ADMINISTRATION OF THE UNIFORM ENVIRONMENTAL COVENANTS ACT

FINAL RULEMAKING AMENDMENTS

COMMENT AND RESPONSE DOCUMENT

INTRODUCTION

In assembling this document, the Environmental Quality Board (Board) has addressed all pertinent and relative comments associated with this package. For the purposes of this document, comments of similar subject material have been grouped together and responded to accordingly.

During the public comment period, the Board received approximately 66 comments from eleven individuals, industry organizations and the Independent Regulatory Review Commission. The following table lists these commentators. The Commentator ID number is found in parenthesis following the comments in the comment/response document.

Table of Commentators

Commentator ID #	Name	Address	Requested Final Rule	Submitted One-Page Summary
1.	Brian G. Thompson, P.E. Director, Bureau of Deisgn	Pennsylvania Department of Transportation 400 North Street, 7th Floor Harrisburg, PA 17120		
2.	Gene Barr Vice President, Government & Public Affairs	Pennsylvania Chamber of Business and Industry 417 Walnut Street Harrisburg, PA 17101		X
3.	David L. Reusswig, P.G. Senior Hydrogeologist Groundwater Sciences	2601 Market Place St. Harrisburg, PA 17110		
4.	John C. Laager, Esq. Maron Marvel Bradley & Anderson, P.A. ON BEHALF OF BP Products North America, Inc.	102 Pickering Way, Suite 200 Exton, PA 19341		X
5.	H. Scott Laird URS Corp.	333 Commerce Drive, Suite 300 Fort Washington, PA 19034		
6.	Jason A. Speicher First Energy Corp.	2800 Pottsville Pike P.O. Box 16001 Reading, PA 19612		

7.	Benjamin Henry PECO Energy Company	2301 Market St., S7-2 Philadelphia, PA 19103		
8.	Louise A. Rynd, Esq. General Counsel Pennsylvania Bankers Association	3897 Front Street Harrisburg, PA 17110		
9.	Jim LaRegina, P.G. President Pennsylvania Council of Professional Geologists	116 Forest Drive Camp Hill, PA 17110		
10.	Rodd Bender, Esq. Manko, Gold, Katcher & Fox ON BEHALF OF Beazer East, Inc.	401 City Ave., Suite 500 Bala Cynwyd, PA 19004		
11.	Kim Kaufmann, Executive Director Independent Regulatory Review Commission	333 Market Street 14th Floor Harrisburg, PA 17101		

Preamble, Economic Impact.

1) Comment: In the Preamble, the Board states it does not anticipate increased costs except for the $350 filing fee. In the Regulatory Analysis Form, the Board estimates $105,000 of costs imposed on the regulated community due to the filing fee. The Board states that the use of environmental covenants is established by the Uniform Environmental Covenants Act ("UECA"), and therefore any costs are imposed by the UECA, not the proposed regulation.

Commentators disagree and ask that the Board also include the costs of development of environmental covenants, internal review of environmental covenants and the administrative and legal costs to demonstrate an environmental covenant on a property can be removed. Commentators noted the filing of draft environmental covenants and then later filing final versions would also be costly. We ask the Board to quantify these costs, or in the alternative, to explain why these costs should not be included in the economic impact analysis of this regulation. (2, 6, 11)

Response: The Department of Environmental Protection (Department) acknowledges that there are costs associated with the preparation and negotiation of environmental covenants. Those costs are imposed regardless of the rulemaking, however, as UECA itself requires the use of covenants in certain situations. The only new cost imposed by the rulemaking itself is the review fee that is necessary for the Department to carry out its obligations under the statute.

Preamble, Use of Covenants for Nonresidential Statewide Health Standard Cleanups

2) Comment: The most striking example of the manner in which the Department has changed the Land Recycling and Environmental Remediation Standards Act (Act 2) program as part of implementing UECA is the fact that the Department now requires sites that are attaining the medium specific concentrations (MSCs) developed by the Department to implement the Statewide health cleanup standard under Act 2 for nonresidential properties to restrict future use of such sites through the use of environmental covenants. This change in policy is explicitly described in the preamble to the proposed regulations. By contrast, activity and use limitations for sites attaining the Statewide health standard under Act 2 (regardless of whether residential or nonresidential MSCs were used) were not required prior to the adoption of UECA.

The Department's change in policy, purportedly driven by UECA, is deeply flawed for multiple reasons. UECA itself is devoid of any requirement that would support the change in policy that the Department has instituted.

The Department's change in policy is also in direct contravention of the specific provisions of Act 2. For example, Section 303(e)(3) of Act 2 provides that "[i]nstitutional controls such as . . . future land use restrictions on a site may not be used to attain the Statewide health standard." 35 P.S. § 6026.303(e)(3). This provision of Act 2 also states that "[i]nstitutional controls ***may*** be used to maintain the Statewide health standard after remediation occurs." *Id.* (emphasis added.) As such, the provision is permissive in that it recognizes that institutional controls may be used following attainment of the Statewide health standard under Act 2. By contrast, nothing in this provision mandates that institutional controls be used where the nonresidential MSCs are

selected for purposes of demonstrating attainment with the Statewide health standard under Act 2.

The Department's change in policy is likewise in conflict with Act 2's "reopener" provisions. Under Section 505(4) of Act 2, a reopener of liability protection afforded under Act 2 can occur when the level of risk is increased beyond the acceptable risk range at a site due to substantial changes in exposure conditions "such as a change in land use from nonresidential to a residential use." 35 P.S. § 6026.505(4). However, in such circumstances, Act 2 provides that the person "who changes the use of the property causing the level of risk to increase beyond the acceptable risk range shall be required by the department to undertake additional remediation measures under the provisions of this act." *Id.* Act 2 prescribes the remedy that is to be imposed if there is a change in the use of the property that alters the acceptable risks — namely, that the Department is to require the person who caused the change in property use to perform additional remediation. Act 2 does not mandate that in the case of remediation under the Statewide health standard to attain the nonresidential MSCs, the future use of the property must be limited to nonresidential purposes through an environmental covenant.

Finally, the Department's change in policy has also had adverse consequences in the administration of the Act 2 program. The process of obtaining approvals from the Department of environmental covenants has proved in many instances to be more time consuming and cumbersome than the actual review and approval of the underlying reports under Act 2. The Department's staff personnel are apparently overwhelmed with the workload associated with implementing UECA. By reverting to the approach that successfully guided the implementation of the Act 2 program for more than a decade, the number of matters requiring the Department's attention in reviewing and approving environmental covenants can be pruned substantially.

The commentator specifically requests that the Department return to the approach that is mandated by Act 2 and served the Department and the regulated community well for the first 13 years of the Act 2 program – that projects that attain the Statewide health standards do not trigger the need to prepare environmental covenants even if the nonresidential medium specific concentrations are selected. (2)

Response: 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.

Rulemaking Timeframe.

3) Comment: The Board has provided insufficient time for public input and analysis of the proposed regulations, including discussion with the Storage Tank Advisory Committee (STAC) and Cleanup Standards Scientific Advisory Board (CSSAB) in September 2009 and a 30-day public comment period following publication of the proposed rules in March 2010. The Department should take a more considered and measured approach to these important regulations and should take additional steps to engage the regulated community and other stakeholders, including by extending the period for public review and comment. (10)

Response: The Department believes that the process used in developing and discussing these regulations was adequate for the task. To a large degree, the rulemaking reflects the

Department's positions on these issues since February 2008, when UECA became effective. The Department had almost 18 months experience implementing the UECA program before presenting the proposed regulations to the CSSAB and the STAC in September 2009. The Department also notes that UECA does not mandate review of regulations by any particular advisory committee, but the Department worked with the CSSAB and STAC as they represented the regulated community most directly affected by the proposed Chapter 253 regulations. The Department also notes that six months passed from the time of CSSAB and STAC review until publication of Chapter 253 as proposed rulemaking in the Pennsylvania Bulletin in March 2010, but the Department did not receive any communications relating to the proposed rulemaking during those 180 days. Finally, a 30-day public comment period is relatively standard for rulemakings under the Regulatory Review Act.

§ 253.1 Definitions.

4) Comment: The proposed definitions in many instances reformat the definitions provided within section 6502 of UECA to use subparagraphs but neglect to include the proper punctuation to indicate whether the paragraphs are conjunctive or in the alternative. These omissions are likely to lend new ambiguity and confusion that is not present in the statutory text of UECA. The statutory text should be restored. (10)

Response: The Board included definitions from the statute in the form found in UECA, but in several instances the format of a definition was changed to reflect the Legislative Reference Bureau's (LRB) Format and Style Manual.

5) Comment: The term "Department" is used throughout the regulation, including within the definition of "agency." Subsection 253.2(e) uses both the terms "Department" and "agency." Additionally the term "Board" is used in Subsection 253.7(c). For clarity, we recommend defining both of the terms "Department" and "Board" in the regulation. (2, 10, 11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

6) Comment: The term "eminent domain proceeding" should be added to the rulemaking and defined as "Any acquisition of property by condemnation or in lieu of condemnation." (1)

Response: The Department agrees with the commentator and the final rulemaking reflects this change, as amended following discussion with the commentator, the CSSAB and several stakeholders.

7) Comment: In the definitions of "Final Report" and "Remedial Action Completion Report," there should be an amendment to recognize that a combination of cleanup standards may be used under Act 2. We recommend adding this clarification or, alternatively, that the Board provide an explanation of why this amendment is not appropriate. (2, 10, 11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

8) Comment: The proposed definition of "environmental covenant" is difficult to follow. For clarity, the definition should be revised to read "A servitude which imposes activity and use limitations as part of an environmental response project." (2)

Response: This definition comes from UECA, and in fact reflects the definition of the term included in the national uniform act. In order to avoid confusion, the definition remains as proposed.

9) Comment: In the definitions of "Final Report" and "Remedial Action Completion Report," each should end the last time the word "Act" appears, as the rest of the language is confusing and unnecessary. (10)

Response: The Department believes that the cross-references to Chapters 250 and 245, in the respective definitions, adds clarity to the regulation and the definitions remain as proposed.

10) Comment: The term "regulated substances" is used in the definitions of "engineering controls" and "institutional controls." For clarity, we recommend adding a definition of "regulated substances." (2, 11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change through cross-reference to the definition of "regulated substances" contained in section 103 of Act 2 (35 P.S. § 6026.103).

11) Comment: A definition for "Environmental Hearing Board" should be added to this section (see Comment 22, below). (2, 11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

12) Comment: The definition of "activity and use limitations" appears to suggest that engineering controls are activity and use limitations. This is fundamentally at odds with the manner in which activity and use limitations are understood and applied in the environmental context. Engineering controls may be used to implement a risk-based approach to remediation, but they reflect physical structures or devices rather than legal restrictions or obligations. In addition, the second clause of this definition does little to amplify the operative first clause and is mere surplusage. Therefore, the second clause of the proposed definition should be eliminated. (2)

Response: The Department disagrees with the premise of this comment. The definition of "activity and use limitation" is taken directly from UECA, with amendment for LRB format (see Response to Comment 4, above). Engineering controls are clearly included in the definition of "activity and use limitations" in UECA and so the definition is retained as proposed.

13) Comment: The definition of the term "engineering controls" is overly narrow. The first clause of the definition should be amended to read: "Remedial actions directed exclusively toward containing or controlling the migration of regulated substances through the environment, or limiting or eliminating pathways of potential exposures to regulated substances." (2)

Response: The definition of "engineering controls" is taken from section 6502 of UECA (27 Pa.C.S. § 6502). That definition was modeled on the definition for the term in section 103 of Act 2 (35 P.S. § 6026.103), and so the definition is retained as proposed.

14) Comment: A commentator supports the limiting definition of the term "instrument." However, the definition of "instrument" is overly broad because it could be interpreted to include prospective, as-yet-unrecorded instruments. The commentator suggest adding "An existing" to the beginning of the definition and deleting "or required by the Department to be filed" from the definition. (10)

Response: The Department agrees with the commentator and the final rulemaking reflects this change. If a Final Report or Remedial Action Completion Report approved prior to the effective date of UECA required the remediator to create and record a deed restriction, but that task was not accomplished, then the Department intends to exercise its enforcement authority under section 905 of Act 2 (35 P.S. § 6026.905) to require the restriction to be recorded in the future as an environmental covenant. Further, the remediator who failed to record the deed restriction and any successors and assigns may be subject to a reopener under section 505 of Act 2 (35 P.S. § 6026.505) and may not have effective relief from liability.

15) Comment: The second clause of the proposed definition of "institutional controls" states that the term includes "fencing." Fences are generally considered to be engineering controls in that they are structural devices as opposed to legal requirements that can be included in an environmental covenant. Therefore, "fencing" should be removed from the second clause in this definition. (2)

Response: The definition of "institutional controls" is taken from section 6502 of UECA (27 Pa.C.S. § 6502). That definition was modeled on the definition for the term in section 103 of Act 2 (35 P.S. § 6026.103), and so the definition is retained as proposed.

§ 253.2. Contents and form of environmental covenant.

16) Comment: PennDOT must ensure that the highway system is operated in an economically responsible manner, especially in light of the crisis in transportation funding. Imposing use restrictions on isolated sections of highway through environmental covenants is neither an effective nor efficient way to operate the state-wide highway systems. PennDOT proposes to work with the Department to properly address contamination issues when acquiring new highway right-of-way or when they arise in existing right-of-way, without the use of environmental covenants. This goal could be facilitated by adding language to subsection (a) requiring all environmental covenants to contain a provision for automatic termination upon acquisition by the Commonwealth for use as a highway right-of-way. (1)

Response: The Department is sensitive to PennDOT's concerns and has added a new paragraph (a)(8) addressing this issue following consultation with the commentator, PCBI and the CSSAB. This termination paragraph will be included as a mandatory provision in all environmental covenants created after the effective date of the rulemaking, and the Department will make changes to its model covenant reflecting this provision as soon as possible.

17) Comment: For drafting clarity, several changes should be made to subsection (a). First, the word "The" should be removed from the beginning of subsection (a)(6). Second, subsection (a)(6)(i) should be revised to read "The agency, unless the environmental covenant is deemed to be approved under subsection (c)(4), below. Third, subsection (a)(7) should be revised to read "The name and location of any administrative record for the environmental response project referred to in the environmental covenant." (2)

Response: The first and third changes suggested by the commentator flow out of section 6503 of UECA (27 Pa.C.S. § 6503(a)) and are retained as proposed. As for the second change, the Department agrees with the commentator and the final rulemaking reflects this change.

18) Comment: Subsection (b) contains provisions that may be included in the covenant but not required. The Department has treated this permissive list as a universe of compulsory requirements. Therefore, the subsection should be revised to read: "An environmental covenant may contain other information, restrictions and requirements agreed to by the persons who signed it, including the following, provided that an agency shall not require the following types of information, restrictions or requirements as a condition to approving an environmental covenant." (2)

Response: The Department disagrees with the premise of this comment and notes that section 6504(c)(1) of UECA (27 Pa.C.S. § 6504(c)(1)) does not place any limits on the Department's discretion to require conditions for its approval of an environmental covenant, outside of appeal to the Environmental Hearing Board. Even so, the Department believes that the limitations on its discretion contained in section 253.2(c)(1) of the final rulemaking are valid and should limit the need for argument over the contents of the environmental covenant in environmental response projects.

19) Comment: In addition to the required information an environmental covenant must include that is listed in subsection (a), paragraph (b)(6) permits optional information to include:

> A ***detailed*** narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure and the location and extent of the contamination. (Emphasis added.)

Both the regulatory and statutory provisions list the information to be included in the narrative. However, the regulatory provision differs from the parallel language in UECA at 27 P.S. § 6504(b)(6) by adding the word "detailed" to the narrative. We have two concerns. First, why is the word "detailed" needed in addition to the statutory language? Second, what guidance does the word "detailed" provide? The Board should explain why the regulation varies from the statute, how the requirement for a "detailed" narrative differs from the statutory language and how the word "detailed" provides better direction than what is found in the statute. (2, 9, 11)

Response: The word "detailed" was include to differentiate this paragraph from section 253.2(a)(3), which mandates the inclusion of a "brief" narrative description of the contamination and remedy. The Department believes that the complexity of some environmental response projects may require additional explanation beyond a "brief" narrative, and so the paragraph is retained as proposed.

20) Comment: To be consistent with changes suggested to subsection (b) (see Comment 18, above), subsection (c)(1) should be changed to read: "Prior to signing an environmental covenant, an agency may review the environmental covenant and, subject to the limitations in § 253.2(b) (relating to additional information, restrictions and requirements), provide its conditions for approval, including subordination under § 253.8 (relating to subordination)." (2)

Response: See Response to Comment 18, above. Although the Department disagrees with the premise behind the comment, the final rulemaking limits the Department's discretion to require conditions for approval in section 253.2(c)(1).

21) Comment: Paragraph (c)(5) states:

> The date the Department receives the necessary copies of the signed final covenant, and the information reasonably required by the Department to make a determination concerning the approval or disapproval of the covenant, shall be designated as the "date of receipt" under section 6504(c)(4) of the UECA (relating to contents of environmental covenant).

We note that this provision was added to the statutory provisions found in 27 P.S. § 6504(c).

There are two concerns. First, it is not clear how to determine when the criterion is met regarding "information reasonably required by the Department to make a determination." This criterion is also contained in paragraph (4). We recommend that within a certain time period after the covenant is filed, the Department send written notice to the remediator indicating the start of the 90-day time period or that additional information is required for the filing to be considered complete.

Second, commentators believe it is unnecessary and premature to require a "signed final covenant" at this point in the process. The commentators assert that the expense of providing a final covenant would be wasted if that covenant is required to be changed. They also point out that if the draft covenant is approved, it could be signed afterward but prior to recording the environmental covenant. The Board should explain why it is reasonable and cost effective to require a "signed final covenant" in subsection (c)(5). (2, 10, 11)

Response: As for the first concern, the Department notes that the standard for deemed approvals is established by UECA and is not changed by the rulemaking. Whether or not the Department has received all information reasonably required to make a determination will be a fact-intensive inquiry that may vary depending on the particular property and remediation. Therefore, paragraph (4) is retained as proposed. As for the second concern, the Department has amended paragraph (5) to eliminate the requirement for submission of a signed final covenant at this point in the process.

22) Comment: Section 6504(c)(5) of the UECA (27 P.S. § 6504(c)(5)) was omitted from the regulation. It states, "[T]he Department's decision to approve or not approve an environmental covenant is appealable to the board." The regulation should include this provision. (2, 11)

Response: The authority to take an appeal from this decision is established by UECA and cannot be limited or expanded through this rulemaking. Although redundant, the Department has added the provision to the rulemaking as a reminder of the UECA provision.

23) Comment: Commentators believe subsection (d) is repetitive of provisions already contained in subsections (a), (b) and (c). Some do not believe subsection (d) is needed, while others believe it imposes mandatory requirements not found in the UECA relating to subsection (b). The Board should explain why subsection (d) is needed and reasonable. (2, 10, 11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

24) Comment: Although this section follows the provisions of UECA relating to mandatory and permissive content, the Department has attempted to mandate permitted content when negotiating terms of environmental covenants. Subsection (d) extends authority to the Department beyond that granted by the Legislature because it explicitly allows the Department to mandate inclusion of any of the permissible content. (10)

Response: The Department does not agree with the premise behind this comment. See Responses to Comments 18 and 20, above.

25) Comment: Subsection (e) provides that the covenant "will be in the form of the Model Covenant posted on the Department's web site or any other form acceptable to the agency." Commentators believe that, based on their experience, the model will be enforced as the defacto regulation outside the regulatory review process. For example, commentators state that the model covenant contains reporting obligations that they believe have been carried into actual covenants unnecessarily.

While we believe examples can provide needed guidance toward regulatory compliance, we agree that the example must be understood to be an example and should not be raised to the level of enforcement as if it were a regulation. Therefore, we recommend adding clarification to subsection (e) that states other covenants will be accepted by the Department that meet the requirements of the UECA and that the model covenant is only one example of how to comply. (2, 10, 11)

Response: The intent behind the proposed rulemaking provisions relating to the model covenant was only to state that the model covenant was available but was not required to be used if the remediator proposed an acceptable alternative. The changes to the final rulemaking are intended to clarify this position.

26) Comment: The Department's insistence that environmental covenants contain reporting requirements go well beyond the authority provided by UECA. Assuming some type of reporting obligation may be legitimate in certain narrowly defined circumstances, the Department has not articulated the factors it considers in "determining" what interval is necessary or appropriate with regard to the frequency of compliance reporting. If compliance reporting is going to be routinely required (an outcome we strongly oppose), then the proposed regulations should describe site specific factors that the Department will consider in "determining" what reporting interval is considered to be "necessary." (2)

Response: The Department disagrees with the premise underlying the comment and believes that reporting requirements often are appropriate and may be necessary, depending on the facts underlying each environmental response project. The final rulemaking reflects this position through changes to subsections (c)(1) and (d). See Responses to Comments 18, 23 and 24 above.

27) Comment: The only reporting requirement placed on the property owner to report to the Department that activity and use limitations and engineering controls remain in place should be at the time the property is sold or transferred to another party, if there is an environmental covenant placed on the deed to that property. If the Department waives the requirement for an environmental covenant based on the property owner's denial, then periodic assessment of that property should be required as part of the post-remedial care plan and the periodic reporting requirement should be covered under and part of the post-remedial care plan for the site which would be in perpetuity unless the Statewide health standard is demonstrated for the site sometime in the future. Disclosure at the time of transfer (or a Phase I site assessment) will provide future buyers with knowledge of activity and use limitations. (3)

Response: See Response to Comment 26, above.

28) Comment: The Department should identify that a covenant must include language outlining under what conditions a covenant can be terminated or amended (for example, attainment of residential soil or drinking water standards). At a minimum, such language should be included in the "permitted" portion of this section. (6)

Response: Subsection (b)(7) includes these concepts and the Department expects that it will approve environmental covenants with such language should remediators propose them.

29) Comment: Section 253.2(b)(3) continues a practice by the Department that is not required by UECA – the Department's requiring access to the property subject to the covenant on its own terms and conditions. This poses serious safety and security concerns for utilities. (7)

Response: The concepts contained in subsection (b)(3) mirror those in UECA and are permitted under the statute. The rulemaking does not change that provision or expand its scope. Where appropriate, the Department may condition its approval of an environmental covenant on inclusion of access to the site to determine compliance with the activity and use limitations.

30) Comment: Subsection (f) provides useful clarity to the regulated community, but the Department should consider extending the authority to execute environmental covenants to ALL property within common interest community, not just commonly owned areas. (10)

Response: Although the Department understands the concerns expressed by the commentator, the Department has not made this change in the final rulemaking. There are due process concerns with a board of a common interest community exercising authority over areas of the community that are not commonly owned. If the board can exercise such authority, the remediator may indicate so to the Department and, in that specific situation, the Department may accept board approval of broader environmental covenants.

§ 253.3. Notice of environmental covenant.

31) Comment: For purposes of clarity, we suggest the first sentence in subsection (a) be changed to read "An environmental covenant shall indicate to whom copies are to be provided, when those copies are to be provided and by whom the copies are to be provided." (2)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

32) Comment: Subsection (c) limits the opportunity to file waiver information to "no later than the date the draft environmental covenant is submitted to the agency." Commentators believe this may be too restrictive. They believe after a filing there may be discussions with the agency that results in a change to the notification list. The Board should explain why the waiver information is needed when the draft environmental covenant is submitted. (11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change. Also, see Response to Comment 43, below.

33) Comment: The Department should expand the deadline for providing copies of environmental covenants to 90 days. (1)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

34) Comment: The proposal in subsection (c) to allow for waivers from the requirement to provide copies of the covenant is a good one. The requirement that any such requests be provided at the time of the draft environmental covenant is unnecessary, substantially limits the waiver right granted by the Legislature and unduly limits the Department's flexibility. The final sentence of the subsection should be deleted. (2, 10)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

§ 253.4. Requirements for and waiver of environmental covenants.

35) Comment: Subsection (a) is confusing because engineering controls are physical structures rather than legal restrictions (see Comment 13, above). To address this concern, we suggest that the subsection be redrafted to state "[u]nless waived by the Department, activity and use limitations required to demonstrate attainment of a remediation standard under the Land Recycling Act or the Storage Tank Act shall be in the form of an environmental covenant." This would also track the parallel language in UECA more closely, as the statute does not require a covenant to "maintain" attainment of a remediation standard. (2)

Response: The Department disagrees with the premise of this comment and the conclusions reached by the commentator. The Department believes that UECA allows for the use of environmental covenants where activity and use limitations are necessary to maintain a standard. Further, the Department believes that the requirements in subsection (a) are well within the spirit of UECA. Finally, the Department notes that section 6517(b) requires conversion of instruments

used both to attain and maintain a remediation standard under UECA. Not requiring covenants when activity and use limitations are necessary to maintain a remediation standard simply because of the date the covenant was created (after the effective date of UECA versus prior to that date) is illogical and unwarranted. For these reasons, although editorial changes were made to subsection (a) in the final rulemaking, the substance remains as proposed.

36) Comment: Subsection (a) could be interpreted to require environmental covenants even when a municipal ordinance exists that prohibits groundwater use on all impacted properties. To clarify that this is not the case, we suggest adding the following language to the subsection:

> The Department shall not require the use of environmental covenants to demonstrate or maintain attainment of a groundwater Statewide health standard based on a nonuse aquifer determination pursuant to § 250.303, or of a groundwater site-specific standard based on pathway elimination pursuant to § 250.404, when a municipal ordinance exists that satisfies the following criteria:
>
> > (1) establishing a specific geographic area to which the ordinance relates, which may be part of a political subdivision or multiple subdivisions;
> > (2) prohibiting use of groundwater for drinking water use and for agricultural purposes (as defined by § 250.5);
> > (3) requiring that all properties in the specified area connect to a community water supply for the uses described above;
> > (4) notifying water suppliers servicing the area of the conditions of the ordinance; and
> > (5) providing for notification to the Department if and when the ordinance is modified or eliminated.

(2, 10)

Response: While the Department agrees with the spirit of the comment, the situation described by the commentator would be appropriate for a waiver of the requirement to create an environmental covenant. The Department did not address the substance of waivers in the rulemaking to maintain maximum flexibility to waive the requirement for a covenant for appropriate environmental response projects, as well as to limit the size of the rulemaking. The Department is developing a statement of policy under UECA to address waivers. A statement of policy will allow the Department to maintain this flexibility as well as using narrative descriptions of waiver situations (exemplary language is not permitted in regulations). The Department will seek input from the public and the regulated community in developing the waiver statement of policy.

37) Comment: Subsection (a) is similar to section 6517(a)(1) of the UECA (27 P.S. § 6517(a)(l)), but not identical. The regulation uses the phrase "...controls ***used*** to demonstrate ***or maintain*** attainment of a remediation standard...." The regulation also states "...shall be ***implemented through*** an environmental covenant." (Emphases added.) It is not clear why these phrases were substituted for the statutory language. The Board should explain why these amendments to the statutory language are needed and what purpose they serve. (11)

Response: See Response to Comment 35, above. The Department agrees with the commentator's second comment and the final rulemaking reflects this change.

38) Comment: A commentator observes that the requirements in subsection (b) do not appear in the UECA and suggests deleting it. The commentator explains that an environmental covenant would essentially be redundant of requirements already in other required agreements at Special Industrial Area remediation sites. The Board should explain why subsection (b) is needed. (2, 11)

Response: Special industrial area (SIA) sites may use activity and use limitations to demonstrate attainment and maintenance of remediation standards under Act 2, and so are subject to the requirements of UECA. At the current time, the Department's agreement with remediators at SIA sites requires the use of deed restrictions when land use limitations are necessary to meet the requirements of Act 2. Finally, SIA agreements may not bind future owners of the site and so covenants may be needed to meet the goal of limiting the future use of the SIA site. Therefore, the rulemaking is retained as proposed.

39) Comment: Commentators believe the Department will not have sufficient information to make an informed decision on waiver requests at the times they are required under subsections (c) and (d). They believe waivers need to be considered later in the process. The Board should explain why information on waivers is needed as specified in subsections (c) and (d) and how the Department can properly review the waiver requests at that time. (2, 9, 10, 11)

Response: The final rulemaking has been changed to require waiver requests to be made at the time of submission of the Final Report or Remedial Action Completion Report. The Department believes that the environmental response project should be finalized enough at that point for a thoughtful decision to be made as to waiver requests.

40) Comment: The regulations should include an automatic waiver of an environmental covenant in the form of only an institutional control (prohibiting installation of private water supply wells) on either a railroad property that includes only the railroad tracks and the railroad's right-of-way and a PennDOT right-of-way for situations where groundwater contamination has migrated beneath these properties, since it is extremely unlikely that any private wells would be or have ever been drilled on these properties. (3)

Response: See Response to Comment 36 relating to waivers, above. The Department expects to generally grant waivers in such cases.

41) Comment: Beyond the example of common interest communities, it is not clear under what circumstances the Department would grant a waiver from the requirement that the covenant be signed by every owner in fee simple of real property subject to the covenant. The Department should provide in some forum a listing of situations in which the Department has granted such waivers in the past and a non-exclusive listing of examples of situations in which such waivers would be considered. (4)

Response: See Response to Comments 36 and 40, above. The Department is developing a waiver statement of policy that will reflect its experience in implementing UECA since the effective date of the statute.

42) Comment: The regulations should clarify whether or not an environmental covenant is necessary when the remediator demonstrates attainment of the background standard. (4)

Response: If an environmental response project requires the use of activity and use limitations to demonstrate attainment or maintenance of a standard under section 302 of Act 2 (35 P.S. § 6026.302), then an environmental covenant generally would be required, regardless of the standard chosen by the remediator.

§ 253.5. Submission of environmental covenants and related information.

Note: This section of the proposed rulemaking generated the most comment during the public comment period. To the greatest extent possible, the Department has consolidated the concerns expressed over this section in this portion of the Comment and Response Document. Where a commentator raised a unique concern relating to this section of the proposed rulemaking, it is included as a separate comment.

43) Comment: Extensive public comment was submitted relating to Subsections (a), (b) and (d). Commentators stated:

- The timeframes established in Section 235.5 are unworkable, impractical and not authorized by the UECA or any other statute.

- The timing of the submittal requirements in these provisions is too early to be productive.

- It is premature and a waste of resources to prepare and negotiate the terms of an environmental covenant before the facts underlying the environmental covenant are determined.

- An environmental covenant should be the last step in the remediation process.

- The time and cost of the work will have to be repeated because the environmental covenant will likely need to be revised based on the remedial outcome.

We are concerned that resources may be wasted and question why draft and final environmental covenants are needed at the points specified in Subsections (a), (b) and (d). The Board should explain how the process in the regulation represents an effective use of time and resources for all parties involved. We will evaluate this response, as well as the response to public comment on these sections as part of our determination of whether the final regulation is in the public interest. (2, 3, 4, 5, 9, 10, 11)

Response: The Department agrees with the commentators and has revamped the submission process contained in the final rulemaking to delete any requirements to submit draft environmental covenants. The final rulemaking also moves the covenant submission and approval process to after the Department has reviewed and approved a Final Report or Remedial Action Completion Report. The Department anticipates that this change should reduce the amount of development and negotiation necessary for individual covenants as most issues should be resolved during the Final Report/Remedial Action Completion Report review and approval

process. All parties should have a clear understanding of what activity and use limitations are necessary to demonstrate attainment or maintenance of the Act 2 standard. When activity and use limitations are necessary, the Final Report or Remedial Action Completion Report will need to indicate either that a covenant will be submitted or that a waiver of the covenant is being requested.

44) Comment: Subsection 253.5(b) should be amended to require that the remediator, in his/her report, identify whether they intend to rely on any activity and use limitations to achieve the selected remediation standard. If so, the properties requiring a covenant should be identified as well as what activity and use limitations the remediator is proposing to attain and maintain the selected standard. This would provide the Department with the conceptual approach to the remediation without the time and effort involved in drafting a covenant. (9)

Response: Changes to the requirements for Final Reports are outside the scope of this rulemaking. The Department believes that this requirement can be addressed under section 250.204(g) (relating to final report) of the Act 2 regulations.

45) Comment: Subsection (c) requires a list of the names and current addresses of persons involved with the environmental covenant. That list must be provided when the unsigned draft of the environmental covenant is submitted. A commentator believes Subsection (c) is burdensome and describes it as a useless recordkeeping exercise because the list could be substantially changed by the time the environmental covenant is finalized. Another commentator suggests that the information required by Subsection (c) should not be required if that information is already contained in the environmental covenant. The Board should explain why the list required by Subsection (c) is needed in addition to the information in the environmental covenant and also why the list is needed and useful when the unsigned draft is submitted. (10, 11)

Response: See Response to Comment 43, above, relating to submission of draft covenants. The Department believes that submission of the list is necessary to determine whether or not the proper parties have signed the covenant, whether subordination may be required and to ensure that all parties entitled to receive notice of the covenant under UECA receive a copy of the covenant. Therefore, the final rulemaking reflects the requirement to submit the information to the Department at the time the Final Report or Remedial Action Completion Report is submitted to the Department.

46) Comment: Section 253.5(c) requires the person submitting the covenant to the Agency to also provide the name and current address of each occupier of the property and each person owning a recorded interest in that property. This section provides no guidance as to the scope of the investigation that must be made to determine owners, occupiers and persons with recorded interests. Nor does the regulation give guidance as to which type of recorded interests need to be reported to the Department. Are water, mineral or airspace rights or easements covered by the proposed regulation? The nature and extent of title or other record searches could be substantial and the regulated community is entitled to much more certainty on what the Department expects with this type of requirement. The Department should specify the extent of the occupancy and ownership search, as well as the scope of coverage of any search for recorded interests in the property. (7)

Response: This notice is required by section 6507 of UECA (27 Pa.C.S. § 6507); subsection (a)(2) requires notice to owners of recorded interests and subsection (a)(3) requires notice to persons in possession of the property. The Department believes that developing such lists is relatively routine in real estate transactions. Because the subsection only mirrors the requirements of the statute, the final rulemaking retains the subsection as proposed in terms of the substance of this comment.

47) Comment: Subsection (c) should be amended to provide that additional information is not required with the submission if already contained in the environmental covenant. (1)

Response: See Response to Comment 43, above. Because the submission process consists of only one step in the final rulemaking, this change is unnecessary.

48) Comment: Subsection (e) should be amended to allow for 90 days to provide the Department with proof of recordation of the covenant with the County Recorder of Deeds. (1)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

49) Comment: Subsection (e) imposes the requirement to return proof of recordation to the Department within 60 days of approval of the environmental covenant. There is no support for this requirement in UECA and this unnecessary burden should be deleted. (10)

Response: Environmental covenants must be recorded to be effective instruments imposing activity and use limitations under Pennsylvania real estate law. The Department must have proof of recordation to ensure that the covenant is effective. As for timing, see Response to Comment 48, above.

§ 253.6. Requirements for county recorder of deeds.

50) Comment: This section directs the actions of a recorder of deeds. Subsection (a) directs that "the recorder of deeds shall provide" a copy of the recorded document. Subsection (b) states the "county recorder of deeds may not require payment of the Realty Transfer Tax..." It is not clear in the regulation or Preamble what authority the Board is using to regulate the actions of recorder of deeds. The Board should explain its statutory authority to enforce Section 253.6. (11)

Response: The Department believes that Counties are persons under UECA and subject to rights and responsibilities under the statute like any other person, as defined by the statute. Therefore, the timing requirement is retained. Although the Department believed that the proposed rulemaking provision relating to the Realty Transfer Tax merely reflected current tax law in the Commonwealth, the Department acknowledges that such a provision can be addressed elsewhere and so it is deleted from the final rulemaking.

51) Comment: This section should address whether or not a regulated entity/remediator must request an extension from the Department if the county recorder of deeds does not provide a copy of the recorded document to the remediator in a timely manner. (6)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

§ 253.7. Fees.

52) Comment: Several commentators are concerned that the application of the $350 fee is not sufficiently clear given the regulation's requirements for multiple submittals of draft and final environmental covenants. For example, the regulation does not address amendments the Department may require to an environmental covenant. The regulation should clearly state what filings require payment of a fee. One suggestion was to amend the subsection (a) to state, "A nonrefundable fee of $350 shall be submitted with each covenant approved by the Department and sent for its execution." (10, 11)

Response: The fee is to be submitted with each individual covenant, and not with multiple submissions of the same covenant, should changes be necessary to the initial submission. The final rulemaking retains the proposed language relating to submissions.

53) Comment: Section 253.7 should be amended to explicitly waive the payment of the fee for agencies of the Commonwealth. (1)

Response: Neither Act 2 nor UECA explicitly waive payment of fees under the statutes for Commonwealth agencies (c.f., section 110 of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.110). Therefore, the final rulemaking retains the language as proposed, requiring payment of fees by all remediators submitting environmental covenants.

§ 253.8. Subordination.

54) Comment: Because of the importance of minimizing the interference with vested interests in real estate, the rulemaking should provide that (1) subordination be required only based upon specific findings explaining how and why a lack of subordination will interfere with the implementation or enforcement of an environmental covenant; and (2) subordination not be directed unless consultations with holders of prior real estate interests fail to result in an agreement regarding subordination, or alternatives to subordination that will otherwise ensure that the objective of an environmental covenant are achieved. (2)

Response: As to the first comment, the Department agrees with the commentator and the final rulemaking reflects this change. As for the second comment, the Department will work with all parties if subordination is required, but does not believe that the additional process is mandated or necessary under UECA, and the change is not included in the final rulemaking.

55) Comment: A commentator noted that this section includes portions and excludes portions of the parallel provision in section 6503(d) of the UECA (27 P.S. § 6503(d)). For example, the second sentence of section 6503(d)(3) (27 P.S. § 6503(d)(3)) is not included in subsection (c) of the regulation. Also, section 6503(d)(1) of the UECA (27 P.S. § 6503(d)(l)) is not included in the regulation. We recommend including all of the provisions from section 6503(d) of the UECA in the regulation. Alternatively, the Board should explain why only portions are needed. (2, 8, 11)

Response: As to the first comment, the Department agrees with the commentator and the final rulemaking reflects this change. For the second comment, the provision is not necessary to be repeated in the rulemaking because UECA controls this question; inclusion of the subsection would be redundant and therefore the change is not made to the final rulemaking.

56) Comment: With respect to the second sentence of Section 253.8(c), a commentator questions whether it should be necessary to provide to the Department proof of recordation of a subordination agreement. The commentator also suggested that the following provision from Section 6503(d)(3) be added to Section 253.8(c): "If the environmental covenant covers commonly owned property in a common interest community, the subordination agreement or record may be signed by any person authorized by the governing board of the owners association." (2, 8)

Response: The Department agrees with the commentator and the final rulemaking reflects these changes.

57) Comment: Section 253.8(d) should be modified for clarity to read "An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of the person's interest but does not itself impose an affirmative obligation on the person with respect to the environmental covenant nor does it affect that person's existing environmental liabilities." (2, 8)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

§ 253.9. Duration.

58) Comment: Section 6509 of UECA contains five mechanisms whereby environmental covenants can be terminated. For clarity and ease of use, we suggest that subsection (a) be revised to expressly include the five mechanisms for termination listed in the statute. (2)

Response: As the commentator notes, section 6509 of UECA (27 Pa.C.S. § 6509) explicitly lists the methods of termination of an environmental covenant. Therefore the changes suggested are unnecessary in the rulemaking and the changes are not made.

§ 253.10. Conversion and waiver of conversion.

59) Comment: For purposes of clarifying which existing instruments must be converted to environmental covenants, subsection (a) should be modified to read:

> An instrument created before February 18, 2008, containing activity and use limitations for a parcel of property or portion thereof necessary to demonstrate attainment of maintenance of a remediation standard under the Land Recycling Act or to demonstrate satisfaction of a corrective action requirement under the Storage Tank Act shall be converted to an environmental covenant by February 18, 2013, unless waived by the Department or waived by provisions in this section.

(2)

Response: The Department agrees with the spirit of this comment and the final rulemaking reflects comparable changes.

60) Comment: Subsection (a) closely tracks the language of section 6517(b)(1) of the UECA (27 P.S. 6517(b)(l)), but excludes the statutory phrase "which establishes activity and use limitations." The Board should explain why this statutory phrase was omitted in the regulation. (11)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.

61) Comment: Commentator supports the clarification that the obligation for conversion is placed on the current property owner by subsection (b). Commentator further supports the inclusion of the final sentence of subsection (b) that the Department may not require any additional activity and use limitations in the covenant during conversion. This subsection does not go far enough in limiting the Department. It should provide that the Department may not require any additional items beyond those mandated by section 6504(a) of UECA. The Department should revise the final sentence of subsection (b) to read: "The Department will not require, but may allow, the environmental covenant to contain anything beyond what is required by § 253.2(a), including any activity and use limitations not contained in the existing instrument or a Department-approved postremediation care plan." (2, 10)

Response: The Department acknowledges the support of the commentator for the approach taken by subsection (b). The Department agrees with the spirit of the changes requested and the final rulemaking reflects comparable changes.

62) Comment: Commentator supports the inclusion of a waiver from the obligation to convert an existing instrument. However, commentator notes the ambiguity and broadness of the definition of "Instrument" (see Comment 14, above) and incorporates the comments relating to the term by reference. (10)

Response: See Response to Comment 14, above.

63) Comment: It is not clear under what circumstances the Department would grant a waiver from the requirement that the prior instruments be converted to environmental covenants. The Department should provide in some forum a listing of situations in which the Department has granted such waivers in the past and a non-exclusive listing of examples of situations in which such waivers would be considered. (4)

Response: See Responses to Comments 36, 40 and 41, above. The changes requested are not included in the final rulemaking.

64) Comment: Section 253.10(b) places the obligation of converting an existing instrument to an environmental covenant under the UECA on the current owner of the property subject to an environmental covenant.

The regulation is silent with respect to the failure of the current owner to convert an existing instrument. It would follow the sense of the Act and the regulatory proposal as a whole to

assume that any existing liability protections accorded under Act 2 would continue with respect to persons holding such protection. Since subsection (c) allows a waiver of the current owner's obligation to convert, it would be patently unfair for others enjoying the liability protection to lose that status if the current owner fails to convert or obtain a waiver of conversion.

The commentator believes that these are the most reasonable interpretations under these regulations of circumstances in which the current owner fails to convert an existing instrument or obtain a waiver from the requirement to do so, there are other interpretations the Department could embrace that are inimical to the purposes of the UECA. The commentator suggests that the Department should clarify that liability protections accorded others under Act 2 will not be affected under such circumstances. (7)

Response: The Department cannot mandate whether or not liability relief granted under Act 2 is lost when the current owner fails to convert an existing instrument to an environmental covenants, but notes the close coordination between the two statutes.

65) Comment: The Department should consider extending the authority to execute environmental covenants to ALL property within a common interest community, not just commonly owned areas. (10)

Response: See response to Comment 30, above. The Department is concerned that a board may not have authority to bind owners of non-commonly owned property within the community.

§ 253.11. Assignment of interest.

66) Comment: The 30-day requirement is inflexible and the phrase "unless waived by the Department" should be added to the end of this section so that flexibility with the 30-day rule will be available by waiver should the Department agree to grant it. (4)

Response: The Department agrees with the commentator and the final rulemaking reflects this change.