

BURACK

ENVIRONMENTAL LAW OFFICES

2 Bala Plaza, Suite 300

Bala Cynwyd, PA 19004-1501

Tel: 610 660 7790

Fax: 610 660 9084

Mburack1@verizon.net

ENVIRONMENTAL UPDATE—MAY 2009

COMPLIANCE WITH STATUTORY REQUIREMENTS FOR RECORDING INSTITUTIONAL CONTROLS IMPOSED IN ACT 2 APPROVALS

Background: The Pennsylvania Uniform Environmental Covenants Act, 27 Pa.C.S. §6501 et seq. (UECA) became effective in early 2008. UECA sets forth informational requirements applicable to the Environmental Covenants that are required to be recorded for properties receiving Act 2 approval in conjunction with a Site Specific Standard. For those who may be unfamiliar with the term “Environmental Covenant” it is simply a combination of land use restrictions and engineering controls, which are recorded with a property deed. The contents of such a covenant are often also referred to as “institutional controls”. Typical institutional controls include prohibition on residential use, prohibition on use of groundwater, and maintenance of pavement or vegetation acting as a “cap” over residual contaminated soil areas.

UECA was enacted because PADEP concluded that the variance in specificity between covenants filed by ACT 2 remediators was unacceptable, and that all parties should have uniform minimum requirements for including background information on the site.

Compliance Requirements: Section 6504 of the Act, sets forth the specific information and legal provisions now required to be included in environmental covenants. DEP has incorporated these requirements into a form that is available on their web site. A link to the web site, as well as customized version of the form can be found on my web site in the reference section (www.burackenvironmentallaw.com).

UECA also requires that covenants be enforceable by DEP, the municipality, and any other party that signs the covenant as a “holder”. A “holder” is a third-party other than the municipality, having an interest, specifically recognized in the document, in compliance with the covenant’s terms.

The statutory requirements apply to all covenants recorded after February 16, 2008. The statute also requires that covenants filed before that date, all the way back to 1995, must be upgraded and re-recorded, by February 16, 2013.

Compliance Recommendations: Covenant upgrades are not due for another 45 months. Consequently, many clients and consultants I speak to have not focused on the requirement. Nevertheless, my experience with recording several covenants during the past year, suggests that waiting until 2013 is a bad idea. Once an Act 2 approval is more than a few years old, it starts becoming more difficult to locate the files and the individual consultant project manager that can make the covenant upgrade a tolerable and reasonably priced exercise. Companies go through corporate changes or dissolve, individuals transfer or retire, and files get lost. Properties also change hands and current occupants may not be diligently complying with institutional controls. Clients may also simply forget about old Act 2 sites that are no longer owned, especially smaller companies whose archived files are sitting in the owner's attic.

Any party that has ever obtained Act 2 approval as a remediator for either currently or previously owned property, and any party that currently owns or occupies property that previously received Act 2 approval, is well advised to do the following, **as soon as possible**:

- 1) Prepare a list of properties owned or formerly owned, for which Act 2 approval was obtained;
- 2) Locate a copy of the DEP Act 2 approval letter, or obtain a copy from DEP files;
- 3) Determine if a deed restriction was required as a condition of approval [Usually in conjunction with Site Specific Standards];
- 4) Determine if the company was considered a "remediator", and if so, whether they were the active remediator or a nominal remediator who had an agreement with a Buyer, Seller or responsible party who actually did the work, or whether work was done by another signatory to a Buyer Seller Agreement. The answer to this question can often be found in a Buyer-Seller Consent Order, and/or private clean up cost allocation agreement.
- 5) If you were not the remediator, and you still own the property, contact the remediator and request UECA compliance and proof of such compliance. If they cannot be located, you will likely need to take responsibility for UECA compliance.
- 6) If you were the active remediator, prepare and file the required upgraded covenant as soon as possible, and submit copies to DEP, the municipality and the property owner (if owned by another).
- 7) If you were a nominal remediator, contact the active remediator and obtain their commitment to comply with UECA at their expense. If they cannot be located or if agreement cannot be reached regarding the costs of UECA compliance, you may need to take responsibility for UECA compliance.

Frequently asked questions:

Q: Does UECA cover underground tank remediation approvals?

A: Yes—UST remediation that meets Act 2 standards achieves Act 2 release of liability, and typically includes institutional controls such as use restriction or cap maintenance if residual contamination is allowed to remain pursuant to a site specific standard. Future deed notices must comply and pre-February 2008 deed notices must be updated.

Q: What is the role of a “holder” under UECA?

A: A holder would typically be a neighboring property owner, or a lender holding a security interest, who insists on having an enforceable property interest in assuring compliance with the covenant. A lender, however, might worry about creating unnecessary indicial of “control” by signing a UECA covenant as a holder. A UECA covenant is not required to name a holder, and in most cases, it seems likely that the only signatories will be the owner/grantor, and PADEP.

Q: What happens after a UECA grantor sells the property in the future?

A: The UECA covenant runs with the land. The covenant also requires the grantor to notify any future purchaser of the covenant and its specific restrictions and obligations.

Q: Does UECA require more stringent institutional controls?

A: No. The primary substantive addition to the covenant is the enforceability by a municipality or holder.

Q: What are the typical costs of upgrading and recording an environmental covenant?

A: If the necessary files and consultant project manager are available, most covenants should run no more than \$2,000, including attorney time, environmental consulting fees, and time and fees for recording of the covenant. If information has to be located in DEP files, additional consultant time would be expected; and if a title company is used for the filing, the cost may also increase.