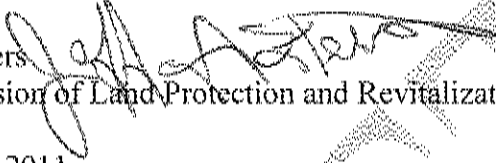


COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Division of Land Protection and Revitalization Guidance
Memo No. LPR-REM-2011-07
Review Process for UECA Environmental Covenants

To: Division Staff, Division of Land Protection and Revitalization

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Copies: Regional Directors

Summary

This guidance provides an overview of the Department of Environmental Quality's Uniform Environmental Covenants Act (UECA) Regulation and establishes procedure for DEQ staff when reviewing a proposed UECA covenant. This guidance includes general background information concerning UECA covenants and their implications in Virginia; an explanation of participating parties; processing UECA covenants, including timelines for document and fee submittals; monitoring environmental covenants, environmental covenant amendments, and possible scenarios.

Electronic Copy

An electronic copy of this guidance is available on DEQ's website at <http://www.deq.virginia.gov/waste/guidance.html>.

Contact Information

Please contact the UECA Coordinator, Ms. Michelle Hollis at (804) 698-4014 or michelle.hollis@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.



Review of UECA Environmental Covenants

I. Introduction

During the 2010 legislative session, the Virginia General Assembly passed SB 686 (Acts of Assembly Chapter 691, codified at §10.1-1238 et seq. of the Code of Virginia), which directs the Department of Environmental Quality (DEQ or the Department) to implement, by regulation or other measures, the Uniform Environmental Covenants Act (UECA). The final regulation was published in the Virginia Register on October 12, 2011 with an effective date of November 9, 2011. This guidance establishes the general policy and procedure for staff to receive, review and approve a proposed environmental covenant submitted pursuant to the UECA Regulations.

II. Background

An environmental covenant is defined generally by the National Conference of Commissioners on Uniform State Law (NCCUSL) as a servitude arising under an environmental response project that imposes activity and use limitations on future use of a contaminated real property. NCCUSL asserts that environmental covenants under NCCUSL's model UECA statute ensure public notice of these limitations, enhance enforcement of the limitations, and facilitate return of the sites to productive use.

Virginia's UECA statute generally conforms to the model Act with two exceptions, as follows: Virginia's UECA does not require the Department to maintain a registry of UECA covenants and Virginia's UECA includes provision for fees to be paid to the Department to cover the costs of administering UECA.

The final proposed regulation was accepted by the Office of the Attorney General (OAG) staff and a letter prepared to certify the Department's authority to issue the regulation, which was approved by the DEQ Director on August 2, 2011.

III. Authority

The UECA regulation was issued under authority of Chapter 12.2 (§ 10.1-1238 et seq.) of Title 10.1 of the Code of Virginia, the Uniform Environmental Covenants Act (UECA).

IV. Definitions

The definitions found within the Uniform Environmental Covenants Act (UECA) and the Uniform Environmental Covenants Act Regulation (UECA Regulation), 9VAC15-90 *et seq.*, have been used in this guidance.

V. Roles of Participating Parties

UECA requires that the Holder, Owner, and Agency each sign the covenant for it to be valid. Covenants that are not signed by each of these persons are not valid. Thus, Virginia's UECA regulation is voluntary and applicable when all parties are in agreement. 9VAC15-90 is applicable when the Holder, Owner, and Agency enter into agreement voluntarily. If these parties are not in agreement, then there is no UECA environmental covenant, and 9VAC15-90 does not apply.

The Virginia UECA template must be used if the Department is the Agency or the Holder. DEQ also recommends that the Virginia UECA template be employed for all UECA covenants in Virginia, even when DEQ is not the Agency or the Holder. All UECA covenants must contain the required statutory provisions in order to be a valid UECA covenants under Virginia law.

Holder: UECA requires that each environmental covenant identify a "Holder" to be the grantee of the covenant. § 10.1-1238 the Code of Virginia (Va. Code) defines a "Holder" as "the grantee of an environmental covenant as specified in Va. Code § 10.1-1239." The "Holder" is obligated to maintain stewardship of a piece of property and to enforce the environmental covenant in court. The Holder acts as a monitor of the property to ensure the restrictions under the covenant are followed. The Holder can file suit in court in accordance with Va. Code § 10.1-1247, if the requirements of the covenant are not being followed.

The Holder, under Va. Code § 10.1-1239(A) can be any person, including a person who owns the real property, the Agency, or a municipality, or other unit of local government. Therefore, there may be instances where the Owner and the Holder are the same person. In that case, the Owner will remain the Holder following sale or transfer of the property unless the Holder is replaced in accordance with Va. Code § 10.1-1246.

Va. Code § 10.1-1239(A) makes clear that the Holder's interest is an interest in real property and that there may be more than one holder. Va. Code § 10.1-1239(B) provides that the Agency's interest in the covenant as a consequence of signing the covenant or having a right to enforce it under this Act is not an interest in real property.

Enforcement of the UECA covenant by the Holder or other party is in addition to the Agency's existing enforcement authority under programmatic statutes and regulations. The Department's existing enforcement authority is not abrogated by a UECA covenant; however, the Department could, in addition to its existing enforcement authority, file a civil action for injunctive or other equitable relief for violation of a UECA covenant (§10.1-1247 of the Code of Virginia).

Owner: The Owner holds fee simple title to the real property to which the UECA covenant attaches. The Owner is generally the grantor of the covenant. The Owner is required to sign the environmental covenant in order for it to be valid. The Owner is the current owner of the real property at the time the UECA covenant is executed. There can be more than one Owner. The Owner can and likely will change over time; however, the obligations under the covenant run with the land. Accordingly, each new Owner is required to maintain the UECA covenant's

activity and use limitations and other requirements. If the Owner decides to sell the property, or to change the use, or in the case of other changes that impact the covenant, the Virginia UECA Template specifies certain requirements, including written notification and fee payment requirements.

Under the traditional tenets of property law, the fee simple owner is the absolute owner of real property, limited only by the government's powers of taxation, eminent domain, police power, and escheat (property that has reverted to the state when no legal heirs or claimants exist), as well as limits based on encumbrances or conditions in the deed. Fee Simple Ownership is the most common way that real property is owned in the United States. Property held in fee simple generally gives the owner the right to possession, enjoyment, and use of the land as well as the right to sell or transfer upon the land during their lifetime and determine transfer upon his or her death. Under UECA, the fee simple owner is the same thing as the "Owner," as defined in 9VAC15-90-10.

Agency: The Agency is DEQ, EPA, or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created. Where the Department is the Agency or the Holder of a UECA environmental covenant, the covenant must follow the Virginia UECA Template as provided in 9VAC15-90-30 of the UECA Regulation. Where the Department is neither the Agency nor the Holder of a UECA environmental covenant, applicants desiring to execute a UECA environmental covenant may utilize the Virginia UECA Template or another instrument that meets the requirements of Va. Code § 10.1-1238 et seq. The fee schedule for UECA covenants is dependent on the role of the Department in the UECA process.

VI. Processing UECA Covenants

The Division of Land Protection and Revitalization (Division) has identified a staff point of contact (UECA Coordinator) for all UECA environmental covenants. The staff UECA Coordinator is responsible for coordinating all reviews of UECA covenants.

The applicant will be required to submit the UECA Covenant with appropriate fee to DEQ's Receipts Control, P.O. Box 1104, Richmond, VA 23218. The finance office will deposit the fee and forward the submittal along with a record of deposit to the UECA Coordinator. If program staff or the coordinator is aware of an incoming package, the finance office should be alerted ahead of time.

When DEQ is the Agency or the Holder for a UECA covenant, it is the role of the Applicant (who is generally the Owner) to draft a proposed UECA covenant and submit it, along with the required fee, to DEQ for review, approval, and signature. If DEQ staff finds any provision deficient, the Applicant will be notified and asked to make corrections and then re-submit the proposed UECA covenant.

When DEQ is the Agency, DEQ is the party responsible for establishing the requirements

contained in the decision document, pursuant to programmatic statutes and regulations. The decision document is generally a “case decision.” By contrast, the UECA covenant is not intended to be a “case decision,” but rather a legal contract and deed restriction by which the activity and use limitations stipulated in the decision document are memorialized (and thereby provide additional public notice and enforcement options). DEQ does not envision providing an Applicant with written suggestions or edits to the language of a proposed UECA covenant, in order to avoid someone’s misconstruing such written responses as legal advice or a case decision. Rather, DEQ can discuss and explain deficiencies to an Applicant who requests this information. DEQ would anticipate discussion between the Applicant and the Department concerning how the decision document is incorporated into the UECA covenant. The drafting of the UECA covenant, however, remains the responsibility of the Applicant (Owner).

When DEQ is not the Agency or the Holder of the UECA covenant, the Applicant (Owner) is required to submit a copy of the UECA covenant to DEQ for signature prior to recording the covenant, along with the required fee.

Following receipt of a UECA Covenant, the following procedures should then be used to perform and coordinate the review and signature of the covenant.

A. UECA staff point of contact:

For covenants identifying DEQ as the Holder or Agency, all comments from programmatic, enforcement and OAG review (where applicable) should be returned to the UECA Coordinator for consolidation and transmittal to the applicant.

Once the covenant is submitted to the UECA Coordinator, the UECA Coordinator should review the covenant to confirm the following:

1. Does the covenant include proof of payment for the appropriate fee?
 - a. If yes, proceed to next step
 - b. If no, contact applicant and request submittal of fees
2. Is DEQ listed as the Agency or Holder?
 - a. If yes, fees are due upon submittal to DEQ
 - b. If no, fees are due prior to recordation
3. If DEQ is not the Agency or the Holder, transmit the covenant to the appropriate program manager.
 - a. Transmit the covenant to the appropriate program manager and then proceed to step 13 below
 - b. If DEQ is the Agency or Holder, proceed to next step.
4. DEQ is identified as the Holder or Agency confirm the VA UECA template is being utilized and all required template provisions are present (designated with * on template).
 - a. If yes, proceed to next step.
 - b. If no, contact applicant and request submittal of completed covenant.
5. Have all fee simple Owners, Holder(s) and Agency(ies) been identified?

- a. If yes, proceed to next step.
 - b. If no, contact applicant and request submittal of completed covenant.
6. Does the covenant include the UECA Template language for notice of limitations in future conveyances (Recommended Section 4 of the UECA Template), notification (Recommended Section 5.b.), and access (Recommended Section 6)?
 - a. If yes, proceed to next step.
 - b. If no, is justification for exclusion of these provisions provided?
 - c. If justification is not provided, include a comment to the program manager.
7. Does the covenant include the required language for Recording, etc. (Required Section 8 of the UECA Template) and Termination or Amendment (Required Section 9)?
 - a. If yes, proceed to the next step.
 - b. If no, contact applicant and request submittal of completed covenant.
8. Once a completed covenant has been submitted, identify the program under which the environmental response project was performed. Note: Refer to the next section (VI.B.) for guidance regarding programmatic review.
 - If VRP, transmit covenant to VRP program manager for review
 - If RCRA CA, transmit covenant to RCRA CA program manager
 - If SW, transmit covenant to regional office LPM
 - If HW, transmit covenant to HW program manager
 - If Tanks, transmit covenant to regional Tanks Remediation program manager
 - If Brownfields, transmit covenant to Brownfields program manager
9. If the completed covenant identifies DEQ as the Agency, transmit the covenant to the Enforcement Division for review and comment. The Enforcement Division may request additional review by the Attorney General's Office (OAG). Refer to section VI.C. for guidance regarding enforcement review.
10. If the completed covenant identifies DEQ as the Holder, transmit the covenant to the Enforcement Division with a request for additional review by the OAG.
11. Following the response from the program, enforcement and OAG review; determine if all required elements of the template are included.
 - a. If yes, proceed to the next step
 - b. If no, request the appropriate revisions
12. Upon receipt of an acceptable covenant following review by all relevant parties, the covenant should be prepared for agency signature. The following signature authorities apply:
 - a. For UECA covenants where DEQ is neither the Agency nor the Holder; the appropriate Program Manager should sign that the covenant has been seen and received, acknowledging receipt of both the covenant and the applicable fees by the Department.

- b. For UECA covenants where DEQ is the Agency, the Division Director should sign as the Department's representative, indicating that the covenant is approved by the Department and the applicable fees received.
 - c. For UECA covenants where DEQ is the Holder, the Agency Director should sign as the Department's representative, indicating that the covenant is approved by the Department and the applicable fees received.
13. Once the covenant has been signed, the original should be returned to the applicant with instructions for recording, proof of recordation and notification as required by the UECA Template (Section 8). The outgoing correspondence including the signed covenant should be added to ECM under the appropriate retention schedule and file series.
 14. Upon receipt of the recorded covenant, the covenant should be added ECM under the appropriate retention schedule and file series. The key word field should include the words "UECA Covenant" to facilitate future searches.
 15. As resources allow, the covenant coordinates should be added to the DEQ GIS.

B. Programmatic Review

The procedures and review steps listed below apply for covenants where the Department is either the Agency or the Holder, unless otherwise noted. All comments for covenants identifying DEQ as the Holder or Agency should be returned to the UECA Coordinator for consolidation and transmittal to the applicant.

1. For covenants where DEQ is not the Agency or the Holder, does the covenant include a signature section to indicate seen and received by the Department?
 - a. If yes, prepare covenant for signature by the Program Manager. Return the signed covenant to the UECA Coordinator.
 - b. If no, send an acknowledgment to the UECA Coordinator that the covenant was seen and received and prepare the covenant for ECM.
2. Does the covenant include the name and location of the administrative record for the environmental response project reflected in the covenant (Required Section 2.a. of the UECA Template)?
 - a. If yes, proceed to next step.
 - b. If no, request submittal of completed covenant.
3. Does the covenant include an adequate description of the contamination and remedy including descriptions of the Property before remedy implementation; contaminants of concern; pathways of exposure; limits on exposure; location and extent of contamination; and the remedy/corrective action undertaken? Is a copy of the remediation decision document attached? (Recommended Section 2.b. of the UECA Template)
 - a. If yes, proceed to next step
 - b. If not adequate, request corrections. If no attached decision document, request document or justification for omission

- c. If the applicant is providing a summary rather than the decision document, staff should consider:
 - i. Is the summary adequate to serve as a basis of enforcement of the UECA Covenant?
 - ii. Is the summary consistent with the decision document?
4. Are all activity and use limitations listed and described properly and in accordance with the decision document (Required Section 3.a. of the UECA Template)?
 - a. If yes, proceed to next step.
 - b. If no, request corrections.
5. Does the covenant include the geographic coordinate lists as specified in the UECA template (Recommended Section 3.b. of the UECA Template)?
 - a. If yes, confirm that the coordinates are accurate using either Google Earth or requesting validation from EPA.
 - b. If no, request the missing information from the applicant.
6. Does the covenant include adequate reporting instructions and intervals (Recommended Section 5.a. of the UECA Template)?
 - a. If yes, proceed to the next step.
 - b. If no, request corrections.
7. Are there any other considerations that warrant additional review or revisions?
 - a. If yes, identify issues for consideration.
 - b. If no, provide comments to the UECA staff point of contact for processing

Where the programmatic review is performed by central office ensure the appropriate regional office has been solicited for input.

C. Enforcement/OAG Review

All comments should be returned to the UECA staff point of contact for consolidation and transmittal to the applicant.

1. Are all fee simple Owners, Holder(s) and Agency(ies) identified accurately?
 - a. If yes, proceed to next step.
 - b. If no, request submittal of completed covenant.
2. Does the covenant include a sufficient description of the real property (Required Section 1 of the UECA Template)?
 - a. If yes, proceed to next step
 - b. If no, request revised submittal
3. Is a title review provided (Recommended Section 7 of the UECA Template)?
 - a. If yes, proceed to next step
 - b. If no, request submittal of title review
4. Are any encumbrances identified?
 - a. If yes, proceed to next step

- b. If no, skip the next step
5. Do any encumbrances need to be subordinated?
 - a. If yes, request that the appropriate subordination agreement be executed and that the subordination agreement for such encumbrances is reproduced within the covenant
 - b. If no, proceed to next step
6. Does the covenant appear to have any deficiencies regarding the requirements under the Virginia Environmental Covenant Act?
 - a. If yes, discuss with POC
 - b. If no, proceed to next step
7. Does the covenant identify the Department as the Holder, or are any other considerations present that warrant a review by the OAG?
 - a. If yes, request OAG review
 - b. If no, provide comments to the UECA staff point of contact for processing.

D. Processing by Other Agencies

If another agency is the approving agency for the environmental response project that provides the basis for the UECA covenant, it is recommended that the approving agency work collaboratively with the DEQ's program manager in developing the UECA covenant.

DEQ recommends that the VA UECA template be employed for all UECA covenants in Virginia, even when DEQ is not the Agency. Another Agency, in concert with the Owner and Holder, may choose to use the Virginia UECA Template or to use another format as long as all of Virginia's statutory requirements are met. The approving Agency should ensure that the applicant provides a copy of the covenant and the associated fee payment to the DEQ UECA Coordinator prior to recordation of the covenant. In order to ensure this process, it is recommended that approving agencies add the "Seen and Received" block to their covenants, if at all possible.

If the approving Agency and DEQ agree that DEQ should be added to the covenant as another Agency, the review process as outlined above will apply (including review by the DEQ's Enforcement Division and possibly the OAG), the Virginia UECA Template must be used and the fee schedule for DEQ as the Agency applies.

E. Funding for UECA Covenant Reviews

A "UECA Environmental Covenants Fund" for UECA activities was established by the UECA regulation and the Department has identified a cost code for associated activities. The following tasks are generally chargeable against the UECA Fund as tasks separate from the regular programmatic tasks. Staff should contact the designated fund manager if there are any questions.

- Phone consultations regarding the covenant
- Reviews of submitted covenants

- Data entry for covenants (ECM, Google Earth)
- Site visits to properties with covenants to ensure compliance (when not visiting site as part of programmatic duties)
- Notifications to purchasers
- Database queries for covenants (ECM, Google Earth)
- Review of written documentation regarding the covenant
- Enforcement or enforcement support of the covenant
- Administration of UECA Fund

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