

Notice of Final Rulemaking

Department of Environmental Protection

Environmental Quality Board

25 Pa.Code Chapter 253

Administration of the Uniform Environmental Covenants Act

Order

The Environmental Quality Board (Board) by this order creates *25 Pa. Code*, Chapter 253 (relating to Administration of the Uniform Environmental Covenants Act). The final regulations address ambiguities in the Uniform Environmental Covenants Act and establish procedural interfaces with other statutes.

This order was adopted by the Board at its meeting of _____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Troy Conrad, Director, Land Recycling Program, P.O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105-8471, (717) 783-7816; or Kurt Klappowski, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17 105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654- 5988 (voice users). This proposal is available electronically through the Department's website (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The final-form rulemaking is being made under the authority of section 6515 of the Uniform Environmental Covenants Act (UECA) (27 Pa.C.S. § 6515), which grants the Board the power and the duty to promulgate regulations for the proper performance of the work of the Department under UECA; and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that are necessary for the proper work of the Department. Section 6515 of UECA also explicitly grants the Board the power to develop fees by regulation for environmental covenants.

D. Background and Purpose

The UECA was signed into law in Pennsylvania on December 18, 2007. The statute was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under the Land Recycling and Environmental Remediation Standards Act (Act 2) or the Storage Tank and Spill Prevention Act

(Tank Act). These limitations are restrictions on the use of the remediated property (“institutional controls”) or the maintenance of a “structure” needed to control the movement of regulated substances through the environment (“engineering controls”). The environmental covenant is a property interest with a holder and is capable of being transferred and may be enforced by multiple parties, including the Department. Finally, the environmental covenant is recorded with the County Recorder of Deeds where the property is located, giving future landowners and developers notice of the activity and use limitations. Once the Department develops a formal Registry containing all covenants, as required by section 6512 of UECA, only a simple Notice will need to be recorded with the County Recorder of Deeds where the property is located.

Although UECA does contain relatively detailed procedural requirements, the Department determined that regulations under UECA would be necessary to address ambiguities in the statute and to establish procedural interfaces with the Tank Act and Act 2. Collection of the fee will support the Department’s review of environmental covenants and the development and maintenance of the electronic Registry of environmental covenants that section 6512 of UECA requires the Department to develop and maintain.

The statute does not require review of proposed regulations under the statute by any particular advisory committee. However, the Department has had discussions with several outside groups concerning the proposed rulemaking. The Department presented the proposed rulemaking to the Cleanup Standards Scientific Advisory Board (CSSAB). The proposal was discussed and supported at the CSSAB board meeting held on September 1, 2009; no formal motion supporting the proposed rulemaking was considered due to a lack of a quorum at the meeting. The proposed rulemaking was also discussed with the Storage Tank Advisory Committee (STAC) on September 8, 2009. The STAC did not take any formal action on the proposed rulemaking at that meeting.

The proposed rulemaking was published in the *Pennsylvania Bulletin* on March 6, 2010, with a 30-day public comment period. 40 Pa.B. 1379. The Board received 66 comments from 11 commentators, including the Independent Regulatory Review Commission. The Department presented the draft final-form rulemaking to the STAC on June 8, 2010, in substantially the same form as published today. The STAC approved a motion to recommend approval of the final-form rulemaking by the Board. The Department also presented the draft final-form rulemaking to the CSSAB on June 15, 2010. The CSSAB was supportive of the draft final-form rulemaking but did not take formal action on the rulemaking, pending resolution of several issues. The Department had further discussions with the CSSAB on June 28, 2010 resulting in the final-form rulemaking published today.

E. Summary of Comments and Responses on the Proposed Rulemaking and Changes to the Proposed Rulemaking

As noted, the final-form rulemaking is intended to supplement UECA and tie the statute together with Pennsylvania’s existing risk-based corrective action programs. The Department developed the final-form rulemaking to provide the regulated community and program staff a straightforward step-by-step outline of when environmental covenants are required to be used, how they are created, what they must contain and when they must be submitted to the Department. While there is some overlap with UECA when necessary, the Department did not include those portions of UECA that were clear in the statute and did not pertain to the process for creating and implementing an environmental covenant. Such items include enforcement of the environmental covenant and the various parts of UECA outlining the legal effect of creating an environmental covenant.

The contents of the final-form rulemaking are discussed below, with special attention to those provisions that were amended between the proposed rulemaking and final-form rulemaking.

§ 253.1. Definitions.

This is the definitions section of the final-form rulemaking. For ease of understanding, the definitions from UECA are included in this section. Several definitions not in UECA are included in the proposed rulemaking, including *Final Report*, *Instrument*, *Political Subdivision*, *Remedial Action Completion Report*, *Storage Tank Act* and *UECA*. Several of these definitions were amended in minor ways in response to comments.

Several definitions were added to the final-form rulemaking at the suggestion of commentators. These definitions include *Board*, *Department*, *Eminent Domain Proceeding*, *EQB* and *Regulated Substance*.

§ 253.2. Contents and Form of Environmental Covenant.

This section describes what must be included in an environmental covenant and what may be included as appropriate; it follows section 6504 of UECA. Subsection (c) affirms that the Department may require the permitted information from subsection (b) or other conditions appropriate to the remediation. Subsection (e) makes it clear that the Department's model covenant may be used, although the Department will accept alternative language in the appropriate case. The model covenant is an evolving document drafted with a significant amount of input from the regulated community. Finally, subsection (f) allows for the special situation where an environmental covenant covers commonly owned property in a common interest community.

Most of the changes to this section of the final-form rulemaking were minor points of clarification or consolidation. For example, subsection (d) of the proposed rulemaking addressed limitations on the Department's ability to require conditions for approval; that subsection was deleted and the substance of the subsection added to subsection (c)(1) of the final-form rulemaking. In addition, the final-form rulemaking contains language (paragraph (c)(6)) tracking the language in UECA making the Department's decision to approve or disapprove an environmental covenant appealable to the Environmental Hearing Board.

The final-form rulemaking does contain a new paragraph (8) in subsection (a). This paragraph will be a mandatory component of all environmental covenants. The paragraph addresses concerns expressed by the Pennsylvania Department of Transportation concerning termination of environmental covenants where property is taken for use as a highway right-of-way in an eminent domain proceeding.

§ 253.3. Notice of Environmental Covenant.

This section describes who is to receive notice of the environmental covenant and when; it tracks section 6507 of UECA. Subsection (c) allows for waivers of required notice and establishes a procedure for persons interested in receiving such a waiver.

Several changes were made to this section in the final-form rulemaking to address comments. First, the time for provision of file-stamped copies of the covenant to parties is extended to 90 days from filing (an increase from 60 days), and language allowing the Department to extend that timeframe was added. Second, a new paragraph (a)(4) was added to allow the board of a common interest community to receive the required copy on behalf of the community. Sites cleaned up to the

non-residential Statewide health standard and requiring an activity and use limitation to demonstrate attainment or maintenance of the standard will be required to comply with UECA.

§ 253.4. Requirements for and Waiver of Environmental Covenants.

Section 253.4 outlines when environmental covenants are required as well as the procedures for the Department's waiver of the requirement for an environmental covenant. The basic requirement for use of an environmental covenant is contained in section 65 17(a) of UECA.

Several changes were made to this section in response to comments. As discussed in more detail relating to section 253.5, below, the final-form rulemaking does not require submission of draft environmental covenants, and only requires submission of requests for waivers at the time the remediator submits the Final Report or Remedial Action Completion Report to the Department. As a result, all references to submission of draft environmental covenants or submission of environmental covenants at earlier stages in the process have been eliminated from this section. This includes deletion of references to the various Act 2 standards and deletion of subsection (d) of the proposed regulations in its entirety. Subsection (c) of the final-form rulemaking establishes requirements relating to the process for and timing of submission of requests for Department waiver of the requirement to use environmental covenants in Chapter 245 and Chapter 250 cleanups.

Subsection (b) clarifies that where activity and use limitations are to be used in special industrial area cleanups under section 305 of Act 2, they are to be in the form of an environmental covenant.

Subsection (d) relates to a provision in section 6517(a)(3) of UECA. Section 6517(a)(3) establishes special provisions relating to the use of environmental covenants at federally-owned property. Subsection (e) makes it clear that the requirement to use environmental covenants at such properties is not waived by UECA but delayed until such time as the property is transferred out of federal government control. Until such time of transfer, the activity and use limitations must be memorialized in an installation's master plan or similar remedial documentation. It also requires notification of the Department in the event of transfer.

§ 253.5. Submission of Environmental Covenants and Related Information.

This is an important section because it addresses ambiguities in UECA in terms of establishing procedural interfaces between the statute and existing remedial action programs in the Commonwealth. This section establishes the timeframes for submission of draft and final signed environmental covenants to the Department. This section was also one of the most-commented upon in the proposed rulemaking, and several major changes have been made to this section.

Several commentators raised concerns regarding the deadlines for submission of draft and final signed environmental covenants. As a result, the submission process has been overhauled in the final-form rulemaking. The first major change to this section relates to submission of draft environmental covenants prior to the Final Report/Remedial Action Completion Report stage of the remediation process. The final-form rulemaking completely eliminates the requirement to submit draft environmental covenants to the Department for review. Instead, the final-form rulemaking requires the remediator to provide the environmental covenant no later than 30 days after receipt from the Department of written approval for the Final Report or Remedial Action Completion Report. The Department believes that most if not all issues relating to the activity and use limitations required to attain or maintain an Act 2 standard will be worked out as part of the review and approval of such reports. The environmental covenant will reflect the requirements contained in those reports and

should be relatively straightforward to prepare and submit.

As a result of this change, references to the various Act 2 standards in proposed subsections (a) and (b) have been removed, along with language requiring submission of draft reports. Proposed subsection (b) was deleted in its entirety and proposed subsection (c) was amended and renumbered as subsection (b). That subsection addresses submission to the Department of information regarding persons who must be given notice of the environmental covenant (section 253.3). It is also necessary so the Department can determine if subordination should be required (section 253.8) as holders of prior interests are not subject to the environmental covenant under UECA unless they agree to subordinate their interest to the covenant (see section 6503(d) of UECA, 27 Pa.C.S. § 6503(d)).

Given the changes to the submission process, proposed subsection (d) was no longer necessary and was deleted. Finally, proposed subsection (e) addressed recording the signed covenant and the timeframe for providing the Department with proof of recordation. This subsection is retained in the final-form rulemaking and re-numbered as subsection (c). In response to concerns raised by commentators, the final-form rulemaking increases the time available to provide the Department with proof of recordation from 60 to 90 days after approval of the covenant by the Department, and allows for the Department to agree to extensions if needed.

§ 253.6. Requirements for County Recorder of Deeds.

The proposed section contained two provisions relating to the recordation of environmental covenants with county Recorder of Deeds. Subsection (a) required the Recorder of Deeds to provide proof of recordation in a timely manner, and subsection (b) made it clear that environmental covenants, as negative restrictions, generally have no or negative value and so should not be routinely subject to the Pennsylvania Realty Transfer Tax. In response to comments, the final-form rulemaking deletes subsection (b) as issues relating to the Realty Transfer Tax are better addressed elsewhere.

§ 253.7. Fees.

This section of the final-form rulemaking establishes fees for the review of environmental covenants by the Department. This section also contains an exemption from the requirement to pay a fee for environmental covenants submitted to convert a prior instrument where the person submitting the environmental covenant did not cause or contribute to the contamination described in the environmental covenant. Finally, subsection (c) requires the Department to review the fee at least every three years and report to the Board as to whether the fee continues to meet the Department's cost of administering the program.

Only one significant change was made to this section. The amount of the fee was increased from \$350 per environmental covenant submitted to \$500 per covenant. Upon review of the program and associated costs the Department realized that the higher fee would be necessary to cover the costs of administering program established by UECA.

§ 253.8. Subordination.

This section tracks UECA language regarding subordination, and is included for reference. Several commentators raised issues concerning the Department's exercise of discretion to require subordination. As a result, subsection (b) of the final-form rulemaking requires the Department to provide a basis for requiring subordination should the agency reach that conclusion. The Department does not anticipate frequent requests for subordination and if the need should arise, will work

together with the parties involved to try to ensure an amicable resolution to the issue.

Subsection (c) of the final-form rulemaking was amended to delete the requirement that proof of recordation of a subordination agreement be provided to the Department, to allow for extension of time to provide the subordination agreement and to address situations involving common interest communities.

§ 253.9. Duration.

In two situations an environmental covenant can be terminated through action outside of the specific terms of the covenant – eminent domain and judicial termination. In both instances, a Department determination is required for the termination to occur. This section establishes a process for requesting such Department action in an appropriate proceeding. Only minor editorial changes were made to this section of the final-form rulemaking.

§ 253.10. Conversion and Waiver of Conversion.

In order for persons researching activity and use limitations at properties in the Commonwealth to have a clear understanding of the complete universe of properties with activity and use limitations, section 6517(b) requires an instrument that establishes activity and use limitations under Act 2 or the Tank Act created prior to February 2008 to be converted to an environmental covenant by February 2013. By converting these prior instruments to covenants and including them in the Department’s Registry, the limitations will have the legal protection afforded by UECA and be readily available and transparent to property developers with a minimum of effort on their part. The term “instrument” is defined in section 253.1 as a “deed restriction, restrictive covenant or other similar document that imposes activity or use limitations filed or required by the Department to be filed with a Recorder of Deeds.”

The Department is conducting an internal review to identify all such sites and anticipates targeted outreach to owners of property identified as being subject to a prior “instrument.”

The final-form rulemaking establishes requirements related to this conversion requirement and provides a temporal waiver for a certain class of prior instruments. Subsection (b) requires the current property owner to convert the prior instrument and states that the Department will not require (but may allow) the new environmental covenant to contain activity and use limitations not contained in either the existing instrument or a “Department-approved postremediation care plan.”

Subsection (c) of the final-form rulemaking contains the conditional temporal waiver noted above. This subsection waives the requirement to convert the prior “instrument” until such time as the current property owner transfers the property, so long as the owner requests the waiver and provides the Department with proof that the prior instrument was recorded with the Recorder of Deeds in the county where the property is located. Based on comments, subsection (d) of the proposed rulemaking was judged to be duplicative of the requirements in subsection (c) and therefore subsection (d) is deleted in the final-form rulemaking.

Finally, subsection (d) notes that the Department may waive the requirement to convert a prior instrument outright, and that such a waiver will be issued in writing.

§ 253.11. Assignment of Interest.

Section 6510 of UECA requires the Department to consent to several categories of changes

relating to the holder, or grantor, of the environmental covenant. This section outlines the requirements applicable to such a request.

F. Benefits, Costs and Compliance Benefits

The final-form rulemaking will assist the Department and the regulated community in implementing UECA and will serve the dual purpose of enhancing the protection of human health and the environment, while promoting the safe reuse of contaminated brownfields sites. Brownfield redevelopment in this state has been successful largely because regulators, property owners, and communities have accepted that contamination can be left in place with the proper activity and use limitations to allow redevelopment - without presenting any significant risk to human health or the environment.

The final-form rulemaking provides better legal tools to ensure that future generations understand the reasons why activity and use limitations have been imposed and why certain long-term maintenance/monitoring might be needed. Regulators and the community can have confidence that environmental activity and use limitations will be enforced in perpetuity. The final-form rulemaking allows all parties to have a clear understanding of how UECA will be implemented going forward.

Compliance Costs

The Department does not anticipate any increased costs to the regulated community as a result of the final-form rulemaking, except for the fee contained in section 253.7. The activity and use limitations are necessary to demonstrate attainment or maintenance of an Act 2 standard; the final-form rulemaking does not expand the use of such limitations. The obligation to use environmental covenants to implement those activity and use limitations is established by UECA and not these regulations.

Based on historical data developed in administering UECA program since February 2008 (the effective date of UECA), the Department projects that approximately 165 environmental covenants will be submitted for review and approval annually. Therefore, the fees collected under the regulation are projected be around \$82,500 per year.

Compliance Assistance Plan

It is not anticipated that the Commonwealth will provide sources of financial assistance to aid in compliance with this rulemaking. As noted in section E., above, the Department will target outreach to property owners whose properties are identified as being subject to the conversion requirement in section 65 17(b) of UECA. Finally, the Department developed a model environmental covenant and will develop policies, guidance and factsheets as needed to explain particular aspects of how implementation of UECA fits in with other parts of the remediation process.

Paperwork Requirements

The final-form rulemaking does not establish any new paperwork requirements. Submission of the various documents is required by UECA; the rulemaking merely formalizes the manner and timing of those submissions along with the Department's responses.

G. Pollution Prevention

This rulemaking relates to pollution that has already been released into the environment. The

use of environmental covenants should ensure long-term stewardship of activity and use limitations, however, helping to ensure that existing problems do not get worse through inattention or further spread of pollution through the environment. The regulation does not directly promote a multi-media pollution prevention approach.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended. Section 253.7(c) obligates the Department to evaluate whether or not the current fee covers the expenses associated with the program and report to the Board the results of that evaluation at least every three years.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 24, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 1379 (March 6, 2010) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on _____, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, and approved the final-form rulemaking.

J. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pennsylvania Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 40 Pa.B. 1370 (March 6, 2010).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 Pennsylvania Code, Chapter 253, are created to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board