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Tate, Michele

From: Rodd Bender [RBender@mgkflaw.com]
Sent: Monday, April 05, 2010 9:57 PM
To: EP, RegComments
Cc: Klapkowski, Kurt E
Subject: Comments on Proposed UECA Regulations, Chapter 253

Environmental Quality Board:

We are pleased to submit to the Environmental Quality Board the attached comments (in electronic format) regarding the proposed regulations to administer the Uniform Environmental Covenants Act, which appeared in the Pennsylvania Bulletin on March 6, 2010. These comments are being submitted by Manko, Gold, Katcher & Fox LLP on behalf of Beazer East, Inc. I have included both a transmittal cover letter and the comments themselves in the attached pdf document. My name, address, and additional contact information is set forth below. Please confirm receipt of these comments by reply message to me at rbender@mgkflaw.com. Thank you in advance for your consideration of these comments.

Regards,

Rodd Bender

Rodd W. Bender, Esq.
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 500 | Bala Cynwyd, PA 19004
P: (484) 430-2317 | F: (484) 430-5711
rbender@mgkflaw.com | www.mgkflaw.com

MANKO | GOLD | KATCHER | FOX LLP

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TECHNICAL CONSULTANTS
DARRYL D. BORRELLI
MICHAEL C. NINES

401 CITY AVENUE
SUITE 500
BALA CYNWYD, PA 19004

484 430 5700 TEL
484 430 5711 FAX
WWW.MGKFLAW.COM

CHERRY HILL, NJ
PHILADELPHIA, PA

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April 5, 2010

Via Electronic Mail

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

Re: Proposed Uniform Environmental Covenants Act Regulations, 25 Pa. Code Chapter 253

Dear Members of the Board:

We are pleased to submit the attached comments regarding the Environmental Quality Board's proposed Chapter 253 regulations to administer the Pennsylvania Uniform Environmental Covenants Act ("UECA"), 27 Pa.C.S. §§ 6501-17. The proposed regulations appeared in the *Pennsylvania Bulletin* on March 6, 2010, at 40 *Pa. Bull.* 1379. These comments are being submitted by Manko, Gold, Katcher & Fox LLP on behalf of Beazer East, Inc.

The proposed rulemaking includes significant changes to the use and content of environmental covenants envisioned under UECA and will have a substantial impact on the scope of and approach to environmental remediation in the Commonwealth.

We appreciate the opportunity to comment on the proposed rulemaking and would welcome the opportunity to discuss the attached comments with the Environmental Quality Board and the Department of Environmental Protection.

Sincerely,

Rodd Bender

Rodd W. Bender
For MANKO, GOLD, KATCHER & FOX, LLP

enclosure

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COMMENTS SUBMITTED ON BEHALF OF BEAZER EAST, INC., ON THE PROPOSED 25 PA CODE CHAPTER 253 TO ADMINISTER THE PENNSYLVANIA UNIFORM ENVIRONMENTAL COVENANTS ACT

I. Introduction

On March 6, 2010, the Pennsylvania Environmental Quality Board ("EQB" or "the Board") published in the *Pennsylvania Bulletin* a proposal to create 25 Pa. Code Chapter 253, a set of regulations to govern implementation of Pennsylvania's Uniform Environmental Covenants Act, 27 Pa.C.S. §§ 6501-17 ("UECA"). *See* 40 *Pa. Bull.* 1379 (March 6, 2010). The EQB stated in the publication that the primary goal of the proposed rulemaking is to address ambiguities in UECA and establish interfaces between UECA and the Land Recycling and Environmental Remediation Standards Act ("Act 2") and the Storage Tank and Spill Prevention Act ("Tank Act"). Publication of the proposed regulations in the *Pennsylvania Bulletin* initiated a 30-day public comment period, which is open through April 5, 2010. The comments that are presented herein have been prepared on behalf of Beazer East, Inc. (the "Commenter"). Commenter is the owner of and/or responsible party at numerous facilities and remedial projects throughout Pennsylvania who stands to be significantly and directly affected by the proposed regulations as currently drafted.

As described below, the proposed Chapter 253 regulations include significant changes to the scope of environmental covenants envisioned under UECA as well as to Act 2 and Tank Act remediation projects. These proposed regulations will impose substantial consequences on the conduct of environmental remediation, and on the regulated community, in Pennsylvania. Nevertheless, the EQB, at the suggestion of the Pennsylvania Department of Environmental Protection ("PADEP" or the "Department"), seems to be fast-tracking the proposed regulations with the apparent objective of promulgating final-form regulations in 2010. The EQB should take a more considered and measured approach to finalizing and implementing these important regulations and should take additional steps to engage the regulated community and other stakeholders on the important issues discussed below.

The Commenter generally supports the Department's stated goal of addressing ambiguities in UECA and clarifying the interfaces between UECA and Act 2 and the Tank Act. However, as described below, the Commenter does not believe that PADEP has achieved this goal in the proposed regulations and, in certain circumstances, has created new ambiguities. In addition, the Commenter believes that PADEP has not adequately evaluated the potential impacts that may flow from the proposed regulations and should do so prior to finalizing the proposed regulations.

As noted in the preamble to the proposed rulemaking, UECA is based on the model statute drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). In its September 25, 2005 Report to the Pennsylvania House Environmental Resources and Energy Committee on UECA (the "NCCUSL Report"), the NCCUSL noted 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." More specifically, with the recognized importance of remediating

contaminated sites in efficient and cost-effective manner such that they can be returned to productive use, activity and use limitations have become more prevalent in connection with remedial activities as state and federal regulatory requirements have incorporated the ability to us flexible and risk-based approaches to achieving remedial goals. However, because the validity of activity and use limitations has been questioned under certain common law doctrines (e.g., arguments that a deed restriction or other such document is simply a contract between the agency and current owner of the property, and thereby not binding on later owners), UECA was drafted to buttress these important tools from such attack. Any changes to the ability or attractiveness of using activity and use limitations, whether regulatory or resulting from Department practices, serves only to undercut the strength of the Act 2 program.

Further, in commenting on §6515 of UECA which gives the EQB the power and duty to promulgate regulations under UECA, the NCCUSL Report specifically noted that: "Regulations adopted pursuant to this section should be limited to procedural matters relating to the review, recording and registration of environmental covenants and the assessment and payment of fees. Any regulations imposing alternative substantive requirements regarding the remediation of contaminated sites should be enacted under other law." As described below, the Commenter believes that PADEP has departed from this guidance in the way it has implemented UECA and in certain provisions within the proposed regulations.

We therefore request that the proposed Chapter 253 regulations be clarified and/or modified in accordance with the comments presented herein.

II. General Comments on Proposed Chapter 253

A. Substantive Revisions to Act 2 and Tank Act Remedial Activities

The proposed regulations contain language implying that UECA has an unstated public outreach purpose. In describing the benefits of the proposed regulations, the preamble states that the "proposed rulemaking provides better legal tools to ensure that future generations understand the reasons why land use restrictions have been imposed and why certain long-term maintenance/monitoring might be needed." There are no statements in the NCCUSL Report indicating that the drafters of UECA intended a public outreach purpose. While the Commenter agrees that UECA is intended to ensure the continuing validity and standardized format of environmental covenants so that they are more easily found in public records by subsequent prospective purchasers and owners of the site, the Commenter disagrees with any attempt to impose public outreach requirements through UECA regulatory promulgation when both the text and legislative history of UECA are devoid of any public outreach requirements or pronouncements.

Similarly, in implementing UECA to date, the Department has at times appeared to misinterpret and/or misapply the statute as one seeking to promote public notice about the scope of remedial activities. For example, for remedial activities with offsite groundwater impacts, the Department has routinely sought to include language in the environmental covenant stating that the owners of other impacted properties will be contacted on an annual basis or requiring periodic review and confirmation that the conditions underlying a non-use aquifer determination remain valid (an

exercise that would typically require hiring a professional consultant). Nothing in the UECA statute or its legislative history suggest that UECA is to have – or can legally have – any effect on properties outside the boundaries of the real estate parcel upon which an environmental covenant is recorded. Indeed, by mandating the inclusion of off-property language in a publicly-recorded real property record or by imposing obligations that relate to off-property obligations through a UECA-required environmental covenant, the Department may be subjecting itself or a remediator to common law claims asserted by a frustrated adjacent or nearby owner whose property has now been publicly labeled "contaminated" by the Department and all other persons signing the environmental covenant. Such common law claims might conceivably sound in slander of title, diminution of value, quiet title, or the like.

The Department has also used UECA to substantively change the Act 2 program by requiring sites attaining the statewide health standard ("SHS") for non-residential properties to enact an environmental covenant restricting the future use of such sites to non-residential uses. Prior to UECA's adoption in 2007, activity and use limitations for sites attaining the non-residential SHS were never required. UECA provides absolutely no support for such a change in policy. Moreover, the Department's new policy conflicts with explicit provisions of Act 2. 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," and notes that "[i]nstitutional controls may be used to maintain the Statewide health standard after remediation occurs." Accordingly, institutional controls may be used once attainment of a SHS has been demonstrated. This specific statutory language of Act 2 prohibits any attempt to require the implementation of institutional controls to demonstrate attainment of the SHS: the exact policy that the Department appears to be proposing under the cover of a "UECA" rulemaking.

Each of the above-referenced concerns are substantial departures from what has historically been required for the remediation of contaminated sites under Act 2 or the Tank Act. Furthermore, the preamble of the proposed regulations incorrectly claims that the proposed rules do not expand the use of activity and use limitations, yet – as detailed above – the use of activity and use limitations are being mandated in circumstances where no such requirement previously existed or where statutory prohibitions bar such mandates.

The preamble also incorrectly concludes that increased costs to the regulated community will not stem from the proposed regulations. However, the new regulations contemplate substantial additional requirements relating to new outreach, recordkeeping and reporting components of institutional controls, and further contemplate the grant to PADEP of new regulatory authority to mandate the use of PADEP's model environmental covenant. Therefore, with new obligations imposed on property owners and with new annual reporting requirements for remediators, it is simply incorrect to state that the regulated community will not face increased costs if the proposed regulations are adopted as proposed. In sum, these onerous requirements represent a dramatic departure from the stated purposes of UECA and the comments in the NCCUSL Report noting that "regulations imposing alternative substantive requirements regarding the remediation of contaminated sites should be enacted under other law." Commenter encourages the Board and the Department to heed this important legislative history and leave such substantive requirements to the legislature.

B. Rulemaking Timeframe

The Board has provided insufficient time for public input and analysis of the proposed regulations. PADEP presented its proposed regulations to the Cleanup Standards Scientific Advisory Board ("CSSAB") and to the Storage Tank Advisory Committee ("STAC") and those regulations were considered at the regular meetings of those boards on September 1, 2009, and September 8, 2009, respectively. Neither the CSSAB nor the STAC took formal action to support the proposed regulations. We are unaware of any further outreach on the proposed regulations to obtain the input of the regulated community or other stakeholders. Accordingly, the Department has failed to obtain sufficient input from the regulated community and other stakeholders on the potential impacts of the proposed rulemaking. Further, the Board has provided a comment period of only 30 days on an entirely new regulatory framework. In comparison, a 90-day comment period and a public hearing were provided for the recently proposed regulations under Chapter 95, which included only three pages of proposed regulations. Further, as stated above, PADEP appears to be fast-tracking the proposed regulations with the objective of securing and implementing final-form regulations during calendar year 2010. PADEP should take a more considered and measured approach to these important regulations and should take additional steps to engage the regulated community and other stakeholders, including by extending the period for public review and comment, before finalizing the proposed regulations.

III. Specific Comments to the Proposed Chapter 253 Sections

A. Definitions – Proposed § 253.1

The proposed regulations define numerous terms, and most of the proposed definitions track the language of the corresponding statutory definitions provided in § 6502 of UECA. However, there are certain additions, omissions, and changes in definitions provided by the proposed regulations when compared to § 6502. At the outset, Commenter notes that the proposed definitions in many instances reformat the definitions provided within § 6502 to use subparagraphs but neglect to include the proper punctuation to indicate whether the subparagraphs are conjunctive or in the alternative (e.g., the definitions of "activity and use limitations," "engineering controls," "institutional controls," "person," and "record" all suffer from such omissions). These omissions are likely to lend new ambiguity and confusion that was not present in the statutory text of UECA.

Comments on the specific definitions provided in the proposed regulations follow.

"Agency", "Final report", "Instrument"; "Remedial Action Completion Report" – The proposed regulatory definitions for each of these terms include the word "Department," which is an undefined term. This undefined term is also used throughout the proposed regulations. Presumably, the term is meant to refer to the PADEP, but such reference is never provided in the regulations. Therefore, Commenter suggests adding a definition to track the language of § 6502 of UECA to define the term "Department" as used in the proposed regulations as "the Department of Environmental Protection of the Commonwealth."

"Final report" and "Remedial Action Completion Report" – These two terms were not defined under UECA. Commenter notes that the proposed definitions of these terms are inconsistent with the express statutory options for demonstrating attainment provided by Act 2 (and therefore the Tank Act as well, which incorporates the Act 2 standards). By stating that a report documents "attainment of ***a*** standard" (emphasis added), the proposed definitions appear to limit compliance options to a single Act 2 standard in order to demonstrate attainment under Act 2. Such limitation is contrary to both the express language of Act 2 and the flexible remedial approach embodied in Act 2. Indeed, Section 301(a) of Act 2 permits a remediator to "select and attain compliance with ***one or more*** of the . . . environmental standards when conducting remediation activities . . . ." (emphasis added). In practice, this statutory flexibility permits a remediator to, for example, demonstrate attainment of different standards in different media or different standards for different constituents. For example, a remediator may elect to demonstrate attainment of a SHS for soils and a site-specific standard ("SSS") for groundwater or demonstrate attainment of a SHS for one chemical constituent in soils and a background standard ("BS") for a separate chemical constituent in soils. Accordingly, because these definitions are drafted in a manner that appears contrary to the flexible scheme mandated by Act 2, they should be revised to replace "a standard" with the phrase "one or more standards," the same language used in Section 301(a) of Act 2. Commenter also suggests that each of these definitions should end at the last time the word Act appears, respectively in each, with the remaining language being struck as confusing and unnecessary.

"Instrument" – Given the critical importance this term has in establishing the universe of existing restrictions that will be subject to the requirements relating to conversion of existing restrictions to environmental covenants under § 6517(b) of UECA, Commenter supports the Department's inclusion of a definition for this term. However, Commenter notes that the proposed definition is overly broad in that it could be interpreted as extending to prospective, as-yet-unrecorded, instruments rather than being limited to existing deed restrictions, covenants and other such documents that were recorded prior to enactment of UECA. Section 6517(b) of UECA requires that "[a]n instrument ***created*** prior to the effective date of [UECA] which ***establishes*** activity and use limitations to demonstrate attainment or maintenance of a standard under [Act 2] or to demonstrate satisfaction of a corrective action requirement under the [Tank Act] shall be converted to an environmental covenant within 60 months of the effective date of this section unless conversion is waived by [PADEP]" (emphasis added). Commenter supports the language included in the definition establishing that an "instrument" is a "deed restriction, restrictive covenant or other similar document that imposes activity and use limitations filed" as it is consistent with the concept in § 6517(b) that the conversion requirement applies to existing documents (e.g., to an instrument already "created" that "establishes" restrictions). Commenter requests that the definition begin with the phrase "An existing" to add further clarity to the scope of the conversion requirement. Commenter also requests that the phrase "or required by the Department to be filed" be deleted from the proposed language because it suggests that PADEP could require the creation of an environmental covenant where a past remedial project could have resulted in an existing instrument but did not do so.

B. Contents and form of environmental covenant - Proposed § 253.2

The proposed regulations at Subsections 253.2(a) and (b), respectively, restate the content that "must" and "may" be included in an environmental covenant using language that tracks the

corresponding statutory provision in § 6504 of UECA. However, the Department's practice to date in implementing UECA does not comport with the statutory requirements of § 6504 as restated in this section of the proposed regulations. Commenter notes that the Department often seeks to mandate content that is expressly permissible under § 6504(b) of UECA in the context of negotiating the language of a submitted environmental covenant. Moreover, the model environmental covenant available on the Department's website (last revised April 2009) purports to require certain content that is clearly permissible and not mandated under UECA. For example, paragraph 7 of the Department's model covenant requires notice following certain events at a site and requires inclusion of periodic reporting requirements. Notice and periodic reporting are both explicitly listed as permissible content in § 6504(b)(1) and (2), respectively. Paragraph 8 of the Department's model covenant also provides a right of access to the Department, but access is again within the scope of non-mandatory, permissible content under § 6504(b)(3) of UECA. While the statutory and proposed regulatory provisions establishing permissible content provide that the permitted information "may" be included when "agreed to by the person who signed it," PADEP's practice of requiring this information as part of its model covenant presents a Hobson's Choice for the regulated community: include the "permitted" provisions or face the conversion of a voluntary and flexible cleanup into a mandatory and rigid obligation. Commenter provides below specific suggestions to address this issue, with respect to proposed Subsections 253.2(d) and 253.2(e).

Commenter is also concerned with the troubling practical implications of Subsection 253.2(c)(5) of the proposed regulations. This new provision purports to prevent the start of the Department's statutory 90-day review period to approve or deny an environmental covenant until "copies of the signed final covenant" are received. There is nothing in the text or legislative history of UECA to support this requirement. When coupled with the new requirements established in proposed Section 253.5 relating to the timing of submissions (discussed below), the entirely new requirement to submit a signed environmental covenant in order to begin the review process is burdensome, unwieldy and entirely unnecessary. Submitting signed copies of an environmental covenant prior to final approval of the covenant language is burdensome and unwieldy given the real property requirement that each signature on a covenant must be notarized, the common need for signatures from a number of individuals (e.g., large commercial and industrial properties often have numerous current and/or former owners and operators that need to execute the covenant), and the reality that many of the executing individuals are situated in disparate locales. Such a requirement is also entirely unnecessary in that the Department can certainly begin its review of the proposed covenant language without having a formally executed copy. Moreover, given that many of the model environmental covenant provisions are not required content under UECA (as discussed above), it often takes at least one round of review and comments with the Department to resolve differences regarding the acceptable content for a final covenant. Accordingly, making the regulated community go through the expense and burden of submitting numerous versions of formally notarized proposed covenants is both unnecessary and unjustifiable, and using the regulatory process to impose such a requirement is not supported by the express language of the UECA statute. Therefore, Commenter requests that this subparagraph be deleted in its entirety.

Subsection 253.2(d) of the proposed regulations also extends authority to PADEP that goes beyond that granted by the legislature. This regulatory subsection would explicitly allow PADEP to mandate inclusion any of the "permissible" content discussed above to be part of the

environmental covenant. Such a requirement is in direct contravention of the statutory text in § 6504(b) stating that this content "may" be included when "agreed to by the person who signed it." Commenter recommends deleting this subparagraph in its entirety.

Subsection 253.2(e) of the proposed regulations suffers from the same infirmity. Subsection (3) requires the use of the Department's model environmental covenant. Commenter supports the general premise of the Department offering a model environmental covenant to the regulated community as a starting point for developing a customized document relevant to a particular remediation project. However, because the Department's current model covenant essentially rewrites § 6504 of UECA such that there is no permitted content, only required content, this subparagraph also runs contrary to the express authority granted by the legislature and should be deleted in its entirety. Moreover, failure to delete this paragraph allows PADEP to revise the requirements of UECA at its whim by simply changing the model covenant without adherence to any of the regulatory safeguards provided by the formal notice and comment process for promulgating regulations in the Commonwealth.

Finally, Subsection 253.2(f) of the proposed regulatory provision provides some useful clarity to the regulated community, but Commenter notes that it falls short of addressing an important ambiguity in the conversion requirement established by § 6517(b) of UECA. Commenter supports the concept of common interest community boards being authorized to execute environmental covenants. However, as discussed more fully below in the section dealing with § 253.10 of the proposed regulations, the Department should consider extending this authority to all property in the common interest community, not just that which is commonly owned.

C. Notice of environmental covenant – Proposed § 253.3

Commenter supports the proposal in Subsection 253.3(c) of the proposed regulatory provisions allowing for waivers from the statutory requirement of § 6507 of UECA to provide copies of the signed environmental covenant to certain parties. However, Commenter notes that the requirement that any such waiver request be provided at the time the draft environmental covenant is submitted to the Department is unnecessary, substantially limits the waiver right granted by the legislature and may – in certain circumstances – unduly limit the Department's flexibility. Indeed, if a remediator or the Department were to discover the existence of facts that warranted a waiver after the time the draft environmental covenant was submitted, subsection (c) as drafted limits the Department's ability to elect to grant a waiver in such circumstance. For all these reasons, Commenter requests that the final sentence of this subsection be deleted accordingly.

D. Requirements for and waiver of environmental covenants – Proposed § 253.4

Proposed Subsection 253.4(a) restates the operative language in § 6517(a) of UECA mandating the use of environmental covenants for engineering or institutional controls required to demonstrate attainment of an Act 2 or Tank Act remediation standard, and acknowledging the Department's authority to waive that requirement. With respect to groundwater remediations, this provision, as currently worded, could be interpreted to require environmental covenants even when a municipal ordinance exists that prohibits future use of groundwater on all impacted properties and satisfies the other requirements specified in section II.C.9.c.iv of the Department's

Land Recycling Program Technical Guidance Manual. As indicated in the UECA *Frequently Asked Questions* document posted on the Department's website, the Department allows reliance on such ordinances, in lieu of placing environmental covenants on the impacted properties, both in SHS remediations based on a nonuse aquifer determination, and in SSS remediations based on eliminating the groundwater exposure pathway. Similarly, the NCCUSL Report noted in its comments on what would become § 6517 of Pennsylvania's UECA that "[e]ngineering controls or institutional controls not established by servitudes imposed upon title to land, such as municipal ordinances, need not be in the form of an environmental covenant." To clarify this issue in the proposed regulations, Commenter requests that the following language be added to the end of proposed Subsection 253.4(a):

> The Department shall not require the use of environmental covenants to demonstrate or maintain attainment of a groundwater statewide health standard based on a nonuse aquifer determination pursuant to § 250.303, or of a groundwater site-specific standard based on pathway elimination pursuant to § 250.404, when a municipal ordinance exists that satisfies the following criteria:
>
> > (1) establishing a specific geographic area to which the ordinance relates, which may be part of a political subdivision or multiple subdivisions;
> >
> > (2) prohibiting use of groundwater for drinking water use and for agricultural purposes (as defined by § 250.5);
> >
> > (3) requiring that all properties in the specified area connect to a community water supply for the uses described above;
> >
> > (4) notifying water suppliers servicing the area of the conditions of the ordinance; and
> >
> > (5) providing for notification to the Department if and when the ordinance is modified or eliminated.

Subsections (c) and (d) of Section 253.4 specify when waivers must be submitted based upon the remediation standard being utilized. There is nothing in UECA to support the imposition of a requirement to submit a waiver request in advance of submitting the final report demonstrating attainment under Act 2 (the "Final Report") or the remedial action completion report demonstrating attainment under the Tank Act (the "RACR"). Nor is there any reasonable justification for why the Department needs to receive such waiver requests prior to or simultaneous with its receipt of those reports. The Department should be evaluating the content of those reports on the merits, and the decision of whether or not to waive the requirement to utilize an environmental covenant should be separate from that evaluation and logically should occur during the review of a Final Report or RACR. Commenter requests that subsections (c) and (d) be revised or deleted to eliminate the timing requirements set forth therein.

E. Submission of environmental covenants and related information – Proposed § 253.5

Commenter also has several concerns regarding the requirements for submitting environmental covenants in the proposed Section 253.5. The timeframes established in proposed Section 253.5 are unworkable, impractical and not authorized by UECA or any other statute. Nothing in UECA or Act 2 or the Tank Act requires the remediator to submit an unsigned draft of a deed restriction, deed notice, deed acknowledgement or other institutional control mechanism to the Department within certain timeframes – and, therefore, there is no basis upon which to impose timeframes for submission of an environmental covenant. Indeed, under these laws, any party, including a subsequent owner of a site, can submit and propose an environmental covenant to the Department. Therefore, mandating that it is the obligation of the remediator to do so is erroneous and contrary to enacted law.

Further, under proposed § 253.2(c)(5) discussed above, the Department's statutory 90-day review period to approve or deny an environmental covenant purportedly will not begin to run until "copies of the signed final covenant" are received. Accordingly, if a party were to comply with the requirements of the proposed language in § 253.5 by submitting a "draft" covenant and awaiting the Department's approval of the "draft," then the statutory review period trigger proposed in § 253.2(c)(5) might never begin if the Department fails to comment on the draft. Indeed, by failing to approve or deny the "draft" covenant, the Department prevents a covenant from being finalized. If at the same time the regulations bar submission of a Final Report or RACR unless it is accompanied by the "final" covenant, the Department could effectively grant itself – through what appears to be a regulatory loophole – an unlimited timeframe in which to consider an environmental covenant. Clearly, eliminating the 90-day review timeline through regulation was not within the scope of rulemaking authority granted to the Board by the legislature.

Alternatively, if the intent of the proposed regulation was not to extend the 90-day review timeframe, then the proposed regulatory requirement of submitting a draft covenant in advance of submission of the Final Report/RACR is directly contrary to the Department's practices under, and experiences in implementing, UECA to date. Indeed, if a draft environmental covenant were submitted 30 days in advance of submitting the Final Report/RACR (in accordance with the proposed language of Subsections 253.4(a) and (b)), and the Department did not intend to grant itself unlimited time in which to review the draft, then the Department would have to review and approve the draft within 30 days to avoid further delays in the submittal of the Final Report/RACR. This 30 day review period is far shorter than the 90-day review period established by the text of UECA. And, the experience of the regulated community thus far is that PADEP typically needs and uses the better part of its 90-day review window to approve the terms of proposed UECA covenants. In fact, the Department routinely now issues letters denying the Final Report or RACR, although they may otherwise be "approvable," because PADEP has not completed its review and approval of the associated environmental covenant. Therefore, the regulatory proposal to submit draft covenants 30 days prior to the Final Report/RACR and to submit final covenants with the Final Report/RACR is simply unworkable.

Moreover, as noted above, the mandatory timeframes to submit a draft covenant are also impractical. Proposed Section 253.5(a) would require the submission of a draft covenant "at least 30 days prior to submission of the [RACR or Final Report]" for remediations using a BS or SHS. Putting aside the inherent questions regarding whether an environmental covenant is appropriate or even legally required for some of these cleanups, requiring the submission of a covenant before the text of the report is finalized is particularly problematic. Indeed, the impracticality of requiring early submission of a covenant is even more apparent in the context of proposed § 253.5(b) which would require the submission of a draft covenant for SSS remediations coincident with the submission of the Cleanup Plan or Remedial Action Plan, a submission that could occur years before the Final Report or RACR is prepared. In many cases, the scope of an environmental covenant, or even the need for one at all, will be clarified only after all remedial actions have been completed at a given site by implementing an approved Cleanup Plan or Remedial Action Plan. In addition, as highlighted in the parenthetical notes to many paragraphs in PADEP's model environmental covenant, PADEP expects the content of the environmental covenant to "be consistent" with the Final Report or RACR. Thus, the proposed regulations present the regulated community with a "chicken and egg" problem: on the one hand, the covenant must be submitted before – in some cases long before – the Final Report/RACR is completed; but on the other hand, the covenant must be consistent with the content of a report that is not final and may not be final for years. Accordingly, mandating that an environmental covenant be submitted in advance of the Final Report/RACR, or even submitted with the Cleanup Plan or Remedial Action Plan, will serve only to confuse the regulated community, delay the submission of Act 2 and Tank Act reports, and subject the regulated community to unnecessary and unwarranted delays in completing remediations, obtaining the liability protection afforded by Act 2, and returning remediated sites to productive use.

Subsection 253.5(d) of the proposed regulations requires the submission of the "final" and "signed" environmental covenant with the Final Report or RACR. Such a requirement is contrary to established Department practice under Act 2 and the Tank Act and is not supported by the text or legislative history of UECA. In current practice, a proposed, unsigned environmental covenant is typically submitted to the Department coincident with the Final Report or RACR, and the Department then approves or proposes changes to the covenant and requires an executed copy of the approved covenant before it will issue an approval of that report. The proposed regulatory requirement to submit an executed copy with the Final Report or RACR imposes troubling difficulties upon the regulated community. Under the current practice, the parties do not need to go through the burden and expense of submitting executed copies of an environmental covenant until they learn whether the Department is going to require changes to the associated report, changes which would have to be incorporated into the environmental covenant. Under the proposed regulations, the parties must submit a signed and notarized covenant without any idea whether that covenant might need to be changed and then re-signed and re-notarized should the Department require changes to the Final Report or RACR. As noted above, the Department should be reviewing Final Reports and RACRs on their merits and there is no need, nor is there a statutory basis for requiring, an executed covenant to perform that review. UECA requires the recordation of an environmental covenant in certain circumstances, and the Department should simply note whether or not those circumstances apply

in the context of issuing its approval of a Final Report or RACR. PADEP should not try to wed the approval of the environmental covenant to its approval of that report.

Proposed Subsection 253.5(c) also contains unworkable language. Subsection 253.5(c) would require the submittal of certain information about "each person occupying or otherwise in possession of" or "owning a recorded interest in" the property. Nowhere in UECA is such a submission required, and this requirement is burdensome, unnecessary, and overly broad. Section 6507(a) of UECA requires that certain persons be provided a copy of the signed environmental covenant. It is unclear what, if any, benefit or usefulness such a list would serve, because these parties simply must be notified and UECA does not automatically require that they be signatories. It would appear to be a useless recordkeeping exercise to produce such a list, particularly where the draft regulations require that it be provided with the unsigned draft of the covenant, a document which could be submitted years in advance of when the final covenant is recorded under the proposed requirements. Requiring such a list years in advance further undercuts whatever purpose it would have when the identity of tenants, lenders or other such parties holding an interest in the property affected by the covenant could be substantially changed when the time to provide notice finally arrives.

Moreover, because of the overly broad language used in the proposed regulation, preparing such a list will also be a burdensome task. The proposed regulatory requirement extends to identifying "each person owning a recorded interest in that property." This language does not track that of Section 6507(a) of UECA. Indeed, Section 6507(a)(2) of UECA limits those that must be provided with a copy of the environmental covenant to "all persons holding a recorded interest in the real property subject to the environmental covenant." This is a significant distinction in terminology. Under the UECA statutory text, only those persons holding an interest subject to the covenant must be notified of the covenant's existence. Under the proposed Subsection 253.5(c), every person holding any interest at all in the property – whether or not it will be affected by the covenant – must be identified for PADEP. Thus, a potentially time consuming and expensive title search would be required to divine which, if any, parties own interests in the property, or perhaps even own mineral rights which have been severed from the property and have no bearing on the remediation, on the rights restricted by the environmental covenant, or on the environmental covenant itself. Commenter proposes that proposed Subsection 253.5(c) be modified to eliminate any requirement to produce a the proposed list of persons, as it imposes requirements on the regulated community that are unnecessary, and go beyond the Board's authority, and are unduly burdensome.

Finally, Subsection 253.5(e) of the proposed regulations would impose a requirement to return proof of recordation to PADEP within 60 days after PADEP has approved and signed an environmental covenant. Again, the requirements of this proposed subsection find no support in UECA, and the imposition of such a requirement is simply an unnecessary burden imposed on the regulated community.

Given the host of problems outlined above, Commenter recommends that § 253.5 be deleted in its entirety.

F. Fees – Proposed § 253.7

As proposed, Subsection 253.7(a) of the proposed regulations requires the submission of a "fee of $350...with each covenant appropriately signed by all parties." When coupled with the various draft, final, and executed submittal requirements of proposed Section 253.5 discussed above, whereby numerous copies of signed environmental covenants may need to be submitted for any given site, the proposed requirement in this subsection is problematic. Commenter suggests revising subsection (a) to state: "A nonrefundable fee of $350 shall be submitted with each covenant approved by the Department and sent for its execution." This would be consistent with the current practice of submitting a single signed version of the environmental covenant for the Department's execution upon the Department's approval of the draft environmental covenant. The fee provisions of the UECA statute were not intended to create a windfall for the Industrial Land Recycling Fund based on the number of times the Department may reject a signed covenant and ask for changes and resubmission. As such, the proposed changes to Subsection 253.7(a) would allow for one fee for each covenant approved and executed by the Department.

G. Conversion and waiver of conversion - Proposed § 253.10

As noted above, under UECA and the proposed regulations, certain existing "instruments" must be converted to environmental covenants. Proposed Subsection 253.10(a) is substantially similar to the statutory conversion requirement established by § 6517(b) of UECA when read in conjunction with the proposed definition of the term "instrument" provided in proposed § 253.1. However, § 6517(b) of UECA omitted to assign the burden of this conversion on any particular party, and Commenter therefore supports the inclusion of Subsection 253.10(b) clarifying that it is the obligation of the current owner of the property to perform any conversion, should conversion be necessary. Commenter also supports the inclusion of the last sentence of Subsection 253.10(b) noting that the Department may not require, but may allow, additional activity and use limitations to be incorporated into the environmental covenant developed to satisfy the conversion requirement. Commenter notes, however, that Subsection 253.10(b) stops short of expressly providing that the Department shall not require, but may allow, any additional content beyond the items required by § 6504(a) of UECA. Given the Department's current practices of mandating the inclusion in environmental covenants of much of the "permitted" content contained in UECA § 6504(b), and the content of PADEP's current model environmental covenant also mandating such "permitted" content, an express limitation is warranted. Accordingly, Commenter suggests revising the last sentence of Subsection 253.10(b) to read: "The Department will not require, but may allow, the environmental covenant to contain anything beyond what is required by § 253.2(a), including any activity and use limitations not contained in the existing instrument or a Department-approved postremediation care plan."

Subsection 253.10(c) provides a useful waiver of the obligation that will be placed on the current owner of the property to convert an existing "instrument" until the property is subsequently transferred. Commenter supports the concept of this waiver. However, Commenter again notes the broadness and ambiguity in the definition of the term "instrument" as discussed in the comments provided to that definition above, and incorporates those comments herein by reference.

Finally, as noted above, Commenter supports the concept of common interest community boards being authorized to execute environmental covenants. Proposed Subsection 253.2(f) provides this authority in the context of commonly owned property, as discussed below. However, the Department should consider extending this authority to all property in the common interest community, not just that which is commonly owned. Specifically, there are numerous sites throughout the Commonwealth that have been remediated and subsequently redeveloped into common interest communities with existing instruments establishing engineering and institutional controls that will need to be converted to an environmental covenant. Similarly, there are and will be other sites in similar circumstances that are currently completing, or will complete in the future, the remedial process and will rely on activity and use limitations to demonstrate attainment of an Act 2 standard. To the extent that any activity and use limitations will extend beyond the commonly owned property (e.g., a cap that extends under all of the units in a development), a single obstinate property owner could refuse to sign the environmental covenant (or hold a remediator hostage for compensation), thereby undercutting the ability to obtain the liability protections afforded under Act 2. As such, Commenter proposes that the Department extend the authority of common interest community boards to execute environmental covenants beyond solely common interest property, but to all property located within the common interest community.

IV. Conclusion

The proposed rulemaking includes significant changes to the use and content of environmental covenants envisioned under UECA and will have a substantial impact on the scope and approach to environmental remediation in the Commonwealth. With this in mind, and for all of the reasons set forth above, Commenter believes that the proposed regulation should not be adopted in its current form. We appreciate the opportunity to provide these comments to the Board and request that they be given due consideration.