

Louise A. Rynd, Esq.  
General Counsel  
717-255-6935  
[lynd@pabanker.com](mailto:lynd@pabanker.com)

April 5, 2010

Environmental Quality Board  
P. O. Box 8477  
Harrisburg, PA 17105-8477  
Via [RegComments@state.pa.us](mailto:RegComments@state.pa.us)

**Re:** Proposed 25 PA. CODE CH. 253 (relating to Administration of the Uniform Environmental Covenants Act)

Dear Members of the Pa. Environmental Quality Board:

Thank you for this opportunity to comment on behalf of Pennsylvania's banking industry on your proposed regulation to be issued under the Pa. Uniform Environmental Covenants Act (Pa. UECA).

The banking industry, through the American Bankers Association, was involved in the development of the UECA, and the Pennsylvania Bankers Association (PBA) supported its adoption in Pennsylvania because our members see the value of restoring "brown-fields" to productive re-use and the long-term enforcement of clean-up controls contained in a statutorily-defined, voluntary environmental covenant binding subsequent purchasers and tenants of the property and listed in local land records.

PBA's concern about the proposed regulatory interpretation of Pennsylvania's version of the UECA derives in part from the fact that the UECA was proposed as a self-implementing statute. The uniform version of the act, which has been enacted in most of the other 23 states which have thus far adopted the UECA, does not confer regulatory authority on administrative agencies because the law is intended to primarily address issues arising under real estate law dealing with the validity, enforceability and procedures for the modification and termination of covenants. These matters of real estate law are comparable to issues involving easements, equitable servitudes, trusts and the priority of competing interests in land, which have traditionally been addressed by Courts of Common Pleas rather than administrative agencies. At the insistence of the Department of Environmental Protection, however, the Pa. UECA includes rule-making authority. While regulations may be helpful in

dealing with administrative actions, such as procedures for the establishment of fees and the filing, review and recording of covenants, Pennsylvania should be careful not to adopt rules that will cause the law in Pennsylvania to deviate from the practices of most other states and thereby impose added costs and uncertainty on persons doing business within the Commonwealth.

One area in which a cautious approach to rulemaking is particularly necessary involves the subordination of prior interests in land. While section 3(d)(2)<sup>1</sup> 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," DEP also insisted that the Pa. UECA at 27 Pa.C.S. § 6503(d)(2) provide 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 and the fact that the Uniform Act makes it clear that a state agency may not directly order owners of prior interests to agree to subordination, PBA suggests that these regulations identify circumstances in which DEP may make its approval of a covenant conditional upon subordination rather than simply requiring subordination. Such a revision would also help to minimize the non-uniformity of the Pa. UECA.

We suggest that the rules require that:

(1) subordination only be required based upon specific findings explaining how and why a lack of subordination will interfere with the implementation or enforcement of covenants; and

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<sup>1</sup> The official comments to the Unif. Environmental Covenants Act, § 3 (d) (2003) state:

*Subsection (d) restates and clarifies traditional real property rules regarding the effect of an environmental covenant on prior recorded interests. The basic rule remains that pre-existing prior valid and effective interests – "First in time, first in right" – remain valid. As § 7.1 of the Restatement (3d) of Property: Mortgages states:*

*"A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior [that is, later in time] to the mortgage being foreclosed....Foreclosure does not terminate interests ...that are senior...."*

*At the same time, it is not uncommon for interested parties to re-order the priorities among them by agreement in order to accommodate the economic interests of various parties. The usual device used to re-order priorities is a so-called 'subordination' agreement. Again, this section tracks the outcome suggested in The Restatement (3d) of Property: Mortgages. Section 7.7 of the Restatement provides in pertinent part that:*

*A mortgage, by a declaration of its mortgagee, [that is, the lender] may be made subordinate in priority to another interest in the mortgaged real estate, whether existing or to be created in the future....A subordination that would materially prejudice the mortgagor [that is, the owner of the real estate] or the person whose interest is advanced in priority is ineffective without the consent of the person prejudiced.*

*The impact of the newly recorded environmental covenant on the priorities of other lien holders is sufficiently important that the Act emphasizes this issue both in this section and in Sections 8(b) and 9(c). In all these instances, the Act provides that the usual rules of priorities are preserved, except in the case of foreclosure of tax liens.*

*Thus, in preparing an environmental covenant, it might be advisable for the agency to identify all prior interests, determine which interests may interfere with the covenant protecting human health and the environment, and then take steps to avoid the possibility of such interference. The agency may [emphasis added] do this, for example, having the parties obtain appropriate subordination of prior interests, as a condition to the agency's approval of the environmental covenant.*

(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 environmental covenants are achieved.

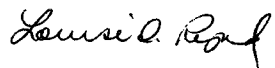
The proposed regulations should also be revised to include the provisions contained in Section 6503(d)(1) of UECA setting forth the general rule that an interest that has priority under law other than UECA is not affected by an environmental covenant unless the owner of that interest subordinates its 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 Pa. DEP 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."

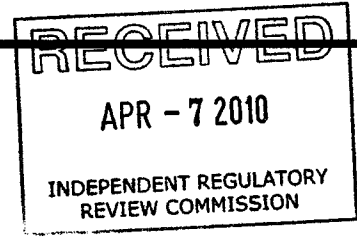
Finally, we suggest that Section 253.8(d) be modified for clarity to read "An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of the person's interest but does not itself impose an affirmative obligation on the person with respect to the environmental covenant nor does it affect that person's existing environmental liabilities."

PBA would be glad to discuss its concerns and suggested revisions with your staff.

Sincerely,



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**From:** Lisa R. Brandt [lbrandt@pabanker.com]  
**Sent:** Monday, April 05, 2010 3:13 PM  
**To:** EP, RegComments  
**Cc:** Louise A. Rynd  
**Subject:** Proposed 25 PA. CODE CH. 253  
**Attachments:** 4-5-10 PBA UECA Rule Comments.doc

Attached please find the comments of the Pennsylvania Bankers Association regarding Proposed 25 PA. CODE CH 253.

Thank you.

Lisa R. Brandt  
Legal Assistant  
Pennsylvania Bankers Association  
3897 North Front Street  
Harrisburg, PA 17110  
717.255.6936  
Visits our web site at [www.pabanker.com](http://www.pabanker.com)