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PA's Uniform Environmental Covenants Act Starts Slow, Raises Questions

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Approximately two months ago, the Uniform Environmental Covenants Act (UECA) took effect in Pennsylvania. The UECA imposes various new substantive and procedural requirements on the creation and recordation of instruments documenting engineering and institutional controls that are used in cleanups of contaminated property. In the past couple of months, numerous questions relating to the UECA's implementation have arisen.

Also during this time period, the Pennsylvania Department of Environmental Protection (DEP) has promulgated a model covenant, as well as a guidance document providing answers to frequently asked questions relating to the UECA. This article examines these recent developments in the context of the legislative history that led to the UECA and summarizes the impact of the UECA on owners and developers of contaminated property.

By way of background, the UECA is part of a national effort to create a standardized approach to creating and documenting activity and use limitations imposed on contaminated sites. As such, the UECA imposes new recording requirements where engineering or institutional controls are currently or will be used to demonstrate compliance with state laws, including Pennsylvania's Land Recycling Act (Act 2) and Storage Tank and Spill Prevention Act (the Tank Act). The need for the UECA stems in part from a growing use of these activity and



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use limitations in cleanups across the nation and the varied way in which they were being documented.

More specifically, many states now have brownfields statutes like Act 2 that allow risk-based cleanups. Instead of remediating a site to meet the regulatory standards that have been established by law, in a risk-based cleanup a certain amount of contamination is left in place because site-specific factors establish a low risk to the public and environment from the residual contamination. Such a site-specific cleanup allows for an economically feasible cleanup so that a contaminated site can be returned to productive use -- a key goal of brownfields legislation. One way to establish the justification for such a site-specific standard is by enacting an activity and use limitation like a cap or prohibition against using

groundwater on or around a site. Because these activity and use limitations were being documented in a variety of ways, pressure arose to develop a standardized approach to this important tool for brownfields redevelopment.

One of the goals of the UECA is to ensure that the covenants created as part of the cleanup are not voided under various common law property doctrines. Certain common law doctrines favored treating a covenant, including those imposing activity and use limitations, as a personal contract between the owner and agency. Pursuant to basic principles of contract law, concerns arose that a future owner of the property who was not a party to that contract could not be bound to it. Accordingly, to the extent that a future owner abandoned any engineering or institutional control imposed as part of the cleanup, the effectiveness of that cleanup would be compromised and the liability protection afforded thereby would lapse. As a result, Section 6505 of the UECA specifies that covenants that comply with the UECA will constitute a servitude, meaning that they will "run with the land" and be binding upon all future owners, thereby ensuring the integrity of the cleanup as well as the liability protection afforded to prior and current owners of the property.

While the UECA does not directly change the type or extent of cleanup required on a site, it does impose requirements on the substance, review, approval, recording and modification of environmental covenants resulting from that cleanup. More specifically, a UECA-compliant environmental covenant must now be used whenever an activity and use

limitation is being used to demonstrate compliance with Act 2 or the Tank Act. Further, Act 2 standards are also used in cleanups undertaken pursuant to the Clean Streams Law, Hazardous Sites Cleanup Act and Solid Waste Management Act, so the UECA will apply to cleanups under these statutes as well. It is also important to note that the UECA is retroactive. More specifically, unless waived by the DEP, every existing instrument that currently imposes an activity and use limitation to demonstrate attainment of an Act 2 or Tank Act remediation standard must be converted to a UECA-compliant environmental covenant within five years.

The model UECA covenant the DEP recently developed specifies that an environmental covenant must abide by the following:

- State that it is a covenant executed under the UECA;
- Contain a “legally sufficient” description of the real property that is the subject of the covenant, basically meaning that it must contain a description sufficient for a deed, but note that this does not necessarily have to be the entire parcel owned if only part of the parcel is subject to the covenant;
- Describe the pertinent contamination and remedy;
- Describe the activity and use limitation being imposed;
- Identify and be executed by certain parties, including the agency overseeing the cleanup, every grantee (also referred to in the UECA as a “holder,” which can include property owners and agencies) of the covenant and every fee simple owner of the property subject to the covenant; and
- Identify any administrative record for the environmental response project that gives rise to the covenant.

As mentioned above, a UECA-compliant covenant must be signed by the DEP, which will accordingly review and approve the covenant prior to signing it. Further, the UECA specifically gives the DEP the authority to impose conditions on approval. For example, it can require anyone with an “interest” in the real property to sign the covenant. The DEP can also require the subordination of prior interests because without subordination, the UECA follows the traditional rule for property interests of “first in time, first in right”

meaning the first recorded interest has priority over subsequent recordings. Thus, foreclosing a prior interest would eliminate a subsequently recorded covenant.

The UECA, however, does not require the holder of that prior interest to subordinate to the environmental covenant, and it is worth noting that this could present problems where the holder of a prior interest will not agree to subordinate that interest to the covenant. The environmental covenant must then be recorded in the county in which the property is located, and copies of the recorded document must be provided to certain parties and governmental entities. Subsequent modifications or terminations of the covenant must also be recorded.

It should come as no surprise that the model covenant contains all of the required information outlined above. However, it also requires that certain other information be provided and also conveys other rights that are set forth in the UECA. Specifically, the model covenant includes a provision whereby any future conveyance of any interest in the property subject to the covenant must contain a notice of the activity and use limitations established in the covenant.

In addition, the model covenant imposes a compliance-reporting requirement whereby the owner of the property subject to the covenant will periodically be required to send a confirmation in writing to the DEP and each holder of the covenant that the activity and use limitations are still in place. Notably, the model covenant also grants the DEP a right of access to the property subject to the covenant “in connection with implementation or enforcement” of that covenant. Finally, while the UECA contained requirements that the environmental covenant must be recorded and copies provided to certain interested parties, the model covenant imposes a 60-day time limit for doing so.

Following the enactment of the UECA and the DEP’s development of the model covenant, numerous questions began to arise concerning the UECA and the DEP’s plans to implement it. In response, the DEP has developed a guidance document responding to frequently asked questions. A few of the responses provided in the FAQ document are worth dis-

cussing.

First, the UECA allows the DEP to waive certain requirements, such as the need to update an existing covenant to comply with the UECA or the need to obtain signatures from certain parties. Pursuant to the FAQ document, any request for a waiver under the UECA must be made in writing and the DEP will issue a written approval or denial including the bases for its decision. The FAQ document also clarifies that any remediation to a nonresidential statewide health standard, despite being a regulatory standard established by law, will require a UECA-compliant covenant. The DEP states in the FAQ document that such a cleanup requires the maintenance of a nonresidential use on the subject property, and this restriction on future use constitutes an activity and use limitation triggering the UECA. The DEP further states that “as a general rule,” it will not waive this requirement.

On a related note, while existing instruments imposing activity and use limitations must be updated within five years pursuant to the UECA unless waived by the DEP, the FAQ document states that the DEP “has not yet developed final guidance relating to the conversion of existing instruments.” Owners of properties remediated pursuant to Act 2 prior to the enactment of the UECA are therefore at somewhat of a standstill on how to comply with the UECA.

Finally, it is worth noting the FAQ document’s discussion of cleanups that rely on a nonuse aquifer determination. Under Act 2, a nonuse aquifer determination allows for a less stringent or site-specific cleanup standard because the groundwater under the property is not used or planned to be used, thereby establishing a lower risk of exposure to contamination. In lieu of executing an environmental covenant for the site and any adjacent properties with impacted groundwater, the FAQ document clarifies that a municipal ordinance banning the use of groundwater can be used in certain circumstances without the need for an environmental covenant. In the alternative, a postremediation care plan that includes a requirement to perform periodic monitoring and reporting on the continued nonuse of the aquifer can also be used in lieu of an envi-

ronmental covenant.

In conclusion, the UECA continues to prompt questions from the regulated community. While the recent releases of

the model covenant and FAQ documents have provided some useful guidance, other questions continue to linger. In particular, questions relating to the scope of

the existing instruments that the DEP will seek to have converted to UECA-complaint covenants will likely persist until further guidance is issued. •