

**Notice of Proposed Rulemaking**  
**Department of Environmental Protection**  
**Environmental Quality Board**  
**25 Pa.Code Chapter 253**  
**Administration of the Uniform Environmental Covenants Act**

**Preamble**

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

This proposal 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 Klappkowski, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (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 proposed rulemaking is being made under the authority of section 6515 of the Uniform Environmental Covenants Act (UECA) (27 Pa.C.S.A. § 6515), which grants the Board the power and the duty to promulgate regulations for the proper performance of the work of the Department under the 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 the 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 UECA was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. The 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 the UECA, only a simple Notice will need to be recorded with the County Recorder of Deeds where the property is located.

Although the UECA does contain relatively detailed procedural requirements, the Department determined that regulations under the 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 the UECA requires the Department to develop and maintain.

The UECA 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.

## **E. Summary of Regulatory Requirements**

As noted, the proposed rulemaking is intended to supplement the UECA and tie the statute together with Pennsylvania’s existing risk-based corrective action programs. The Department developed the proposed 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 the UECA when necessary, the Department did not include those portions of the 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 the UECA outlining the legal effect of creating an environmental covenant.

The contents of the proposed rulemaking are discussed below, with special attention to those provisions that clarify a portion of the UECA.

### **§ 253.1. Definitions.**

This is the definitions section of the proposed rulemaking. For ease of understanding, the definitions from the UECA are included in this section. Several definitions not in the UECA are

included in the proposed rulemaking, including *Final Report, Instrument, Political Subdivision, Remedial Action Completion Report, Storage Tank Act* and *UECA*.

### **§ 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 the 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 should 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.

### **§ 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 the UECA. Subsection (c) allows for waivers of required notice and establishes a procedure for persons interested in receiving such a waiver.

### **§ 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 6517(a) of the UECA. The proposed rulemaking states that, "[u]nless waived by the Department, engineering controls or institutional controls used to demonstrate attainment of a remediation standard under the Land Recycling Act or the Storage Tank Act shall be implemented through an Environmental Covenant." The Department's position is that an environmental covenant must be used whenever a cleanup does not meet an unrestricted use cleanup standard, including the nonresidential Statewide health standard. Subsection (a) goes on to note that although not required, an environmental covenant may be used with other types of environmental response projects.

Subsection (b) clarifies that where land use restrictions 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.

Subsections (c) and (d) establish 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 (c) sets out requirements for remediations done to the background or Statewide health standard; subsection (d) describes the requirements for site-specific standard cleanups. These subsections require requests to be in writing and establish that the Department will respond in writing as well.

Subsection (e) relates to a provision in section 6517(a)(3) of the 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 the 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 the UECA in terms of establishing procedural interfaces between the statute and existing remedial action programs in the Commonwealth. This proposed section establishes the timeframes for submission of draft and final signed environmental covenants to the Department.

It also clarifies that the remediator needs to develop and submit a list of all owners of prior interest in the property. This list is important in terms of who needs to receive 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 the UECA unless they agree to subordinate their interest to the covenant (see section 6503(d) of the UECA, 27 Pa.C.S.A. § 6503(d)).

Subsection (a) relates to remediations under background standard or the Statewide health standard that will include an environmental covenant, and requires submission of a draft covenant to the Department 30 days prior to the submission of the Final Report or Remedial Action Completion Report.

Subsection (b) relates to remediations under the site-specific standard that will include an environmental covenant. Because there is typically Department review of intermediate reports in such cleanups, the draft covenant must be submitted to the Department 30 days prior to submission of those reports. This subsection also acknowledges that even with site-specific cleanups it is possible that there will be no intermediate reports submitted, and so in such a case the proposed rulemaking requires submission of a draft covenant to the Department 30 days prior to the submission of the Final Report or Remedial Action Completion Report.

The Department believes that submission of the draft environmental covenants prior to the submission of these cleanup reports is critical to keeping the process moving smoothly, with the goal of attaining Act 2 standards at contaminated sites in the Commonwealth. By having the opportunity to review and discuss draft covenants with the remediator, the Department hopes that delay in approving Final Reports or Remedial Action Completion Reports due to problems with draft covenants can be minimized to the greatest extent possible.

Subsection (c) requires submission to the Department of information regarding each person occupying or otherwise in possession of the real property subject to the Environmental Covenant and each person holding a recorded interest in that property. Again, this information is important for meeting the notice requirements of the UECA as well as making sure that all persons occupying the property are aware of the activity and use limitations for the property.

Subsection (d) contemplates that the Department and remediator have worked out all issues with the covenant prior to submission of the report demonstrating attainment of a cleanup standard and requires submission of final signed covenants with such reports.

Finally, subsection (e) makes it clear that the signed covenant must be recorded with the Recorder of Deeds for the county where the property is located, as well as the timeframe for providing the Department with proof of recordation. Because the environmental covenant is a property interest, recording is a crucial part of the process of creating an effective instrument for long-term stewardship of activity and use limitations on the property that is remediated.

## **§ 253. 6. Requirements for County Recorder of Deeds.**

This proposed section contains two provisions relating to the recordation of environmental covenants with county Recorder of Deeds. Subsection (a) requires the Recorder of Deeds to provide proof of recordation in a timely manner, and subsection (b) makes 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.

**§ 253.7. Fees.**

This section 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.

**§ 253.8. Subordination.**

This section tracks the UECA language regarding subordination, and is included for reference.

**§ 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.

**§ 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 the 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."

This proposed section 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."

Subsections (c) and (d) contain 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.

Finally, proposed subsection (e) 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 the UECA requires the Department to consent to several categories of changes relating to the holder, or grantor, of the environmental covenant. This proposed section outlines the requirements applicable to such a request.

### **F. Benefits, Costs and Compliance**

#### **Benefits**

The proposed rulemaking will assist the Department and the regulated community in implementing the 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 land use controls to allow redevelopment - without presenting any significant risk to human health or the environment.

The proposed rulemaking provides better legal tools to ensure that future generations understand the reasons why land use restrictions have been imposed and why certain long-term maintenance/monitoring might be needed. Regulators and the community can have confidence that environmental land use restrictions will be enforced in perpetuity. The proposed rulemaking allows all parties to have a clear understanding of how the 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 proposed rulemaking, except for the fee proposed in section 253.7. The activity and use limitations are necessary to demonstrate attainment or maintenance of an Act 2 standard; the proposed 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 the UECA and not these proposed rules.

Based on historical data developed in administering the UECA program since February 2008 (the effective date of the UECA), the Department projects that approximately 300 environmental covenants will be submitted for review and approval annually. Therefore, the fees collected under the regulation are projected be around \$105,000 per year.

#### **Compliance Assistance Plan**

It is not anticipated that the Commonwealth will provide sources of financial assistance to aid in compliance with this proposed 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 6517(b) of the 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 the UECA fits in with other parts of the remediation process.

### **Paperwork Requirements**

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

### **G. Pollution Prevention**

The proposed amendments relate 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 proposed 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.

### **I. Regulatory Review**

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on \_\_\_\_ (date) \_\_\_\_, the Department submitted a copy of the notice of proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

### **J. Public Comments**

**Written Comments** – Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16<sup>th</sup> Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by \_\_\_\_\_ (within 30 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by \_\_\_\_\_ (within 30 days of publication in the *Pennsylvania Bulletin*). The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final-form regulation will be considered.

**Electronic Comments** – Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by \_\_\_\_\_ (within 30 days of publication in the *Pennsylvania Bulletin*). A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgement of electronic comments is not received by the sender within two (2) working days, the comments should be retransmitted to ensure receipt.

BY:

John Hanger  
Chairperson  
Environmental Quality Board