



THE UNIFORM ENVIRONMENTAL COVENANTS ACT

The Basics, the Benefits, the
Challenges

U.S. Environmental Protection Agency

What We'll Cover

- Why we need them—to overcome traditional obstacles to proprietary controls running with the land in order to protect human health and the environment in risk-based cleanups
- Creating a new proprietary control—an Environmental Covenant.
- What covenants are, how they're made, how they work.
- Limitations on, and outstanding issues about, creating and enforcing environmental covenants.

The Elusive Goal

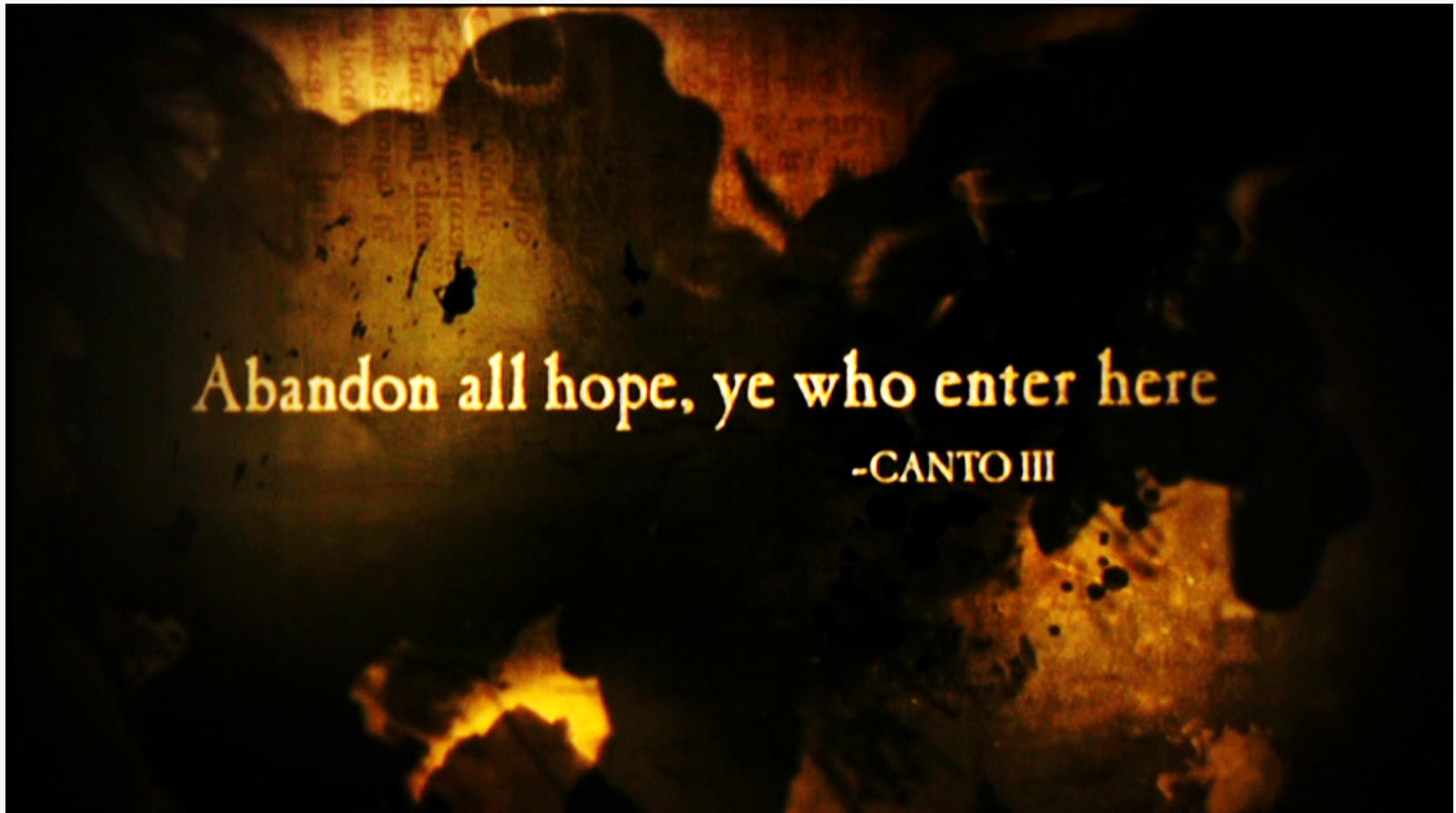
- At sites with waste left in place, restrict use of property and provide for access to protect human health and the environment—sometimes forever.
- Means using proprietary controls—servitudes—which run with the land.
- Based on arcane and ancient English legal doctrines which aren't relevant to our cleanups.

First Problem: Understanding the Old Law

The law in this area [easements, real covenants and equitable servitudes] is an **unspeakable quagmire**. The intrepid soul who ventures into this formidable wilderness **never emerges unscarred**. . . . On looking back they see the trail they thought they broke obscured with **foul smelling waters and noxious weeds**.

Edward Rabin, Fundamentals of Modern Real Property Law 489 (1974).

. . . Or From Dante's Inferno



Second Problem: Traditional Property Law Collides with the Needs of Modern Environmental Law

- Often can't find a Grantee (EPA has limited property acquisition authority).
- The parties aren't adjoining property owners.
- No horizontal privity—mutual (landlord-tenant) or successive (seller-buyer) interest in the property.
- No vertical privity—transferee of the restriction succeeds to the same estate as the grantor. (e.g., a fee transfer from the owner).

Second Problem: Traditional Property Law Collides with the Needs of Modern Environmental Law (Con't.)

- Need to impose affirmative obligations.
- Need enforcement rights outside traditional chain of title.

Trying to Implement Proprietary Controls Under the Old Rules—One Approach

- Through an RD/RA Consent Decree and an Environmental Remediation, Restoration and Conservation Easement.
- Consent Decree with property owners and generator.
- The owners agreed to certain use limitation and access requirements in the consent decree and the Easement.

Implementing Proprietary Controls Under the Old Rules (Con't.)

- The generators granted the easement to the generator.
- The generator agreed in the consent decree to enforce the terms of the easement against the owners.
- Under the Consent Decree, the US and the generator could compel the owners to comply with the access and use limitation requirements and compel the generator to enforce the easement against the owners.

Another Option for EPA Enforcement of a Common-Law Instrument

- The Easement provides EPA with Third-Party Beneficiary rights to enforce the Easement.
- Sounds in contract (not a property acquisition by EPA).

Enter the Uniform Environmental Covenants Act

- A model law developed By The National Conference Of Commissioners On Uniform State Laws (or Uniform Law Commission).
- Conference suggest all sorts of model laws— Uniform Commercial Code, Adoption, Condominiums, Child Custody.
- Act is intended to be enacted by the states.
- UECA is intended to overcome traditional obstacles to creating enforceable environmental real property controls that run with the land.

Enter the Uniform Environmental Covenants Act (Con't.)

- Creates a new real property interest—“An Environmental Covenant.”
- Environmental covenants are servitudes arising under an environmental response projects (e.g., RODs, ESDs, FDRTCs, SWMU closures and VCPs) that impose activity and use limitations.
- Environmental covenants provides broad enforcement rights.

UNIFORM ENVIRONMENTAL COVENANTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

MEETING IN ITS ONE-HUNDRED-AND-TWELFTH YEAR
WASHINGTON, DC

AUGUST 1-7, 2003

WITH PREFATORY NOTE AND COMMENTS

How UECA Helps—Section 5--Validity

- (a) An environmental covenant that complies with this [act] runs with the land.
- b) An environmental covenant that is otherwise effective is valid and enforceable even if:
 - (3) it is not of a character that has been recognized traditionally at common law. . . .

First Common Law Obstacle—A Grantor With No Grantee

- Unwilling or unavailable PRPs as grantees.
- EPA's limited acquisition authority.
 - Can't acquire property without express statutory authority.
 - Superfund—Limited by Section 104(j).
 - RCRA—NONE!

Before UECA—Owner Conveys a Covenant to No One

DECLARATION OF RESTRICTIVE COVENANTS

8th This Declaration of Restrictive Covenants (the "Declaration") made as of this day of March 2013, by Milford Investment Properties, LLC (the "Declarant"), owner of the fee simple title to the property hereinafter described as follows:

RECITALS

WHEREAS, Declarant is the owner in fee simple of certain real property located in the County of Caroline, Virginia, the legal description of which is set forth in Exhibit A attached hereto and made a part hereof (hereinafter referred to as the "Property"); and

NOW, THEREFORE, Declarant makes the following declarations as to limitations, restrictions and uses to which the Property may be put, and specifies that such declarations shall constitute restrictive covenants to run with the Property as provided by law and shall be binding on Declarant, its successors or assigns, all present or future owners of the Property, and all parties who now or hereafter have or hold any right, title or interest in the Property:

The Sound of One Hand Clapping



With UECA Grantor And Grantee Can Be the Same Person

- An environmental covenant that is otherwise effective is valid and enforceable even if:
 - the owner of an interest subject to the environmental covenant and the holder [UECA term for grantee] are the same person.

Section 5(b)(9) of the Model

Example—Grantor-Grantee as the Same Person

**ENVIRONMENTAL COVENANT
EIGHTH AND PLUTUS STREETS POTTERY SUPERFUND SITE
CHESTER, HANCOCK COUNTY, WEST VIRGINIA**

This Environmental Covenant (“Environmental Covenant”), pertaining to certain land hereinafter described in Chester, Hancock County, West Virginia, is made this 15 day of December, 2008, by **Rock Springs Enterprises, Inc. (“Rock Springs”)**, as the Grantor and **the Holder of the Environmental Covenant**, pursuant to W.Va. Code §§ 22-22B-3(a) and 22-22B-5(b)(9).

UECA's Names for "Grantor" and "Grantee"

- "Grantor" under traditional law is the "Owner" under UECA.
- "Grantee" under traditional law is the "Holder" under UECA.
- Often use both terms both to comply with UECA and to make covenants familiar to title abstractors and recorders' offices.
- Example: "Grantor/Owner" and "Grantee/Holder."

Other Traditional Obstacles Abrogated by UECA—Section 5(b) of the Model

- An environmental covenant that is otherwise effective is valid and enforceable even if:
 - (1) it is not appurtenant to an interest in real property; . . .
 - (5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder; [or]
 - (7) there is no privity of estate or contract. . . .

Creating an Enforceable Environmental Covenant—Stuff Ya’ Gotta Have

- Section 4(a)—An environmental covenant must:
 - (1) state that the instrument is an environmental covenant executed pursuant to [insert statutory reference to this [act]].
 - (2) contain a legally sufficient description of the real property subject to the covenant;
 - (3) describe the activity and use limitations on the real property;

Adequate Property Description?

When recorded, return to:
[Name & address of person filing the Environmental Covenant]

The County Parcel Identification No. of the Property is: _____

GRANTOR: _____

PROPERTY ADDRESS: _____

ENVIRONMENTAL COVENANT

This Environmental Covenant is executed pursuant to the Pennsylvania Uniform Environmental Covenants Act, Act No. 68 of 2007, 27 Pa. C.S. §§ 6501 – 6517 (UECA). This Environmental Covenant subjects the Property identified in Paragraph 1 to the activity and/or use limitations in this document. As indicated later in this document, this Environmental Covenant has been approved by the United States Environmental Protection Agency (EPA).

1. **Property affected. The property affected (Property) by this Environmental Covenant is located in** _____ **[name of municipality], _____ County.**

The latitude and longitude of the center of the Property is: [either decimal degrees (DD.DDDDDD) or DD/MM/SS or DD/MM/SS.SSSS; preferred is decimal degrees]

The Property has been known by the following name(s): _____

A complete description of the Property is attached to this Environmental Covenant as Exhibit A. A map of the Property is attached to this Environmental Covenant as Exhibit B.

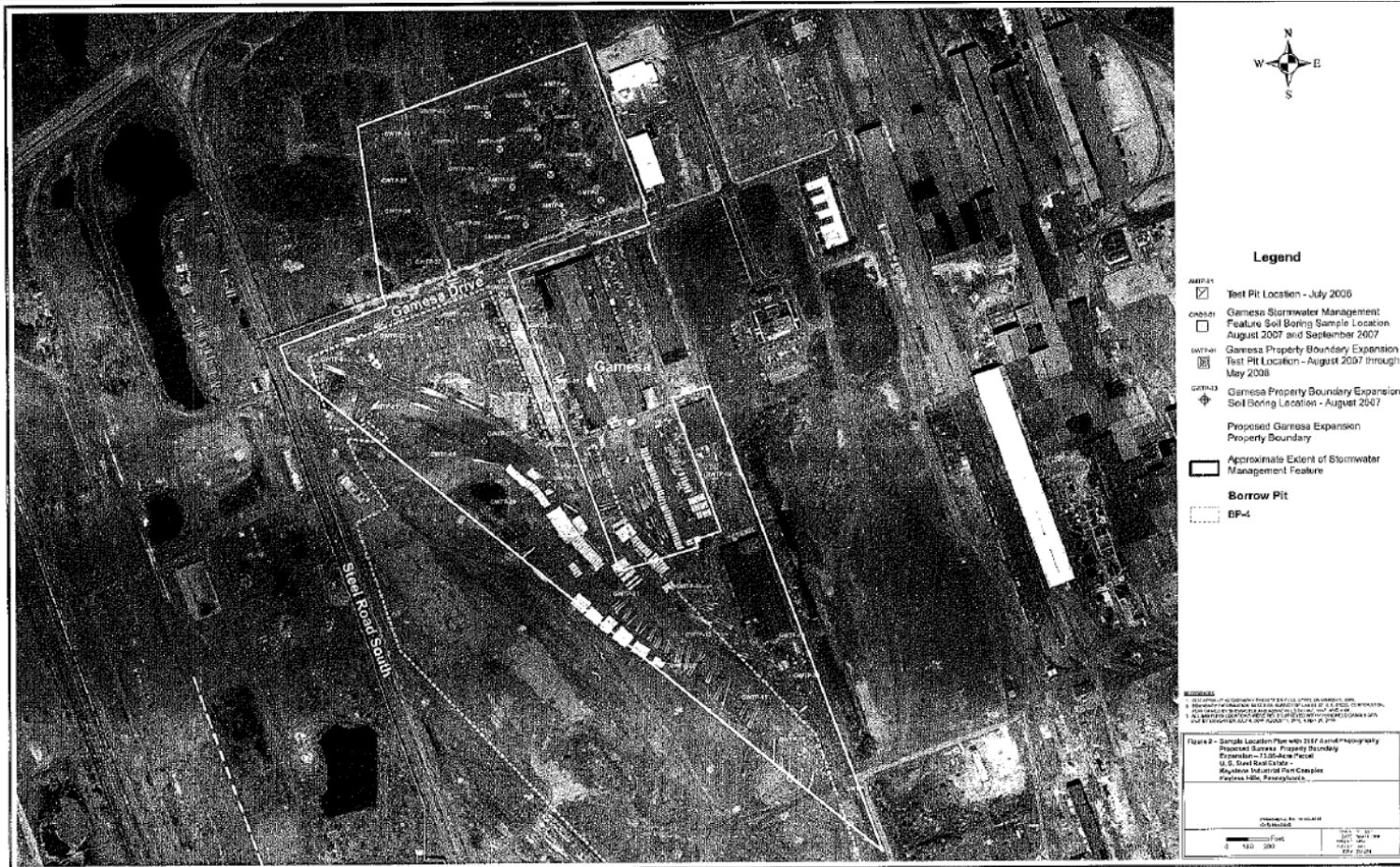
Metes and Bounds Description?

LEGAL DESCRIPTION
for
Proposed Gamesa Property Boundary Expansion
Within **KEYSTONE Industrial Port Complex**

ALL THAT CERTAIN tract of land situated in the Township of Falls, County of Bucks, Commonwealth of Pennsylvania as shown on Figure 2 - Sample Location Plan with 2007 Aerial Photography Proposed Gamesa Property Boundary Expansion – 73.86 acre parcel prepared for U.S. Steel Real Estate dated May 21, 2008 by Langan Engineering and Environmental Services, Philadelphia, Pennsylvania bounded and described as follows to wit:

BEGINNING at a corner, said corner being the intersection of the right of way line of Gamesa Drive(80 feet wide), Steel Road South (80 feet wide) and running thence; 1) along the northerly right of way line of Gamesa Drive, S 90°00'00" E, a distance of 542.68 feet to a **point**; 2) through lands of U.S. Steel, N 00°00'00" E, a distance of 64.00 feet to a **point**; 3) through same, N 11°55'03" E, a distance of 787.98 feet to a **point**; 4) through same, S 90°00'00" E, a distance of 1157.09 feet to a **point**; 5) through same, S 00°00'00" W, a distance of 835.00 feet to a **point**; 6) along northerly right of way line of Gamesa Drive, N 90°00'00" W, a distance of 20.00 feet to a **point**; 7) crossing Gamesa Drive, S 00°00'00" W, a distance of 58.13 feet to a **point**; 8) along the southerly side of Gamesa Drive, N 90°00'00" W, a distance of 695.50 feet to a **point**; 9) along Gamesa Parcel, S 00°00'00" W, a distance of 1572.87 feet to a **point**; 10) along same, S 90°00'00" E, a distance of 389.00 feet to a **point**; 11) along same, N 00°00'00" W, a distance of 43.00 feet to a **point**; 12) along same, S 90°00'00" E, a distance of 137.75 feet to a **point**; 13) along same, N 90°00'00" E, a distance of 685.04 feet to a **point**; 14) along same, S 90°00'00" E, a distance of 188.25 feet to a **point**; 15) along other lands of U.S. Steel, S 00°00'00" W, a distance of 2362.09 feet to a **point**; 16) through same, N 30°42'26" W, a distance of 3546.31 feet to a **point**; 17) along Steel Road South, N 00°00'00" E, a distance of 129.99 feet to a **corner**, said corner being the true PLACE OF BEGINNING.

An Aerial Photograph?



Improved Exhibit:

- Vertices shown
- Coordinate table
- Light or no background
- North arrow
- Scale
- 8.5 X 11
- Can be copied in B/W multiple times

Coordinate Table (WGS 1984)		
Label	Longitude	Latitude
1	-80.7203741	40.0800187
2	-80.7199196	40.0794937
3	-80.7197261	40.0795925
4	-80.7195709	40.0794132
5	-80.7195153	40.079349
6	-80.7194617	40.0792839
7	-80.7194099	40.0792179
8	-80.7193601	40.0791511
9	-80.7193123	40.0790834
10	-80.7192664	40.0790148
11	-80.7192226	40.0789455
12	-80.7191808	40.0788755
13	-80.7196252	40.0785571
14	-80.7200882	40.0782254
15	-80.7210367	40.0790065
16	-80.7207334	40.0794697

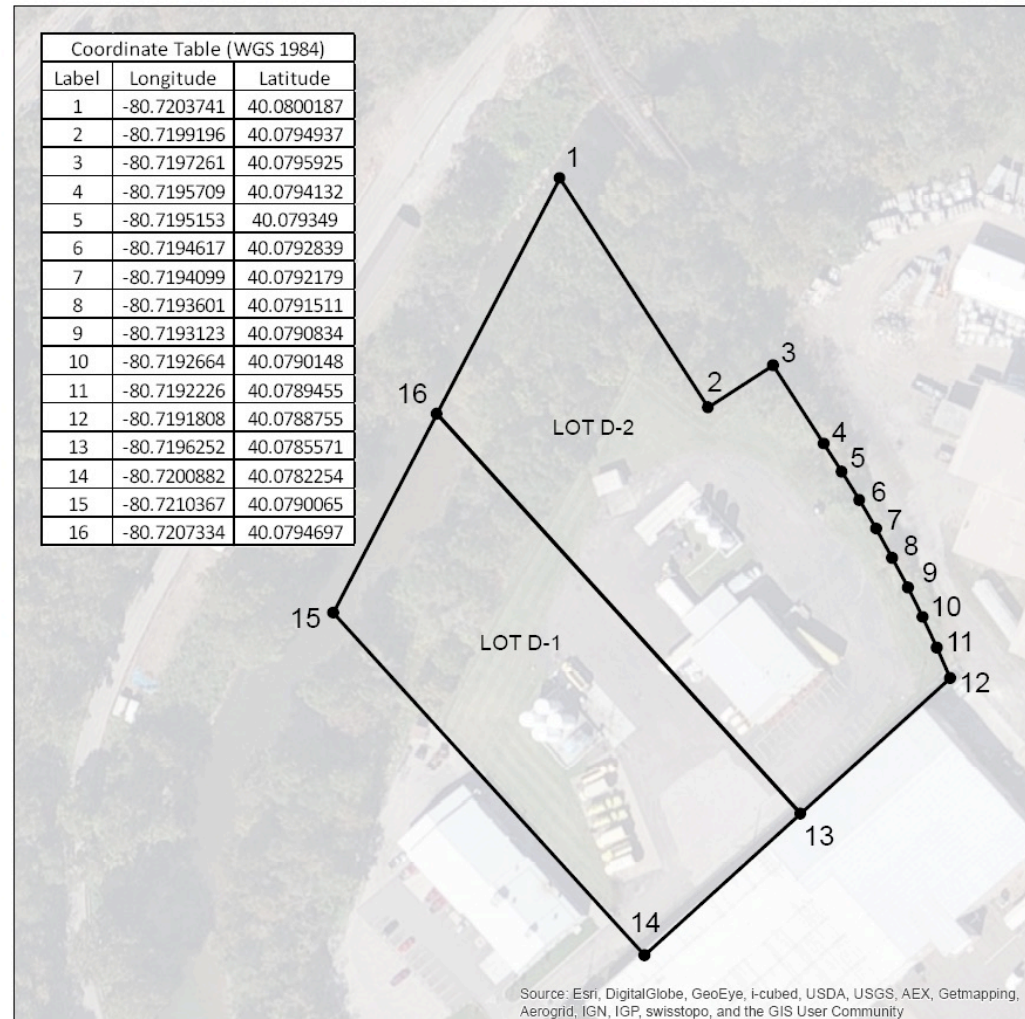
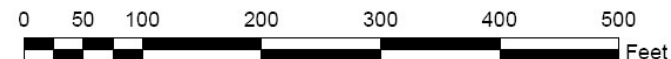


Exhibit A
Safety-Kleen Systems, Inc.
10 Industrial Park
Wheeling, WV
EPA ID # WVD981034101



 Parcel Boundaries



More Stuff Ya' Gotta Have

- Section 4(a)—An environmental covenant must:
 - (4) identify every holder;
 - (5) be **signed by the agency**, every holder, and **unless waived by the agency every owner of the fee simple of the real property** subject to the covenant; and
 - (6) identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

Stuff Ya' Can Have in a Covenant

- 4(b) [A]n environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:
 - (1) requirements for notice following transfer of a specified interest in . . . the property. . .
 - (2) requirements for periodic reporting describing compliance with the covenant;

More Stuff Ya' Can Have in a Covenant

- (2) requirements for periodic reporting describing compliance with the covenant;
- (3) rights of access to the property granted in connection with implementation or enforcement of the covenant;
- (4) a brief narrative description of the contamination and remedy. . . .

What Happens When EPA Signs a Covenant?

- EPA gets enforcement and other rights under a covenant by approving it as the “Agency.”
- But EPA’s approval doesn’t create a property interest running to EPA. Section 3(b) of the Model.
 - EPA property acquisition limitations and prohibitions—(CERCLA 104(j) and RCRA) don’t apply. **THERE’S NO ACQUISITION!**

Example—EPA's Approval of an Environmental Covenant

ENVIRONMENTAL COVENANT

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Sources of EPA Authority to Enter Into UECA Covenant

- Section 104(a) of CERCLA
 - “ . . . President is authorized to act, consistent with NCP, [in addition to conducting removal and remedial actions] or take any other response measure consistent with the NCP which the President deems necessary to protect public welfare or the environment. . . .”

Superfund Delegations

- HQ Delegation 14-2 Delegates CERCLA Response Authority to Regional Administrators.
- Under this Delegation, RAs may select a response action, which under NCP Sec. 300.430 may include institutional controls.
- Look to your corresponding Regional Delegation to Determine who has the authority to sign a UECA covenant.
 - Should be whoever has authority to sign ROD.

In Region 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APPROVED by the United States Environmental Protection Agency as required by § 10.1-1238
et seq. of the Code of Virginia.

By:



Cecil A. Rodrigues, Director
Hazardous Site Cleanup Division
United States Environmental Protection
Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

What If EPA Isn't the Agency?

- It can't approve a covenant.
- It can't enforce a covenant (with one exception).
- It can't be involved in modifying or terminating a covenant.

Who's in Charge—The Agency

- “Agency” means the [state environmental regulatory agency . . .] or . . . **federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.**

Section 2(2) of the Model

Who's in Charge—The Agency?

The Model's Definition

“Agency” means the [state environmental regulatory agency . . .] or . . . **federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.**

. . . And Delaware's

(3) “Department” means the Department of Natural Resources and Environmental Controls (DNREC).

Del. Code Ann. Title 7, § 7907(3).

And Who Approves a Covenant?—The Model v. Delaware's

- (a) An environmental covenant must: . . .
- 5) be signed by the ~~agency~~ Department,
every holder, and

Practice Tip: Read the State's Statute

- The Uniform Environmental Covenants Act isn't uniform.
- The Commission had intended the model to be enacted by the states.
- State legislatures and the governors can enact whatever statute they want.

Are both State and Federal Agencies Required to Sign?

- No
- However, in many circumstances, both a federal and a state agency may have jurisdiction over the contamination that led to the environmental response project. In this situation, **the best practice may be** for both federal and state agencies with jurisdiction over the contaminated property to sign the environmental covenant.

Commentary, Section 2, Note 4

Scope of Agency's Waiver of Owner's Signature

- Covenants must be signed by the agency, every holder, and **unless waived by the agency every owner of the fee simple of the real property** subject to the covenant. . . .

But in Delaware. . . .

- An environmental covenant must:
 - (5) Be signed by the Department, ~~and unless waived by the agency,~~ all owners of the real property subject to the covenant. . . .

Waiving the Owner's Signature— Only Under Exceptional Circumstances

- The human owner is dead.
- The owner is a dissolved corporation, and no directors can be found.
- The owner granted a 99-year lease and the cleanup will take another 20 years—get lessee's signature, waive the fee owner's.
- Four of five general partners agree to sign; waive the signature of the fifth.

The Scope of Affirmative Obligations in a Covenant

- The Entire Remedy?
 - Could require provisions for approval/disapproval and dispute.
 - Off-the-Shelf remedies such as vapor mitigation?
- O&M?
 - Maintain the cap.
 - Operate the treatment plant.
- Reporting?

Conditionally Permitted Uses—Example

- The Property shall be restricted to commercial and/or industrial purposes and shall not be used for residential purposes unless (i) it is demonstrated to the Department and EPA that such use will not pose a threat to human health or the environment or adversely affect or interfere with the Final Remedy; and (ii) the Department and EPA provide prior written approval for such use. . . .

Enforcing a Covenant

- (a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:
 - (1) a party to the covenant;
 - (2) the agency or, if it is not the agency, the [insert name of state regulatory agency for environmental protection];
 - (3) any person to whom the covenant expressly grants power to enforce [EPA in Delaware covenants, Citizens' Groups];

Enforcing a Covenant (Con't)

- (4) a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or
- (5) a municipality or other unit of local government in which the real property subject to the covenant is located.

Actions Not Authorized by UECA

- Actions for damages, restitution, tort claims, court costs, attorneys' fees.
- Citizen Suits.
- However, UECA does not bar or preclude these causes of action.

How Would EPA Enforce a Covenant?

- Only one enforcement action so far—state brought the action; EPA deferred.
- Bring Action In State Court—Then Remove to Federal Court—NO
 - a civil action, brought in state court, may be removed by “the defendant or defendants.” 28 U.S.C. § 1441(a)
 - A plaintiff may not remove a civil action once he brings the claim before a state court.

Could the US Act Under Direct Federal Authority?

- This [act] does not limit the regulatory authority of the agency or the [insert name of state regulatory agency for environmental protection] under law other than this [act] with respect to an environmental response project.

Section 11(b) of the Model

And the Commentary

- Subsection (b) recognizes that in many situations the statutes authorizing an environmental response project will provide substantial authority for governmental enforcement of an environmental covenant in addition to rights specified in the environmental covenant.
- Section 11, Note 4 of the Commentary

Sue Directly Under CERCLA Section 106 or RCRA Section 7003

- What we used to do before we began issuing orders first and then suing to enforce those orders.
- “When the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief.”

How Long Does a Covenant Last?— Section 9

- [Forever], unless it is. . .
 - (1) by its terms limited to a specific duration or terminated by the occurrence of a specific event;
 - (2) terminated by consent . . .;
 - (3) terminated [under the doctrine of changed circumstances];
 - (4) terminated by foreclosure of an interest that has priority over the environmental covenant; or
 - (5) terminated or modified in an eminent domain proceeding....

BUT WAIT!!



- Foreclosure of a prior or senior interest (e.g., mortgage) may extinguish a covenant, absent satisfaction or voluntary subordination.

What Can't Terminate a Covenant— Section 9(c)

- Except as otherwise provided in subsections (a) and (b), an environmental covenant **may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien**, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

Can a Covenant, or Any Requirement therein, Be Self-Terminating?

- A Covenant can by its terms be limited to a specific duration or be terminated by the occurrence of a specific event.
- But does meeting those criteria still require a formal modification or termination of the covenant?

Example

- Until such time as EPA determines that the groundwater clean-up levels specified in the . . . ROD have been achieved and this environmental covenant has been amended to allow the same, the following groundwater use and well restrictions shall apply:
 - 1. Groundwater beneath the Property shall not be extracted or used for any purpose, except as may be required by EPA or DEQ for ground water monitoring and/or remediation; and
 - 2. No groundwater extraction wells shall be installed on the Property, until and unless, approved, in writing, by EPA.

Best Answer—Must Formally Amend or Terminate

- Required by UECA.
- Provides stakeholders with enforcement rights, current owners and prospective purchasers with recorded evidence that the requirements of the original covenant were amended or terminated.

Conclusion

- Environmental covenants are powerful tools that run with the land and protects human health and the environment in risk-based cleanups.
- They overcome traditional obstacles to proprietary controls running with the land by creating a new proprietary control.
- There are limitations on, and outstanding issues about, creating and enforcing environmental covenants.