



## FREQUENTLY ASKED QUESTIONS (FAQ) & ANSWERS

### Utilization of Uniform Environmental Covenants at Solid Waste Landfills under the Virginia Solid Waste Management Regulations

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#### **Introduction**

An environmental covenant, defined by the National Conference of Commissioners on Uniform State Law (NCCUSL) as a servitude that imposes activity and use limitations on contaminated real property, allows for the long-term monitoring and enforcement of any risk-exposure controls placed on the property (i.e., restrictions on land uses/disturbances and prohibitions on using the impacted aquifer) in a statutorily-defined, voluntary agreement (“environmental covenant”). Such a covenant runs with the land and would be binding on subsequent land purchasers and tenants of the property. It would also be listed/recorded in the local land records office. A UECA Task Force, comprised of the commissioners who worked on the drafting committee, as well as a number of the advisors, observers, and environmental law experts who participated in the drafting effort, maintains a website devoted to UECA, [www.environmentalcovenants.org](http://www.environmentalcovenants.org), which contains useful information on the act.

Virginia adopted its own UECA law in November 2011 and promulgated its regulation at 9 VAC 15-90-10 et seq. Some general FAQs as well as two potential scenarios under which use of a UECA covenant might be applicable at solid waste facilities are discussed below.

For further assistance with questions related to this FAQ, please contact the solid waste Groundwater Program Coordinator, Mr. Geoff Christe at (804) 698-4283 or via email at [geoff.christe@deq.virginia.gov](mailto:geoff.christe@deq.virginia.gov) or Ms. Michelle Hollis, UECA Coordinator at (804) 698-4014 or [michelle.hollis@deq.virginia.gov](mailto:michelle.hollis@deq.virginia.gov).

General FAQs applying to any landfill owner/operator considering use of an environmental covenant:

**Question #1 - Why does DEQ consider a UECA covenant to be more protective of human health and the environment than simple deed restrictions or deed notices already required under the VSWMR?**

*Such a covenant protects environmental land use restrictions from being inadvertently or purposefully extinguished by application of various common law doctrines, adverse possession, tax lien foreclosures, adoption of less-restrictive zoning changes, and/or marketable title statutes.*

**Question #2 - Who is required to be part of a UECA covenant?**

*A signed UECA covenant must include a Holder (the grantee of an environmental covenant, or could be thought of as the monitor of the property), Owner (fee simple owner of the property), and the Department as the agency approving the environmental response project.*

**Question #3 – What would constitute an environmental response project under UECA at solid waste management facilities?**

*As defined in the UECA regulation, "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:*

- 1. Under a federal or state program governing environmental remediation of real property;*
- 2. Incident to (as a result of) closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or*
- 3. Under a state voluntary clean-up program including the Brownfield Restoration and Land Renewal Act, Chapter 12.1 (§ [10.1-1230](#) et seq.) of the Title 10.1 of the Code of Virginia."*

*Therefore, construction of final cover and implementation of post-closure care of a closed landfill or undertaking a corrective action program to remediate groundwater contamination could both be considered environmental response projects under the UECA regulation.*

**Question #4 - What baseline information should the UECA covenant contain before it is signed?**

*The UECA covenant must contain the required statutory provisions in order to be a valid covenant under Virginia law. A link to the Virginia UECA template can be found here: <http://lis.virginia.gov/cgi-bin/legp604.exe?000+reg+9VAC15-90-30>.*

*No site can be eligible for a UECA covenant until the Department has approved the associated environmental response project, such as a corrective action plan, post-closure care plan or alternate measure. The condition/restrictions contained within the environmental response project will be incorporated into the UECA covenant.*

**Question #5 - Is there a fee associated with the submittal?**

*Yes. Information on submission fees may be found under 9 VAC 15-90-40. <http://lis.virginia.gov/cgi-bin/legp604.exe?000+reg+9VAC15-90-40>*

*For most UECA covenants under the Virginia Solid Waste Management Regulations, the Department would act as the Agency, with an associated fee of \$4,000.*

**Question #6 - Who should review a UECA covenant before it is signed?**

*A signed UECA covenant affects property use and rights. As a result, those signing the document should consult legal and technical experts before agreeing to sign the document. The Department will also review and sign the document prior to it being recorded. The Virginia Townhall website contains a link to the existing Department review guidance (LPR-REM-2011-07) on the UECA law effective November 2011.*

**Question #7 - Would there be public participation associated with adoption of a UECA covenant?**

*There are no public participation requirements associated with the Uniform Environmental Covenants Act regulation. Therefore, only the public participation requirements under the VSWMR would apply. For example, 9 VAC 20-81-600.F defines any change in groundwater remedy or any reduction of the PCC period as a major permit modification which would at a minimum require public notice, and perhaps a public meeting.*

**FAQs specific to termination of Post-closure Care where no groundwater impact exists beyond the relevant point of compliance:**

Following closure of a solid waste landfill, the Virginia Solid Waste Management Regulations (VSWMR) requires an owner or operator to conduct post-closure care (PCC) of the landfill. While the VSWMR specifies the length of the PCC period (based on the date of last waste receipt for sanitary landfills), the regulation also allows the PCC to be decreased if the owner or operator demonstrates that the reduced period is equally protective of human health and the environment and the department approves the demonstration. The demonstration must include a certification, signed by the owner or

operator and a professional engineer, verifying that decreasing the PCC period will be equally protective of human health and the environment as well as an evaluation prepared by a professional engineer, assessing and evaluating the landfill's potential for increased risk to human health and the environment in the event that the post-closure period is decreased.

Owners/operators may wish to implement a UECA covenant to remain in place following termination of post-closure care. The FAQs below provide some considerations in determining if a UECA would be beneficial for a landfill as part of PCC termination.

**Question #8 - My understanding is that entering into a UECA covenant as part of the termination of PCC process is not mandated under the current VSWMR.**

*Correct. The current regulation does not mention such covenants as part of the PCC termination process. On the other hand, nothing in the VSWMR restricts a landfill owner/operator from entering into a UECA covenant as part of the PCC termination process and doing so has several long term risk management benefits.*

**Question #9a - What are the benefits to the owner/operator of using such a mechanism?**

*The UECA covenant allows the use of exposure controls and as a result may lessen liability concerns of future sellers and lenders associated with the redevelopment and purchase of a former landfill property which has otherwise been released from state regulatory oversight. This may be especially of interest to owners/operators of non-municipal landfills.*

*The UECA covenant helps fulfill the dual purposes of defining the activity and land use restrictions which will constitute protection of human health and the environment while at the same time allowing economically viable reuse of the property within a permanent legal infrastructure (covenant).*

*Implementing a UECA covenant may also strengthen an owner/operator's request for early termination of PCC.*

*UECA covenants as part of an approval to terminate PCC provide benefits because reliable long term controls reduce the risk that a future owner might (accidentally or deliberately) revive the first owner's environmental liability caused by exposure to the waste mass or impacted groundwater at the landfill after PCC has been terminated. Use of a UECA covenant can be thought of as a form of risk management to prevent inadvertent future exposures to the waste mass and groundwater which may no longer display the same characteristics as it did at the time of PCC termination.*

**Question #9b - Are there benefits to the owner/operator of a landfill using UECA in those cases where an Alternate Point of Compliance (APC) has been approved through a variance?**

*In cases where the Department has approved an alternate point of compliance (APC) through a variance, impacted groundwater may be present between the limits of the landfill waste mass and the designated APC. When the facility is requesting termination of PCC care, 9 VAC 20-81-170.C.1.b requires that the owner/operate provide an evaluation, prepared by a professional engineer or professional geologist, assessing and evaluating the landfill's potential for increased risk to human health and the environment in the event that PCC monitoring and maintenance are discontinued. Having a UECA in place to restrict groundwater use and disturbance of the landfill final cover on the property would provide long-term assurance that inadvertent future exposures to the waste mass and to impacted groundwater within the APC would be prevented. As a result, utilization of UECA in cases such as this would be a risk management tool which should be evaluated by the owner/operator.*

**Question #10 - What benefit does use of a UECA covenant provide to a potential future owner?**

*A subsequent purchaser of a property would buy the land subject to the controls recorded in the covenant and would do so with actual knowledge of the restrictions as recorded in the land records. Since such a covenant gives a broad array of interested parties the ability to enforce the land use and activity restrictions contained within, the covenant helps to ensure those controls will remain in place and prevent unintended risk of exposure to contaminated media.*

**Question #11 - Would a UECA covenant have included within it a requirement to perform any form of long-term monitoring even though the site may be in the process of being released from solid waste PCC requirements?**

*If a site is having PCC requirements terminated and has never been in, or has completed all required VSWMR remediation actions, then further monitoring of environmental media would not be required after PCC has been terminated. However, UECA covenants do require, on some specified frequency, compliance and use reporting to demonstrate that the activity and use limitations within the covenant are being observed.*

**Question #12 - Will the development and acceptance of a UECA covenant delay the PCC termination approval process?**

*Because the use of an environmental covenant would be a voluntary action in cases such as these, the Department's review of the PCC termination request*

*will proceed on a separate path while the covenant is being drafted. For early PCC termination requests, implementing a UECA covenant may actually strengthen an owner/operator's petition to terminate PCC.*

**Question #13 - If I choose not to enter into a UECA covenant as part of terminating PCC when I have met all other VSWMR requirements, will PCC termination approval be delayed?**

*No. Because the use of such an environmental covenant would be a voluntary action in cases such as these, the Department's review of the PCC termination request, and potential approval of it, will proceed solely based on the requirements currently defined under the VSWMR. In the case of early termination requests, implementing a UECA covenant may provide additional justification to meet the required performance standards.*

**FAQs related to UECA use as Alternate Measures and termination of Post-closure Care at sites with groundwater impairment:**

For those facilities that have exceeded groundwater protection standards (GPS), termination of PCC will typically not be granted unless the remedy has been completed and the owner or operator can demonstrate the landfill complies with the groundwater protection standards at all points within the plume of contamination that lie at or beyond the disposal unit boundary (or APC granted by variance pursuant to 9VAC20-81-740). Groundwater protection standards must be met for a period of three consecutive years of monitoring using the appropriate statistical procedures and performance standards as described under 9 VAC 20-81-250 D.

There may be some cases where the groundwater remedy(ies) will be unable to meet the performance standard of achieving all GPS within a reasonable timeframe or the PCC period. In such cases, the PCC period can be extended by the Director (9 VAC 20-81-170.B.4 and C.2) to cover the time needed to complete cleanup. However, there may be cases where clean-up will not be able to achieve the remediation end-points. 9VAC 20-81-260.G allows the owner/operator to demonstrate, in a report submitted for Director approval, certified by a qualified groundwater scientist, that compliance with the groundwater protection standards established under 9 VAC 20-81-250.A.6 cannot be practically achieved with any currently available groundwater remedial method.

If the Director gives approval to this demonstration, the owner/operator will be required by the VSWMR to implement *alternate measures* as necessary to protect human health and the environment as a means to control exposure of humans or the environment to residual groundwater contamination that will remain as a result of the failure of the groundwater remedy. In addition, the Director may require removal or decontamination of any remediation-related equipment, units, devices, or structures formerly utilized on site as part of groundwater corrective action.

Owners/operators may wish to implement a UECA covenant as the alternate measure to “control exposure of humans or the environment to residual contamination that will remain as a result of termination of remedial actions, as necessary to protect human health and the environment”. The FAQs below provide some considerations in determining if a UECA would be beneficial for a landfill as part of an alternate measures demonstration.

**Question #14 – Why would the Department consider a UECA covenant a stronger demonstration in support of alternate measures than simple deed restrictions or deed notices?**

*As discussed above, deed restrictions or notices can be removed and thus are not a form of permanent protection / land use restrictions which will run with the property in the future. The alternate measure must be a binding (permanent) set of restrictions to meet the VSWMR performance requirement of being able to: “control exposure of humans or the environment to residual contamination that will remain as a result of termination of remedial actions, as necessary to protect human health and the environment”.*

**Question #15 - What benefit does use of a UECA covenant provide to the owner/operator in cases like these?**

*The implementation of a UECA covenant provides a mechanism for the long-term stewardship of remediated properties and helps ensure that the specified land use restrictions remain in place as long as needed to protect human health and surrounding property, allowing the Department to potentially terminate PCC even at sites with some groundwater contamination.*

*The Uniform Environmental Covenant Act requires a state or federal environmental agency to be a signatory to the covenant, thereby ensuring that owner/operator submitted risk assessments and control mechanisms proposed for the property are based on sound science and will adequately protect human health, environment, and surrounding properties, and that notice of the covenant is provided to potentially affected third parties.*

**Question #16 - Would conditions potentially include some form of long-term monitoring?**

*In order to terminate PCC at a solid waste site where a successful demonstration under 9 VAC 20-81-260.G.3 has been made, the owner/operator would still need to continue monitoring under the requirements of 9 VAC 20-81-250.B or C until such time as it would be possible to demonstrate that the plume has been stable and no new constituents are anticipated to exceed their respective groundwater protection standard based on trend analysis. Once that condition has been met, it may be possible to discontinue long-term monitoring, terminate PCC and implement use and activity restrictions through the UECA covenant. UECA covenants do require, on some specified frequency, compliance*

*and use reporting to document that the activity and use limitations are being observed. Whether or not the UECA covenant contained long-term sampling requirements at some of the former monitoring wells would be a determination made after reviewing site specific information.*