

Legal Brief

The ABCs of Pennsylvania's Uniform Environmental Covenants Act



If you own a piece of property in Pennsylvania with current or historical environmental contamination, then you need to be aware of recent changes in state law regarding environmental covenants. Last year, Pennsylvania adopted a national uniform law to standardize the approach to creating and recording environmental deed notices and land use restrictions. After February 19, 2008, any environmental land use or activity restrictions (such as prohibition of residential use or groundwater use) must follow the form prescribed by the Uniform Environmental Covenants Act (UECA). The UECA requires each "Environmental Covenant" (EC) document to meet specific notice, content and filing requirements. The UECA requirements apply to all Pennsylvania Land Recycling Act (Act 2) and Storage Tank Act (UST) remediations, as well as all other state and federal environmental remediation programs.

The Pennsylvania Department of Environmental Protection's (PADEP) approval and signature is now required on all EC documents. PADEP may provide conditions for its approval, such as requiring mortgage holders to subordinate their interests to the EC land use restrictions. Mortgage holders must receive written notice of any EC placed on the property, and a prior mortgage is not affected by an EC (unless subordinated). PADEP has issued a model "Environmental Covenant" form document, with both mandatory and optional EC provisions, that landowners can elect to follow. While adherence to the PADEP model likely will ensure approval, a number of the optional provisions contained in the model favor PADEP's interests over those of the landowner. PADEP's failure to approve or disapprove a proposed EC within 90 days will constitute a "deemed"

approval. PADEP actions under the UECA are appealable to the Pennsylvania Environmental Hearing Board.

It is important to recognize that PADEP and other signatories to the EC are "holders" of the rights under the EC, and may enforce its restrictions. Holders may include owners, tenants, mortgage holders, remediators, neighbors, agencies, et cetera. The landowner must provide a copy of the final signed EC to: all signatories of the EC, anyone with a "recorded interest" in the property, anyone in possession of the property (including tenants), the municipality and county where the land is located, and anyone else PADEP requires. The EC must include a legal description of the property, a brief description of the contamination and the remedy, the identity of all grantees (holders), a description of all use limitations, and the name and location of the administrative record for the cleanup. The final signed EC must be recorded at the local county courthouse and must be registered at a new PADEP statewide electronic database "registry."

In general, ECs "run with the land" and the duration of an EC is perpetual, unless it terminates (by its own language) upon a specific duration or event. Because ECs benefit all holders, generally, the modification or termination of an EC requires the consent of all holders (including PADEP) and the current landowner. The land use restrictions under an EC may be enforced by: any party to the EC, PADEP and any other applicable agency, anyone whose "property rights," "collateral" or "liability" may be affected by a violation of the EC, and the municipality or county where the property is located.

A key feature of the UECA is that it requires "conversion" of any environmental land use restriction

already in place, under Act 2 or the Storage Tank Act prior to February 19, 2008, to a new "Environmental Covenant" meeting all of the UECA requirements within five years (by February 19, 2013). Failure to "convert" such pre-existing ECs to the new UECA ECs does not invalidate such land use restrictions, but PADEP may take enforcement action to require such conversion. The UECA does not specify who is responsible for conversion of existing ECs (that is, the current landowner or the landowner who recorded the existing restriction). To date, PADEP has not made any effort to identify existing restrictions or notify landowners of the obligation to convert. Even so, parties with pre-2008 ECs should be aware of this obligation and should take action now to begin identifying and converting their older ECs to new ECs meeting all UECA requirements.

For more information, please contact Robert E. Gandley at MacDonald, Illig, Jones & Britton LLP, at rgandley@mijb.com or 814/870-7661.

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