

Regulatory Analysis Form



IRRC
Independent Regulatory Review Commission

SECTION I: PROFILE

(1) Agency:
Environmental Protection

(2) Agency Number:

Identification Number: #7-454

IRRC Number: 2824.

(3) Short Title:

Administration of the Uniform Environmental Covenants Act

(4) PA Code Cite:

Title 25, Chapter 253

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Michele Tate, 783-8727, RCSOB, 400 Market St., 783-8926, mtate@state.pa.us

Secondary Contact: Duke Adams, 783-8727, RCSOB, 400 Market St., 783-8926, dadams@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

Environmental Quality Board

PO Box 8477

Harrisburg, PA 17105-8477

Phone: (717) 787-4526

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

☐ Proposed Regulation

☒ Final Regulation

☐ Final Omitted Regulation

☐ Emergency Certification Regulation;

☐ Certification by the Governor

☐ Certification by the Attorney General

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(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The UECA was signed into law in Pennsylvania on December 18, 2007. UECA was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under the Land Recycling and Environmental Remediation Standards Act (Act 2), the Storage Tank and Spill Prevention Act (Tank Act) and other state and federal statutes. These limitations are restrictions on the use of the remediated property ("institutional controls") or the maintenance of a "structure" needed to control the movement of regulated substances through the environment ("engineering controls"). The environmental covenant is a property interest with a holder and is capable of being transferred and may be enforced by multiple parties, including the Department. Finally, the environmental covenant is recorded with the County Recorder of Deeds where the property is located, giving future landowners and developers notice of the activity and use limitations. Once the Department develops a formal Registry containing all covenants, as required by section 6512 of UECA, notice will need to be recorded with the County Recorder of Deeds where the property is located.

(9) Include a schedule for review of the regulation including:

- | | |
|---|---------------------------|
| A. The date by which the agency must receive public comments: | April 5, 2010 |
| B. The date or dates on which public meetings or hearings will be held: | N/A |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | December 2010 |
| D. The expected effective date of the final-form regulation: | Upon publication as final |
| E. The date by which compliance with the final-form regulation will be required: | Upon publication as final |
| F. The date by which required permits, licenses or other approvals must be obtained: | N/A |

(10) Provide the schedule for continual review of the regulation.

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended. Section 253.7(c) obligates the Department to evaluate at least every three years whether or not the current fee covers the expenses associated with the program and report to the Environmental Quality Board the results of that evaluation.

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SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The final-form rulemaking is being made under the authority of section 6515 of the UECA, which grants the Board the power and the duty to promulgate regulations for the proper performance of the work of the Department under UECA; and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that are necessary for the proper work of the Department. Section 6515 of UECA also explicitly grants the Board the power to develop fees by regulation for environmental covenants.

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No. Section 6517(b) of UECA requires the conversion of “instruments created prior to the effective date of [the UECA] which establish activity and use limitations” prior to February 13, 2013. Because the final-form rulemaking applies to conversion, and in certain cases waives the requirement to convert prior instruments, the rulemaking should be completed in advance of that date.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Although UECA does contain procedural requirements, the Department determined that regulations under UECA would be necessary to address ambiguities in the statute and to establish procedural interfaces with the Tank Act and Act 2. Collection of the fee will support the Department’s review of environmental covenants and the development and maintenance of the electronic Registry of environmental covenants pursuant to section 6512 of UECA.

Because UECA creates a legal instrument that will provide notice to future property owners and occupiers of activity and use limitations, as well as creating a legal obligation to maintain or not disturb such limitations, the rulemaking should result in reduced exposure to regulated substances and continued protection of public health, welfare, safety and the environment.

It is difficult to quantify the benefits of UECA and the final-form regulations because the choice of remediation standards is up to the remediator under Act 2. If, for example, every remediator chose to meet the residential statewide health standard in their cleanup, no activity and use limitations would be

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necessary and therefore no environmental covenant would be required. Because this factor is outside of the control of the Department, we cannot accurately estimate potential benefits.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

N/A

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The Department does not expect any parties to be adversely affected by the final-form rulemaking creating Chapter 253.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

The creation of this new Chapter 253 will affect owners and operators and purchasers of properties who volunteer to or are required to remediate contaminated sites, when the remediation is performed to attain or maintain an Act 2 standard that requires activity and use limitations.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The final-form rulemaking establishes a fee of \$500 for each signed environmental covenant submitted for review and approval.

The Department estimated that 210 environmental covenants will be submitted annually. Therefore, the total costs on the regulated community will be approximately \$105,000 per year.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain

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how the dollar estimates were derived.

Chapter 253 will affect owners and operators and purchasers of properties who volunteer to or are required to remediate contaminated sites, when the remediation is performed to attain or maintain an Act 2 standard that requires activity and use limitations.

Local governments are not exempted from the requirements of Chapter 253 and they are not exempted from the \$500 fee. If a local government volunteers or is required to remediate a contaminated site, and the remediation is performed to attain or maintain an Act 2 standard that requires activity or use limitations then they would need to prepare an environmental covenant and pay the \$500 fee in accordance with the provisions of Chapter 253.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

Chapter 253 will affect owners and operators and purchasers of properties who volunteer to or are required to remediate contaminated sites, when the remediation is performed to attain or maintain an Act 2 standard that requires activity and use limitations.

State government agencies are not exempted from the requirements of Chapter 253 and they are not exempted from the fee \$500 fee. If a state government agency volunteers or is required to remediate a contaminated site, and the remediation is performed to attain or maintain an Act 2 standard that requires activity or use limitations then they would need to prepare an environmental covenant and pay the \$500 fee in accordance with the provisions of Chapter 253.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community		N/A	N/A	N/A	N/A	N/A
Local Government		N/A	N/A	N/A	N/A	N/A
State Government		N/A	N/A	N/A	N/A	N/A
Total Savings		N/A	N/A	N/A	N/A	N/A
COSTS:		N/A	N/A	N/A	N/A	N/A
Regulated Community		\$105,000	\$105,000	\$105,000	\$105,000	\$105,000

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Local Government						
State Government						
Total Costs		\$105,000	\$105,000	\$105,000	\$105,000	\$105,000
REVENUE LOSSES:						
Regulated Community		N/A	N/A	N/A	N/A	N/A
Local Government		N/A	N/A	N/A	N/A	N/A
State Government		N/A	N/A	N/A	N/A	N/A
Total Revenue Losses		N/A	N/A	N/A	N/A	N/A

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3 (2007-2008)	FY -2 (2008-2009)	FY -1 (2009-2010)	Current FY (2010-2011)
Environmental Protection Operations (#160-10381)	\$98,574,000	\$98,544,000	\$84,218,000	\$79,344,000
Environmental Program Management (#161-10382)	\$39,685,000	\$37,664,000	\$31,100,000	\$29,357,000
Industrial Land Recycling Fund (#689-60080)	\$14,000	\$123,000	\$137,000	\$567,000
Hazardous Site Cleanup Fund/General Operations (#201-20070)	\$12,594,000	\$21,994,000	\$27,725,000	\$24,554,000

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

Because UECA creates a legal instrument that will provide notice to future property owners and occupiers of activity and use limitations, as well as creating a legal obligation to maintain or not disturb such limitations, the final-form rulemaking should result in reduced exposure to regulated substances and continued protection of public health, welfare, safety and the environment. The fees collected will be used to develop and maintain the Registry required by section 6512 of UECA, which serves as an alternative land use record for persons wishing to purchase or develop real property in the Commonwealth. Having the Registry available should facilitate these transactions by allowing all

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parties involved to understand the activity and use limitations at a property with a minimal transaction cost. Therefore, the final-form rulemaking provides additional public health benefits at no net cost.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

The UECA does not require review of proposed regulations under the statute by any particular advisory committee. However, the Department has had discussions with several outside groups concerning the proposed rulemaking. The Department presented the proposed rulemaking to the Cleanup Standards Scientific Advisory Board (CSSAB). The proposal was discussed and supported at the CSSAB board meeting held on September 1, 2009; no formal motion supporting the proposed rulemaking was considered due to a lack of a quorum at the meeting. The proposed rulemaking was also discussed with the Storage Tank Advisory Committee (STAC) on September 8, 2009. The STAC did not take any formal action on the proposed rulemaking at that meeting.

The proposed rulemaking was published in the Pennsylvania Bulletin on March 6, 2010, with a 30-day public comment period. The Department received 66 comments from 11 commentators, including the Independent Regulatory Review Commission. After the close of the public comment period, the Department had extensive discussions with several of the commentators regarding their concerns, primarily the Pennsylvania Department of Transportation and the Pennsylvania Chamber of Business and Industry. The Department presented the draft final-form rulemaking to the STAC on June 8, 2010, in substantially the same form as the final-form rulemaking. The STAC approved a motion recommending approval of the final-form rulemaking by the Environmental Quality Board. The Department also presented the final-form rulemaking to the CSSAB on June 15, 2010. The CSSAB was supportive of the final-form rulemaking, but did not take formal action on the regulations, pending resolution of several issues. The Department had further discussions with the CSSAB on June 28, 2010, resulting in the final-form rulemaking submitted to the Environmental Quality Board for approval.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

Although the UECA does contain procedural requirements, the Land Recycling Program determined that regulations under the UECA would be necessary to address ambiguities in the statute and to establish procedural ties to the Tank Act and Act 2. The Department believes that the clear requirements in the final-form rulemaking will go a long way toward smoothing out the process of remediating contaminated sites in the Commonwealth.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

At the current time there are no federal standards for the long-term stewardship of activity and use

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limitations. Because UECA takes a property law approach, and property law is mainly a state law matter, the federal requirements for remediation do not expressly consider restrictions on future land use at contaminated sites. It is worth noting, however, that the process for developing UECA at the national level was initiated with funding from the United States Department of Defense.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

At this time approximately 24 other states (including the District of Columbia and the U.S. Virgin Islands) have adopted some form of UECA.

<http://www.environmentalcovenants.org/ueca/DesktopDefault.aspx?tabindex=1&tabid=92>

Many of the jurisdictions that have not yet adopted UECA have chosen not to do so because they believe their current regimes for the long-term stewardship of activity and use limitations are more effective and, in some cases, more stringent than the requirements of UECA. The Department does not anticipate that the final-form rulemaking will negatively affect Pennsylvania's ability to compete with other states. Rather, the use of environmental covenants will afford remediators certainty concerning the future use of remediated property and should therefore give the Commonwealth an advantage over other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No, although the final-form rulemaking does reference the regulations of the Department implementing Act 2 (25 Pa.Code Chapter 250) and the Tank Act (25 Pa.Code Chapter 245), in terms of when environmental covenants must be submitted to the Department when conducting a cleanup pursuant to one of those Chapters.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

None.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

None. The Department developed a "model" environmental covenant pursuant to the UECA that should allow the regulated community to draft environmental covenants with a minimal amount of effort.

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
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(Pursuant to Commonwealth Documents Law)

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Copy below is hereby approved as to form and legality.
Attorney General

By: _____
(Deputy Attorney General)

DATE OF APPROVAL _____

☒ Check if applicable.
Copy not approved. Objections attached.

Copy below is hereby certified to be true and
correct copy of a document issued, prescribed or
promulgated by:

**DEPARTMENT OF ENVIRONMENTAL
PROTECTION
ENVIRONMENTAL QUALITY BOARD**

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-454

DATE OF ADOPTION August 30, 2010

BY John Hanger

TITLE **JOHN HANGER
CHAIRPERSON**

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality
Executive of Independent Agencies

BY

Andrew C. Clark

DATE OF APPROVAL **SEP 14 2010**

(Deputy General Counsel)
(~~Chief Counsel - Independent Agency~~)
(~~Strike inapplicable title~~)

☒ Check if applicable. No Attorney General Approval
or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

ADMINISTRATION OF THE UNIFORM ENVIRONMENTAL COVENANTS ACT

25 Pa. Code, Chapter 253

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 Pa.Code Chapter 253

Administration of the Uniform Environmental Covenants Act

Order

The Environmental Quality Board (Board) by this order creates 25 Pa. Code, Chapter 253 (relating to Administration of the Uniform Environmental Covenants Act). The final regulations address ambiguities in the Uniform Environmental Covenants Act and establish procedural interfaces with other statutes.

This order was adopted by the Board at its meeting of August 30, 2010.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Troy Conrad, Director, Land Recycling Program, P.O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105-8471, (717) 783-7816; or Kurt Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17 105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654- 5988 (voice users). This proposal is available electronically through the Department's website (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The final-form rulemaking is being made under the authority of section 6515 of the Uniform Environmental Covenants Act (UECA) (27 Pa.C.S. § 6515), which grants the Board the power and the duty to promulgate regulations for the proper performance of the work of the Department under UECA; and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that are necessary for the proper work of the Department. Section 6515 of UECA also explicitly grants the Board the power to develop fees by regulation for environmental covenants.

D. Background and Purpose

The UECA was signed into law in Pennsylvania on December 18, 2007. The statute was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under the Land Recycling and Environmental Remediation Standards Act (Act 2) or the Storage Tank and Spill Prevention Act

(Tank Act). These limitations are restrictions on the use of the remediated property ("institutional controls") or the maintenance of a "structure" needed to control the movement of regulated substances through the environment ("engineering controls"). The environmental covenant is a property interest with a holder and is capable of being transferred and may be enforced by multiple parties, including the Department. Finally, the environmental covenant is recorded with the County Recorder of Deeds where the property is located, giving future landowners and developers notice of the activity and use limitations. Once the Department develops a formal Registry containing all covenants, as required by section 6512 of UECA, only a simple Notice will need to be recorded with the County Recorder of Deeds where the property is located.

Although UECA does contain relatively detailed procedural requirements, the Department determined that regulations under UECA would be necessary to address ambiguities in the statute and to establish procedural interfaces with the Tank Act and Act 2. Collection of the fee will support the Department's review of environmental covenants and the development and maintenance of the electronic Registry of environmental covenants that section 6512 of UECA requires the Department to develop and maintain.

The statute does not require review of proposed regulations under the statute by any particular advisory committee. However, the Department has had discussions with several outside groups concerning the proposed rulemaking. The Department presented the proposed rulemaking to the Cleanup Standards Scientific Advisory Board (CSSAB). The proposal was discussed and supported at the CSSAB board meeting held on September 1, 2009; no formal motion supporting the proposed rulemaking was considered due to a lack of a quorum at the meeting. The proposed rulemaking was also discussed with the Storage Tank Advisory Committee (STAC) on September 8, 2009. The STAC did not take any formal action on the proposed rulemaking at that meeting.

The proposed rulemaking was published in the *Pennsylvania Bulletin* on March 6, 2010, with a 30-day public comment period. 40 Pa.B. 1379. The Board received 66 comments from 11 commentators, including the Independent Regulatory Review Commission. The Department presented the draft final-form rulemaking to the STAC on June 8, 2010, in substantially the same form as published today. The STAC approved a motion to recommend approval of the final-form rulemaking by the Board. The Department also presented the draft final-form rulemaking to the CSSAB on June 15, 2010. The CSSAB was supportive of the draft final-form rulemaking but did not take formal action on the rulemaking, pending resolution of several issues. The Department had further discussions with the CSSAB on June 28, 2010 resulting in the final-form rulemaking published today.

E. Summary of Comments and Responses on the Proposed Rulemaking and Changes to the Proposed Rulemaking

As noted, the final-form rulemaking is intended to supplement UECA and tie the statute together with Pennsylvania's existing risk-based corrective action programs. The Department developed the final-form rulemaking to provide the regulated community and program staff a straightforward step-by-step outline of when environmental covenants are required to be used, how they are created, what they must contain and when they must be submitted to the Department. While there is some overlap with UECA when necessary, the Department did not include those portions of UECA that were clear in the statute and did not pertain to the process for creating and implementing an environmental covenant. Such items include enforcement of the environmental covenant and the various parts of UECA outlining the legal effect of creating an environmental covenant.

The contents of the final-form rulemaking are discussed below, with special attention to those provisions that were amended between the proposed rulemaking and final-form rulemaking.

§ 253.1. Definitions.

This is the definitions section of the final-form rulemaking. For ease of understanding, the definitions from UECA are included in this section. Several definitions not in UECA are included in the proposed rulemaking, including *Final Report*, *Instrument*, *Political Subdivision*, *Remedial Action Completion Report*, *Storage Tank Act* and *UECA*. Several of these definitions were amended in minor ways in response to comments.

Several definitions were added to the final-form rulemaking at the suggestion of commentators. These definitions include *Board*, *Department*, *Eminent Domain Proceeding*, *EQB* and *Regulated Substance*.

§ 253.2. Contents and Form of Environmental Covenant.

This section describes what must be included in an environmental covenant and what may be included as appropriate; it follows section 6504 of UECA. Subsection (c) affirms that the Department may require the permitted information from subsection (b) or other conditions appropriate to the remediation. Subsection (e) makes it clear that the Department's model covenant may be used, although the Department will accept alternative language in the appropriate case. The model covenant is an evolving document drafted with a significant amount of input from the regulated community. Finally, subsection (f) allows for the special situation where an environmental covenant covers commonly owned property in a common interest community.

Most of the changes to this section of the final-form rulemaking were minor points of clarification or consolidation. For example, subsection (d) of the proposed rulemaking addressed limitations on the Department's ability to require conditions for approval; that subsection was deleted and the substance of the subsection added to subsection (c)(1) of the final-form rulemaking. In addition, the final-form rulemaking contains language (paragraph (c)(6)) tracking the language in UECA making the Department's decision to approve or disapprove an environmental covenant appealable to the Environmental Hearing Board.

The final-form rulemaking does contain a new paragraph (8) in subsection (a). This paragraph will be a mandatory component of all environmental covenants. The paragraph addresses concerns expressed by the Pennsylvania Department of Transportation concerning termination of environmental covenants where property is taken for use as a highway right-of-way in an eminent domain proceeding.

§ 253.3. Notice of Environmental Covenant.

This section describes who is to receive notice of the environmental covenant and when; it tracks section 6507 of UECA. Subsection (c) allows for waivers of required notice and establishes a procedure for persons interested in receiving such a waiver.

Several changes were made to this section in the final-form rulemaking to address comments. First, the time for provision of file-stamped copies of the covenant to parties is extended to 90 days from filing (an increase from 60 days), and language allowing the Department to extend that timeframe was added. Second, a new paragraph (a)(4) was added to allow the board of a common interest community to receive the required copy on behalf of the community. 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.

§ 253.4. Requirements for and Waiver of Environmental Covenants.

Section 253.4 outlines when environmental covenants are required as well as the procedures for the Department's waiver of the requirement for an environmental covenant. The basic requirement for use of an environmental covenant is contained in section 65 17(a) of UECA.

Several changes were made to this section in response to comments. As discussed in more detail relating to section 253.5, below, the final-form rulemaking does not require submission of draft environmental covenants, and only requires submission of requests for waivers at the time the remediator submits the Final Report or Remedial Action Completion Report to the Department. As a result, all references to submission of draft environmental covenants or submission of environmental covenants at earlier stages in the process have been eliminated from this section. This includes deletion of references to the various Act 2 standards and deletion of subsection (d) of the proposed regulations in its entirety. Subsection (c) of the final-form rulemaking establishes requirements relating to the process for and timing of submission of requests for Department waiver of the requirement to use environmental covenants in Chapter 245 and Chapter 250 cleanups.

Subsection (b) clarifies that where activity and use limitations are to be used in special industrial area cleanups under section 305 of Act 2, they are to be in the form of an environmental covenant.

Subsection (d) relates to a provision in section 6517(a)(3) of UECA. Section 6517(a)(3) establishes special provisions relating to the use of environmental covenants at federally-owned property. Subsection (e) makes it clear that the requirement to use environmental covenants at such properties is not waived by UECA but delayed until such time as the property is transferred out of federal government control. Until such time of transfer, the activity and use limitations must be memorialized in an installation's master plan or similar remedial documentation. It also requires notification of the Department in the event of transfer.

§ 253.5. Submission of Environmental Covenants and Related Information.

This is an important section because it addresses ambiguities in UECA in terms of establishing procedural interfaces between the statute and existing remedial action programs in the Commonwealth. This section establishes the timeframes for submission of draft and final signed environmental covenants to the Department. This section was also one of the most-commented upon in the proposed rulemaking, and several major changes have been made to this section.

Several commentators raised concerns regarding the deadlines for submission of draft and final signed environmental covenants. As a result, the submission process has been overhauled in the final-form rulemaking. The first major change to this section relates to submission of draft environmental covenants prior to the Final Report/Remedial Action Completion Report stage of the remediation process. The final-form rulemaking completely eliminates the requirement to submit draft environmental covenants to the Department for review. Instead, the final-form rulemaking requires the remediator to provide the environmental covenant no later than 30 days after receipt from the Department of written approval for the Final Report or Remedial Action Completion Report. The Department believes that most if not all issues relating to the activity and use limitations required to attain or maintain an Act 2 standard will be worked out as part of the review and approval of such reports. The environmental covenant will reflect the requirements contained in those reports and

should be relatively straightforward to prepare and submit.

As a result of this change, references to the various Act 2 standards in proposed subsections (a) and (b) have been removed, along with language requiring submission of draft reports. Proposed subsection (b) was deleted in its entirety and proposed subsection (c) was amended and renumbered as subsection (b). That subsection addresses submission to the Department of information regarding persons who must be given notice of the environmental covenant (section 253.3). It is also necessary so the Department can determine if subordination should be required (section 253.8) as holders of prior interests are not subject to the environmental covenant under UECA unless they agree to subordinate their interest to the covenant (see section 6503(d) of UECA, 27 Pa.C.S. § 6503(d)).

Given the changes to the submission process, proposed subsection (d) was no longer necessary and was deleted. Finally, proposed subsection (e) addressed recording the signed covenant and the timeframe for providing the Department with proof of recordation. This subsection is retained in the final-form rulemaking and re-numbered as subsection (c). In response to concerns raised by commentators, the final-form rulemaking increases the time available to provide the Department with proof of recordation from 60 to 90 days after approval of the covenant by the Department, and allows for the Department to agree to extensions if needed.

§ 253. 6. Requirements for County Recorder of Deeds.

The proposed section contained two provisions relating to the recordation of environmental covenants with county Recorder of Deeds. Subsection (a) required the Recorder of Deeds to provide proof of recordation in a timely manner, and subsection (b) made it clear that environmental covenants, as negative restrictions, generally have no or negative value and so should not be routinely subject to the Pennsylvania Realty Transfer Tax. In response to comments, the final-form rulemaking deletes subsection (b) as issues relating to the Realty Transfer Tax are better addressed elsewhere.

§ 253.7. Fees.

This section of the final-form rulemaking establishes fees for the review of environmental covenants by the Department. This section also contains an exemption from the requirement to pay a fee for environmental covenants submitted to convert a prior instrument where the person submitting the environmental covenant did not cause or contribute to the contamination described in the environmental covenant. Finally, subsection (c) requires the Department to review the fee at least every three years and report to the Board as to whether the fee continues to meet the Department's cost of administering the program.

Only one significant change was made to this section. The amount of the fee was increased from \$350 per environmental covenant submitted to \$500 per covenant. Upon review of the program and associated costs the Department realized that the higher fee would be necessary to cover the costs of administering program established by UECA.

§ 253.8. Subordination.

This section tracks UECA language regarding subordination, and is included for reference. Several commentators raised issues concerning the Department's exercise of discretion to require subordination. As a result, subsection (b) of the final-form rulemaking requires the Department to provide a basis for requiring subordination should the agency reach that conclusion. The Department does not anticipate frequent requests for subordination and if the need should arise, will work

together with the parties involved to try to ensure an amicable resolution to the issue.

Subsection (c) of the final-form rulemaking was amended to delete the requirement that proof of recordation of a subordination agreement be provided to the Department, to allow for extension of time to provide the subordination agreement and to address situations involving common interest communities.

§ 253.9. Duration.

In two situations an environmental covenant can be terminated through action outside of the specific terms of the covenant – eminent domain and judicial termination. In both instances, a Department determination is required for the termination to occur. This section establishes a process for requesting such Department action in an appropriate proceeding. Only minor editorial changes were made to this section of the final-form rulemaking.

§ 253.10. Conversion and Waiver of Conversion.

In order for persons researching activity and use limitations at properties in the Commonwealth to have a clear understanding of the complete universe of properties with activity and use limitations, section 6517(b) requires an instrument that establishes activity and use limitations under Act 2 or the Tank Act created prior to February 2008 to be converted to an environmental covenant by February 2013. By converting these prior instruments to covenants and including them in the Department's Registry, the limitations will have the legal protection afforded by UECA and be readily available and transparent to property developers with a minimum of effort on their part. The term "instrument" is defined in section 253.1 as a "deed restriction, restrictive covenant or other similar document that imposes activity or use limitations filed or required by the Department to be filed with a Recorder of Deeds."

The Department is conducting an internal review to identify all such sites and anticipates targeted outreach to owners of property identified as being subject to a prior "instrument."

The final-form rulemaking establishes requirements related to this conversion requirement and provides a temporal waiver for a certain class of prior instruments. Subsection (b) requires the current property owner to convert the prior instrument and states that the Department will not require (but may allow) the new environmental covenant to contain activity and use limitations not contained in either the existing instrument or a "Department-approved postremediation care plan."

Subsection (c) of the final-form rulemaking contains the conditional temporal waiver noted above. This subsection waives the requirement to convert the prior "instrument" until such time as the current property owner transfers the property, so long as the owner requests the waiver and provides the Department with proof that the prior instrument was recorded with the Recorder of Deeds in the county where the property is located. Based on comments, subsection (d) of the proposed rulemaking was judged to be duplicative of the requirements in subsection (c) and therefore subsection (d) is deleted in the final-form rulemaking.

Finally, subsection (d) notes that the Department may waive the requirement to convert a prior instrument outright, and that such a waiver will be issued in writing.

§ 253.11. Assignment of Interest.

Section 6510 of UECA requires the Department to consent to several categories of changes

relating to the holder, or grantor, of the environmental covenant. This section outlines the requirements applicable to such a request.

F. Benefits, Costs and Compliance Benefits

The final-form rulemaking will assist the Department and the regulated community in implementing UECA and will serve the dual purpose of enhancing the protection of human health and the environment, while promoting the safe reuse of contaminated brownfields sites. Brownfield redevelopment in this state has been successful largely because regulators, property owners, and communities have accepted that contamination can be left in place with the proper activity and use limitations to allow redevelopment - without presenting any significant risk to human health or the environment.

The final-form rulemaking provides better legal tools to ensure that future generations understand the reasons why activity and use limitations have been imposed and why certain long-term maintenance/monitoring might be needed. Regulators and the community can have confidence that environmental activity and use limitations will be enforced in perpetuity. The final-form rulemaking allows all parties to have a clear understanding of how UECA will be implemented going forward.

Compliance Costs

The Department does not anticipate any increased costs to the regulated community as a result of the final-form rulemaking, except for the fee contained in section 253.7. The activity and use limitations are necessary to demonstrate attainment or maintenance of an Act 2 standard; the final-form rulemaking does not expand the use of such limitations. The obligation to use environmental covenants to implement those activity and use limitations is established by UECA and not these regulations.

Based on historical data developed in administering UECA program since February 2008 (the effective date of UECA), the Department projects that approximately 165 environmental covenants will be submitted for review and approval annually. Therefore, the fees collected under the regulation are projected be around \$82,500 per year.

Compliance Assistance Plan

It is not anticipated that the Commonwealth will provide sources of financial assistance to aid in compliance with this rulemaking. As noted in section E., above, the Department will target outreach to property owners whose properties are identified as being subject to the conversion requirement in section 65 17(b) of UECA. Finally, the Department developed a model environmental covenant and will develop policies, guidance and factsheets as needed to explain particular aspects of how implementation of UECA fits in with other parts of the remediation process.

Paperwork Requirements

The final-form rulemaking does not establish any new paperwork requirements. Submission of the various documents is required by UECA; the rulemaking merely formalizes the manner and timing of those submissions along with the Department's responses.

G. Pollution Prevention

This rulemaking relates to pollution that has already been released into the environment. The

use of environmental covenants should ensure long-term stewardship of activity and use limitations, however, helping to ensure that existing problems do not get worse through inattention or further spread of pollution through the environment. The regulation does not directly promote a multi-media pollution prevention approach.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended. Section 253.7(c) obligates the Department to evaluate whether or not the current fee covers the expenses associated with the program and report to the Board the results of that evaluation at least every three years.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 24, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 1379 (March 6, 2010) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on _____, this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, and approved the final-form rulemaking.

J. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pennsylvania Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 40 Pa.B. 1370 (March 6, 2010).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 Pennsylvania Code, Chapter 253, are created to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL

PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND

SAFETY

ARTICLE VI. GENERAL HEALTH AND SAFETY

CHAPTER 253. ADMINISTRATION OF THE

UNIFORM ENVIRONMENTAL COVENANTS ACT

Sec.

- 253.1. Definitions.
- 253.2. Contents and form of environmental covenant.
- 253.3. Notice of environmental covenant.
- 253.4. Requirements for and waiver of environmental covenants.
- 253.5. Submission of environmental covenants and related information.
- 253.6. Requirements for county recorder of deeds.
- 253.7. Fees.
- 253.8. Subordination.
- 253.9. Duration.
- 253.10. Conversion and waiver of conversion.
- 253.11. Assignment of interest.

§ 253.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Activity and use limitations—

- (i) Restrictions or obligations with respect to real property created under this chapter.
- (ii) The term includes engineering controls and institutional controls.

*Agency—*Any of the following:

- (i) The Department.
- (ii) A Federal agency which determines or approves an environmental response project pursuant to which the environmental covenant is created.

*Common interest community—*A condominium, cooperative or other real property, with respect to which a person, by virtue of ownership of a parcel of real property or of ownership of an interest in real property, is obligated to pay for property taxes, insurance premiums, maintenance or improvement of other real property described in a recorded covenant which creates the common interest community.

DEPARTMENT — DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH.

EMINENT DOMAIN PROCEEDING —AN ACQUISITION OF PROPERTY BY AN ENTITY ACTING WITH THE POWER OF EMINENT DOMAIN, WHETHER BY CONDEMNATION OR IN LIEU OF CONDEMNATION.

Engineering controls—

- (i) Remedial actions directed exclusively toward containing or controlling the migration of regulated substances through the environment.
- (ii) The term includes slurry walls, liner systems, caps, leachate collection systems and groundwater recovery trenches.

*Environmental covenant—*A servitude arising under an environmental response project

which imposes activity and use limitations PURSUANT TO UECA.

EOB—ENVIRONMENTAL QUALITY BOARD.

Environmental response project—A plan or work performed for environmental remediation of real property conducted under one of the following:

- (i) A Federal program governing environmental remediation of real property.
- (ii) A Commonwealth program governing environmental remediation of real property.
- (iii) Incident to closure of a solid or hazardous waste management unit if the closure is conducted with approval of an agency.
- (iv) A Commonwealth voluntary cleanup program authorized by statute.

Final report—A report filed with the Department by a remediator documenting attainment of ONE OR A COMBINATION OF [a] CLEANUP standards under the Land Recycling Act under § 250.204, § 250.312 or § 250.411 (relating to final report).

Holder—A person that is the grantee of an environmental covenant as specified in section 6503(a) of ~~[the]~~ UECA (relating to nature of rights; subordination of interests).

Institutional controls—

- (i) Measures undertaken to limit or prohibit certain activities which may interfere with the integrity of a remedial action or result in exposure to regulated substances at a site.
- (ii) The term includes fencing and restrictions on the future use of the site.

Instrument—A deed restriction, restrictive covenant or other similar document that

imposes activity or use limitations filed ~~[or required by the Department to be filed]~~
with a recorder of deeds.

Land Recycling Act—The Land Recycling and Environmental Remediation Standards Act (35 P. S. §§ 6026.101—6026.908).

Person—

(i) Any individual, corporation, partnership, association or other entity recognized by law as the subject of rights, duties or obligations.

(ii) The term includes the United States of America, a Federal agency, the Commonwealth, an agency or instrumentality of this Commonwealth and a political subdivision.

Political subdivision—Any county, city, borough, township, or incorporated town.

Record—Information which is:

(i) Inscribed on a tangible medium or stored in an electronic or other medium.

(ii) Retrievable in perceivable form.

REGULATED SUBSTANCE—THE TERM SHALL HAVE THE SAME MEANING AS GIVEN TO IT IN SECTION 103 OF THE LAND RECYCLING ACT, 35 P.S. § 6026.103.

Remedial Action Completion Report—A corrective action report filed with the Department by a remediator documenting attainment of **ONE OR A COMBINATION OF [a] CLEANUP STANDARDS UNDER THE** Land Recycling Act **[standard]** pursuant to the Storage Tank Act under either § 245.310(b) or § 245.313 (relating to site characterization report; and remedial action completion report).

State—A state of the United States, the District of Columbia, Puerto Rico, the

United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

Storage Tank Act—The Storage Tank and Spill Prevention Act (35 P. S. §§ 6021.101—6021.2104).

UECA —The Uniform Environmental Covenants Act (27 Pa. C.S. §§ 6501—6517).

§ 253.2. Contents and form of environmental covenant.

(a) An environmental covenant must contain the following:

(1) A statement that the instrument is an environmental covenant executed under ~~[this chapter]~~ UECA.

(2) A legally sufficient description of the real property subject to the environmental covenant.

(3) A brief narrative description of the contamination and the remedy.

(4) A description of the activity and use limitations on the real property.

(5) An identification of every holder.

(6) The signatures, with the formalities required for a deed, by the following:

(i) The agency, unless THE ENVIRONMENTAL COVENANT HAS BEEN ~~[there is a]~~ deemed ~~[approval]~~ APPROVED under subsection

(c)(4), BELOW.

(ii) Every holder.

(iii) Every owner in fee simple of the real property subject to the environmental covenant, unless waived by the agency.

(7) The name and location of any administrative record for the environmental

response project reflected in the environmental covenant.

(8) A CLAUSE THAT THE COVENANT MAY BE AMENDED OR
TERMINATED AS TO ANY PORTION OF THE REAL PROPERTY
SUBJECT TO THE COVENANT THAT IS ACQUIRED FOR USE AS
HIGHWAY RIGHT OF WAY BY THE COMMONWEALTH, PROVIDING
THAT:

(i) THE DEPARTMENT WAIVES THE REQUIREMENTS FOR AN
ENVIRONMENTAL COVENANT AND FOR CONVERSION PURSUANT TO
27 Pa. C.S. §6517 TO THE SAME EXTENT THAT THE ENVIRONMENTAL
COVENANT IS AMENDED OR TERMINATED,

(ii) THE DEPARTMENT DETERMINES THAT TERMINATION OR
MODIFICATION OF THE ENVIRONMENTAL COVENANT WILL NOT
ADVERSELY AFFECT HUMAN HEALTH OR THE ENVIRONMENT, AND

(iii) THE DEPARTMENT SHALL PROVIDE 30-DAYS ADVANCE
WRITTEN NOTICE TO THE CURRENT PROPERTY OWNER, EACH
HOLDER, AND, AS PRACTICABLE, EACH PERSON THAT ORIGINALLY
SIGNED THE ENVIRONMENTAL COVENANT OR SUCCESSORS IN
INTEREST TO SUCH PERSONS.

(b) An environmental covenant may contain other information, restrictions and requirements agreed to by the persons who signed it, including the following:

(1) The requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for or proposals for any site work affecting the contamination on the property subject to the environmental covenant.

(2) The requirements for periodic reporting describing compliance with the environmental covenant.

(3) The rights of access to the property granted in connection with implementation or enforcement of the environmental covenant.

(4) The restrictionS or limitationS on amendment or termination of the environmental covenant in addition to those contained in sections 6509 and 6510 of ~~[the]~~ UECA (relating to duration; and amendment or termination by consent).

(5) The rights of the holder in addition to its right to enforce the environmental covenant under section 6511 of ~~[the]~~ UECA (relating to enforcement of environmental covenant).

(6) 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.

(7) ~~[Any]~~ [I] Limitations on the duration of the environmental covenant.

(c) Agency review ~~[will be as follows:]~~

(1) Prior to signing a N ENVIRONMENTAL covenant, an agency may review the covenant and provide its conditions for approval, including subordination under § 253.8 (relating to subordination), IF THE CONDITIONS ARE APPLICABLE TO THE IMPLEMENTATION OF A REMEDY (INCLUDING ANY POSTREMEDIATION CARE PLAN THAT IS PART OF THE REMEDIATION).

(2) In addition to other conditions for its approval of an environmental covenant, an agency may require those persons specified by the agency that have interests in the real

property to sign the covenant.

(3) Except as set forth in paragraph (4), signature by an agency on an environmental covenant constitutes its approval of the environmental covenant. Disapprovals of an environmental covenant by the Department will be made in writing to the person submitting the environmental covenant AND SHALL DESCRIBE THE BASIS FOR THE DISAPPROVAL.

(4) Failure of the Department to approve or disapprove an environmental covenant within 90 days of receipt of all information reasonably required by the Department to make a determination shall be deemed an approval of the environmental covenant, unless the Department and the remediator agree to an extension of time.

(5) The date the Department receives [~~the necessary copies of the signed final~~] AN ENVIRONMENTAL covenant FOR REVIEW], and the information reasonably required by the Department to make a determination concerning the approval or disapproval of the ENVIRONMENTAL covenant, shall be [~~designated as~~] the [“]date of receipt[”] under section 6504(c)(4) of [~~the~~] UECA (relating to contents of environmental covenant) AND FOR PURPOSES OF THIS CHAPTER.

(6) THE DEPARTMENT’S DECISION TO APPROVE OR NOT APPROVE AN ENVIRONMENTAL COVENANT IS APPEALABLE TO THE ENVIRONMENTAL HEARING BOARD.

~~[(d) The Department may require the covenant to include any of the permitted items referenced in subsection (b) or require other conditions referenced in section 6504(e) of the UECA if the items or conditions are applicable to the implementation of a remedy including any postremediation care plan that is part of the remediation.]~~

([e]D) An environmental covenant MAY [will] be in the form of the Model Covenant posted on the Department's web site or MAY BE IN any other form acceptable to the agency.

([f]E) If the environmental covenant covers commonly owned property in a common interest community, the covenant may be signed by any person authorized by the governing board of the owners association.

§ 253.3. Notice of environmental covenant.

(a) The environmental covenant SHALL [will] indicate TO WHOM COPIES ARE TO BE PROVIDED, when THOSE copies [of it will] ARE TO be provided and by whom THE COPIES ARE TO BE PROVIDED. A grantor, a holder or any person who signed the environmental covenant may be designated as the individual responsible for distributing copies of the environmental covenant. File-stamped copies shall be provided no later than [60] 90 days after the recording of the environmental covenant by the county recorder of deeds[.], UNLESS THE DEPARTMENT AGREES TO AN EXTENSION OF TIME.

(b) [~~The environmental covenant will indicate to whom copies of it will be provided.~~]

Unless waived by the Department in writing, copies OF THE ENVIRONMENTAL COVENANT shall be provided to the following persons:

(1) Each person who signed the environmental covenant.

(2) Each person holding a recorded interest in that portion of the real property subject to the environmental covenant.

(3) Each person in possession of that property.

(4) IF THE ENVIRONMENTAL COVENANT COVERS COMMONLY OWNED PROPERTY IN A COMMON INTEREST COMMUNITY, THE COPIES

**OF THE ENVIRONMENTAL COVENANT MAY BE PROVIDED TO ANY
PERSON AUTHORIZED BY THE GOVERNING BOARD OF THE OWNERS
ASSOCIATION.**

(5) Each political subdivision in which that property is located.

([5]6) Other persons designated by the agency, based upon the rights or interests that the other persons have in receiving a copy of the environmental covenant.

(c) A person submitting an environmental covenant to an agency may request waiver of requirement that copies of the environmental covenant be provided. The request must be in writing and include the reasons for the requested waiver. ~~[The information shall be provided no later than the date the draft environmental covenant is submitted to the agency.]~~

§ 253.4. Requirements for and waiver of environmental covenants.

(a) Unless waived by the Department, ~~[engineering controls or institutional controls]~~

ACTIVITY AND USE LIMITATIONS used to demonstrate or maintain attainment of a remediation standard under the Land Recycling Act or the Storage Tank Act shall be ~~[implemented through]~~ **IN THE FORM OF** an environmental covenant. An environmental covenant may be used with other types of environmental response projects.

(b) Remediation measures undertaken pursuant to the special industrial area provisions of the Land Recycling Act which include land use restrictions limiting use of the property to the intended purpose shall implement those land use restrictions in the form of an environmental covenant.

(c) For remediations ~~[under the background standard or the Statewide health standard]~~ that require an environmental covenant **PURSUANT TO SUBSECTION (A),**

requests and justifications for waivers FROM THE REQUIREMENT TO DEVELOP AND RECORD AN ENVIRONMENTAL COVENANT shall be submitted to the Department in writing [~~at least 30 days prior to~~] NO LATER THAN AT THE TIME OF submission of the Remedial Action Completion Report or the Final Report. Any waivers that are granted by the Department will be issued in writing.

~~[(d) For remediations under the site-specific standard that require an environmental covenant, requests and justifications for waivers shall be submitted to the Department in writing either as part of the Remedial Action Plan (under Chapter 245 (relating to administration of the storage tank and spill prevention program)) or as part of the Cleanup Plan (under Chapter 250 (relating to administration of land recycling program)). Waivers that are granted by the Department will be issued in writing.]~~

[(e)] (D) An environmental covenant will not be required, but may be used, for property owned by the Federal government before transfer of the property to a non-Federal entity or individual. At least 120 days before the transfer of a property owned by the Federal government, at which engineering or institutional controls are used to demonstrate or maintain attainment of a remediation standard under the Land Recycling Act or the Storage Tank Act, the Department shall be notified of the proposed transfer of the property and be provided with a draft environmental covenant. The requirement for providing notice and a draft environmental covenant to the Department shall be incorporated into an installation's master plan or other similar and appropriate remedial documentation.

§ 253.5. Submission of environmental covenants and related information.

(a) For remediations [~~under the background standard or the Statewide health standard~~] that [~~will include~~] REQUIRE an environmental covenant PURSUANT TO SECTION 253.4

(RELATING TO REQUIREMENTS FOR AND WAIVER OF ENVIRONMENTAL COVENANTS), the remediator shall ~~[draft the environmental covenant and provide an unsigned draft of the]~~ PROVIDE THE ENVIRONMENTAL covenant TO THE DEPARTMENT NO LATER THAN [at least] 30 days ~~[prior to submission]~~ AFTER RECEIPT OF WRITTEN APPROVAL FROM THE DEPARTMENT of the Remedial Action Completion Report or the Final Report~~[to the Department. At the time the draft is submitted to the Department, the remediator shall also submit a separate document that identifies all owners of recorded interests in the property and the nature of their interest].~~

~~[(b) For remediations under the site-specific standard that will include an environmental covenant, the remediator shall draft the environmental covenant and provide an unsigned draft of the covenant either as part of the Remedial Action Plan (under Chapter 245) or as part of the Cleanup Plan (under Chapter 250). If no Remedial Action Plan or Cleanup Plan is required, the draft environmental covenant shall be submitted to the Department at least 30 days before submittal of the remedial Action Completion Report or the Final Report. At the time the draft is submitted the remediator shall also submit a separate document which identifies all owners of recorded interests in the property and the nature of their interest.]~~

~~[(c)]~~ (B) FOR REMEDIATIONS THAT REQUIRE AN ENVIRONMENTAL COVENANT PURSUANT TO SECTION 253.4 (RELATING TO REQUIREMENTS FOR AND WAIVER OF ENVIRONMENTAL COVENANTS), the person who submits the environmental covenant to the agency shall provide the agency with the name and current address of each person occupying or otherwise in possession of the real property subject to the environmental covenant and each person owning a recorded interest in that property. IF

**THE ENVIRONMENTAL COVENANT COVERS COMMONLY OWNED
PROPERTY IN A COMMON INTEREST COMMUNITY, ONLY THE PERSON AS IS
AUTHORIZED BY THE GOVERNING BOARD OF THE OWNERS ASSOCIATION
TO RECEIVE THE COVENANT NEED BE INCLUDED UNDER THIS SUBSECTION.**

The information shall be provided no later than when the ~~[unsigned draft of the
environmental covenant]~~ **REMEDIAL ACTION COMPLETION REPORT OR
THE FINAL REPORT** is submitted to the agency.

~~[(d) All necessary copies of the final environmental covenant shall be signed and
submitted along with the Remedial Action Completion Report or the Final Report.]~~

~~[(e)]~~ **(C)** Within ~~[60]~~ **90** days after the environmental covenant has been approved and signed by the Department, the person who submitted the environmental covenant shall provide the Department with proof of recordation of either the approved environmental covenant or the substitute notice allowed by section 6512 (b) of ~~[the]~~ UECA (relating to registry; substitute notice) , **UNLESS THE DEPARTMENT AGREES TO AN EXTENSION OF TIME.**

§ 253.6. Requirements for county recorder of deeds

~~[(a)]~~ Within 45 days after the filing of an environmental covenant, or the substitute notice allowed by section 6512 of ~~[the]~~ UECA (relating to registry; substitute notice), with a county recorder of deeds, the recorder of deeds shall provide the person who filed the document with a copy of the recorded document which indicates where the recorder has indexed the document.

~~[(b) The county recorder of deeds may not require the payment of the Realty Transfer Tax, set forth in section 1102-C of the Tax Reform Code of 1971 (72 P. S. § 8102-C), unless~~

~~the environmental covenant includes a statement of value in the form used by the Department of Revenue that indicates that the environmental covenant has a specified dollar value.]~~

§ 253.7. Fees.

(a) A nonrefundable fee of \$[350] **500** shall be submitted to the Department with each ENVIRONMENTAL covenant appropriately signed by all parties other than the Department.

(b) A fee is not required for environmental covenants submitted under § 253.10 (relating to conversion and waiver of conversion) where the person submitting the environmental covenant did not cause or contribute to the contamination described in the environmental covenant.

(c) At least every [3] **THREE** years, the Department will provide the EQB with an evaluation of the fees in this chapter and recommend regulatory changes to the EQB to address any disparity between the program income generated by the fees and the Department's cost of administering the program with the objective of ensuring fees meet all program costs and programs are self-sustaining.

§ 253.8. Subordination.

(a) As a condition of approving an environmental covenant, the Department may require that an owner of a prior interest subordinate its interest to the environmental covenant.

(b) If the Department requires subordination of a prior interest to the environmental covenant, it will notify the person submitting the [draft] environmental covenant and the owner of the prior interest of this condition in writing AND DESCRIBE THE BASIS FOR REQUIRING SUBORDINATION.

(c) A subordination agreement may be contained in the environmental covenant or in a separate record. If contained in a separate record, a copy of the subordination document [~~and proof of recordation~~] shall be provided to the Department prior to approval of the environmental covenant, UNLESS THE DEPARTMENT AGREES TO AN EXTENSION OF TIME. IF THE ENVIRONMENTAL COVENANT COVERS COMMONLY OWNED PROPERTY IN A COMMON INTEREST COMMUNITY, THE AGREEMENT OR RECORD MAY BE SIGNED BY ANY PERSON AUTHORIZED BY THE GOVERNING BOARD OF THE OWNERS ASSOCIATION.

(d) 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 the person's existing environmental liabilities.

§ 253.9. Duration.

(a) *Duration of covenant.* An environmental covenant is perpetual [~~unless terminated in accordance with~~] EXCEPT AS PROVIDED BY section 6509 of [~~the~~] UECA (relating to duration).

(b) *Eminent domain.* When the Department is the agency referenced in section 6509(a)(5) of [~~the~~] UECA, notice and request for consent must be made in writing and submitted to the Department at least 30 days prior to commencement of the eminent domain proceeding.

(c) *Judicial termination or amendment.* Where the Department is the agency referenced in section 6509(b) of [~~the~~] UECA, the notice and request for determination must be made in writing and submitted to the Department at least 90 days prior to commencement of the

judicial proceeding.

§ 253.10. Conversion and waiver of conversion.

(a) An instrument created before February 18, 2008, WHICH ESTABLISHES ACTIVITY AND USE LIMITATIONS to demonstrate attainment or maintenance of [a] ONE OR A COMBINATION OF CLEANUP standardS 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 AS OTHERWISE PROVIDED IN this section.

(b) The current owner of a property subject to an instrument covered in subsection (a) shall have the responsibility to convert the existing instrument to an environmental covenant in accordance with the requirements of [the] UECA and this chapter. The Department will not require, but may allow, [the] SUCH AN environmental covenant to contain INFORMATION, RESTRICTIONS OR REQUIREMENTS, INCLUDING activity and use limitations, not contained in the existing instrument or a Department-approved postremediation care plan.

(c) The obligation to convert an instrument covered in subsection (a) shall be waived until the property is transferred TO A NEW OWNER if the current owner of the property requests the waiver in writing and provides the Department with proof of recordation of the instrument covered by subsection (a).

~~[(d) If the conditions of subsection (c) are met, the instrument shall be converted to an environmental covenant at the time of transfer of the property in accordance with the UECA and this chapter.]~~

[~~(e)~~] D The Department may waive the requirement to convert an instrument. Waivers that

are granted by the Department will be issued in writing.

§ 253.11. Assignment of Interest.

When the Department's consent is required for a holder to assign its interest, or for the removal and replacement of a holder, request for the consent must be made in writing and submitted to the Department at least 30 days prior to the assignment[-], UNLESS

WAIVED BY THE DEPARTMENT.

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, 7 th 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		

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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.

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)(1)), 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)(1)) 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)(1)), 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.

FEE REPORT FORM

Environmental Protection
Agency

June 28, 2009
Date

Troy Conrad
Contact Person

(717) 783-9480
Phone Number

	<u>Prior Year</u>	<u>Current Year</u>	<u>1st Future Year Projected</u>	<u>2nd Future Year Projected</u>
FEE COLLECTIONS:				
Current	\$0	\$0	\$0	\$0
Proposed Regulations	\$0	\$0	\$105,000	\$105,000
Final Rulemaking	\$0	\$0	\$82,250	\$82,250

FEE TITLE AND RATE:

Current	None
Proposed	Section 253.7 of the proposed rulemaking establishes the fee as follows: "A nonrefundable fee of \$350 shall be submitted to the Department with each covenant appropriately signed by all parties other than the Department."
Final	Section 253.7 of the proposed rulemaking establishes the fee as follows: "A nonrefundable fee of \$500 shall be submitted to the Department with each covenant appropriately signed by all parties other than the Department."

FEE OBJECTIVE:

The Uniform Environmental Covenants Act (27 Pa.C.S.A. §§ 6501-6517) (UECA) was signed into law on December 18, 2007. The UECA places several obligations on the Department. Each environmental covenant must be reviewed and approved by the Department when one is required to be used, and the Department must develop and maintain an on-line Registry containing all covenants. Section 6515 of the UECA allows the Board to establish a fee relating to environmental covenants.

The objective is to establish a fee that bears a reasonable relationship to the costs of administering the Department's obligations under UECA.

FEE RELATED ACTIVITIES AND COSTS:

Environmental covenants are initially reviewed by Environmental Cleanup Program (ECP) staff in the Regional Office where the site is located, usually as part of the review of a Final Report or Remedial Action Completion Report. The covenant is a legal document creating a property interest; therefore, the covenant must also be reviewed by Regional Counsel. The final environmental covenant must be reviewed, approved, and signed by the ECP Environmental Program Manager. In some cases review and comment by Central Office staff and Regulatory Counsel may be needed. Under the proposed regulation the Department estimated reviewing between 250 and 350 environmental covenants per year, with an average of about 300 reviews per year.

Section 6512 of the UECA imposes an obligation on the Department to develop and maintain an on-line Registry of all approved environmental covenants. This on-line Registry serves as a land repository similar to and parallel with the County Records of Deeds offices. The Department currently maintains a basic listing of all approved environmental covenants on the Department's website and plans to develop an improved on-line registry in the future.

ANALYSIS for PROPOSED REGULATIONS:

The complexity of the environmental covenants can vary from a simple case that follows the standard covenant language to a more complex case with unique provisions. The typical review times can range from one hour to several hours. It is estimated that on average that Department personnel will spend about three work-hours reviewing each environmental covenant. If the Department reviews 300 covenants per year, at 3 work-hours per covenant, that would require a total of 900 work-hours of staff time per year. Approximately half of these reviews relate to regulated storage tank sites. The Department staff costs related to work-hours spent on these regulated storage tanks sites are funded by the Underground Storage Tank Indemnification Fund (USTIF). Therefore, the total non-USTIF funded work-hours spent reviewing covenants not related to regulated storage tanks is 450 work-hours per year.

The estimated average hourly personnel cost (including salary, benefits, direct costs, and indirect costs) for DEP staff is approximately \$100 per work-hour. The funding for the 450 work-hours of non-USTIF funded reviews, at \$100 per hour, would require \$45,000 per year to cover DEP personnel costs.

The DEP Bureau of Information Technology estimates that the on-line registry will cost \$325,000 for the initial development or \$32,500 per year spread over 10 years. The Bureau estimates that it will cost \$25,000 per year for ongoing maintenance. The total annual cost for development and maintenance of the on-line registry would be approximately \$57,500 per year.

The total of the annual costs for personnel (\$45,000) combined with the total annual costs for the on-line registry (\$57,500) gives a grand total annual cost of \$102,500 per year for implementing the

UECA program. The total annual costs (\$102,500) divided by the estimated number of covenants per year which will be submitted for review (300) gives an estimated cost per covenant of \$342 per covenant. Based on this analysis the Department is proposing a fee of \$350 per covenant. The \$350 fee would cover the costs of administering the UECA program.

ANALYSIS for FINAL RULEMAKING:

The Preamble of the Proposed Regulations included the following language in Section 253.4 relating to requirements for and waiver of environmental covenants; "The Department's position is that an environmental covenant must be used whenever a cleanup does not meet an unrestricted use cleanup standard, including the nonresidential Statewide health standard." In the Final Regulations this position has been changed, so that an environmental covenant will not be required for cleanups that meet the nonresidential Statewide health standard, or the site specific standard based on nonresidential exposure assumptions.

Due to this change in position, the total number of environmental covenants that will need to be reviewed and approved by the Department staff will be reduced. This will reduce the total costs associated with conducting the reviews, but the on-line registry costs will remain the same and will need to be spread over a smaller number of covenants, which will increase the cost per covenant. The Department estimates that the numbers of covenants requiring review and approval will be reduced to about 165 covenants per year.

If the Department reviews 165 covenants per year, at 3 work-hours per covenant, that would require a total of 495 work-hours of staff time per year. Approximately half of these reviews relate to regulated storage tank sites. The Department staff costs related to work-hours spent on these regulated storage tanks sites are funded by the Underground Storage Tank Indemnification Fund (USTIF). Therefore, the total non-USTIF funded work-hours spent reviewing covenants not related to regulated storage tanks would be 247.5 work-hours per year.

The estimated average hourly personnel cost (including salary, benefits, direct costs, and indirect costs) for DEP staff is approximately \$100 per work-hour. The funding for the 248 work-hours of non-USTIF funded reviews, at \$100 per hour, would require \$24,750 per year to cover DEP personnel costs.

The DEP Bureau of Information Technology estimates that the on-line registry will cost \$325,000 for the initial development or \$32,500 per year spread over 10 years. The Bureau estimates that it will cost \$25,000 per year for ongoing maintenance. The total annual cost for development and maintenance of the on-line registry would be approximately \$57,500 per year.

The total of the annual costs for personnel (\$24,750) combined with the total annual costs for the on-line registry (\$57,500) gives a grand total annual cost of \$82,250 per year for implementing the UECA program. The total annual costs (\$82,250) divided by the estimated number of covenants per year which will be submitted for review (165) gives an estimated cost per covenant of \$498 per covenant. Based on this analysis the Department is proposing a fee of \$500 per covenant. The \$500 fee would cover the costs of administering the UECA program.

RECOMMENDATION AND COMMENT:

Establish the fee of \$500 in section 253.7.



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

POLICY OFFICE

September 20, 2010

Mr. Kim Kaufman, Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17120

Re: Final-Form Rulemaking – Beneficial Use of Coal Ash (#7-442)
Final-Form Rulemaking – Paper, Film and Foil Surface Coating Processes (#7-448)
Final-Form Rulemaking – Administration of the Land Recycling Program (#7-453)
Final-Form Rulemaking – Administration of the Uniform Environmental Covenants Act (#7-454)

Dear Mr. Kaufman:

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find enclosed copies of four final-form rulemakings for review and comment by the Independent Regulatory Review Commission (IRRC). The Environmental Quality Board (EQB) approved these final-form rulemakings at its August 30, 2010, meeting.

The first final rulemaking enclosed, the **Beneficial Use of Coal Ash final rulemaking**, incorporates key provisions of the Department of Environmental Protection's (Department) policies and procedures on the beneficial use of coal ash through amendments to Chapter 287 and the introduction of a new Chapter 290. Prior to this rulemaking, the beneficial use of coal ash, including abandoned and active mine reclamation, was managed through existing residual waste regulations and Departmental technical guidance. In 2008, the Department proposed amendments to the following technical guidance documents: "Document Number 563-2112-225: Mine Site Approval for the Beneficial Use of Coal Ash," and "Document Number 563-2112-224: Certification Guidelines for the Chemical and Physical Properties of Coal Ash Beneficially Used at Mines." The most prevalent comment received during the public comment period on these technical guidance documents was that the content of each document should be placed in regulations rather than in Department technical guidance. In response, the Department has developed this rulemaking, which includes provisions of the aforementioned technical guidance documents and includes further enhancements to the residual waste regulations related to the beneficial use of coal ash.

Provisions of the rulemaking address the operating requirements necessary for the beneficial use of coal ash, including certification guidelines for the chemical and physical properties of coal ash, water quality monitoring at sites where coal ash is beneficially used, requirements for the storage of coal ash in piles and surface impoundments, and improvements in reporting requirements to track volumes and locations of sites where coal ash is beneficially reused. The

rulemaking also adopts recommendations by the National Academy of Sciences in their 2006 report, *Managing Coal Combustion Residues in Mines*, and includes an annual fee to offset Department costs for coal ash and water quality sampling and testing at mine sites where coal ash is beneficially used.

The proposed rulemaking was approved by the Board on July 21, 2009, and was published in the November 7, 2009, issue of the *Pennsylvania Bulletin* (39 Pa.B. 6429), where a 45-day public comment period was advertised as well as four public hearings. The Board received comments on the proposed rulemaking from over 1,100 commentators, including 13 industry organizations, 7 environmental groups, the Pennsylvania Chamber of Business and Industry, and the Independent Regulatory Review Commission (IRRC). Comments received on the rulemaking encompassed a broad range of viewpoints, including sentiments that additional requirements specified in the rulemaking are not needed and will be burdensome to industry and will discourage further beneficial use of coal ash. Other commentators recommended further strengthening the regulations, including eliminating provisions that provided the Department with discretion to issue waivers or modifications to certain requirements. Perceived by the public as potential "loopholes," most of these provisions were deleted in the final-form rulemaking. For example, the Department's ability to issue a waiver concerning the eight-foot separation distance requirement between coal ash and groundwater has been eliminated in the final-form rulemaking, except where coal ash is used for mine subsidence control, mine fire control or mine sealing pursuant to § 290.106(a)(7). In addition, the final rulemaking establishes a minimum number of monitoring points and the frequency for which water quality monitoring must be conducted; however, the Department retains the ability to require additional monitoring points and an increase in monitoring frequency. Some commentators expressed that a timeline should be given in the rulemaking for compliance with the new requirements. As a result, interim requirements have been added to the final-form rulemaking for water quality monitoring and storage requirements.

The Department initiated extensive outreach on the rulemaking. The Department met with industry groups representing both corporate energy facilities and independent power producers, including Reliant Energy, PPL, ARIPPA, and with various plant operators by request. The Department has also provided information on the rulemaking to the Pennsylvania Coal Association and the Pennsylvania Anthracite Council. The draft-final form regulations were presented to the Solid Waste Advisory Committee (SWAC) on May 27, 2010, and to the Citizens Advisory Council (CAC) on June 15, 2010. SWAC unanimously approved the draft final regulations for submission to the Board as a final-form rulemaking.

The second final rulemaking enclosed, **Paper, Film and Foil Surface Coating Processes**, amends 25 Pa Code, Chapters 121 and 129 to limit emissions of volatile organic compounds (VOCs) from the use and application of coatings and cleaning materials in paper, film and foil surface coating processes. The rulemaking adopts the emission limits and other requirements of the U.S. Environmental Protection Agency's (EPA) 2007 Control Techniques Guidelines for paper, film and foil coatings in order to meet federal Clean Air Act requirements. Adoption of the VOC emission requirements in the rulemaking is part of the Commonwealth's strategy, in concert with other Ozone Transport Region (OTR) jurisdictions, to further reduce the transport

of VOC ozone precursors and ground-level ozone throughout the OTR and to attain and maintain the 8-hour ozone national ambient air quality standard. The regulation, when adopted by the Board as a final-form rulemaking, will be submitted to the EPA as a revision to the State Implementation Plan (SIP).

There are approximately 15 paper, film and foil coating operations in the Commonwealth that emitted approximately 374 tons of VOCs in 2009 and would be subject to the limitations included in this rulemaking. The EPA estimates that implementation of the recommended control options for paper, film and foil surface coating processes will result in approximately a 47% reduction in VOC emissions. As a result of this rulemaking, the anticipated maximum additional annual VOC reductions from the paper, film and foil surface coating facilities is expected to be approximately 176 tons.

The Board approved the proposed rulemaking on September 15, 2009, and it was published in the *Pennsylvania Bulletin* on November 7, 2009, at 39 *Pa.B.* 6460, where a 60-day public comment period and three public hearings were advertised. No public comments were submitted to the Board on the proposed rulemaking; however, IRRC submitted comments where it questioned the clarity of several provisions of the rulemaking. For example, IRRC commented that the proposed §§ 129.52b(d) and (e), which require the owners and operators of a regulated surface coating processes to maintain certain records, was unclear. IRRC requested that the Board clarify the format in which these records must be maintained. IRRC also commented that proposed § 129.52b(e), which requires that records required under § 129.52d(d) be submitted to the Department “upon request,” is unclear as to whether the request will be made orally or in writing. Clarifications to the final-form rulemaking, where warranted, were made in response to IRRC’s comments.

The Department presented the draft final-form rulemaking to the Air Quality Technical Advisory Committee (AQTAC) on June 17, 2010. AQTAC concurred with the Department’s recommendation to move the final-form rulemaking forward to the Board. The Department also consulted with the CAC on June 30, 2010, and with the Small Business Compliance Advisory Committee on July 28, 2010.

The third final rulemaking enclosed, the **Administration of the Land Recycling Program**, updates numeric Statewide health-based standards in 25 *Pa Code* Chapter 250 relating to the cleanup of contaminated sites under the Land Recycling and Environmental Remediation Standards Act (Act 2). Act 2 requires the Board to establish by regulation uniform Statewide health-based standards for regulated substances for each environmental medium so that any substantial present or probable future risk to human health and the environment is eliminated. Section 104(a) of Act 2 also explicitly recognizes that such Statewide health-based standards would need to be updated over time as better science became available and as the need for clarification or enhancement of the program became apparent. This final-form rulemaking uses current EPA guidance and up-to-date scientific and toxicological information to revise the cleanup standards. The technical amendments in the final-form rulemaking will affect owners, operators and purchasers of properties and facilities who volunteer or are required to perform remediation of contaminated sites.

Included in the final rulemaking are Statewide health standards for Methyl Tertiary Butyl Ether (MTBE); however, no changes are proposed to the standard from what is currently in effect in Chapter 250. The current Chapter 250 Statewide health cleanup standard for MTBE is 20 ug/l for groundwater used for drinking water. This 20 ug/l standard is the odor threshold for MTBE as published by the EPA in the *"2006 Edition of the Drinking Water Standards and Health Advisories"* (EPA 822-R-06-013). During the development of the proposed rulemaking, the Department had considered revising the MTBE standard, which would have allowed for higher concentrations of MTBE based on health-based calculations, but would have resulted in unacceptable taste and odor impacts on groundwater used for drinking water.

The proposed rulemaking was approved by the Board on December 15, 2009, and was published in the March 6, 2010, edition of the *Pennsylvania Bulletin* (40 Pa.B. 1297), where a 30-day public comment period was advertised. During the official comment period, the EQB received comments from five commentators and IRRC. The proposal to leave the medium-specific concentrations (MSCs) for MTBE unchanged from its current form in Chapter 250 generated the most comments on the proposed rulemaking, with one commentator suggesting that the Board adopt two separate standards for MTBE – risk-based MSCs and a separate Secondary Maximum Contaminant Level (SMCL) based on taste and odor concerns for MTBE. This suggestion was not accommodated because EPA, to date, has not promulgated an SMCL level for MTBE. Other commentators provided suggestions for improving clarity of the rulemaking, which were accommodated. No substantive changes were made to the final-form rulemaking, as a result of comments received on the proposal.

The final-form rulemaking was discussed with the Cleanup Standards Scientific Advisory Board (CSSAB) on June 15, 2010. The CSSAB was supportive of the overall rulemaking, but opposed retaining the standards for MTBE because they do not reflect specific health-based criteria from Act 2. The final rulemaking was also shared with the Department's Storage Tank Advisory Committee (STAC) on June 8, 2010, where the Board voted to approve the rulemaking as written for presentation to the Board as final rulemaking.

The fourth and last final-form rulemaking enclosed, the **Administration of the Uniform Environmental Covenants Act**, establishes requirements for the submission of an environmental covenant to the Department as demonstration of attainment or maintenance of an environmental remediation standard under Act 2. The rulemaking is authorized by the Uniform Environmental Covenants Act (UECA), which was signed into law in Pennsylvania on December 18, 2007. UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under Act 2, the Storage Tank and Spill Prevention Act (Tank Act), and other state and federal statutes. The regulations include provisions that clarify when an environmental covenant is required, how an environmental covenant should be created, what an environmental covenant must contain and when an environmental covenant must be submitted to the Department. The rulemaking also establishes a fee to support the Department's review of environmental covenants that are submitted as part of a demonstration of attainment or maintenance of a remediation or corrective action standard.

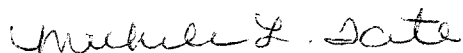
The proposed rulemaking was approved by the Board on December 15, 2009, and was published in the March 6, 2010, edition of the *Pennsylvania Bulletin* (40 *Pa.B.* 1379), where a 30-day public comment period was advertised. During the official comment period, the Board received comments from eleven commentators, including IRRC. As a result of comments received on the proposal, several changes, mostly editorial and corrective in nature, were made to the rulemaking; however, several substantive changes were also made to the regulations, including changes associated with the submission process for Departmental consideration of environmental covenants. In lieu of requiring the submission of draft environmental covenants at early or interim time periods, the final-form rulemaking only requires submission of an environmental covenant after the Department has approved a Final Report or Remedial Action Completion Report demonstrating attainment of an Act 2 standard. Other substantive changes at final rulemaking include amendments that provide the Department and the remediator with explicit authority to agree to longer compliance timeframes when necessary and amendments that add a mandatory provision regarding the termination of covenants, which is intended to address situations where the Pennsylvania Department of Transportation acquires property that is subject to an environmental covenant for use as a highway right-of-way.

The Department consulted with the regulated community on the rulemaking, including discussions with STAC on June 8, 2010, and the CSSAB on June 15, 2010. STAC approved a motion to recommend approval of the final-form rulemaking by the Board, while the CSSAB, although supportive of the draft final-form rulemaking, did not take formal action on the rulemaking, pending resolution of several issues. The Department had further discussions with the CSSAB on June 28, 2010, resulting in further refinements to the rulemaking to address the committee's concerns.

The Department will provide assistance as necessary to facilitate the Commission's review of these final-form rulemakings under Section 5.1(e) of the Regulatory Review Act. Please contact me at the number above if you have any questions or need additional information.

Please contact me at the number above if you have any questions or need additional information.

Sincerely,



Michele L. Tate
Regulatory Coordinator

Enclosures

bcc: Final Regulatory File #7-442
Final Regulatory File #7-448
Final Regulatory File #7-453
Final Regulatory File #7-454



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF POLICY

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO
THE REGULATORY REVIEW ACT

I.D. NUMBER: 7-454

SUBJECT: Administration of the Uniform Environmental Covenants Act

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor
- ☐ Delivery of Tolled Regulation
- a. ☐ With Revisions b. ☐ Without Revisions

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FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

9-20-10 D. Neut

Majority Chair, HOUSE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Rep. Camille George

9-20-10 R. W. White

Minority Chair, HOUSE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY

9/20 Wallace

Majority Chair, SENATE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY
Senator Mary Jo White

9-20-10 A. Lipacofsky

Minority Chair, SENATE COMMITTEE ON
ENVIRONMENTAL RESOURCES & ENERGY

9/20/10 K. Cooper

INDEPENDENT REGULATORY REVIEW COMMISSION

ATTORNEY GENERAL (for Final Omitted only)

LEGISLATIVE REFERENCE BUREAU (for Proposed only)

