



Fox Rothschild LLP  
ATTORNEYS AT LAW

# In the Zone

Presented by the Zoning and Land Use Practice Group

February 2010

## PADEP Releases Draft UECA Regulations on Its Web Site

By M. Joel Bolstein



The Uniform Environmental Covenants Act (UECA) was signed into law on December 18, 2007. Since that time, the Pennsylvania Department of Environmental Protection (PADEP) has provided guidance in the form of fact sheets, a model covenant and a Q&A on its web site. Recently, the PADEP posted on its web site a draft set of proposed UECA regulations. The proposed regulations were approved for comment by the Environmental Quality Board on December 15, 2009. A 30-day comment period is expected to commence in mid to late February, depending on publication in the Pennsylvania Bulletin.

In reviewing the proposed regulations, I believe that the biggest issue is not what is in the draft regulations but rather what is not in there. After several years of advising clients regarding compliance with UECA and having submitted a number of environmental covenants to the PADEP for review and approval, I can say that the most significant concern for real estate developers is the fact the Model Covenant on PADEP's web site imposes periodic reporting obligations on the property owner that run in perpetuity. So, for example, if the remediation involves capping some contaminated soil with asphalt or concrete, the environmental covenant will say that the cap has to be maintained and the property owner must report annually (i.e., forever) to the department that it is continuing to maintain that engineering control. It was not that way prior to UECA, when the property owner would put notice of the cap in its deed and that would be that.

Upon first reading UECA, one could have easily concluded that the drafters did not intend to impose perpetual reporting obligations in each and every environmental covenant. Information "required" to be included in environmental covenants is set forth in Section 6504(a) of UECA, and additional information that was supposed to be optional was set forth in Section 6504(b). One of the optional requirements is Section 6504(b)(2) -- "requirements for periodic reporting describing compliance with the environmental covenant." Nonetheless, what appears to have been considered optional by the drafters of UECA has now become required, as a result of the use of the Model Covenant and through the actions of the PADEP staff responsible for reviewing and approving the environmental covenants.

I had hoped the regulations would provide an avenue for the PADEP to interpret Section 6504(b)(2) in a way that would set forth criteria to use in determining instances in which periodic reporting was not required. Surely, perpetual monitoring is not necessary for every institutional and engineering control. The Commonwealth got along just fine without it in the 12 years that real estate developers were successfully remediating thousands of sites under Act 2 prior to UECA's passage. In addition to using the regulations to draw distinctions between sites that require periodic monitoring and sites that do not, the regulations could be used to set ground rules for the frequency of the periodic reporting. Some environmental covenants approved by the PADEP require annual reporting while others allow reporting every three years or no reporting at all.

There is nothing in any UECA guidance (the fact sheets and model covenant) issued by the PADEP to date that explains how one determines the needed frequency for the reporting. It seems to me that the regulations might be an appropriate place to set those ground rules, but it appears the PADEP has decided not to go in that direction.

In my reading through the draft regulations, it is apparent that the PADEP has chosen not to use the regulations to clarify when the "optional" reporting obligation need not be imposed or the frequency of the reporting obligation in those instances when it is imposed. I spoke with Troy Conrad at the PADEP, who will be responsible for moving the draft regulations to completion, and he acknowledged that the draft regulations do not address the issue of periodic reporting. He suggested it may be better addressed with additional guidance to be provided in the Act 2 Technical Guidance Manual (TGM). I agree that is a possibility, but these are issues that need to be addressed in one form or another.

To the extent that the PADEP is using the regulations to interpret UECA, then it may be entirely appropriate to include provisions addressing the requirements for periodic monitoring in Section 6504(b). The Act 2 TGM is used as a supplement to the Act 2 regulations. It expands upon and provides additional guidance, but the Act 2 regulations address the major issues. The need, or lack thereof, for periodic reporting is a significant issue that needs to be addressed. Perpetual reporting under UECA draws the attention of buyers and sellers in Pennsylvania real estate

transactions. The uncertainty of what requirements will be imposed in the environmental covenant, which generally is developed at the end of a site remediation project, makes it difficult for real estate purchasers to know what continuing obligations will be imposed on their ownership of the property they are looking to acquire. Presumably, commenters will be able to express their concerns regarding the

lack of guidance on the need for periodic monitoring and the frequency of that monitoring when the draft regulations are released for public comment, which might persuade the PADEP to address those issues in the regulations before they become final.

The draft regulations can be found at <http://www.depweb.state.pa.us/ocrlgs/cw/p/view.asp?a=1459&Q=534936>.

For more information, please contact Joel Bolstein at 215.918.3555 or [jbolstein@foxrothschild.com](mailto:jbolstein@foxrothschild.com). Joel has also addressed other UECA-related issues in multiple posts on his blog (<http://pabrownfieldsenvironmentallaw.foxrothschild.com>).

### Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.