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April 1, 2010

Environmental Quality Board  
Rachel Carson State Office Building  
16<sup>th</sup> Floor  
400 Market Street  
Harrisburg, PA 17101-2301

DEP POLICY OFFICE  
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VIA OVERNIGHT COURIER

Re: Proposed Rulemaking, Administration of the Uniform Environmental Covenants Act  
Comments of BP Products North America Inc.

Dear Sir/Madam,

Enclosed is my letter dated April 1, 2010 containing comments to the captioned rulemaking and a Summary of the comments to be provided to each member of the Board as provided in the notice of proposed rulemaking.

Thank you very much. Please let me know if you have any questions.

Sincerely,

John C. Laager

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ATTORNEY TECHNOLOGY  
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DEPARTMENT OF ENVIRONMENTAL  
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ADMINISTRATION OF UECA, 25 Pa.Code Ch. 253  
SUMMARY OF COMMENTS OF BP PRODUCTS NORTH AMERICA INC. ("BP")

To date, BP has submitted over 30 draft covenants to the Department under a Multi-Site Agreement signed on March 14, 2001 covering the remediation of hundreds of sites in Pennsylvania. BP provides these comments based upon its experience with the UECA program:

**1. BP suggests that Section 253.5(b) of the proposed rule be amended so that, for remediations using the site-specific standard, the final rule will (1) require the submission of draft environmental covenants at least 30 days prior to the submission of the Remedial Action Completion Report ("RACR") or Final Report, rather than when the Remedial Action Plan or Cleanup Plan is submitted, and (2) require that the list of "all owners of recorded interests in the property and the nature of their interest" be submitted at the same time as the draft environmental covenant. This would be conceptually similar to the timing that the proposed rule adopts in Section 253.5(a) for remediations under the background standard or the Statewide health standard.**

Under the proposed rule, a draft covenant is required when the Remedial Action Plan ("RAP") or Cleanup Plan is submitted. A RAP or Cleanup Plan is submitted before remediation has been undertaken and the necessary use restrictions have been identified. It is very likely that a draft covenant submitted with the RAP or Cleanup Plan will have to be substantially amended later. Further, under the current proposed rule, two title searches will have to be conducted: one when the draft covenant is submitted with the RAP to identify existing legal interests, and another one when the final covenant is prepared (perhaps years later), to determine if additional interests have been recorded in the intervening time. Thus, the proposal is wasteful of resources and will result in increased costs for remediaters, owners, and USTIF, which covers such costs. The proposed revision reflects the Department's current practice, in which the draft covenant is submitted shortly before, after, or at the time of the submittal of the RACR or Final Report, thereby avoiding the waste of resources and making the rules for remediations under the statewide health standard and site-specific standard more consistent.

**2. BP suggests that Section 253.5(d) of the proposed rule be amended to retain the Department's current practice under which draft environmental covenants are submitted shortly before or concurrently with the RACR or Final Report, and the Department does not issue its letter approving the Report until the signed covenant is received and executed by the Department. This will address the reluctance of many owners to sign an environmental covenant relating to a Report that has not even been submitted to the Department, and will eliminate the possibility of having to go back to the owner to sign a revised covenant if the Department requires changes based upon its review of the Report.**

BP rarely owns the sites it remediates. Based upon BP's experience, the proposed rule will make it more difficult to obtain an owner's signature on an environmental covenant if the final report relating to the covenant has not even been submitted to the Department or reviewed by the Department. This will also delay the submission of final reports, making site closure more difficult. BP suggests that the final rule retain the Department's current practice, as explained above.

**3. BP suggests that the words "unless waived by the Department" be added to the end of proposed Section 253.11 regarding approval of assignments so that flexibility with the 30-day rule will be available by waiver where the Department agrees to grant it.**

BP's proposal would provide flexibility in appropriate cases where a request for approval of an assignment is not, or cannot be, provided 30 days before the assignment.



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Re: Proposed Rulemaking, Administration of the Uniform Environmental Covenants Act  
Comments of BP Products North America Inc.

Dear Members of the Board,

On behalf of BP Products North America Inc. ("BP"), I am submitting comments to the proposed rulemaking for the administration of the Uniform Environmental Covenants Act ("UECA"), 25 Pa. Code Ch. 253, that appeared in the Pennsylvania Bulletin dated Saturday, March 6, 2010. BP wishes to commend the Environmental Quality Board and the Pennsylvania Department of Environmental Protection ("Department") on the publication of the proposed rulemaking and the Department's administration of the UECA program to date.

On March 14, 2001, the Department signed a Multi-Site Agreement with BP that covers the process of remediating hundreds of sites throughout the Commonwealth. Since the adoption of UECA a little over two years ago, BP has submitted to the Department approximately 30 draft environmental covenants to assist in the closure of sites included in the Multi-Site Agreement. These proposed covenants are in various stages of review and finalization. BP believes that the Department has been very successful in its initial implementation and administration of the UECA program.

BP expects to be submitting many more environmental covenants to the Department in the years to come. In general, BP believes that the proposed rulemaking will assist in establishing a workable program for the administration of UECA. However, BP believes that some portions of the proposed rule will be detrimental to such a result. Thus, BP is providing the following comments based upon its experience with the UECA program in an effort to insure that the program will be administered as effectively and efficiently as possible to the benefit of the Department, site owners, the regulated community, and the citizens of the Commonwealth:

Comment No. 1/Section 253.5 (b) of Proposed Rule, "Submission of environmental covenants and related information."

Based upon its experience with the UECA program, BP believes that the requirement of proposed rule 253.5(b) that an unsigned draft of an environmental covenant be submitted as part of the Remedial Action Plan or the Cleanup Plan for closures under the site-specific standard is

inefficient, wasteful of resources, and will result in increased costs for remediaters, owners, and the Underground Storage Tank Indemnification Fund ("USTIF").

For remediations under the site-specific standard that will include an environmental covenant, Section 253.5(b) of the proposed rule requires that an unsigned draft of the covenant be included either as part of the Remedial Action Plan (under Chapter 245) or as part of the Cleanup Plan (under Chapter 250). In BP's experience this differs from the current approach utilized by the Department, in which the draft environmental covenant is submitted much later in the process. Under current practice, the draft covenant is provided shortly before, after, or contemporaneously with the Remedial Action Completion Report or the Final Report. Under the current process, the draft covenant typically is submitted after the substantial part of the remedial work (including attainment sampling) has been conducted, and the particular engineering and institutional controls necessary for site closure have been identified.

BP believes that requiring that a draft covenant be submitted too early in the process will lead to inefficiencies, be wasteful of the resources of the Department and remediaters, and will lead to increased costs. At the time that the Remedial Action Plan or Cleanup Plan is submitted, it is not known what engineering and institutional controls will be required when remedial actions are completed years later. Any engineering and institutional controls included in a draft environmental covenant prepared before remediation has even begun will be little more than informed guesses. Moreover, Section 4 of the Department's Model Environmental Covenant requires a "Description of Contamination and Remedy", but the remedy cannot be accurately described until remedial actions have been completed, making it impossible to accurately draft Section 4 at the time of the Remedial Action Plan or Cleanup Plan. Thus, BP believes that requiring remediaters to prepare draft environmental covenants that will be subject to substantial change, and requiring the Department's case managers to review them multiple times, is wasteful of resources.

Further, requiring that the draft environmental covenant be submitted at this early stage will also mean that two title searches will be required, rather than one. Proposed rule Section 253.5(b) requires that a list of "all owners of recorded interests in the property and the nature of their interest" be submitted with the draft environmental covenant. The first title search will be required when the Remedial Action Plan or Cleanup Plan is prepared, in order to identify the recorded interests for the draft covenant that would accompany the particular Plan. The second title search would occur years later, after remediation or attainment sampling is complete, when the Remedial Action Completion Report or Final Report is submitted and the environmental covenant is to be finalized, to determine if there are any new interests that have been recorded in the intervening time.

The proposed rule therefore will result in two title searches, and a doubling of costs for title searches that could be avoided if only one title search was conducted closer to the time of the preparation of the final environmental covenant. This doubling of costs will be wasteful not only of the remediator's or owner's financial resources, but will also increase costs that are subject to reimbursement from the limited resources of the Underground Storage Tank Indemnification Fund, which has included these costs in its reimbursement program. Although the costs of conducting the necessary title search can differ from site to site, it is not uncommon for such searches to cost \$500 to \$1,000 per search.

**BP suggests that Section 253.5(b) of the proposed rule be amended so that, for remediations using the site-specific standard, the final rule will (1) require the submission of draft environmental covenants at least 30 days prior to the submission of the Remedial Action Completion Report or Final Report, rather than when the Remedial Action Plan or Cleanup Plan is submitted, and (2) require that the list of "all owners of recorded interests in the property and the nature of their interest" be submitted at the same time as the draft environmental covenant. This would be conceptually similar to the timing that the**

**proposed rule adopts in Section 253.5(a) for remediations under the background standard or the Statewide health standard.**

Adopting such a change would also make the procedure more efficient for three reasons: (1) the necessary engineering and institutional controls will be able to be identified and included in the draft environmental covenant with substantial certainty, (2) Section 4 of the Model Covenant requiring the preparation of the "Description of Contamination and Remedy" will be able to be accurately prepared, and (3) the title search to identify the recorded interests will need to be conducted only once, closer to the time that the environmental covenant is finalized, thereby eliminating the cost of duplicative title searches.

Comment No. 2/Section 253.5(d) of Proposed Rule, "Submission of environmental covenants and related information."

Based on its experience with the UECA program, BP believes that the requirement of proposed rule 253.5(d) that signed originals of the environmental covenant be submitted with the Remedial Action Completion Report or Final Report will (1) delay the submission of these reports and (2) will also make it more difficult for remediatos to get owners to sign environmental covenants. Like many other remediatos in the Commonwealth, BP is remediating numerous sites that it does not own. As BP has discussed many times with the Department, BP often experiences difficulty in getting current owners to sign environmental covenants.

The proposed procedure differs in BP's experience with the Department's current procedure, in which draft covenants are submitted to the Department shortly before, after or contemporaneously with the submission of the Remedial Action Completion Report or Final Report. The Department then reviews the Report and confirms that any required changes are made, and approves (or requests changes to) the draft environmental covenant. The Department does not issue the letter approving the Report until the final environmental covenant signed by the remediator (as holder) and the owner is received by the Department and executed by the Department.

BP strongly believes that, if Remedial Action Completion Reports or Final Reports cannot even be submitted until after a signed environmental covenant is obtained from the owner, the submission of many of these reports will be delayed for months or possibly years. Indeed, in some situations BP is still unable to obtain an owner's signature more than 1 year after the draft covenant was approved by the Department.

In BP's experience, some of the major questions owners ask BP as remediator are whether the Remedial Action Completion Report or Final Report has been submitted to the Department at the time the owner is asked to sign the environmental covenant, and whether the Department has reviewed or commented on the Report. Owners often request a copy of the Report that has been submitted to the Department so that they can review the Report in conjunction with the environmental covenant. In BP's experience, many owners will be very reluctant to sign an environmental covenant if the Remedial Action Completion Report or Final Report that is the basis for the need for the environmental covenant has not even been submitted to the Department.

The rulemaking's explanatory comment to proposed Section 253.5(d) states that the proposed Section "contemplates that the Department and the remediator have worked out all issues" with the covenant prior to the submission of the Final Report or Remedial Action Completion Report. However, in situations where the remediator is not the owner, the owner's reluctance to sign the covenant because the Remedial Action Completion Report or Final Report that is the basis for the environmental covenant has not even been submitted to the Department will make it more difficult to close sites in the Commonwealth than is the case today. The result for the remediator is a "Catch-22" situation in which it cannot submit a final report unless the

covenant is signed by the owner, and the owner is reluctant to sign an environmental covenant where the final report has not been submitted to the Department.

Further, if the signed environmental covenant is to be submitted with the Remedial Action Completion Report or Final Report, the environmental covenant will have to be re-executed if there are any further changes to the covenant based upon the Department's review of the Report. Even the smallest of changes to an environmental covenant that has already been signed by the owner and remediator will require that the covenant be re-executed. Having to go back to the owner and seek the re-execution of a second, revised environmental covenant will make a difficult situation even worse and be further wasteful of resources.

Finally, remediaters typically are ready to submit a Remedial Action Completion Report or Final Report soon after attainment sampling is completed. If submission of these Reports is to be delayed because of inability to obtain an owner's signature on the environmental covenant, there may be an increasingly long gap in the time between the end of the attainment sampling and the time when the owner's signature has been obtained and the Report is submitted for approval to the Department. Despite the previous attainment sampling, site closure may be further delayed if the Department requires additional sampling due to this long gap in time.

**BP suggests that Section 253.5(d) of the proposed rule be amended to retain the Department's current practice under which draft environmental covenants are submitted shortly before or concurrently with the Remedial Action Completion Report or Final Report, and the Department does not issue its letter approving the Report until the signed environmental covenant is received and executed by the Department. This will address the reluctance of many owners to sign an environmental covenant relating to a Remedial Action Completion Report or Final Report that has not even been submitted to the Department, and will eliminate the possibility of having to go back to the owner to sign a revised covenant if the Department requires changes to the covenant based upon its review of the Report.**

Comment No. 3/Section 253.11 of Proposed Rule, "Assignment of Interest."

Section 253.11 of the proposed rule creates a requirement that requests for the Department's consent of a holder to assign its interest, or for the removal or replacement of a holder, be made in writing "at least 30 days prior to the assignment." This 30-day requirement is not mandated by UECA. Rather, Section 6510(d) of UECA merely requires the "consent of the other parties" to the assignment or substitution.

BP is concerned with the operation of an inflexible 30-day deadline in situations where the 30-day deadline cannot be met, even where the Department agrees that appropriate circumstances exist in a given situation to be flexible with the application of the 30-day rule.

**BP suggests that the words "unless waived by the Department" be added to the end of proposed Section 253.11 so that flexibility with the 30-day rule will be available by waiver where the Department agrees to grant it.**

Comment No. 4/Section 253.2(a)(6)(iii) of Proposed Rule, "Contents and form of environmental covenant."

Section 253.2(a) lists the mandatory requirements of an environmental covenant. One of the requirements is contained in 252(a)(6)(iii), requiring that the covenant be signed "by every owner in fee simple of the real property subject to the environmental covenant, unless waived by the agency." The statutory basis for such waivers is Section 6504(a)(6)(iii) of UECA. Section 253.2(f) of the proposed rule provides that an environmental covenant may be signed by a person authorized by the governing board of an owner's association in a common interest community to

sign on behalf of individual owners. Beyond this example, it is not clear in what situations the Department would grant a waiver of the need for an owner to sign an environmental covenant.

**BP requests that the Department provide in some forum (possibly the Department's "Frequently Asked Questions" regarding UECA) a listing of the situations in which the Department has granted such waivers in the past under Section 6504(a)(6)(iii) of UECA, and a non-exclusive listing of examples of the situations in which waivers of this obligation would be considered. This would assist the regulated community in identifying the situations in which the waiver has been applied in the past and might be available in the future in an appropriate case.**

Comment No. 5/Section 253.10 of Proposed Rule, "Conversion and waiver of conversion."

Section 253.10 (a) of the proposed rule states that an instrument created before February 18, 2008 to demonstrate attainment or maintenance of a standard or satisfaction of a corrective action requirement is to be converted to an environmental covenant by February 18, 2013 "unless waived by the Department or this section." Section 253.10(c) sets out the procedure regarding waivers for extensions of the conversion requirement until the property is transferred. However, Section 253.10 (e) makes clear that the Department may also "waive the requirement to convert an instrument," but no examples of the situations or circumstances in which the Department would consider granting such a waiver are provided.

**BP requests that the Department provide in some forum (possibly the Department's "Frequently Asked Questions" regarding UECA) a listing of the situations in which the Department has granted such waivers in the past, and a non-exclusive listing of some of the situations in which waivers would be considered. This would assist the regulated community in identifying the situations in which the waiver has been applied in the past and might be available in the future in an appropriate case.**

\* \* \*

BP looks forward to continuing to work with the Department in the remediation of sites in the Commonwealth. Further, BP appreciates the opportunity of providing these comments in the hope that they will assist in the development of the most efficient and effective administrative program possible for the administration of UECA.

Very truly yours,



John C. Laager

