

## **ASTSWMO INFORMATION PAPER ON THE UNIFORM ENVIRONMENTAL COVENANTS ACT (UECA)**

With the increased reliance on Institutional Controls (ICs) as an integral part of the remedy at a site, it is critical that mechanisms exist to ensure implementation, monitoring, and enforcement of the use restrictions in perpetuity. The Uniform Environmental Covenants Act (UECA) is a useful starting tool for States to work from to develop legislation requiring environmental covenants.

UECA establishes a process and tools that could be of value to States. While wholesale adoption may not be appropriate and or helpful to all States, our members may still find it of value thru tailoring it to fit their circumstances.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) have developed this information paper with the goal of outlining issues associated with the UECA. The purpose is strictly to provide State program managers evaluating adoption of the UECA with the pros and cons from a State perspective.

### **Benefits of UECA:**

**Provides a mechanism to restrict land use for States where none currently exist.** A land use restriction mechanism is critical to maintain the integrity of the remedy where ICs are used. Since ICs are being used more frequently as an integral part of the remedy, it is very important each State has a mechanism to maintain, monitor and enforce them.

**Runs with the land and in perpetuity (must be recorded).** This is necessary because the IC must be tied to the land being restricted and provide clear notice to any parties interested in the land and/or its possible uses.

**Is enforceable by the relevant environmental regulators, the property owner, any other holders, and third party holders.** It may be of benefit to have as many entities as interested be able to enforce against potential covenant violations.

**The covenant may be amended or terminated.** This is an important aspect of a covenant that runs with the land. There needs to be a mechanism to amend or terminate a covenant where there is a change to, or no more risk to, public health or the environment. However, the amendment or termination should only be made after the State has approved the change. (See discussion under Policy Discussion Section)

- Requires that parties with an interest in the land (mortgagors, lessees, etc) receive a copy of the covenant. Also requires notice to the local government in whose jurisdiction land subject to the covenant is located.



- Precludes a valid environmental covenant from being inadvertently extinguished by various common law property doctrines, adverse possession, tax lien foreclosures, and marketable title statutes.

**Includes an optional section that requires the State regulatory agency for environmental protection to establish and maintain a registry that contains all environmental covenants and any amendment or termination of those covenants.**

This is an important and powerful tracking and notification tool for environmental covenants recorded on property. It seems to make the most sense to have the State regulatory agency responsible for this.

#### **Policy Decisions that UECA Raises for State Environmental Managers:**

**Environmental cleanup decision-maker approves covenant (i.e. Department of Energy (DOE), Department of Defense (DOD), Environmental Protection Agency (EPA) or State).** The UECA is drafted to involve the State or federal agency that approves the environmental response project that requires a covenant as part of the remedy. This is a great concern to many States for a variety of reasons. This concept has the potential to diminish State authority over the creation of covenants even though they are created pursuant to State law. In many situations the State's remediation requirements are more stringent than those of the federal government, however, the federal government may be the lead regulator at the site. Further, at fund-lead NPL sites, the NCP requires States to ensure that ICs at such sites "are in place, reliable, and will remain in place." Yet, under the UECA provisions, the State would have no role in the covenant process at CERCLA sites other than to maintain the registry.

The federal government has openly recognized in numerous documents that where ICs are implemented at a site, they will generally be implemented under State law. Further, federal agencies like DOD and EPA have made it clear that they expect States to shoulder the primary role in maintaining, monitoring, and enforcing covenants. Therefore, it is critical to the success of the remedy implementing institutional controls that the State has some approval role in the covenant. States must be a party to the covenant to ensure implementation, monitoring and enforcement of covenants to protect public health and the environment.

**No administrative enforcement is available, only judicial.** The UECA offers only judicial enforcement. It would be much less burdensome and more efficient to allow the State administrative enforcement options as well as judicial.

**Amendment or termination requires consent of all parties, including original grantor, or through judicial proceeding; State approval is not necessarily required.** The UECA lists the parameters by which a covenant may terminate. There are concerns surrounding a number of the parameters offered. One regards the specification of duration or termination at the time of a specified occurrence. There is a risk in having an automatic termination period spelled out in the covenant. The covenant is supposed to

run with the land in perpetuity and should only be amended or terminated when the risk to human health and the environment is changed or eliminated.

This determination should be made by the State at the time the request for an amendment or termination is made. To try to make a determination of risk in the future would call for a lot of speculation of numerous variables, and would undoubtedly be the basis of extensive negotiation between regulators and the responsible parties (RPs). The covenant should not be able to be amended or terminated without affirmative action taken by the State.

Another concern is the requirement that all parties that originally signed the covenant approve of a termination or modification, essentially creating a right of property. The burden of this requirement severely outweighs the possible benefit to the parties. One scenario is that 40 years after the recordation a new owner remediates to a residential use level. The new owner must find the original owners, and persuade them to agree to a termination. Not even going into the burden of locating the original parties, once located, they may refuse for a variety of reasons that have nothing to do with the reality of the situation or the present-day risk. In the worst case, they could use this approval requirement as extortion. Why should an innocent party seeking to redevelop a site have to pay the entity responsible for contaminating that site for the privilege of cleaning up that entity's residual contamination? In essence, this aspect of the UECA creates a property right in pollution.

**No mention of payment / cost recovery for the additional State burdens.** The UECA fails to mention anything about the cost of the covenant. Regardless of the parties involved, a covenant inherently has a cost associated with implementation, monitoring, and enforcement. These costs must be estimated and accounted for as early in the remediation process as possible, but absolutely prior to recordation. The covenant is an integral part of the remedy and without costs to support the implementation, monitoring and enforcement thereof, there is more opportunity for land use violations, which constitutes a remedy failure. It is also important to identify the anticipated costs early in the remediation process since the RP is selecting ICs as part, or all, of the remedy most likely due to great cost savings, yet neglecting to include future costs for implementation, monitoring, and enforcement of the covenant.

UECA requires that the State regulatory agency for environmental protection establish and maintain a registry that contains all environmental covenants and any amendment or termination of those covenants. This system also carries a cost that should be shouldered by the RPs, those specifically benefiting from having the covenant as part of the remedy.

**The interest held under the UECA is property interest and there must be a "holder" (defined as grantee).** Can be terminated by exercise of eminent domain.

**No trigger for when a covenant is required resulting in potential ARAR disputes.** The UECA does not specify when a covenant is required. This allows flexibility in deciding what sites and remediation (defined in the UECA as "environmental response

projects”) will necessitate a covenant. This flexibility is not helpful to State regulators. If a remedy calls for ICs, and a covenant is needed to restrict the use of the land, then that should be a mandatory requirement as part of the remedy. Statutes that are written with some flexibility (a trigger, but written with the permissive “may”) have caused problems where DOD and EPA refused to recognize the legislation requiring covenants as Applicable or Relevant and Appropriate Requirements (ARARs). The UECA has no trigger at all, so there is a great concern that the federal government would refuse to view the legislation as an ARAR. To have the statute more easily accepted as an ARAR, it should be drafted stating that the covenant is a requirement that must be recorded after specific events are triggered, and avoid any permissive statute or regulations.

There is also the issue that agencies fail to create ICs even when they know they should, so a trigger is also a mandate to the agency that creating the IC is part of its job, and is not discretionary.

**For non-NCP sites, like privately owned brownfield sites, no public participation will be required (unless that is the policy of the regulatory agency overseeing the remediation).** This is a policy issue specific to each State, but something to keep in mind while drafting the covenant legislation. The UECA is silent on public participation.

**Amendment or Termination:** The State should be able to amend or terminate a covenant based upon its discretion, through a determination that the restrictions are no longer warranted based upon the risk present or additional remediation that has taken place. If the State is not in agreement with the owner, there should be an administrative process available for an owner of property to apply for an amendment or termination.

**Administrative Process:** There should also be an administrative process available for enforcement and amendment and termination of the covenant.

Approved by the Board of Directors, April 19, 2006 in Saratoga Springs, NY.