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Brownfield Redevelopment in Pennsylvania Impacted by UECA

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The Uniform Environmental Covenants Act (UECA) became effective in Pennsylvania on February 16, 2008, and it is already having a profound effect on brownfield redevelopment activities.

Everyone who deals with brownfield properties in Pennsylvania – lawyers, consultants, developers, municipalities – needs to understand that this Act fundamentally changes the manner in which institutional and engineering controls will be handled in the Commonwealth. Up until now, when a property has environmental contamination and a deed notice or deed restriction is required under Pennsylvania law (for example, by the Solid Waste Management Act or the Hazardous Sites Cleanup Act), a notice or restriction would have to be placed in the deed at the time of conveyance. Under certain statutes (Act 2, Storage Tank Act), the deed notice or deed restriction would be included in the deed in conjunction with the remediation. The deed notice or deed restriction generally described the contamination, identified the location on the property, and also noted whether there were any limitations on the future use of the property. For example, the deed notice could state that the groundwater at the property was contaminated with hazardous substances, that the PADEP had approved a final report that demonstrated that the property had attained the Site Specific Standard under the Land Recycling Act, and that the groundwater was not to be used for drinking water purposes unless the residential statewide health standard was attained in the future. That language placed in the deed was all that was required to be a valid institutional control and acceptable under Pennsylvania law. That is no longer the case.

It is not possible in a few short pages to summarize every provision in the Act. With that said, here are the most significant changes brought about by the adoption of the Uniform Environmental Covenants Act.

1. Instead of preparing a deed notice or deed restriction and putting it in the deed, **you will now have to draft an environmental covenant and get it approved by PADEP**. A covenant will be required for any remediation done under a federal or state program governing environmental remediation of property, specifically including remediation done under Act 2 and the PA Storage Tank Act. **PADEP will actually have to sign the covenant** (but it would be deemed approved if PADEP doesn't sign it within 90 days of receipt).
2. A copy of the environmental covenant will need to be provided to all persons owning or occupying the property and who have a recorded interest in the property. **A copy of the covenant also needs to be sent to each political subdivision in which the property is located**. It has to be recorded in every county in which a portion of the property subject to the environmental covenant is located.
3. **The environmental covenant is perpetual**, unless certain conditions are met that allow it to be terminated.

4. A **civil action can be brought for injunctive or other equitable relief to enforce an environmental covenant**.
5. **PADEP and the political subdivision in which the real property is located both have the right to sue to enforce the environmental covenant**.
6. **The Act requires PADEP to establish and maintain a registry for all of the environmental covenants**, and people can reference the availability of the covenant in the registry when preparing deed notices.
7. Going forward, **every cleanup under Act 2 and the PA Storage Tank Act that uses engineering and institutional controls to attain one of the standards, will need to have an environmental covenant**.
8. All deed notice and deed restrictions that are currently in place that establish activity and use limitations (for all practical purposes any engineering and institutional controls) **will need to be converted to an environmental covenant within 60 months of the Effective Date** (by February 16, 2013).

The biggest change is that PADEP will now be reviewing, approving, and **signing** the actual document that imposes the institutional and engineering controls. While PADEP did review and approve proposed deed notice language, in reviewing and approving final reports, it never signed the instrument that was recorded. Already, the need for PADEP to review and sign has caused delays, as covenants have begun to pile up in regional PADEP offices.

The second biggest change is giving PADEP and the municipality the right to enforce the covenants. There has always been concern that there was little anyone could do if institutional and engineering controls weren't being followed. For example, if a final report was approved with an engineering control that said a fence was to be placed around a waste area or an asphalt cap had to be maintained on top of some remaining contamination, there was very little that was being done to police those things. Now, the Department or the municipality can go back to sites and bring action to enforce the covenants, and remediators have to understand that is exactly what is contemplated by the statute. It's also possible that the Department might decide to perform routine, random audits of the covenants and take action based on those results. Whether and how municipalities would enforce the covenants is unclear.

The process of converting existing deed notices and deed restrictions that contain institutional and engineering controls into covenants should also be considered. At this point, it would be prudent for landowners who have large portfolios of property to start looking at how the UECA will effect those properties, and think about inventorying the instruments that will need to be converted to covenants and start to put in a long term procedure for doing that.

Subsequent to the effective date of the Act, PADEP sent out information regarding its implementation of the UECA to the people on the Land Recycling program's email list. The information includes PADEP's overview of UECA, a model environmental covenant, and a model notice of environmental covenant. It is now posted on PADEP's Web site and is available for review at www.depweb.state.pa.us/ocrlgs/cwp/view.asp?a=1459&q=534040.

Having read through the materials, here are the highlights:

- When an environmental covenant is required as part of a site remediation project, the Department will expect the remediator to draft the covenant and submit the draft prior to the Act 2 Final Report or Storage Tank Act Remedial Completion Report. The suggestion is to submit the draft covenant with the Cleanup Plan that is submitted under the Act 2 Site Specific Standard or the Remedial Action Plan for a tank remediation under Chapter 245. Presumably, if the covenant is an institutional control required under the non-residential statewide health standard (such as a deed notice that says the property cannot be used for residential purposes), then the remediator can submit that with the Final Report because no cleanup plan is required.

- PADEP says that remediators can request that the Department waive the need for a covenant, and that such waivers will be granted only in limited circumstances. I'm not sure when a remediator would need to seek a waiver, but it is good to know that the Department recognizes that it has that discretion.
- The Department wants the remediator to submit at least two copies of the proposed covenant. The copies should be signed by all parties except PADEP and submitted to the regional office with the Act 2 Final Report or the Remedial Action Completion Report.
- The covenant will be reviewed by both the program and legal staff and it will be signed by the regional ECP manager at the same time that he/she sends out the final report approval letter.
- The Department is working to put together the PA Environmental Covenant Registry that is required by the Act. That is a work in process, and for now, the Department will be posting a listing of covenants on its website.
- The model Environmental Covenant posted on PADEP's Web site is a fill-in-the-blanks document similar to the model Buyer/Seller Agreement that has instructions provided within the model itself. It appears that considerably more information is necessary than the standard deed notice used up until now. For example, Section 4 of the model covenant, which requires a description of the contamination and the remedy, appears to require a listing of all documents ("any administrative record for the environmental response project"). An administrative record is a term generally used to refer to a HSCA or CERCLA administrative record, and maybe that is how it is intended to be used here. It is unclear whether PADEP expects an Act 2 voluntary remediator, for example, to include in this description a listing of every document submitted to PADEP as part of the remediation project. Presumably, it will be sufficient to identify the Final Report, which references all of the other documents generated and relied upon for the remediation.
- Section 7 of the model covenant contains the most troublesome provision. It imposes a compliance reporting obligation when an engineering or institutional control is used. The example used in the model requires that the Owner of the property submit to PADEP and any holder of the covenant at fixed intervals, such as every January or every third January, "written documentation stating whether or not the activity and use limitations in this Environmental Covenant are being abided by." That type of obligation, until now, typically only has been imposed in HSCA or CERCLA consent decrees that impose annual reporting or five year type reporting obligations. It looks like going forward, property owners are going to need to be responsible for submitting written certifications that the covenant is being complied with, and that obligation will continue for as long as the covenant is in place (which in most instances is in perpetuity). This responsibility is a new one and property owners may need to get used to it. Providing these certifications will need to be scheduled just like other continuing obligations imposed on a property owner, like paying taxes.

  One problem is the disconnect between property owners and their environmental consultants. Typically, the environmental consultant does all of the work and files the Act 2 Final Report for the property owner. Once the property owner receives the letter from the PADEP approving the Report, the consultant's work typically ends and the property owner assumes no further work is required. Now, property owners will need to be given explicit instructions by their outside environmental counsel or consultants to identify all continuing obligations, and it will then be the property owner's responsibility to comply with those future reporting obligations.

  The last point regarding Section 7 is that it appears to require that documentation be submitted to PADEP every time "any site work affecting the contamination on the property" is "proposed." That would seem to impose a very heavy burden on property owners where contamination is left in place under a cap. For example, will the Department expect the property owner to submit copies of proposals for replacing utilities, such as stormwater pipes, on

properties that have contamination under a concrete or asphalt cap before such work is undertaken? If such proposals have to be submitted to the Department, do you have to wait for approval prior to conducting the work? Who would review the proposal? What would the review time be for the Department? In the past, no such prior approval would be necessary but the property owner would be expected to maintain and/or replace the cap to maintain its Act 2 liability protection. This obligation will need to be clarified by the Department.

The last significant issue raised by UECA is whether it requires that environmental covenants be recorded on adjacent properties when the remediator seeks to attain the Site Specific Standard on a property where groundwater contamination is migrating off-site. That issue is being hotly debated. The way it works now, and has worked for the last 11 years, a remediator can demonstrate attainment of the Site Specific Standard at a site with groundwater contamination migrating off-site by doing a fate and transport analysis and showing that there is no impact on drinking water or surface water and demonstrating that vapor intrusion is not an issue. The remediator in that case would, after completion of the attainment sampling, publish a notice of the remediation in the local newspaper and submit the Final Report for review and approval to PADEP. In addition, under Act 2, the remediator would record a deed restriction stating that the groundwater on his or her property should not be used for drinking water purposes. Such notice would be recorded only on the property being remediated.

Here is a hypothetical showing how this issue may arise. Let's say you are a developer looking to purchase a shopping center that has, among other things, a dry cleaner. You decide you want to do some soil and groundwater sampling to determine if there is any contamination. You find that there is PCE in the groundwater at the property. You determine that the shopping center and all properties surrounding it are on public water and there are no drinking water wells. You also determine that there is a local ordinance prohibiting the installation of any new drinking water wells. Your consultant takes two rounds of samples and does a fate and transport analysis and determines that while PCE in the groundwater is migrating off-site, it isn't impacting any drinking water wells or surface water. Your consultant also determines that the PCE levels are below the threshold of the vapor screen so there is no vapor intrusion issue. Now your due diligence period is about to expire, and you, as a buyer, need to decide whether or not you want to proceed with the transaction. You ask your consultant to give you a scope of work and cost estimate to complete the Act 2 process and get a release of liability. Your consultant says that you will need to do eight quarters of groundwater samples and then file a Final Report under the Site Specific Standard. Now you remember that one of your lawyers mentioned that Pennsylvania recently adopted the UECA, and that you heard that in order to get an Act 2 release in this situation you might have to get the owners of the adjacent properties to agree to place environmental covenants on their properties because the plume has moved off-site. You worry that if that is true you could get to the end of the process and any one of those adjacent property owners could say no and prevent you from getting your Act 2 Final Report approved using the Site Specific Standard. Is that a real concern? It appears that it may be a real concern based on some answers PADEP recently posted on its Web site.

In April, PADEP posted some "frequently asked questions" on the UECA section of its brownfields Web page. The Q&A addresses the options available to a remediator seeking to attain the Site Specific Standard at a site where there is off-site migration but everyone is using public water. The concern has been that, in those circumstances, the Department would say that UECA requires covenants on all downgradient properties above the plume, and that would limit the ability to use the Site Specific Standard in these circumstances, and provide a disincentive to future redevelopment. According to the Q&A, the Department will require remediators in those circumstances to either get covenants on all the downgradient properties OR show that a municipal ordinance exists that prevents the use of groundwater and meets other specific criteria (which may be difficult to meet) OR agree to a Post Remediation Care Plan (PRCP) that would, in perpetuity, require the site owner to verify the continued nonuse of groundwater on the downgradient properties in accordance with 25 Pa. Code Section 250.303(d)(3). In most of these instances, the easiest way out would appear to be agreeing to the PRCP.

The perpetual reassessment on the future use of groundwater is a significant and profound change in how Act 2 has been implemented. It is possible that PADEP will provide further options as it moves to implement UECA. We've been told that the Department intends to expand the Q&A section on its webpage over the next 8 to 12 weeks. That would then be folded into an interim guidance that would give way to a rule making and new regulations.

Anyone with concerns or issues regarding PADEP's implementation of UECA should contact Joel Bolstein at 215.918.3555 or jbolstein@foxrothschild.com.

Bolstein has been in close contact with PADEP's Deputy Secretary and the Director of PADEP's Land Recycling Program raising issues on behalf of the regulated community. Keep up with Bolstein's continuing conversation with PADEP by going to his blog at http://pabrownfieldsenvironmentallaw.foxrothschild.com.

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