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Impending Deadline Under Pa. Uniform Environmental Covenants Act

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Special to the Legal

On December 18, 2007, then-Governor Ed Rendell signed into law the Pennsylvania Uniform Environmental Covenants Act (UECA), which became effective on February 18, 2008. In addition, regulations implementing UECA were promulgated on November 20, 2010. Pursuant to UECA and its implementing regulations, all environmental cleanups conducted after February 18, 2008, that rely on the use of activity and use limitations (AULs) to meet a remediation standard under Pennsylvania's Land Recycling and Environmental Remediation Standards Act (commonly referred to as Act 2) or Pennsylvania's Storage Tank and Spill Prevention Act (Tank Act) must be recorded in the form of an environmental covenant that complies with the requirements of UECA. Examples of AULs that are commonly used in connection with environmental cleanups include deed restrictions requiring the maintenance of a cap at a site to prevent exposure to residual contamination present in soils, or prohibitions on the use of contaminated groundwater. UECA also created a requirement that certain existing AULs be converted to a UECA-compliant environmental covenant by February 18, 2013 — a deadline that is quickly approaching.



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Prior to the adoption of UECA, parties developed their own forms of instruments to reflect AULs utilized for site remediations, and often such instruments varied dramatically from site to site. Given the variability of such instruments, and the sometimes arcane nature of real property law, concerns were raised as to whether certain AULs would survive in perpetuity or were even enforceable by interested parties or the Pennsylvania Department of Environmental Protection (PADEP). This uncertainty as to validity and enforcement, combined with the increased importance of AULs in conducting risk-based site

cleanups, led to a national effort to create standardized documentation for AULs, and Pennsylvania's UECA statute was largely based on a model statute that was developed from this national effort.

Pursuant to UECA and its regulations, any AULs utilized by a party performing a cleanup at a site intended to meet a remediation standard under Act 2 or the Tank Act must be in the form of an environmental covenant that complies with UECA. In addition, UECA requires that PADEP (or another agency, such as the U.S. Environmental Protection Agency) to sign the covenant, and as such, the proposed form of covenant must first be approved and executed by PADEP (or the other agency) prior to recordation. UECA also requires that all covenants be maintained in a public registry, searchable online by the public.

UECA also imposed requirements on AULs created prior to the enactment of the statute. Specifically, pursuant to Section 6517(b) of UECA, any instrument created prior to February 18, 2008, that established AULs to comply with a remediation standard under Act 2 or the Tank Act must be converted into a UECA-compliant environmental covenant by February 18, 2013 unless this conversion requirement is otherwise waived in writing by PADEP. Under the UECA regulations, PADEP must waive this conversion requirement until the time of a property transfer, if the

current property owner requests such a waiver in writing prior to February 18, 2013 and provides PADEP with proof of recordation of the original instrument. If no waiver is obtained from PADEP prior to February 18, 2013 the owner of the property would still be subject to the February 18, 2013 conversion deadline. Given that PADEP's approval and execution of a proposed UECA covenant (along with the time to record the covenant) can take a couple of months, most property owners subject

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to the conversion requirement should strongly consider pursuing a waiver from PADEP at this time.

Although UECA does not specify penalties for failure to comply with its instrument conversion requirements, PADEP could issue an order to a non-compliant party, and that party's failure to comply with a PADEP order would subject the party to civil penalties and other enforcement action. Regardless of any enforcement action from PADEP, failure to convert an instrument in accordance with UECA would constitute noncompliance with legal requirements, and could therefore impact the accuracy of a party's representations, warranties or covenants contained in existing or prospective loan or other transactional agreements.

At present, many property owners are unaware of the impending UECA conversion deadline and/or the fact they may have recorded instruments that must now be converted. For those owners who are aware of the deadline, it may

nonetheless be impractical or impossible to satisfy the conversion requirements. For example, if a beneficiary of an already-recorded instrument is no longer in existence, or is non-cooperative in modifying the instrument to be in a UECA compliant form, it may be difficult, if not impossible, to convert such an instrument. While PADEP has the statutory authority to waive the conversion requests entirely pursuant to Section 6517(b)(1) of UECA, it is unclear when PADEP would be willing to exercise this authority. Further, PADEP's willingness to consider such an outright waiver may be negatively impacted if PADEP is not contacted at all prior to the February 18, 2013 conversion deadline.

Given the looming deadline, now is the time to carefully assess the impact of the UECA conversion requirements to all properties impacted by AULs. •