

UNIFORM TRANSBOUNDARY POLLUTION
RECIPROCAL ACCESS ACT

SECTION 1. *Definitions*

As used in this [Act]:

(1) "Reciprocating jurisdiction" means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States of America, or a province or territory of Canada, which has enacted this [Act] or provides substantially equivalent access to its courts and administrative agencies.

(2) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government in its private or public capacity, governmental subdivision or agency, or any other legal entity.

COMMENT

The definition of "jurisdiction" performs a number of functions. It enables the Act to be applied in interstate and inter-provincial pollution actions, in addition to actions involving pollution spanning the U.S./Canada International boundary. The Act does not apply to U.S./Mexico transboundary pollution or to pollution from any other nation.

The reciprocal aspect of the Act is achieved by Section 1(1) providing that both the "polluting" and "polluted" jurisdictions must have "enacted this Act" or "provide substantially equivalent access to the courts and administrative agencies." The requirement of reciprocity applies to access only. This threshold test is applied by the courts in the U.S. on a case by case basis, it being regarded as a question of fact whether a particular jurisdiction is a reciprocating jurisdiction. In Canada, by contrast, it is usual for reciprocity to be formally recognized through provincial governments designating by regulation lists of reciprocating states, where they are satisfied that reciprocity exists. Section 7(b) is designed to permit this procedure to be followed. For jurisdictions, such as Minnesota by judicial decision and New York by statute, that already provide access to their courts for non-resident pollution victims by abandoning the rule of *Livingston v. Jefferson*, the words "provide substantially equivalent access" ensure that these jurisdictions will be recognized as reciprocating jurisdictions without the need to enact formally the Act. Finally, it should be noted that Section 1(1) concludes with the words "access to

the courts and administrative agencies," a specific reference to the fact that it is contemplated that the Act will also apply to proceedings before tribunals.

The definition of "person" derives from standard wording used in many uniform acts adopted by the National Conference of Commissioners on Uniform State Laws. It is designed to include all natural and legal persons within the ambit of the Act. In addition, if the Attorney General, or another public official of the state or province where the injury occurred, is able to bring action with respect to environmental injury, then the Attorney General of another state harmed by the "originating state's" pollution should also be able to bring an action in the "originating state."

SECTION 2. *Forum.*

An action or other proceeding for injury or threatened injury to property or person in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction may be brought in this jurisdiction.

COMMENT

Together with Section 3, this section forms the main operative provision of the statute. Section 2 provides access to the courts in one jurisdiction for pollution victims in another jurisdiction. A question may arise whether the pollution originated in a particular jurisdiction, and this is a question of fact which the courts must decide. It should be noted that the statute is not restricted in its scope to civil trials; it also extends to other proceedings before tribunals concerning environmental injury or threatened injury.

As used in this Act "injury" includes wrongful death and "property" includes both real and personal property.

It has been suggested that enactment of this proposed statute would cause a rush of litigants from out of state to the state where the alleged pollution originated or where it may originate. So far as is known states with very extensive long-arm statutes have not experienced this rush of litigation, and this suggests that it would not happen if a new, and less convenient forum was made available to them.

SECTION 3. *Right to Relief.*

A person who suffers or is threatened with injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief

with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction, as if the injury or threatened injury occurred in this jurisdiction.

COMMENT

This section equates the rights of an extra-jurisdictional pollution victim to those of a victim who is a resident of the jurisdiction. It is designed to ensure that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the jurisdiction where the pollution originated, if a victim residing in that jurisdiction would have had a remedy for injury or threatened injury in the case of pollution caused locally. Whether or not particular pollution did originate in a jurisdiction is a question of fact for the court to decide.

SECTION 4. *Applicable Law.*

The law to be applied in an action or other proceeding brought pursuant to this [Act] including what constitutes "pollution", is the law of this jurisdiction excluding choice of law rules.

COMMENT

This section provides that the law of this jurisdiction will apply in actions brought under the Act. In the United States this includes federal, state and local law where applicable. The applicable law is defined to exclude choice of law rules so as to avoid the whole problem or *renvoi*. While the committee initially considered drafting a definition of "pollution" for inclusion in this Act, it was decided that it would be exceptionally difficult to draft such a definition without it degenerating into an unmanageable "shopping list" and difficult to harmonize such a list in practice with the definitions provided in the substantive law of a particular jurisdiction. Jurisdictions differ markedly in their treatment of matters such as smells, radiation, vibration, and visual pollution. To avoid difficulties in interpretation, it was decided that what constitutes pollution would be decided by reference to the law of an enacting jurisdiction; such a definition might encompass both statutory definitions as well as any applicable judicial decisions under the common law. It is contemplated that it would include but not be limited to discharges and emissions into land, air or water.

SECTION 5. *Equality of Rights.*

This [Act] does not accord a person injured or threatened with injury in another jurisdiction any rights superior to those that the person would have if injured or threatened with injury in this jurisdiction.

COMMENT

See Comment following section 6.

SECTION 6. *Right Additional to Those Now Existing.*

The right provided in this [Act] is in addition to and not in derogation of any other rights.

COMMENT

These two sections clarify that the Act is designed to put non-residents on the same footing as residents with respect to access to courts and tribunals in claims involving transboundary pollution. The rights of non-residents under this Act will be no higher than those of residents, and they must accept any procedural or substantive limitations that may happen to exist under the applicable law of the originating jurisdiction. Section 6 ensures that the right of access provided by the Act is supplementary and is not intended in any way to diminish existing rights under the laws of this jurisdiction, which may be enforced independently of this Act.

ALTERNATIVE FOR THE U.S.A.

[SECTION 7. *Waiver of Sovereign Immunity.*

The defense of sovereign immunity is applicable in any action or other proceeding brought pursuant to this [Act] only to the extent that it would apply to a person injured or threatened with injury in this jurisdiction.]

ALTERNATIVE FOR CANADA

[SECTION 7(a). *[Act] Binds Crown.*

This [Act] binds the Crown in right of (Province or Territory) only to the extent that the Crown would be bound if the person were injured or threatened with injury in this jurisdiction.]

SECTION 7(b) FOR CANADA ONLY

[Section 7(b). *Regulations.*

Notwithstanding section 1(a), the Lieutenant Governor in Council may by regulation declare a jurisdiction to be a reciprocating jurisdiction for the purposes of this Act.

COMMENT

The two alternative drafts, the one applicable in Canada, and the other in the United States, are provided to deal with the question of

sovereign or crown immunity, and to ensure that extra-jurisdictional actions will be treated under the doctrines in the same way as actions brought by residents.

Section 7(b) establishes a procedure for Canadian provinces and territories to develop and maintain an authoritative list of reciprocating jurisdictions. In developing such a list, regard might be had to this lists of enacting jurisdictions contained in the Annual Handbook of the National Conference of Commissioners on Uniform State Laws.

SECTION 8. *Uniformity of Application and Construction.*

This [Act] shall be applied and construed to carry out its general purpose to make uniform the law with respect to the subject of this [Act] among jurisdictions enacting it.

SECTION 9. *Title.*

This [Act] may be cited as the Uniform Transboundary Pollution Reciprocal Access Act.

SECTION 10. *Time of Taking Effect.*

This [Act] takes effect on _____.

COMMENT

[To be included in the Canadian version only.]

NOTE: This Act is the cooperative effort of the National Conference of commissioners on Uniform Law Conference of Canada. Sections containing equivalents of sections 8, 9 and 10 are included in the Uniform or Model Acts of the National Conference in the United States by reason of Rule 22 of its Drafting Rules. Each jurisdiction will want to examine these sections for enactment in the light of its own requirements and the drafting conventions of the Canadian Conference.

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