[Senator Care, continued.] I have here with me today Michael Kerr, who has been with the National Conference for a number of years. We're headquartered in Chicago. He is the Deputy Executive Director and is more than familiar with this bill. I have asked him to come before the Committee and testify on it. He has been able to go to a lot of the states I've mentioned earlier and make this same presentation. I might point out that, in this case, the Environmental Protection Agency has given its blessing to this bill, as has our State Division of Environmental Protection.

I think you're going to hear from Leo Drozdoff a little bit later. We did have it checked out by others. This is not just from us; this has been reviewed by a lot of people.

Michael Kerr, Deputy Executive Director, National Conference of Commissioners on Uniform State Laws, Chicago, Illinois:
[Submitted Exhibit B.] This act creates a voluntary mechanism, a legal framework. It will allow long-term use restrictions and activity requirements on redacted property to be made more reliable and less subject to the vagaries of real property law. By that, I mean if you do a cleanup project or redevelopment project and you put a restriction into a deed now, there are any number of real property doctrines and events that can come in and knock those restrictions out. There are, for example, foreclosure of a prior real property interest, adverse possession claim, and a number of elements of what are called "servitudes," which, if not met, might make the covenant challengeable on different bases: tax lien foreclosures, eminent domain actions, and a pretty long list of things.

A number of states have addressed the issue of how to make these use restrictions reliable over the long term, and they have done it in slightly different ways. There has been a consensus that the best way to do it is to record a use restriction in the land title records, because that gives notice to future purchasers and is going to be binding if it runs with the land effectively. However, in a number of those states, when asked for a legal opinion, the U.S. Environmental Protection Agency (EPA) or the local government that is watching over these things cannot say for sure, if there is a use restriction that needs to be in place for 20 or 30 years, that it's going to be reliable over that long period of time. A number of states have a thing called a "marketable title statute" or doctrine. What that means is that if you don't rerecord your interest every four years, it goes away.

In a lot a cases, such as if you have MTBE [methyl tertiary-butyl ether] contamination underneath an old gas station, you're going to want to put berms around the property, plastic sheeting, and monitoring requirements to make sure it's not going past the property line or the pollutant's not spreading. You're

going to make sure that the state environmental protection agency has access rights to that property to come in and test from time to time if they need to. You're going to want to make sure that nobody's putting a drinking water well in the middle of it. All of those things might not need to be there forever, but they're probably going to need to be there for more than ten years. They're almost certainly going to need to be there for longer than just the next person who buys the property.

[Michael Kerr, continued.] One of the reasons you see these gas stations and other properties with fences around them is that the people who are responsible for that cleanup liability find that it is cheaper and safer for them just to fence it off than it is to sell it and then face the possibility of somebody coming in 25 years from now and doing something not that smart with the land in terms of its contamination. Their liability doesn't go away; it's strict joint and several liability that, at least under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [42 USC 9614], is there forever. The most important party here is the people with the liability, but there are other important parties.

Basically, UECA creates a voluntary instrument. If the owner, the developer, the bank, the state environmental agency, and, potentially, a buyer all want to engage in the cleanup, the act doesn't say what the cleanup is to be; that's left up to existing law. The act doesn't change anybody's liability; that's under existing law. However, if they decide to do the cleanup and put controls in as part of that, this act provides a more reliable basis for having those controls in the long term.

A little bit about the development of the act: we spent three years on this. We had representatives from virtually every conceivable interested group, including environmentalists, at the table. The Sierra Club supported this act in a couple of states already. We've had title insurers, the banks, the U.S. EPA, state and local governments, redevelopment agency representatives, folks from the National Governors Association, folks from the National Association of Attorneys General, several folks from the American Bar Association—both experts in real property law and experts in environmental law. Virtually everyone with an interest in either redeveloping land or protecting environmental health or making sure that large companies—for example, General Electric has an awful lot of companies; they came; they sent a representative to the drafting committee, mostly because they'd like to have the same tool in every state. I think that was really their only interest, and they have an interest in making sure they're reliable.

[Michael Kerr, continued.] There has not been any substantive opposition to this act. In a few states there have been some people who were surprised by it, because, frankly, we're a staff of ten with virtually no budget. Our commissioners come in and people say, "Well, this sounds great, but what's the catch?" It just takes an extra year for everyone to get comfortable with it, but there hasn't been any substantive opposition.

In most of the states that have passed it, this has been what I like to call a "kumbayah" bill. For example, in Nebraska, we had the Sierra Club, British Petroleum, Burlington Northern Santa Fe Railway, and somebody from the State Attorney General's Office all saying they liked the bill. In Maryland, we had the Chesapeake Bay Foundation and the American Chemistry Council. The reason everybody likes it is that everyone in these transactions has a strong interest in making sure that if you're going to put land use controls in, they're reliable. This bill simply creates the infrastructure to make sure that they are reliable.

Let me tell you where the bill stands nationally. We printed out this map (Exhibit B) on Thursday of last week. Since then, Virginia has adopted the act. Iowa has sent it to their governor. Colorado and Delaware have introduced it. It may have passed in the Virgin Islands. The act has a lot of momentum, and it probably could have passed in quite a few more states this year, but we have a very small staff and a limited budget. I can only cover 25 states at a time. I urge your support for this bill.

Assemblyman Goicoechea:
As I look at Section 20 of this, it appears that either the agency or the current owner of the fee simple property can amend or terminate the covenant at any point.

Michael Kerr:
That's to amend it by consent. There are other ways to amend or terminate a covenant. Section 19 includes other mechanisms for it. "By consent" means that if essentially, all the original signatories to the covenant, as well as the current owner, agree that either the contamination is—sometimes contamination takes care of itself. It just takes a long time. Bacteria eat pollutants, and after a period of time, if you're going to test it to make sure that everything's safe, the agency can require the testing. Maybe those use restrictions can be lifted or lessened.

Other times, somebody has a property that has these use restrictions on it, and they want to do some additional cleanup and put the property to a use that was not contemplated in the original covenant. It's important to have an entry point

for those kinds of things to happen. This protects the interests of the person who has the contingent liability from the initial placement of the restriction.

[Michael Kerr, continued.] The agency is an integral part of termination or modification by consent, and the current owner has to be a member of it, so it's a fairly balanced process. If situations change and everyone's agreeable, either through doing additional cleanup or because the contamination has been ameliorated through time or through a process, it makes sense to be able to change these things down the line. This is one of the mechanisms we have for it.

Assemblyman Goicoechea:
The way I was reading it, it almost sounded like the agency or the current owner could withdraw the property out of it, but that isn't the case.

Michael Kerr:
All signatories to the original covenant have to agree to it. The agency, the holder, and the original owner are all mandatory signatories to the original covenant. Sometimes there will be other people, such as a buyer or a local government. Sometimes there might be two environmental agencies on the same project. Whoever originally signed it has to consent, because the agency has an interest in protecting human health. The original grantor of the interest is typically someone who has long-term liability concerns. These are the same people who leave a fence around the property, so they are going to want to be consulted before they are exposed to renewed liability. The current owner also clearly has an interest in doing this. If the people who originally signed the covenant and the current owner are agreeable to it, then it doesn't seem to make much sense not to allow them to terminate or modify.

Assemblyman Goicoechea:
So the agency would be in place. NDEP [Nevada Division of Environmental Protection] and the U.S. EPA are the two agencies that could come and, once these covenants are adopted, would become the agency. Let's take the case of a spill or leak at a gas station. Once this legislation was adopted, then the NDEP or EPA could come in say, "You will function under these covenants." Am I correct?

Michael Kerr:
The covenants are voluntary, so if you had a spill at a gas station, the state environmental agency already has authority to require a cleanup action. As part of that cleanup action, they are going to say to take out the tanks, put down 20 feet of topsoil, and put these berms up here, and then they're going to want to test it. They can do all of that now.

[Michael Kerr, continued.] If you want to impose use restrictions—don't put a drinking-water well on this property, and don't take down these berms, and by the way, we're going to want to come every five years and test the soil to see if the pollution's moving—those restrictions need to be applicable not just to the person they're taking the immediate action against, but also to all subsequent purchasers, because they're going to need to do that for more than a single 5-year period. Those berms might need to be there for 25 years. The act creates an instrument that you can record in the title, and anybody that the current gas station owner sells that property to is going to be subject to those restrictions.

Assemblyman Goicoechea:
That would remove the requirement from the lender, then. If he was going to come in, he wouldn't require that you do an environmental assessment, because it would already be on the deed restriction. Is that correct?

Michael Kerr:
If a lender has a prior mortgage before the environmental cleanup action for the spill, if there is a mortgage on that property, what should happen—it doesn't have to, but it should happen—is that the people getting this covenant together should get that lender to subordinate the note. Otherwise, the foreclosure could conceivably knock out all later-recorded interests. That's just the way real property law works. The act deals with that in a pretty straightforward way by letting everybody know that you need to subordinate things that can knock out later-recorded interests. However, once that interest has been subordinated, the lender basically doesn't have an interest other than making sure that the collateral value of the loan is protected.

Frankly, doing these cleanups and putting these use restrictions in place increases the value of the property. That's why the parties are going to be willing to subordinate in most cases.

Assemblyman Marvel:
Do you foresee this maybe mitigating a lot of lawsuits in the future?

Michael Kerr:
Absolutely, because it creates clear rules and a reliable mechanism, especially if you have this in place in 25 states, which I think we'll have next year. Every time a state under UECA considers a new problem—there are always new problems and questions that arise about what a word means or what to do in a situation—because it's a uniform act, folks here in Nevada can look and see what they did in Ohio when the question came up about that particular provision. That's going to lead to settlements and expedited resolutions of those

questions. Rather than having to go to court and every state having a different system and figuring it out every time, the uniformity of the laws will help. Also, the rules are very clear, and they are much less likely to cause unanticipated problems—especially for property law—down the line, which is where a lot of lawsuits would come from.

Assemblyman Marvel:
There won't be any misrepresentation that this is there. If you sell some property, there won't be a misrepresentation if that's already in place.

Michael Kerr:
That there would be something fraudulent filed on a deed?

Assemblyman Marvel:
No, there wouldn't be. It would be out in the open.

Michael Kerr:
Right. Exactly. It's transparent. Everyone is going to know what's on that property, because everybody can go to the recorder of deeds and look it up.

Assemblyman Hogan:
I wonder if you can give us a few words on the scope of the environmental hazards that could be addressed by this device. I'm thinking of something in the nature of lead paint contamination in a residential rental building. What would the scope be?

Michael Kerr:
We make the tool fairly broad. We want to give states the flexibility to use it in situations where they want to use it. Under the act, the signature of the state environmental agency is going to be required, so to some extent they do have some leverage in deciding where best to use these covenants. The definition of an environmental response project is on page 2 of the bill, Section 8. That plugs into essentially the three major sources of law that cleanups are going to be undertaken from: state or federal programs for remediation, incidents of closures of hazardous waste units subject to approval of the agency, and state voluntary cleanup programs. Those are fairly generic descriptions, but that's probably what's going to be feeding the process into who's doing these cleanups.

There could be situations where you'd have some kind of contamination that's very short term, such as a poultry processing plant. It's something that's just naturally going to decompose, but it does present a hazard. If somebody wants to sell that property, they'll want to make sure nobody's digging a well for two

or three years or however long it should take for that to be cleaned up. You could put a time-limited covenant and say that this use restriction lasts only until a certain date and then automatically terminates. It gives you a lot of flexibility. We tried to keep the tool as flexible as possible.

[Michael Kerr, continued.] With paint cleanups in condo complexes, if the state agency, as part of their signing off on the cleanup, says you need a long-term use restriction, or if the owner is worried about somebody digging out asbestos that is encased in concrete, they might say that we should have a covenant to make sure you're not going to spill asbestos ten years from now and get us sued. So, it could come from the agency, it could come from the current owner, or it could be part of a transaction where somebody wants to sell the property, and the person who wants to buy it is going to use it in a responsible way that's consistent with the proper uses of the land right now. It could be transaction-based; it could be regulatory based by the department; it could be just a responsible owner wanting to make sure that the cleanup takes place, the controls are reliable, and they're not going to face liability later that they can avoid by doing the responsible thing.

Assemblyman Hogan:
You stated that one of the main purposes is to return contaminated properties to the stream of commerce as promptly as possible, and that this would help do that. How would use of these covenants accelerate the process of returning properties to the stream of commerce?

Michael Kerr:
Currently, one of the biggest problems with what are collectively called "brownfields." There are probably more than 800,000 sites in the United States. They have low-level contamination, but there are liability concerns. One of the reasons these properties aren't being redeveloped is the fear of the owner or the person left holding the bag. Sometimes it's a bank; sometimes it's a local government; sometimes it's a state government or a redevelopment agency. They don't want to expose themselves to risks in the future.

Sometimes it's impossible to do 100 percent cleanup. With MTBE, I'm told that it's virtually impossible. You can get it 95 percent clean, but that last 5 percent is going to cost $20 million on a $25,000 piece of property. Nobody's ever going to do that, so it sits there. However, you can say, "You can use this land. We're going to put a concrete cap over it and a berm around it to make sure there's no groundwater pollution." It's perfectly fine to use this as a mechanic's shop or as a self-storage facility, but we want to make sure they're not going to build a day care center there or build a house and dig a well.

[Michael Kerr, continued.] Making those choices safer will mean the liability is not likely to pop up again. The more comfortable people are that these use restrictions—such as no day care centers or keeping the berm in place—are going to be respected over the long term, the more likely it is that they will take the step of doing the reasonable, risk-based cleanup they can do now, working with the agency and getting the property back into a saleable form they can be comfortable with. Making it clearer that use restrictions are going to be respected in the future will help folks feel comfortable with the transactions, rather than fearful of liability.

Assemblyman Hogan:
I gather that there's some experience to show that the fact of the covenant being there—going with the land, being fully visible and fully disclosed—effectively negates the risk to the purchaser of losing a subsequent lawsuit if one goes through this process and then conveys the not-quite-cleaned-up property to a purchaser.

Michael Kerr:
Yes, that's clearly true, since they have actual notice now, because it's part of the deed. But the act also has fairly extensive enforcement procedures. The owner who has that contingent liability, the state agency, or perhaps a local government has the ability to go in and enforce the covenant if they think someone is digging in the berms or is about to develop a day care center. It is not just notice; it is also enforcement. That's an important component of this act. It's not the whole world that can enforce this, but enough of the world that folks are going to feel comfortable that these things are going to be respected.

Assemblywoman Kirkpatrick:
I think these things are going to come before a redevelopment area. People will be trying to go back in and clean it up. There's a big difference between putting a day care center in an area zoned for extremely commercial use or for industrial use, so I'm not sure that's really a good example. Is that what you're talking about? The zoning doesn't ever change unless you come back before a public body to get that kind of change.

Michael Kerr:
Right. Page 5 of the bill, Section 16, deals with zoning. It doesn't authorize anything that's prohibited by zoning, and it says essentially that the covenant can make things more restrictive than what the zoning is. If the zoning says this is residential and the covenant says you can't have residential here, then the covenant is going to trump that. The covenant is always going to be able to be more restrictive than the surrounding zoning law.

Assemblywoman Kirkpatrick:
So, with that being said, usually there is a process where you go before not only a planning commission, but also a redevelopment agency and then some type of local government. Where would this covenant come in, and when would it be applied?

Michael Kerr:
When the parties—the agency, the holder, the owner—sign the covenants, it'll be recorded in the land records, and it will be effective as to those parties immediately. That will be based on contract and will be effective against any purchaser through the deed, the right of ownership.

Assemblywoman Kirkpatrick:
But when you're putting in your application to go in and redevelop this part, when would that information be available? The owner is not necessarily going to submit that information, and that could, in my opinion, be unenforceable if they're not going to bring it forward. You're saying it's a voluntary process.

Michael Kerr:
What I'm saying is that you can't force people to do the covenants, but once the covenant is in place, it is in place. It's a restriction on the ownership of the property. For example, we have a covenant on a gas station. They sell it to Joe, and Joe sells it to Steve. Steve takes that property, and his deed, his right of ownership of that property, says, "Thou shalt protect the berms. Thou shalt not dig a well, and by the way, you can't have a day care center here," or 15 other things more general or more specific. It's what the parties originally decided needed to be done for that property, based on its risk.

If Steve wants to submit this to a redevelopment agency that wasn't part of this process, he does not have the ownership right to say he's going to put a day care center there. The original parties, including the state agency, can say, in an enforcement action or otherwise, that he can't build a day care center there—regardless of what the redevelopment agency says—because they don't own that right anymore. The holder has that right. That's legally how it works, but that right to do that development of the day care center has been split off from the original deed and given to what is called the holder in the act. The future purchaser doesn't have it anymore, so ultimately, if he's going to the redevelopment agency and saying that he does, he won't be able to. I would assume that the redevelopment agency is going to be able to look at the public record, including the land records, to see that that restriction is there.

Assemblywoman Kirkpatrick:
A lot of times you're going to find this type of thing in an industrial corridor, a C2, a C3, or some heavy commercial thing. According to local government, they don't necessarily have to come back in before anybody to build that. They would just go up to the building department to see that they had met all the requirements.

Michael Kerr:
They would have to go back to the agency. If they were going to do something that wasn't allowed under the covenant—for example, build a structure or do something that is going to change the controls on the land, impact them negatively—they are going to have to go back to the original parties and seek a modification. There is going to be a check on that, but it's going to be based on the parties that originally signed the covenant. It's probably a good idea, if you've got a property that's in one of these redevelopment corridors, for the parties to include the redevelopment agency or whatever board they're going to have to go to for future modifications or development concerns as signatories of the covenant or, if not, at least include them in a notice. The act is flexible enough that the actions taken under it can be broader than the minimums that it describes.

That might be something that the agency, especially, might want to insist on as a condition of them signing off, if it's something specific and you can foresee that it might be an issue. But ultimately, if they're going to do something that's going to impair an activity and use restriction on the property, they need to go back to the original signatories. Otherwise, they're in violation of covenant and are subject to an enforcement action by the agency and the other parties.

Assemblywoman Kirkpatrick:
Because Nevada is such a transient state, is there a provision in here that tells you what to do if you can't get in touch with these people? Sometimes it's very hard to contact someone. I didn't see that in here.

Michael Kerr:
Section 20, page 6 of the bill requires all of the original signatories, unless they've waived it at the beginning of the process or if the court finds a person no longer exists or cannot be located with the exercise of reasonable diligence. If all the other parties that are still around think it's okay to make the change and one of the signatories doesn't exist anymore—they've gone bankrupt, or you can't find them through reasonable diligence—then you can do the change without them. However, you need to have someone overseeing that process, as opposed to just the parties deciding to do it.

Assemblyman Marvel:
How is this going to affect mines, particularly those that use cyanide?

Michael Kerr:
The covenants could be used productively in that situation. This act just creates a tool. It gives the parties and the state agency and others a tool they can use. Say you're going to close a mine, sell a mine, or do a cleanup project—probably under both federal and state supervision, in the case of cyanide—and you're going to encase a cyanide-laden spill zone in concrete to keep it from spreading, and then that's approved by the state or federal environmental agency as a partial cleanup. You're still not going to want people to develop that land into a subdivision and crack through that concrete casing. The act could provide a tool by which you can help prevent that by putting a restriction on the actual deed of that parcel.

The act does not say anything about how you clean up cyanide, what cleanup level is appropriate, or who's going to be liable for it. That was a fairly specific and smart political decision we made at the beginning of the project, because those things are going to vary from state to state, pollutant to pollutant, and party to party. However, it could be useful, especially if the owner of that mine wants to make sure there's no further spill and that, should something happen, whoever they went into receivership with or for isn't going to be facing liability later. It might just be a mine operator, with the blessing of the agency, to do protective things to the property and make sure they're enforceable long-term.

Assemblyman Goicoechea:
I just want to make sure that if we adopt the Uniform Environmental Covenants Act, the program is strictly voluntary. Is that correct?

Michael Kerr:
That is correct. Let me just give you one caveat: because the agency has a mandate under UECA, it has the ability to take cleanup enforcement action, at least with some, if not most, pollutants. It can say that in order to get your release of liability for further cleanup—with a no-further-action letter—you should really put in a berm. It can say that you should put in a berm and record it in the deed.

We think UECA is a good way to do that. It's voluntary. A lot of the people using UECA will be landowners who are not under current sanction or in a fight with an agency, but who just want to get rid of the property. Sometimes the agency is going to want to use this as part of their cleanup requirements when they do an enforcement action. It's voluntary; they can't just direct parties to

sign these, but the agency will have some leverage in those kinds of situations. I don't want to give you the wrong idea.

Assemblyman Goicoechea:
That leverage is what concerns me. There's a big difference between voluntary and being leveraged into something.

Michael Kerr:
Yes, but remember, they have all the leverage in the world because they're doing a cleanup action already. They're setting the cleanup levels, how much it's going to cost, and all sorts of things like that. I don't think this actually gives them that much more leverage than they already have in these situations.

Renny Ashleman, Legislative Advocate, representing the City of Henderson, Nevada:
Our planning people and legal people think this would be a very useful tool in dealing with some problems we have in the city that we could address now. For example, we have a contaminated, previously industrial area. Absent this tool, it is likely we would simply say nothing could be done with the property. With this tool, it might be possible for us to allow industrial development of a certain kind in there as long as the parties entered into one of these covenants and promised it would never become residential and there were limits on how it could expand. It gives us more ways to address these possibilities.

In general, it is probably going to be favorable for developers, landowners, and so on as much as it is for the municipalities that are involved in it. One of the nice things about the enforcement is that both the agencies that have entered into it, which may or may not be the City of Henderson in a given case, and the municipality or other local government, such as a county, become parties to an enforcement action. They can undertake enforcement, whether they were part of the covenant or not, and I think that's very useful from that viewpoint.

Assemblyman Marvel:
You're talking about PEPCON [Pacific Engineering Production Company of Nevada]. Is that the area?

Renny Ashleman:
I'm talking about similar areas—not necessarily just PEPCON—but yes, there are areas like that.

Assemblyman Hogan:
I wonder if you could again touch on how a local government entity could become a party to an enforcement action when it was not a party before in connection with this.

Renny Ashleman:
On page 7, Section 21 of the bill, the point is that these covenants can be enforced by a party to the covenant, the agency—which is a word of art—that entered into the covenant with the individual, any person that the covenant gives power to enforce, any person whose interest in the real property or whose collateral liability may be affected by the violation, or a municipality or other unit of local government in which the real property subject to the covenant is located. That was the thrust of my remarks.

Barry Duncan, Government Relations Manager, Southern Nevada Home Builders Association, Las Vegas, Nevada:
We are in full support of this bill for many of the reasons that were just cited by the able counsel and my distinguished colleague. We can protect public health and safety forever, reuse land throughout the state—whether it is a factory of some type or a former processing facility of some type—and utilize that land for maybe a somewhat similar purpose with the appropriate remediation. We think that it protects the public health, and you get a double bonus by being able to put some land back into circulation that would otherwise never be developed and is really nothing more than an eyesore to the community, whether that be in Elko, Clark County, Washoe County, or what have you.

Leo Drozdoff, Administrator, Division of Environmental Protection, Nevada Department of Conservation and Natural Resources:
I have some brief, prepared remarks that I will read into the record, and then I'll try to answer Assemblyman Marvel's question. [Read from prepared testimony.]

> Senate Bill 263 provides a standard legal framework for property owners to agree to environmental covenants or deed restrictions when appropriate and when it encourages the development of previously contaminated properties, while ensuring safe future uses. In our experience, deed restrictions or environmental covenants are typically requested by the responsible party, such as the landowner, as part of an environmental cleanup. This type of institutional control may be used when cleanup of environmental contamination beyond a certain point is either technologically or economically unfeasible. The Division would not anticipate unilaterally imposing any such instrument on a responsible party.

> The Division has worked with Senator Care and the Senate Natural Resources Committee on the amended version you have before you today. The Division is in full support of S.B. 263, and we appreciate Senator Care's work on the bill.

[Leo Drozdoff, continued.] In regard to Assemblyman Marvel's question on whether this would be a relevant document or would affect Nevada's mines, I would say probably not. Nevada's mines are regulated heavily, not just by us, but by other State and federal agencies. In regard to cyanide, the process we have is the facility's bond for closure. At last count that bonding amount is somewhere upwards of $700 million. The impetus to properly close and reclaim mines is to get that bond money back.

On an old, historic mine that predates our regulations, you never say never. Perhaps there would be an opportunity on those, but I don't envision that we would be using it on any active mine that is regulated in our system today. I think we'd use it more in the environments that Senator Care talked about, such as an orphan gas station or something like that.

Kaitlin Backlund, Political Director, Nevada Conservation League:
We'd like to go on record in support of S.B. 263. We do have some concerns about enforcement, which you'll hear about, but we are still in support of the bill.

Joe Johnson, Legislative Advocate, representing the Toiyabe Chapter of the Sierra Club:
We have a neutral position on this bill, neither in support nor in opposition. Assemblywoman Kirkpatrick mentioned one of the drawbacks of the bill. There are also some very strong recommendations for the bill. One of the areas we particularly maintain a neutral position on is that of enforcement, especially on some of the smaller parcels. Where you have a large industrial site with active involvement in development and renewable projects, you have much better control.

But where you have an isolated site—it just makes me cringe when you mention drilling water wells; we don't allow water wells in most of our municipalities—the agency that approves those is, as Mrs. Kirkpatrick mentioned, the building department. When you have appropriate zoning, you simply go in and pull your building permit, or you go to the folks who regulate well drilling and pull your permit to drill a well. They haven't received a notice of this covenant, and they normally do not check in the historic land record before they do anything. This is an area of concern. We're not asking that you do anything in this bill, but it should simply be noted in record that these can be problematic.

Assemblyman Hogan:
You have given this some thought and developed a concern about that aspect of enforcement. Do you see any way that this bill could be tinkered with to better address that, or should we leave that for another day?

Joe Johnson:
I really do not. I'm a registered geologist in the state of California and have operated in site assessments and remedial action, and I have familiarity with these types of things. They seem to be in areas where we already prevent those domestic wells. I think the risk is fairly minimal, because the major industrial sites where this would be used would receive the enforcement and the concern to enforce on a larger scale. We're looking at fairly minimal risk in this process.

Assemblyman Marvel:
I heard Michael earlier say the Sierra Club did endorse this in other states. Is that right? [Mr. Johnson replied in the affirmative.] Then why aren't you endorsing it in this state?

Joe Johnson:
I represent the Toiyabe Chapter of the Sierra Club. They pay my bills and pay me to attend here. There are also the Nebraska Chapter and the National Association. The National actually has a fairly restrictive policy on accepting covenants. We are allowed to deviate from that in certain cases and in practical matters. The Toiyabe Chapter of the Sierra Club's official position is neutral on this bill.

Assemblyman Marvel:
The National Association hasn't taken action on it, then?

Joe Johnson:
The National has not reviewed this bill or the particular covenants, and to my knowledge, they do have a national policy that is fairly restrictive. If I were to read the national policy in a strict interpretation, I might have a different position here.

Chairman Claborn:
I'll close the hearing on S.B. 263 and open the hearing on S.B. 26.

Senate Bill 26 (1st Reprint): Revises provisions governing distribution of money in Pollution Control Account to local governmental agencies. (BDR 40-397)

Dennis Colling, Chief, Administrative Services Division, Nevada Department of Motor Vehicles (DMV):
Essentially, S.B. 26 has two purposes. The first, the fiscal purpose, is to modify, change, increase, and carry forward operating expenses from $500,000 to $1 million in Budget Account 4722. Some of the members of this Committee are members of our Budget Subcommittee and heard testimony about that this morning.

The second portion of the bill is an attempt to ease the method by which the two large counties, Washoe and Clark, receive the dedicated funds for emission control off of the emission certificates. As you're all aware, Washoe and Clark Counties each get $1 in dedicated funds for each certificate sold in that county. We're trying to make it easier to distribute those funds. Basically, we'd like to distribute those funds in a way similar to what we do with the Government Services Tax, which we also collect on behalf of counties, cities, and school districts.

The Legislature has the ability to and does approve the dollar amount of the distribution through its action in the budgets. Then, under the current process, the counties have to petition us, and we go back through the IFC [Interim Finance Committee] process to reapprove what has already been approved once. We're really asking for authority to distribute this money to the counties as we collect it on a quarterly basis, since they have already been approved.

I would state that, should the approved amount not be generated by the sale of certificates, we would, of course, not distribute what we didn't collect. If there were more funds collected—there were more certificates sold—then, of course, we would have to go back to IFC and get approval to distribute additional funds, depending on the dollar amount.

Chairman Claborn:
Are there any additional fees or monies that you've already appropriated from the fiscal year? Is that the money you're talking about distributing, or are you talking about new fees?

Dennis Colling:
No, these are not new fees. This is the $1 associated with the emissions certificate. When you go in and get your car smog checked and pay for that smog check, $1 of that goes to Clark County if you do it in Clark County or to Washoe County if you get it done in Washoe County.

Assemblyman Marvel:
How much money do you have in the account now?

Dennis Colling:
We have sufficient funds to go through the subsequent biennium. I know that.

Assemblyman Marvel:
Is it sent to Lake Tahoe?

Dennis Colling:
Whatever the Legislature approves.

Assemblyman Goicoechea:
The $25 licensing per inspection site goes to the DMV, correct? Of course, none of that is disbursed back. Also—this is old language in the bill—a set of 25 forms certifying emission controls—does the DMV get $150 for those?

Dennis Colling:
We collect $6 for each of the forms. One dollar of that $6 is the dedicated portion that we're talking about in this bill to allow us to do distribution of this.

Assemblyman Goicoechea:
I'm wondering where the other $175 goes. The $25 for the licensing of the station, as well as, I'm assuming, $150 for the 25-form certifying. Is that correct? Are we looking at $5 a form there?

Troy Dillard, Administrator, Compliance Enforcement Division, Nevada Department of Motor Vehicles:
The $25 you're looking at is the licensing fee that the station pays on an annual basis. The forms—there are 25 forms in a booklet that are sold—are $6 a form and are sold in bunches of 150, so $150 is what that goes to. Those are prepaid. The stations then sell them. Of that, $1 is associated with the county that test occurs in. That's the funding we're talking about trying to alleviate the duplicative process that exists in the statute today.

Assemblywoman Kirkpatrick:
I'm just curious as to why, in subsection 6, line 24, we're raising the amount that can be held in excess. Are you guys taking in more than you thought?

Dennis Colling:
This is a fee-funded budget. Theoretically, a budget like this starts with zero. We have operating costs that occur immediately, such as salaries, et cetera. We have gone through and looked at our costs for the Department, NDEP [Nevada

Division of Environmental Protection], and other people who receive funding through this budget, and it runs about $625,000 a month. A rule of thumb is that you should have about one quarter's carry-forward so you can have operating funds sufficient to operate until the funds start to come in.

[Dennis Colling, continued.] With a $500,000 carry-forward, after three weeks of operation, we're basically out of money, so we've asked to increase it to $1 million, knowing that the State likes to operate on a nice, tight string. We do not ask for a full quarter's funding, but we do ask for $1 million. We feel that would be sufficient with proper cash handling and cash watching.

Chairman Claborn:
Is there anyone else who would like to speak on S.B. 26? We'll close the hearing on S.B. 26. Is there any old business? Hearing none, we are adjourned [at 2:45 p.m.].

RESPECTFULLY SUBMITTED:

Sarah Gibson
Committee Attaché

Mary Garcia
Transcribing Attaché

APPROVED BY:

Assemblyman Jerry D. Claborn, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Natural Resources, Agriculture, and Mining

Date: May 4, 2005 **Time of Meeting: 1:40 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
SB 263	B	Michael Kerr / NCCUSL	Information packet containing letters, booklet, et cetera