On December 18, 2007, Pennsylvania became the 20th state to enact the Uniform Environmental Covenants Act (UECA) putting it at the forefront of states to adopt a statutory mechanism to create, modify, enforce and terminate land use and institutional controls at risk-based cleanup sites. The UECA will take effect on February 16, 2008. Not only does the UECA fundamentally change how we create and implement institutional controls and covenants going forward, it requires us to revisit Act 2 and Tank Act properties in current and former portfolios.

The UECA is a logical complement to Pennsylvania’s Land Recycling and Environmental Remediation Standards Act (Act 2), which permits risk-based remediation where exposure to residual contamination is controlled by engineered and non-engineered protective measures, but which fails to provide specific tools to implement and enforce those measures. Until now, parties had to rely on traditional property law tools (i.e., deed restrictions, affirmative and negative easements, restrictive covenants) to ensure institutional controls would be followed. Unfortunately, these common law tools raise many questions: Who has standing to enforce them? Do they run with the land? Can they impose affirmative obligations? Are they affected by adverse possession? Can they be waived? Are they affected by a foreclosure? Can they run in perpetuity? What if there are changed circumstances? When and where can they be recorded? Who receives notice? These uncertainties undermine the very purpose of the controls, which is to assure that the integrity of a risk-based remedy is maintained and protected over time, preventing future exposure to contamination.

The UECA tries to answer these questions by specifically providing that an environmental covenant recorded in compliance with the act:

- runs in perpetuity unless it is limited in duration by its terms, or terminated under circumstances enumerated in the statute;
- can be enforced via injunction or other equitable relief only by those enumerated in the statute, including PADEP and the political subdivision in which the property is located;
- can impose engineering and institutional controls, reporting and other affirmative obligations; and
- generally is not extinguished, limited or impaired by:
  - issuance of a tax deed;
  - foreclosure of a tax lien; or
  - application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement or a similar doctrine.

The holder(s) of an environmental covenant (analogous to a grantee under traditional property law), can include a state agency (including PADEP), a federal agency (that determines or approves the environmental response project pursuant to which the covenant is created) or a person.

### Statutory Requirements

The UECA requires that an environmental covenant include the following: a statement that the instrument is an environmental covenant executed pursuant to the statute; a legally sufficient description of the real property; a brief narrative description of the contamination and the remedy; the activity and use limitations; the signatures of the agency, every holder and every owner in fee simple; and the identity and location of any administrative record for the environmental response project reflected in the covenant. In addition, there are several categories of permitted, but not required, information.
Unlike the traditional real property tools, an environmental covenant under the UECA must be signed by an agency, which constitutes its approval. If the agency fails to act on an environmental covenant within 90 days of receipt of all information reasonably required to make a determination, the covenant is deemed approved. Actions of the Department under the UECA are appealable to the Environmental Hearing Board.

Although the UECA does not invalidate prior institutional controls, an instrument created prior to the effective date of the act that establishes activity and use limitations to demonstrate attainment or maintenance of a standard under Act 2 or to demonstrate satisfaction of a corrective action requirement under the Storage Tank and Spill Prevention Act (Tank Act) must be converted to an environmental covenant within 60 months of the effective date of the act unless conversion is waived by the Department. And going forward, engineering or institutional controls required to demonstrate attainment of a remediation standard under Act 2 or the Tank Act must be in the form of an environmental covenant. Although not required, an environmental covenant will satisfy a deed acknowledgement requirement under Section 405 of the Solid Waste Management Act and Section 512(b) of the Hazardous Sites Cleanup Act.

New Questions

While the UECA eliminates many of the uncertainties that existed under common law, the statute raises a host of new questions: Under what circumstances will the Department waive the conversion requirement for Act 2 sites prior to this act? Who is obligated to effectuate the conversion? How will conversions be tracked? What are the legal and practical ramifications of failing to convert (given that the statute specifically provides that failure to timely convert does not invalidate existing controls)? Despite the new questions it raises (which will likely be addressed in PADEP guidance, form documents and policies slated for roll-out later this month), the UCEA’s statutory recognition of environmental covenants and its provisions for their practical enforceability represent another important step toward promoting the redevelopment of contaminated sites in this Commonwealth in a timely and economically valuable way.

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