

Uniform Environmental Covenants Act (UECA) Frequently Asked Questions (FAQs)

Remediators, consultants, attorneys and real estate professionals have identified a number of questions concerning the provisions and implementation of the Uniform Environmental Covenants Act. The following revised list of “frequently asked questions” is the Department’s response to some of these key questions. The Department will continue to add additional questions to this list and may revise some of its previous responses (Newly revised sections are indicated in red). The list of frequently asked questions will be used in conjunction with input and feedback from the Department’s many stakeholders and its Cleanup Standards Scientific Advisory Board to develop a formal technical guidance in the future. In the interim questions and comments concerning the FAQs may be sent to Troy Conrad, Director of the Land Recycling Program at tconrad@state.pa.us

1. Are environmental covenants required in all cases when an engineering control is required to attain or maintain a standard under the Land Recycling Act (Act 2)?

All remediations that require an engineering control to attain or maintain compliance with the selected standard will require an environmental covenant, or a written waiver of the covenant by the Department. Engineering controls are defined as remedial actions directed exclusively toward containing or controlling the migration of regulated substances through the environment. The term includes slurry walls, liner systems, caps, leachate collection systems and groundwater recovery trenches. The environmental covenant will include activity and use restrictions, limitations, and postremediation care obligations as appropriate.

For example, for remediations that seek to attain and maintain a site-specific standard by containing contamination using an engineering control such as a cap, an environmental covenant will be required for all properties where the engineering control exists.

The environmental covenant would be required for the source property and any adjacent non-source properties upon which the engineering control exists. The environmental covenant will restrict uses of the subject property to maintain and not interfere with the engineering control and will provide for postremediation care. As a general rule, the Department will not waive an environmental covenant based on an engineering control.

2. Are environmental covenants required in all cases when an institutional control is required to attain or maintain an Act 2 standard?

All remediations that require an institutional control to attain or maintain compliance with the selected standard will require an environmental covenant, or a written waiver of the covenant by the Department. Institutional controls are defined

as measures undertaken to limit or prohibit certain activities which may interfere with the integrity of the remedial action or result in exposure to regulated substances at a site. The term includes fencing and restrictions on the future use of the site. The environmental covenant will include land use restrictions and postremediation care obligations as appropriate.

3. Under what circumstances will the Department issue waivers?

As a general rule the Department will not waive an environmental covenant relating to an engineering control.

As a general rule the Department will not waive an environmental covenant relating to an institutional control except in limited specific circumstances. Some examples of the general applicability of environmental covenants for institutional controls and possible waivers are provided in these FAQs.

All requests for waivers must be made in writing. The Department will issue all waivers or denials in writing, and will include the specific bases for the decision.

4. Are environmental covenants required in all cases where the nonresidential Statewide health standard is utilized?

If the nonresidential Statewide health standard is utilized by the remediator, it is not necessary to have an environmental covenant to restrict the property to nonresidential uses. If an engineering control has been used to attain the standard, an environmental covenant will be required to document and maintain that control.

5. Are environmental covenants required in all cases where the site-specific standard based on nonresidential land use is utilized?

If a site-specific standard based on nonresidential land use is utilized by the remediator, it is not necessary to have an environmental covenant to restrict the property to nonresidential uses. If engineering or institutional controls have been used, an environmental covenant will be required to document and maintain those controls.

6. Are environmental covenants required in all cases using the Statewide health standard where a nonuse aquifer determination has been approved by the Department?

Chapter 250.303 provides that the Department may determine, based on a demonstration by the remediator, that groundwater is not used or planned to be used. The requirements for a nonuse aquifer determination under the Statewide health standard include a demonstration that groundwater is not used or planned to be used and that all downgradient properties are connected to a community water system. These requirements must be maintained by one of three methods:

(1) An environmental covenant which prohibits the future use of the groundwater on the source and other impacted downgradient properties. If an environmental covenant which prohibits the future use of groundwater is placed on all impacted properties then the Department will not require periodic monitoring and reporting to verify continued nonuse of the groundwater. The property owner

must report to DEP any proposed groundwater use or failure of the remedy, or upon request by the department.

(2) A municipal ordinance that covers the area of the impacted properties that meets all of the requirements of TGM, Section II.C.9.c.iv, (Local ordinance). This includes the requirement that the ordinance will include a provision that provides for “notification to the Department if and when the ordinance is modified or eliminated.” When this option is selected, the Department will waive the environmental covenant and therefore there will be no periodic reporting requirements.

If a municipal ordinance that otherwise meets the requirements of Section II.C.9.c.iv of the TGM but does not include the provision of notifying the department if and when the ordinance is modified or eliminated, an environmental covenant will be required on the source property. In this instance, no periodic reporting will be required. The property owner must report to DEP if and when the ordinance is modified or eliminated, or upon request by the Department.

(3) A postremediation care plan that includes periodic monitoring and reporting of the status of the impacted downgradient properties to verify continued nonuse of the groundwater in accordance with 250.303(d)(3). The postremediation care plan, with the monitoring and reporting obligations, must be included in an environmental covenant on the source property. When this option is selected, the Department will not waive the requirement for the covenant on the source property. The Department will waive the environmental covenants on the impacted downgradient properties.

7. Are environmental covenants required for all cases using the site-specific standard based on residential land use if the Department determines that there is a current or probable future use of the groundwater?

If the Department determines that there is a current or probable future use of the groundwater and the groundwater meets the site-specific health based concentration without engineering or institutional controls, then a covenant is not required.

If the Department determines that there is a current or probable future use of the groundwater and the groundwater exceeds the site-specific health based concentration, then a covenant that prohibits use of the groundwater generally will be required on all properties on which the groundwater exceeds that concentration. If an environmental covenant which prohibits the future use of groundwater is placed on all impacted properties then the Department will not require periodic monitoring and reporting to verify continued nonuse of the groundwater.

8. Are environmental covenants required for all cases using the site-specific standard if the Department determines that there is no current or probable future use of the contaminated groundwater?

If the Department determines that there is no current or probable future use of the contaminated groundwater, a postremediation care plan will be required which includes periodic monitoring and reporting of the status of the impacted properties

to verify continued nonuse of the groundwater. The postremediation care plan, with the monitoring and reporting obligations, must be included in an environmental covenant on the source property. As a general rule, the Department will not waive the requirement for the covenant on the source property. A waiver may be issued for the source property if the downgradient property is a railroad, highway, stream, etc. (TGM Section II.C.9.c.i) and the Department determines that future use of the groundwater is highly improbable. In either case, the Department will waive environmental covenants on the impacted downgradient properties.

9. Are environmental covenants required for all cases using the site-specific standard with a pathway elimination remedy?

If the remediator implements a site-specific remedy using pathway elimination based on nonuse of the aquifer then the remedy would essentially be the same as a Statewide health nonuse aquifer remedy. As a general rule a groundwater pathway elimination remedy requires a demonstration that all downgradient properties are connected to a community water system. As with the Statewide health nonuse aquifer cases the nonuse of the groundwater must be maintained by one of three methods.

(1) An environmental covenant which prohibits the future use of the groundwater on the source and other impacted downgradient properties. If an environmental covenant which prohibits the future use of groundwater is placed on all impacted properties then the Department will not require periodic monitoring and reporting to verify continued nonuse of the groundwater. The property owner must report to DEP any proposed groundwater use or failure of the remedy, or upon request by the Department.

(2) A municipal ordinance that covers the area of the impacted properties that meets all of the requirements of TGM, Section II.C.9.c.iv, (Local ordinance). This includes the requirement that the ordinance will include a provision that provides for “notification to the Department if and when the ordinance is modified or eliminated.” When this option is selected, the Department will waive the environmental covenant and therefore there will be no periodic reporting requirements.

If a municipal ordinance that otherwise meets the requirements of Section II.C.9.c.iv of the TGM but does not include the provision of notifying the department if and when the ordinance is modified or eliminated, an environmental covenant will be required on the source property. In this instance, no periodic reporting will be required. The property owner must report to DEP if and when the ordinance is modified or eliminated, or upon request by the Department.

(3) A postremediation care plan that includes periodic monitoring and reporting of the status of the impacted downgradient properties to verify continued nonuse of the groundwater in accordance with 250.303(d)(3). The postremediation care plan, with the monitoring and reporting obligations, must be included in an environmental covenant on the source property. When this option is selected, the Department will not waive the requirement for the covenant on the source property.

The Department will waive the environmental covenants on the impacted downgradient properties. In this case, annual reporting to the DEP will be required, or upon request by the Department.

10. Are environmental covenants required for cases meeting the background standard if contamination remains on the property above health based standards?

In some cases it is possible to demonstrate attainment of the background standard and still have soil or groundwater on the property contaminated above health based standards in some areas. In these situations, no engineering or institutional controls are needed to attain or maintain the background standard on the property and therefore no environmental covenant is required.

11. Are environmental covenants required for cases meeting the Statewide health standard if groundwater contamination remains on the property above health based standards?

Under the Statewide health standard the point of compliance for the groundwater is the property boundary and beyond. In some cases it is possible to demonstrate compliance with the Statewide health standard at the point of compliance, and based on fate and transport analysis demonstrate continued compliance in the future, even though groundwater on the source property is contaminated above the standard.

In these cases, no engineering or institutional controls are needed to attain or maintain the Statewide health standard for groundwater on the source property and therefore no environmental covenant is required.

12. How does UECA affect the HSCA and SWMA deed acknowledgement requirements?

The Hazardous Sites Cleanup Act (HSCA) and the Solid Waste Management Act (SWMA) include certain requirements for deed acknowledgements (a/k/a deed notices). These deed acknowledgements do not limit use of the property, and are not institutional controls pursuant to Act 2 or UECA.

UECA does not change these HSCA/SWMA deed acknowledgement requirements. If deed acknowledgements were previously required by HSCA or SWMA, they are still required. If deed acknowledgements were not previously required by HSCA or SWMA, or were exempted or excluded, then deed acknowledgments are not required now because of UECA.

UECA states that if an environmental covenant is required, that a reference to the environmental covenant fulfills the HSCA/SWMA deed acknowledgement requirement. Where a HSCA/SWMA deed acknowledgement is required, but no environmental covenant exists, the HSCA/SWMA deed acknowledgement must still be filed.

13. Will the Department require the conversion of existing deed restrictions to environmental covenants?

UECA requires that "An instrument created prior to the effective date of [UECA] which establishes activity and use limitations to demonstrate attainment or maintenance of a standard . . . shall be converted to an environmental covenant within 60 months." 27 Pa.C.S. § 6517(b). The typical "instrument" used in the past that established "activity and use limitations" was the deed restriction. Deed restrictions have been used as part of certain remediations to establish an activity and use limitation to attain or maintain a standard. HSCA and SWMA deed acknowledgements are not instruments that establish activity and use limitations as part of a remediation and do not require conversion.

The Department has not yet developed final guidance relating to the conversion of existing instruments. However, remediators are encouraged to work with the Department to voluntarily convert existing instruments, such as deed restrictions and restrictions in Consent Orders and Agreements to environmental covenants.

14. Are environmental covenants required on Special Industrial Area (SIA) sites?

If the remediation measures to be undertaken include land use restrictions limiting use of the property to the intended purpose, then those land use restriction should be in the form of an environmental covenant. The environmental covenant should be specified as one of the remediation measures in the SIA Consent Order and Agreement (CO&A).

If an SIA CO&A was executed at the time UECA became effective and the remediation measures specified in the CO&A included a deed restriction limiting use of the property to the intended purpose, then that deed restriction should be implemented in the form of an environmental covenant.

If an SIA CO&A was executed at the time UECA became effective and the remediation measures specified in the CO&A did not include a deed restriction limiting use of the property to the intended purpose, then no deed restriction or environmental covenant is required.

15. Who should review an environmental covenant before it is signed?

A property owner may prepare, execute, and record an environmental covenant with the county recorder of deeds. In many cases, the details in the environmental covenant will address a number of legal issues as well as technical, geologic, or engineering issues. An environmental covenant is an interest in land and having an environmental covenant affects property rights. It often will be appropriate for a property owner to seek legal and technical advice before signing or recording an environment covenant. The DEP's current practice is to have each environmental covenant reviewed by its program and legal staff before DEP signs the covenant.