PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

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April 5, 2010

VIA HAND DELIVERY
The Honorable John Hanger
Secretary, Pennsylvania Department of Environmental Protection
Chairperson
Pennsylvania Environmental Quality Board
Rachel Carson State Office Building,
16th Floor
400 Market Street, Harrisburg, Pennsylvania 17101-2301

Re: Proposed Regulations to Implement the Uniform Environmental Covenants Act

Dear Secretary Hanger:

On December 18, 2007, the Commonwealth of Pennsylvania adopted the Uniform Environmental Covenants Act ("UECA"), 27 Pa.C.S. §§ 6501- 6517. UECA went into effect on February 19, 2008. Over the past two years, the Pennsylvania Department of Environmental Protection ("PADEP") and members of the regulated community have wrestled with various issues arising under UECA. Some of these issues are the product of the provisions of UECA itself while many others are the result of decisions that PADEP has made regarding the manner in which it has initially decided to implement UECA. The collective effect is that UECA (as it is being implemented) has detracted from Pennsylvania's vaunted land recycling program under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 - 6026.908, despite the laudable goals that led to passage of UECA in the first place.

On March 6, 2010, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin proposed regulations to implement UECA. See 40 Pa. Bull. 1379 (March 6, 2010). The proposed regulations are to be codified at 25 Pa. Code Chapter 253 when finalized. In many regards, the proposed regulations simply mirror the provisions of UECA thereby calling into question why they are needed. In limited instances, the proposed regulations step beyond the terms of UECA and include certain provisions designed to clarify the manner in which specific provisions of UECA are to operate. For example, the proposed regulations contain provisions that offer useful guidance to both PADEP and the regulated community as to the manner in which UECA's retroactive requirements are to be satisfied. However, other provisions in the proposed regulations that amplify on the terms of UECA are decidedly less useful and will add to the difficulties that members of the regulated community have encountered in applying UECA in the manner that PADEP believes is appropriate.

The purpose of this submission is to provide comments to the EQB and PADEP regarding the proposed regulations on behalf of the Pennsylvania Chamber of Business and Industry ("PCBI"). The PCBI membership comprises thousands of businesses of all sizes and across all industry sectors, many of which are engaged in land recycling or environmental remediation projects that are substantially affected by the proposed regulations.

PCBI has been a staunch supporter of Pennsylvania's land recycling program and believes that Act 2 has created an innovative and progressive way to promote land recycling and address environmental remediation within the Commonwealth of Pennsylvania that stands head and shoulders above many similar programs in other states. The manner in which UECA is being implemented is unfortunately having a corrosive effect on the Act 2 program. With limited exceptions, the proposed regulations will further detract from the Act 2 program.

The requirements under UECA directly implicate the nature of real property rights and responsibilities. Indeed, UECA is largely focused on issues arising under real property law rather than environmental law. Environmental covenants under UECA are designed in most cases to exist in perpetuity and to directly affect the bundle of property rights associated with a particular parcel. These dynamics underscore the importance of the type of requirements that are being imposed under UECA and differentiate such requirements from other more typical environmental regulations. The stakes are high and the consequences are enduring. We therefore respectfully ask that the EQB and PADEP revise the proposed regulations consistent with the comments contained in the attached document before attempting to finalize the regulations.

For the convenience of the EQB we have also prepared a one-page executive summary of PCBI's comments to be included with the packets that are distributed to the EQB.

We very much appreciate the opportunity to provide comment on the proposed regulations and would welcome the opportunity to discuss in more detail with the EQB and PADEP the concerns described in these comments.

Respectfully submitted,

Gene Barr
Vice President, Government & Public Affairs

cc: Mr. Troy Conrad
Kurt Klapkowski, Esquire

EXECUTIVE SUMMARY
PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY
COMMENTS REGARDING PROPOSED REGULATIONS IMPLEMENTING THE UNIFORM ENVIRONMENTAL COVENANTS ACT

As described in detailed comments submitted herewith regarding proposed regulations to implement Pennsylvania's version of the Uniform Environmental Covenants Act ("UECA"), 27 Pa.C.S. §§ 6501- 6517, the Pennsylvania Chamber of Business and Industry ("PCBI") has significant concerns pertaining to both the terms of the proposed regulations themselves and the manner in which the Pennsylvania Department of Environmental Protection ("PADEP") is implementing UECA. PADEP has used the passage of UECA as a pretext to make important substantive changes to Pennsylvania's vaunted land recycling program under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"). For example, PADEP is now requiring that land use restrictions be imposed prohibiting in perpetuity the residential use of properties that are remediated in accordance with the nonresidential medium specific concentrations ("MSCs") under the statewide health standard of Act 2 despite the fact that such requirements conflict with Act 2 and were never imposed prior to UECA. The manner in which UECA is being implemented is unfortunately having a corrosive effect on the Act 2 program. With limited exceptions, the proposed regulations will further detract from the Act 2 program. PCBI therefore opposes finalizing the proposed regulations without significant changes. PCBI recommends that PADEP engage in further outreach and consultation with the regulated community to seek input into the regulatory development process and is ready to participate in such interactions if the opportunity is provided.

The structure and approach of the proposed regulations reflect a fundamental misperception by PADEP as to the limited but important objectives that UECA is designed to achieve. UECA is not designed to provide a new opportunity for "command and control" regulation in the context of land recycling and environmental cleanup projects. Instead, UECA is designed to create a framework for how activity and use limitations are to be created and not what those activity and use limitations are to include. Moreover, environmental covenants should be the very last step in the remediation process, prepared after final reports and remedial action completion reports are submitted and approved by PADEP.

Consistent with the foregoing, PCBI recommends that the proposed regulations be revised (1) to prohibit PADEP from requiring information, restrictions and provisions in environmental covenants beyond those specifically mandated by UECA, (2) to preserve the use of institutional controls such as ordinances and local regulations that are not in the form of activity and use limitations embodied in an environmental covenant, (3) to shift all requirements relating to the preparation of environmental covenants and requests for waivers to the period following submission and approval of final reports and remedial action completion reports, (4) to eliminate requirements mandating execution of environmental covenants prior to agreement by all parties concerning the terms of the environmental covenants, and (5) to include the numerous clarifying and substantive changes described in the detailed comments prepared by PCBI.

PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY
COMMENTS REGARDING PROPOSED REGULATIONS IMPLEMENTING THE UNIFORM ENVIRONMENTAL COVENANTS ACT

I. Introduction

On December 18, 2007, the Commonwealth of Pennsylvania adopted the Uniform Environmental Covenants Act ("UECA"), 27 Pa.C.S. §§ 6501- 6517. UECA went into effect on February 19, 2008. Over the past two years, the Pennsylvania Department of Environmental Protection ("PADEP") and members of the regulated community have wrestled with various issues arising under UECA. Some of these issues are the product of the provisions of UECA itself while many others are the result of decisions that PADEP has made regarding the manner in which it has initially decided to implement UECA. The collective effect is that UECA (as it is being implemented) has detracted from Pennsylvania's vaunted land recycling program under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 - 6026.908, despite the laudable goals that led to passage of UECA in the first place.

On March 6, 2010, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin proposed regulations to implement UECA. See 40 Pa. Bull. 1379 (March 6, 2010). The proposed regulations are to be codified at 25 Pa. Code Chapter 253 when finalized. In many regards, the proposed regulations simply mirror the provisions of UECA thereby calling into question why they are needed. In limited instances, the proposed regulations step beyond the terms of UECA and include certain provisions designed to clarify the manner in which specific provisions of UECA are to operate. For example, the proposed regulations contain provisions that offer useful guidance to both PADEP and the regulated community as to the manner in which UECA's retroactive requirements are to be satisfied. However, other provisions in the proposed regulations that amplify on the terms of UECA are decidedly less useful and will add to the difficulties that members of the regulated community have encountered in applying UECA in the manner that PADEP believes is appropriate.

The purpose of this letter is to provide comments to the EQB and PADEP regarding the proposed regulations on behalf of the Pennsylvania Chamber of Business and Industry ("PCBI"). The PCBI membership comprises thousands of businesses of all sizes and across all industry sectors, many of which are engaged in land recycling or environmental remediation projects that are substantially affected by the proposed regulations.

PCBI has been a staunch supporter of Pennsylvania's land recycling program and believes that Act 2 has created an innovative and progressive way to promote land recycling and address environmental remediation within the Commonwealth of Pennsylvania that stands head and shoulders above many similar programs in other states. The manner in which UECA is being implemented is unfortunately having a corrosive effect on the Act 2 program. With limited exceptions, the proposed regulations will further detract from the Act 2 program.

The requirements under UECA directly implicate the nature of real property rights and responsibilities. Indeed, UECA is largely focused on issues arising under real property law

rather than environmental law. Environmental covenants under UECA are designed in most cases to exist in perpetuity and to directly affect the bundle of property rights associated with a particular parcel. These dynamics underscore the importance of the type of requirements that are being imposed under UECA and differentiate such requirements from other more typical environmental regulations. The stakes are high and the consequences are enduring. We therefore respectfully ask that the EQB and PADEP revise the proposed regulations consistent with the comments set forth below before attempting to finalize the regulations.

We very much appreciate the opportunity to provide comment on the proposed regulations and would welcome the opportunity to discuss in more detail with the EQB and PADEP the concerns described in these comments.

II. Background and Key Policy Considerations

UECA stems from a national effort to foster a standard approach to creating and documenting activity and use limitations imposed on contaminated sites. Over the past two decades, activity and use limitations have become more prevalent in connection with addressing releases of regulated substances as state and federal regulatory agencies have increasingly embraced more flexible risk-based approaches to remediation decisions rather than continuing to adhere to brittle prescriptive cleanup standards. Because of the nature of the activity and use limitations that are often used in connection with remediation of contaminated sites, such activity and use limitations have not always fit neatly into the legal pigeon holes available under common law to place restrictions on the use of real property. Moreover, concerns regarding the enforceability and durability of restrictive covenants and other types of land use restrictions in connection with environmental remediation projects have created impediments to relying on activity and use limitations as part of remedial approaches.

In August of 2003, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which is also generally known as the Uniform Law Commission ("UCL"), adopted a uniform version of UECA designed to address key challenges associated with activity and use limitations. For example, the uniform statute is designed to provide a greater level of certainty that activity and use limitations in the environmental context can be insulated from legal challenges as to their validity by classifying an environmental covenant as a servitude in order to implicate the full body of real property law. The uniform statute thereby avoids the argument that an environmental covenant is simply a personal common law contract between a regulatory agency and the owner of the real property at the time that the covenant is signed, and thus is not binding on a later owner or tenant of that land. Moreover, the uniform statute is designed to provide greater clarity as to who can enforce activity and use limitations, thereby enhancing their viability. In short, the uniform version of UECA is intended to play a critically important role in facilitating land recycling activities and environmental remediation projects by eliminating or minimizing many of the barriers to relying on activity and use limitations in the context of environmental cleanup of impacted sites. UCL highlighted these objectives in a report to the Pennsylvania House Environmental Resources and Energy Committee concerning UECA dated September 25, 2005, stating that the principal objectives of UECA are "to confirm the legal validity and enforceability of recorded activity and use restrictions upon contaminated property required as part of government approved cleanup programs and to encourage the

development on a nationwide basis of a single, standard approach to the documentation of these restrictions so as to promote the effective remediation and reuse of contaminated sites."

While these considerations provided the initial impetus for the Pennsylvania General Assembly to consider adopting a version of the uniform statute developed by UCL, what ultimately evolved is perhaps wholly unique to Pennsylvania. Unlike other states, Pennsylvania's version of UECA is not designed solely to provide a voluntary safe harbor for remediators and landowners who may wish to take advantage of its provisions. Instead, Pennsylvania's version of UECA is mandatory, requiring that an environmental covenant consistent with UECA be used whenever an "activity and use limitation" is necessary to demonstrate attainment with one or a combination of remediation standards under Act 2, including corrective actions that are necessary under the Pennsylvania Storage Tank and Spill Prevention Act (the "Storage Tank Act"), 35 P.S. §§ 6021.101 – 6021.2104. In addition, Pennsylvania's version of UECA is retroactive in that it requires that within five years after the effective date of UECA, all existing restrictive covenants used to establish activity and use limitations to demonstrate attainment of a remediation standard under Act 2 or the Storage Tank Act must be converted to comply with UECA (unless PADEP waives the requirement). These twin differences have created tremendous challenges for both PADEP and the regulated community in that compliance with the requirements of UECA is a mandatory rather than a voluntary process for a vast array of remediation and cleanup projects in Pennsylvania.

In addition, unlike the uniform statute that is designed to be self-implementing, Pennsylvania's version of UECA contains provisions authorizing the EQB to develop regulations to implement UECA. The uniform statute does not contain such provisions because the statute is intended to deal primarily with the creation, recording, enforceability, termination and modification of equitable servitudes (i.e., a specialized type of ownership interest in real property) that fall primarily within the domain and expertise of local and appellate courts rather than regulatory agencies. The drafters of the uniform act also did not include regulatory authority in the statute because of the concern that controversy regarding substantive environmental law could impair the substantially uniform enactment of the law. Because of these concerns, in its report of 25 September 2005 to the Pennsylvania House Environmental Resources and Energy Committee, the Pennsylvania delegation to the ULC cautioned that any regulations developed under UECA should be "limited to procedural matters relating to the review, recording and registration of environmental covenants and the assessment and payment of fees." UCL also admonished that "[a]ny regulations imposing alternative substantive requirements regarding the remediation of contaminated sites should be enacted under other law." The proposed regulations step well outside these boundaries.

PADEP has added significantly to the challenges posed by Pennsylvania's version of UECA by using UECA as a pretext to make important substantive changes in the Act 2 program which in turn are being implemented in the context of negotiations regarding the content of environmental covenants for specific parcels of property. Such an approach is wholly at odds with the underpinnings of UECA in that UECA is designed to create a framework for <u>how</u> activity and use limitations are to be created and not <u>what</u> those activity and use limitations are to include. In short, UECA is designed to be substantively neutral with respect to Pennsylvania's land recycling program, allowing remediation under Act 2 and the Storage Tank Act to proceed in the

same fashion as prior to the advent of UECA but providing a structure for crafting viable and enforceable environmental covenants containing activity and use limitations that are necessary to attain a cleanup standard under Act 2.

Perhaps the most striking example of the manner in which PADEP has changed the Act 2 program as part of implementing UECA is the fact that PADEP now requires sites that are attaining the medium specific concentrations ("MSCs") developed by PADEP 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.

PADEP's change in policy, purportedly driven by UECA, is deeply flawed for multiple reasons. As a threshold matter, UECA itself is devoid of any requirement that would support the change in policy that PADEP has instituted. Indeed, UECA is almost entirely silent as to how remediation is to be performed. Instead, UECA is designed to address certain narrow issues once the template for remediation has been determined and one or a combination of cleanup standards under Act 2 are attained.

Moreover, PADEP's change in policy is 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. Nevertheless, this is the approach that PADEP is using to implement UECA. In so doing, PADEP has rewritten Act 2.

PADEP'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. As such, 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 PADEP 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. However, this is exactly the approach PADEP has taken since adoption of UECA.

PADEP's change in policy has also had adverse consequences in the administration of the Act 2 program. The process of obtaining approvals from PADEP 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. PADEP's staff personnel are apparently overwhelmed with the work load associated with implementing UECA, albeit during a period of economic recession when the number of real estate transactions and brownfields projects has dropped precipitously from previously levels. 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 PADEP's attention in reviewing and approving environmental covenants can be pruned substantially, thereby freeing resources on the part of both PADEP and the regulated community to focus on other issues.

Other examples of the manner in which PADEP has used UECA as a mechanism to alter substantively the cleanup program under Act 2 abound. For instance, PADEP has insisted in the context of a variety of environmental covenants that onerous reporting and monitoring requirements be included in environmental covenants as a precondition to approval from PADEP. Such reporting and monitoring requirements can go well beyond any sort of obligations that are contained in post-remediation care plans included in final reports under Act 2. Moreover, these type of requirements add to the aggregating burdens on both PADEP and the regulated community pursuant to UECA.

Given the objectives to be achieved under UECA (i.e., enhancing the ability of remediators to use activity and use limitations as part of remediation projects) and the damage that the current approach to implementing UECA is doing to the Act 2 program, PCBI strongly recommends that PADEP focus only on those requirements specifically mandated by UECA and not treat UECA as a new opportunity for "command and control" regulation in the context of land recycling and environmental cleanup projects as it is currently doing. In short, UECA needs to be interpreted and implemented in ways that are consistent with the underlying objectives that drove its passage – to facilitate the use of activity and use limitations in the context of environmental remediation projects. To that end, PCBI specifically requests that PADEP return to the approach that is mandated by Act 2 and served both PADEP and the regulated community well for the first 13 years of the Act 2 program – that projects that attain the statewide health standard do not trigger the need to prepare environmental covenants even if the nonresidential MSCs are selected. PCBI also requests that PADEP eliminate its demands for extraneous requirements in environmental covenants. UECA itself ensures the enforceability of environmental covenants and contains recording requirements for environmental covenants that ensure that notice of institutional controls is available to prospective property owners.

As discussed in subsequent sections of these comments, an environmental covenant should be the very last step in the remediation process. UECA is designed to provide a form for environmental covenants to take once the substantive issues relating to environmental remediation have been determined. Those substantive issues are typically resolved at the point in time that a final report under Act 2 or remedial action completion report under the Storage Tank Act is approved. Once this occurs, any activity and use limitations required to demonstrate one or a combination of cleanup standards under Act 2 as set forth in the approved version of the

final report can be included in an environmental covenant. Such an orderly process avoids the problems that are now created by PADEP's insistence that environmental covenants must be braided together with the preparation of reports and plans under Act 2 and the manner in which PADEP has held hostage approval of final reports and remedial action completion reports until those in the regulated community yield to PADEP's insistence of extraneous requirements in environmental covenants.

III. Discussion of Key Elements of the Proposed Regulations

For ease of review, PCBI has organized its comments regarding the specific elements of the proposed regulations implementing UECA to track the various sections of the proposed regulations. All references to regulatory sections are intended to refer to 25 Pa. Code Chapter 253 (proposed) unless otherwise indicated.

A. Definitions – 25 Pa. Code § 253.1 (Proposed)

The proposed regulations contain 18 separately defined terms. Many of the definitions that are included in the proposed regulations are either identical or substantially similar to definitions that appear in UECA itself.

We note at the outset that earlier drafts of the proposed regulations contained definitions for both the "Department" and the "Environmental Hearing Board." These definitions were not included in the version of the proposed regulations published in the Pennsylvania Bulletin. We suggest that the definitions of these two terms be restored. In addition, because the term "regulated substances" is used in the proposed regulations, we suggest that a definition for this term be included in the proposed regulations, perhaps by cross-referencing the definition of that term in Act 2 or the regulations thereunder. We also suggest that a definition of "EQB" be added to the regulations as that term is used but not defined in the regulations.

The definition of "activity and use limitations" in the proposed regulations is substantially similar to the definition for that term in UECA. However, the proposed definition has been divided into two separate clauses. The first clause is the operative clause. The second clause (which provides that "[t]he term includes engineering controls and institutional controls") does little to amplify on the first clause and is mere surplusage. Moreover, it suggests 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. While engineering controls may be used to help implement risk-based approaches to remediation, they reflect physical structures or devices rather than legal restrictions or obligations. It is certainly the case that engineering controls may be accompanied by activity and use limitations such as operation and maintenance plans that run with the land or prohibitions on activities that could damage an engineering control. However, engineering controls are not, in and of themselves, activity and use limitations that are designed to be included in environmental covenants. For these reasons, we suggest eliminating the second clause of the proposed definition of "activity and use limitations."

The definition of "engineering controls" in the proposed regulations is overly narrow. The operative first clause of the definition describes "engineering controls" as "[r]emedial actions directed exclusively toward containing or controlling the migration of regulated substances through the environment." This clause ignores the fact that engineering controls also include remedial actions directed to limiting or eliminating pathways of potential exposure to regulated substances such as caps or hydraulic containment systems. To address this problem, we suggest that the first clause of the definition of "engineering controls" be amended to provide as follows: "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."

The definition of an "environmental covenant" in the proposed regulations is difficult to follow. For purposes of clarity, we suggest that the definition be modified slightly to read "A servitude which imposes activity and use limitations as part of an environmental response project."

The definitions of "Final Report" and "Remedial Action Completion Report" both ignore the fact that a combination of cleanup standards under Act 2 can be used. Instead, the proposed definitions contemplate that a single cleanup standard is attained. To address this deficiency and to otherwise clarify the proposed definitions, we recommend that the definition of a "Final Report" be amended to provide that a "Final Report" is "[a] report filed with the Department by a remediator pursuant to 25 Pa. Code §§ 250.204, 250.312 and/or 250.411 (relating to final reports) documenting attainment of one or a combination of cleanup standards under the Land Recycling Act." Similarly, we recommend that the definition of "Remedial Action Completion Report" be amended to provide that such a report is "[a] corrective action report under the Storage Tank Act filed with the Department by a remediator pursuant to 25 Pa. Code § 245.310(b) or § 245.313 (relating to site characterization report and remediation completion report) documenting attainment of one or a combination of cleanup standards under the Land Recycling Act."

The second clause of the 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. We therefore recommend that "fencing" be removed from the second clause of the definition of institutional controls.

B. Contents and Form – 25 Pa. Chapter § 253.2 (proposed)

Section 253.2 of the proposed regulations contains a number of provisions that pertain to the contents and form of environmental covenants. These provisions track many but not all of the provisions of 27 Pa.C.S. § 6504. Specific concerns include the following.

Section 253.2(a) of the proposed regulations contains the elements that each environmental covenant must include. As a matter of drafting clarity, we suggest that the word "The" be removed at the beginning of Section 253.2(a)(6), that Section 253.2(a)(6)(i) be revised to read "The agency, unless the environmental covenant is deemed to be approved under subsection (c)(4), below" and that Section 253.2(a)(7) be revised to read "The name and location of any

administrative record for the environmental response project referred to in the environmental covenant."

By contrast, Section 253.2(b) of the proposed regulations is designed to be permissive in nature, identifying information and provisions that may be included in environmental covenants but are not required to be included in environmental covenants. Unfortunately, in implementing UECA, PADEP has frequently treated this permissive list of elements as a universe of compulsory requirements. To avoid the prospects for continuing implementation of UECA in this fashion, we strongly recommend that the introductory provisions of Section 253.2(b) be revised to read as follows: "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 and requirements as a condition to approving an environmental covenant:" Such a change in the proposed regulations is consistent with giving regulated entities the freedom and flexibility to include, as they may wish, additional provisions in environmental covenants that may be driven by their particular needs while ensuring that PADEP does not unilaterally decide to force regulated entities to include additional provisions beyond those specified by UECA as reflected in Section 253.2(a). Stated differently, the role of PADEP and other relevant agencies is to review the activity and use limitations proposed by the remediator as part of the remediation process to ensure that the activity and use limitations comport with the remedial approach that is selected and approved. Once those activity and use limitations are reflected in an environmental covenant, it is within the prerogative of the regulated entities to decide whether there are additional requirements that they might wish to include in the environmental covenant.

In addition to the foregoing, we note that Section 253.2(b)(6) is inconsistent with the parallel provision of UECA. We suggest that the word "detailed" be removed before the phrase "narrative description" to address this inconsistency.

Section 253.2(c) of the proposed regulations describes the governmental review process for environmental covenants. We have several comments pertaining to this process as follows. First, assuming that changes to Section 253.2(b) as described above are made, we suggest a parallel change to Section 253.2(c)(1) so that the provision reads "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).

Second, we suggest for purposes of clarity that the second sentence of Section 253.2(c)(3) be revised to read "If the Department disapproves an environmental covenant, it shall promptly notify the person submitting the environmental covenant in writing of such disapproval and the basis therefore."

Third, the proposed regulations attempt to define the triggering conditions for when the 90-day review period mandated by Section 6504(c)(4) of UECA begins to run. As drafted, the proposed regulations require submission of a "signed final covenant" as a predicate to triggering the 90-day review period. There is nothing in UECA that supports this requirement. Moreover, the

requirement is at odds with standard practices. It should be sufficient to start the 90-day review period to submit an unsigned proposed environmental covenant for review by the Department. If the environmental covenant is approved (or deemed approved), it can then be executed by the parties thereto prior to recording the environmental covenant. If, on the other hand, the environmental covenant is changed as a result of the review process (which is often the case), the parties will not be placed in the position of executing and having notarized multiple versions of the document. To effectuate this modification, we suggest that Section 253.2(c)(5) be revised to read "The date that the Department receives a proposed environmental covenant 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 covenants) and § 253.2(c)(4), above."

Fourth, the proposed regulations have failed to include any provisions advising the regulated community of their rights to appeal decisions by PADEP regarding environmental covenants. These rights of appeal are expressly recognized in UECA. To correct this deficiency, we suggest that a new provision be added as Section 253.2(c)(6) stating "Any decision by the Department to approve or not approve an environmental covenant is appealable to the Board." Such as a provision parallels Section 6504(c)(5) of UECA.

Section 253.2(d) of the proposed regulations purports to restate authority granted to PADEP to require the inclusion of certain requirements and provisions in environmental covenants. Such authority is already described in Sections 253.2(a), (b) and (c) of the proposed regulations. As such, Section 253.2(d) is not necessary. Moreover, it appears to be an attempt to enlarge PADEP's authority beyond what is provided for in UECA. We request that this provision be eliminated.

Section 253.2(e) of the proposed regulations provides that "[a]n environmental 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." While we recognize that forms can be useful in streamlining repetitive processes, the experience of the regulated community since PADEP issued its first model environmental covenant shortly after UECA went into effect is that many of PADEP's staff view the model environmental covenant as a document that must be rigidly applied and allow little latitude for negotiating alternative terms. In such circumstances, the model becomes a *de facto* regulation devoid of the procedural protections afforded by the regulatory process. If a model environmental covenant simply serves in the future as a tool that PADEP and the regulated community can use without being a straight-jacket devoid of flexibility, then PCBI is supportive of the development and use, as appropriate, of a form or model environmental covenant to serve as a point of departure for preparing case-specific environmental covenants for particular projects. However, we are deeply concerned over whether this will actually occur given the experiences by the regulated community to date.

One area in particular that has been particularly controversial over the past two years has been PADEP's insistence that environmental covenants contain various reporting obligations. The model environmental covenant includes reporting obligations at intervals "determined to be necessary by the Department" (e.g., every January or every third January following PADEP's

approval of the environmental covenant. As described earlier, PCBI has serious concerns over PADEP's insistence that environmental covenants contain reporting obligations and believes that such requirements go well beyond the authority provided by UECA. Assuming that some type of reporting obligation may be legitimate in certain narrowly defined circumstances, PADEP has not articulated to date the factors it considers in "determining" what interval is necessary or appropriate with regard to the frequency of any compliance reporting. To many observers, PADEP's choice of interval has been completely arbitrary and related more to the predilections of specific regional offices and individual staff personnel than objective site specific factors. There is a total lack of consistency. Property owners and brownfield developers need certainty and Act 2 gave that to them. Imposing perpetual, never-ending reporting obligations, that lack any consistency and appear completely arbitrary, only provides a disincentive to brownfield developers who want to use the Act 2 program to reclaim abandoned sites and create economic opportunities. At a minimum, if compliance reporting is going to be routinely imposed in environmental covenants on a going forward (an outcome that PCBI strongly opposes), the proposed regulations should describe site specific factors PADEP will consider in "determining" what reporting interval is considered to be "necessary," if any. Failure to do that will further erode confidence in the Act 2 program.

C. Notice of Environmental Covenant – 25 Pa. Chapter § 253.3 (proposed)

Section 253.3 of the proposed regulations focuses generally on who must be provided with copies of an environmental covenant. These issues are addressed in Section 6507 of UECA. While the proposed regulations are similar to the parallel statutory provisions, the EQB has proposed to make certain changes that are quite useful in concept. With that said, we suggest for purposes of clarity that the first sentence of Section 253.3(a) be revised 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." In addition, we suggest that the last sentence of Section 253.3(c) be revised to provide that the information necessary to support a notification waiver request be submitted to the agency prior to approval of the environmental covenant rather than "no later than the date the draft environmental covenant is submitted to the agency" as the proposed regulations now provide. A request for a waiver may arise out of discussions with the agency during the review process associated with an environmental covenant. For example, the agency may identify certain persons that it would like to receive copies of the environmental covenant and the proponent of the environmental covenant may then wish to request a waiver of such an obligation. As now drafted, the proposed regulations appear to foreclose the possibility of such a waiver if it is not made on or before the time that the proposed environmental covenant is submitted to the agency for review.

D. Requirements for and Waiver of Environmental Covenants - 25 Pa. Chapter § 253.4 (proposed)

Section 253.4 of the proposed regulations contains important provisions that describe when environmental covenants are required. In addition, Section 253.4 of the proposed regulations contains procedures for seeking waivers of such requirements. PCBI has concerns with both sets of provisions as described below.

Section 253.4(a) of the proposed regulations is the counter-point to Section 6517(a) of UECA. The proposed regulations state in relevant that "[u]nless waived by the Department, engineering controls or institutional controls used to demonstrate or maintain attainment of a remediation standard under the Land Recycling Act or the Storage Tank Act shall be implement through an environmental covenant." This provision is confusing because as previously discussed, engineering controls are physical structures or devices rather than legal restrictions or obligations. To address this concern, we suggest that the provision be redrafted to state that "[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 alternative also more closely tracks the key statutory language in UECA. For example, UECA does not require an environmental covenant to "maintain" attainment of a remediation standard as the proposed regulations purport to require.

In addition, the proposed revisions Section 253.4(a) help ensure that a range of institutional controls can be used on the context of remediation projects under Act 2. By using the defined term "activity and use limitations" within the proposed reformulation of Section 253.4(a), the requirement of when an environmental covenant is necessary does not inadvertently sweep within its purview situations where institutional controls are used that rely, for example, on local ordinances or other legal requirements rather than site-specific activity and use limitations. Such institutional controls have long been an important part of the tool box available under Act 2 and offer remediators significant benefits in situations where the existing legal framework provides sufficient controls so as to obviate the need to encumber property with site-specific land use restrictions. For example, in many urban and suburban areas in Pennsylvania, ordinances are in place prohibiting the use of groundwater for private drinking water wells because public water distribution systems have been constructed and are only financially viable if the costs are spread to all users within the relevant service areas by mandating that dwellings and other structures connect to the public water distribution systems. Such ordinances can abrogate the need to prohibit the use of groundwater for potable purposes beneath a particular property through an environmental covenant.

Section 253.4(b) of the proposed regulations imposes obligations to use environmental covenants in the context of remediation projects relying on the special industrial area provisions of Act 2. Not only is such a requirement nowhere to be found in UECA, it appears to be premised on a misunderstanding of the procedures applicable to special industrial areas. Under Section 305 of Act 2, 35 P.S. § 6026.305, after a person seeking to reuse a special industrial area has demonstrated that he or she did not cause or contribute to contamination on the property and that person has prepared a baseline remedial investigation report for the property, PADEP and the person seeking to reuse the special industrial area are to enter into an agreement (typically in the form of a Consent Order and Agreement) that describes cleanup liability for the property. It is this agreement that provides the template for what must be done at the property and whether any land use restrictions must be followed. There is no need to overlay on top of these requirements the obligation to prepare an environmental covenant parroting what is already legally required under the agreement. Moreover, the liability protection in Act 2 for a special industrial area is addressed separately in Section 502 of Act 2, 35 P.S. § 6026.502, and is tied to the agreement between PADEP and the person seeking to reuse the special industrial area rather than under

Section 501 of Act 2, 35 P.S. § 6026.501, which affords liability protection to "[a]ny person demonstrating compliance with the environmental remediation standards established in Chapter 3 . . . ." However, as Section 6517(a) of UECA makes clear, environmental covenants are only required in circumstances where activity and use restrictions are necessary "to demonstrate attainment of a remediation standard under the Land Recycling Act" which, under the structure of Act 2, does not include circumstances where environmental conditions are addressed under the provisions applicable to special industrial areas. Accordingly, PCBI suggests that Section 253.4(b) of the proposed regulations be eliminated.

Sections 253.4(c) and 253.4(d) of the proposed regulations contain procedures for when requests are to be submitted to PADEP to waive the requirement that an environmental covenant be used. In general, the proposed regulations require that such waiver requests be submitted to PADEP well in advance of the submissions of final reports demonstrating attainment of one or a combination of standards under Act 2. This approach makes little sense. As discussed in greater detail in connection with the provisions in Section 253.5 of the proposed regulations, preparing and executing an environmental covenant should be the very last step in the Act 2 process. While we understand the EQB's desire to identify relatively early in the Act 2 process situations where waiver requests will be made, a waiver request is certainly an issue that can be appropriately dealt with during the review period associated with a final report. Accordingly, we suggest that Sections 253.4(c) and 253.4(d) of the proposed regulations be modified to allow waiver requests to be submitted up to the time that a final report for a particular parcel is submitted for review. Obviously, a change of this nature would not preclude a remediator from discussing the need for a waiver earlier in the Act 2 process. However, the proposed change would reduce the potential for forcing consideration of the issue in a premature fashion.

E. Submission of Environmental Covenants and Related Information - 25 Pa. Chapter § 253.5 (proposed)

Section 253.5 of the proposed regulations describes when environmental covenants and related information must be submitted. In general, the proposed regulations contemplate that environmental covenants will need to be developed early in the Act 2 process before remediation is even complete. PCBI fundamentally disagrees with this approach and believes that it will further degrade the Act 2 program. Moreover, it highlights the manner in which UECA is perceived by PADEP as a new source of "command and control" authority over the remediation process rather simply augmenting one narrow aspect of the remediation process – namely, the form in which activity and use limitations are to take to make them enforceable and defensible.

As noted in the previous section of these comments, the preparation of an environmental covenant should be the very last step in the remediation process. It should not occur until remedial actions have been completed and the actual post-remediation conditions at a property are understood. It is only at this point in the process that the need for and scope of an environmental covenant can be determined. For example, a remediation plan may contemplate that soil remediation will take place to achieve nonresidential standards but post remediation sampling demonstrates that residential standards have in fact been attained. A remediation approach may also change as a result of field conditions that are encountered during implementation. Instead of capping an area to eliminate pathways of exposure, impacted soils

may be excavated and properly disposed of at an offsite location. Conversely, based on information obtained during the remedial process, a remediator may decide to use as an adjunct to the remediation approach some type of engineering control. These dynamics are an expected part of the remediation process. Act 2 is structured to provide flexibility to allow remediators to use different approaches with the common goal of ensuring that the selected approaches are protective of human health and the environment.

An environmental covenant is premised on a full understanding of what remediation was performed and what conditions at a site remain that must be addressed using an activity and use limitation. Indeed, such information is to be included in the environmental covenant. It is a waste of resources (both those of PADEP and those of the regulated community) to prepare and negotiate the terms of an environmental covenant before the facts on which the environmental covenant is predicated have been determined. Moreover, focusing on an environmental covenant prematurely will necessarily divert attention away from the remediation process itself.

This is not to say that we disagree with the concept of identifying relatively early in the Act 2 process activity and use limitations that will need to be implemented as part of different remedial approaches. Remediators already engage in such a process in the context of evaluating remedial options and may select one remedial option over another because the former would trigger the need for activity and use limitations while the latter would not. Particularly in the context of brownfields projects and land recycling activities, activity and use limitations can be perceived as market deterrents and accordingly, may be used very judiciously. The evaluation of potential activity and use limitations described above is a far cry, however, from actually preparing and negotiating an environmental covenant early in the Act 2 process as the proposed regulations contemplate.

Section 253.5(a) of the proposed regulations requires that in the context remediation projects attaining the background standard or the statewide health standard under Act 2, a proposed environmental covenant must be submitted to PADEP at least 30 days prior to submission of the Final Report under Act 2 or the Remedial Action Completion Report under the Storage Tank Act. With all deference to the EQB, this requirement makes no sense at all. It does illustrate, however, the extent to which UECA has become the proverbial tail wagging the dog.

Setting aside the fundamental issue of whether an environmental covenant should ever be required in a situation where the background standard or the statewide health standard is attained, the mechanics of the Act 2 program simply do not mesh with the approach embodied in Section 253.5(a). Under Act 2, the only report that must be submitted to PADEP where the background standard or the statewide health standard is used is the final report. Moreover, in such circumstances, a notice of intent to remediate ("NIR") can be submitted simultaneously with the final report. Under the proposed requirements in Section 253.5(a), a proposed environmental covenant may be the very first submission that PADEP receives regarding a site that is undergoing remediation. Certainly, PADEP staff will be in no position to conduct anything resembling a meaningful review of the proposed environmental covenant. Without any of the related documentation being available, the environmental covenant will simply be placed in a pile to be looked at later.

Once a Final Report or Remedial Action Completion Report is submitted to PADEP, that document must be reviewed. If deficiencies exist, PADEP will require that changes be made or will disapprove the report. In some instances, this may result in the remediator selecting a different remedial approach for the site in question or undertaking additional remediation. Only at the point in time when a Final Report or Remedial Action Completion Report has been approved is there a degree of certainty as to whether activity and use limitations are integral to the attainment of a remediation standard.

Given the foregoing, PCBI strongly believes that the appropriate time for submitting an environmental covenant to PADEP for review and approval is directly following approval by PADEP of a Final Report or Remedial Action Completion Report (e.g., within 30 days after such an approval). This allows for the substantive process under Act 2 to be completed and the context in which an environmental covenant may be necessary to be fully understood. Information regarding conditions at the site in question, the remedial steps taken, and the activity and use limitations that must be implemented can be readily extracted from the Final Report or Remedial Action Completion Report (as approved by PADEP) and incorporated into the environmental covenant. Moreover, such an approach is consistent with the limited but important objectives on which UECA is premised – to afford the regulated community with a structure for embodying activity and use limitations in a legal document that can be recorded, enforced and defended.

Section 253.5(b) of the proposed regulations requires that for remedial projects where the site specific standard under Act 2 is to be used, a proposed environmental covenant must be submitted to PADEP at the same time that a Cleanup Plan under Act 2 or a Remedial Action Plan under the Storage Tank Act is submitted. If a Cleanup Plan or Remedial Action Plan is not necessary, then the proposed environmental covenant must be submitted to PADEP at least 30 days prior to submission of the Final Report under Act 2 or the Remedial Action Completion Report under the Storage Tank Act (paralleling the requirements of Section 253.5(a) discussed above). For the reasons described above, we believe that this requirement forces PADEP and regulated entities to prematurely devote resources to preparing and considering environmental covenants. While we acknowledge that in the case of a project where the site specific standard is being used and unlike projects being addressed under the background standard or the statewide health standard, PADEP may actually have information in the form of a Remedial Investigation Report or equivalent regarding conditions at a site. However, the actual remedial outcomes will not be known at the time a Cleanup Plan or Remedial Action Plan is prepared. Much can change between conceptual design and final implementation of a remedial approach. We certainly believe that it is appropriate and consistent with standard practices under Act 2 to describe in a Cleanup Plan or Remedial Action Plan activity and use limitations that are contemplated as part of the proposed remedy but without wasting time drafting, negotiating and reviewing an environmental covenant that will most likely need to be revisited when remediation is completed. Instead, the appropriate time for submitting an environmental covenant to PADEP for review and approval is directly following approval by PADEP of a Final Report or Remedial Action Completion Report (e.g., within 30 days after such an approval).

Section 253.5(d) of the proposed regulations compounds the ill-advised approach embodied in Section 253.5(a) and 253.5(b) by providing that "[a]ll necessary copies of the final

environmental covenant shall be signed and submitted along with the Remedial Action Completion Report or the Final Report." This provision is fraught with difficulties. As PADEP is well aware, not all Final Reports or Remedial Action Completion Reports are approved without change. Environmental covenants may very well need to be modified to reflect the final version of a Final Report or Remedial Action Completion Report as approved by PADEP rather than the version that is initially submitted. Moreover, environmental covenants must adhere to requirements as to form that will allow them to be recorded with real property records. Accordingly, parties to environmental covenants must sign environmental covenants using duly authorized representatives. Signatures must be notarized. The number of different parties that must sign an environmental covenant may be extensive depending on the circumstances. It is a waste of resources to require remediators to submit signed environmental covenants to PADEP for consideration with the likelihood that the execution process will need to be repeated one or more times. Instead, once the terms of an environmental covenant are fixed and not subject to further evolution, the parties to the environmental covenant can execute the final version of the environmental covenant so that the environmental covenant can be recorded.

F. Subordination – 25 Pa. Code § 253.8 (proposed)

Section 253.8 of the proposed regulations contains provisions that deal with the subordination of prior interests to the requirements in an environmental covenant. This is an area in which Pennsylvania's version of UECA differs substantially from the uniform act. While Section 3(d)(2) of the uniform act provides that, "This [act] does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant," 27 Pa.C.S. § 6503(d)(2) provides that, "As a condition to approval of an environmental covenant an agency may require that an owner of a prior interest subordinate that interest to the environmental covenant." Because of the importance of minimizing the interference with vested interests in real estate and commercial financial arrangements, the proposed regulations 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 objectives of an environmental covenant are achieved. The proposed regulations should also be revised to include the provisions contained in Section 6503(d)(1) of UECA setting forth the general rule that an interest that has priority under law other than UECA is not affected by an environmental covenant unless the owner of that interest subordinates its interest to the environmental covenant.

With respect to the second sentence of Section 253.8(c), we question whether it should be necessary to provide to PADEP proof of recordation of a subordination agreement as the proposed provision requires. We also suggest 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." Finally, we suggest that Section 253.8(d) 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."

G. Duration – 25 Pa. Code § 253.9 (proposed)

Section 253.9 of the proposed regulations covers the duration of environmental covenants, the manner in which environmental covenants are to be dealt with in eminent domain proceedings and certain procedures for the judicial termination or amendment of environmental covenants. Section 6509(a) of UECA provides that environmental covenants are generally perpetual in nature but provides five separate mechanisms whereby environmental covenants can be terminated. For purposes of clarity and ease of use, we suggest that Section 253.9(a) of the proposed regulations be revised to expressly include the five mechanisms for termination listed in Section 6509(a) of UECA.

H. Conversion and Waiver of Conversion – 25 Pa. Code § 253.10 (proposed)

Section 253.10 of the proposed regulations describes procedures to implement the retroactive elements of UECA. In generally, PCBI supports the approach that the EQB has proposed to use in Section 253.10. For purposes of clarifying which existing instruments must be converted to satisfy the requirements as to form for environmental covenants, we request that Section 253.10(a) be modified to read as follows: "An instrument created before February 18, 2008, containing activity and use limitations for a parcel of property or portion thereof necessary to demonstrate attainment or maintenance of a remediation standard under the Land Recycling Act or to demonstrate satisfaction of a corrective action requirement under the Storage Tank shall be converted to an environmental covenant by February 18, 2013, unless waived by the Department or waived by the provisions in this section."

In addition, we suggest that language be added to the proposed regulations making it clear the conversion process does not provide latitude for PADEP to require that an environmental covenant include elements beyond those mandated by UECA. While Section 253.10(b) is useful in making clear that PADEP may not enlarge the universe of activity and use limitations beyond those contained in the existing instrument that are necessary to demonstrate attainment with one or a combination of cleanup standards, it does not address other requirements that PADEP may seek to include in the environmental covenant. Changes to Section 253.2 discussed above may help address this concern.

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From: Stephanie Wissman [swissman@pachamber.org]
Sent: Monday, April 05, 2010 4:57 PM
To: IRRC
Subject: FW:
Attachments: 20100405160443822.pdf

Attached please find the comments of the PA Chamber of Business and Industry regarding DEP's proposed regulations to implement the Uniform Environmental Covenants Act.

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