

TERRIS, PRAVLIK & MILLIAN, LLP

BRUCE J. TERRIS
CAROLYN SMITH PRAVLIK
KATHLEEN L. MILLIAN

LYNN E. CUNNINGHAM
Of Counsel

1121 12TH STREET, N.W.
WASHINGTON, D.C. 20005-4632
(202) 682-2100
FAX 202-289-6795
tpminfo@tpmlaw.com

MICHAEL G. SHAW
ELISABETH J. LYONS
ALICIA C. ALCORN
ZENIA SANCHEZ FUENTES
MICHELLE WEAVER
JANICE GORIN
ALEXANDER R. KARAM
JANE M. LIU*

*Not admitted D.C. Bar

February 6, 2009

VIA EMAIL ONLY

Marna Brown
Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Floor
Newark, NJ 07102

Re: Uniform Environmental Covenants Act

Dear Ms. Brown:

Pursuant to our previous correspondence, we are providing our comments supporting adoption of the Uniform Environmental Covenant Act ("UECA").

As set forth in our letter of January 14, 2009, we represent individuals and organizations, including the Hackensack Riverkeeper, in federal litigation brought under the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") to remediate numerous chromium waste sites in Jersey City, New Jersey. *See, e.g., Hackensack Riverkeeper, Inc. v. Honeywell International Inc.*, D.N.J., Civ. No. 06-0022. In this litigation, two consent decrees have been entered that require the installation of an engineered cap designed to create a barrier between hazardous waste remaining on the sites and the public. The decrees also provide for the protection of the cap and other related remedial measures in perpetuity.

In developing the consent decrees, we thoroughly researched and examined the legal protections available under New Jersey law to protect the integrity of these planned controls into the future and thereby protect the public and the environment from the hazardous waste contamination remaining on the sites. We found that New Jersey law is presently inadequate to protect in perpetuity

the engineering and institutional controls to be employed in the remediation of contaminated sites.^{1/} The enactment of UECA would remedy many of the inadequacies of existing New Jersey law.

The New Jersey Department of Environmental Protection (“NJDEP”) estimates that there are more than 23,000 contaminated sites in New Jersey and an estimated 10,000 of these sites are potential brownfields.^{2/} NJDEP believes that many more contaminated sites may exist that have not yet been brought to its attention. *Ibid.* New Jersey has more contaminated sites than any other state and has the highest population density of any state.^{3/} In light of the number of contaminated sites in New Jersey, curing the inadequacies of New Jersey law is critical to the health and welfare of the public and environment in New Jersey.

While remediation of the contaminated sites to a level that permits unrestricted use (known as an unrestricted use standard) is the most desirable outcome, often technical and/or economic concerns result in remediation to a less protective standard that allows the contamination to be left in place and controlled through the use of engineering and/or institutional controls. As a result, there is, and will continue to be, a large population of people living, working, and/or recreating near remediated sites with contamination left in place and whose safety depends on the future integrity of the engineering and/or institutional controls utilized at the particular site. For example, in Hudson

^{1/}In general, engineering controls are measures designed to isolate contamination in such a manner that there is no contact with the contaminants by the public or other parts of the environment. *See* N.J.S.A. 58:10B-1; N.J.A.C. 7:26E-1.8. In general, institutional controls are ones designed to protect the integrity of the engineering controls and limit human activities in the vicinity of the contamination. *See ibid.* Notices and, as discussed below, an environmental covenant established under UECA are examples of an institutional controls. The deed notice provided for under current New Jersey law, that we also discuss in detail below, is another example of an institutional control.

^{2/}NJDEP Brownfields FAQ at <http://www.nj.gov/dep/srp/brownfields/faq/#howmanysites> (Last visited February 6, 2009). A brownfield site is "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant." N.J.S.A. 58:10B-23d.

^{3/}NJDEP Brownfield Redevelopment Guide at http://www.state.nj.us/dep/opsc/docs/Brownfield_Redevelopment.pdf (Last visited February 6, 2009) and

US Census Bureau Population, Housing Units, Area and Density at http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_SF1_U_GCTPH1R_US9S&format=US-9S&_box_head_nbr=GCT-PH1-R&ds_name=DEC_2000_SF1_U&geo_id=01000US (Last visited February 6, 2009).

County there are 739 reported brownfields sites and the county has a population density of 13,068/square mile.^{4/}

When remediated properties are located in high density areas, there is an increased likelihood of, and often desire for, development or redevelopment of the property. Therefore, whenever contamination is left in place in such areas, there is an even greater need to protect the engineering and/or institutional controls used to prevent exposure to that contamination. The controls must remain effective for as long as any contamination in concentrations above the unrestricted use standard remains on the site. Only through unambiguous protection of these controls will New Jersey be able to protect people and the environment from contamination left in place on a remediated site.

The Commission's staff has recommended that New Jersey does not need to enact UECA because existing law – the Brownfields and Contaminated Site Remediation Act (“Brownfields Act”), N.J.S. 58:10B, *et seq.* – with minor modifications, will achieve the same goals as UECA. *See* New Jersey Law Revision Commission Staff Memorandum, January 5, 2009. As we address in detail below, we do not agree. In our opinion, existing New Jersey law is inadequate to protect engineering and institutional controls in perpetuity, because it does not clearly authorize creation of valid servitudes, does not clearly establish a legal basis for institutional controls to run with the land and bind future owners, and permits only limited enforceability. These inadequacies cannot be remedied by merely “tweaking” existing New Jersey law, as suggested by the Commission's staff and the New Jersey Brownfields Redevelopment Task Force. There are simply too many gaps and uncertainties in the existing law. Moreover, a band-aid approach to addressing these issues could easily result in inconsistent or inadequate statutory interpretation. Instead, these inadequacies should be addressed comprehensively through adoption of UECA, a uniform act that will create consistency and predictability in the use of environmental covenants as a means of protecting engineering and institutional controls.

It is generally recognized that in order to establish a restriction on the use of land that is viable, enforceable, and protects engineering controls in perpetuity, the restriction must overcome existing principles of property law that reject restrictions on the use of property. National Research Council, *Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites*, 2000, p. 9;^{5/} EPA Guidance, *The Use of Institutional Controls under the RCRA Corrective Action Program*, May 1, 2003, pp 7, 13;^{6/} EPA Region 4 Guidance, *Institutional Controls*, June 27, 2006,

^{4/}NJ Sitemart at <http://www.njsitemart.com> (Last visited February 3, 2009).

^{5/}Excerpt attached.

^{6/}Found at <http://www.epa.gov/epawaste/hazard/correctiveaction/curriculum/download/in-cont-ca.pdf> (Last visited February 5, 2009).

p.14.^{7/} As a result, the restriction must: (1) create a valid real property servitude; (2) run with the land and survive in perpetuity; and (3) encourage proper monitoring and enforcement of the restrictions and/or affirmative obligations of the environmental covenant. EPA Guidance, *The Use of Institutional Controls under the RCRA Corrective Action Program*, May 1, 2003, pp. 7, 13; EPA Region 4 Guidance, *Institutional Controls*, June 27, 2006, p. 14. In addition, there must be certainty with regard to these requirements in order to promote the return of remediated properties to the stream of commerce. UECA, Prefatory Note. Without such certainty, it is unlikely that developers/purchasers would be interested in assuming the potential legal problems that might arise concerning the viability and enforceability of restrictions on the use of the property.

UECA was proposed in response to these generally recognized problems.^{8/} UECA expressly provides for the creation of environmental covenants that remedy the difficulties created by common law. UECA §§ 2(4), 3(a), 4(a), 5(a) and (b), and 11. The purpose of UECA is to create a statutory system under which environmental covenants can be used to protect in perpetuity human health and the environment from the potential risks presented by residual contamination left in place as part of a remediation (*e.g.*, contaminants under a cap or in a groundwater containment system), while also allowing for future development of and economic benefit from the remediated property. UECA, Prefatory Note. Essentially, UECA provides a statutory basis for the establishment of effective institutional controls, their duration, and enforcement without the burden of such common law impediments as privity of estate or contract.

Without UECA, the viability and enforceability of such controls is dependant on the property law of the state in which the contaminated property is located. The law varies substantially from state to state in the enforceability of institutional controls.^{9/} However, the doctrines and requirements of real property common law are often inconsistent with the needs of environmental law. For example, the common law traditionally has been averse to restrictions that run with the land while implementation of environmental law requires an ability to create institutional controls that bind future site owners and protect engineering controls in perpetuity. Therefore, the creators of UECA determined that, in order for institutional controls to act as an effective protective measure, the terms of the controls must be clearly established and their enforcement must be realistically assured by statute. *Ibid.*

As we show below, the deed notice provided for under the Brownfields Act does not remedy expressly the problems that have been recognized as being crucial to the creation of viable and

7/Found at <http://www.epa.gov/osw/hazard/correctiveaction/curriculum/download/in-cont.pdf> (Last visited February 5, 2009).

8/<http://www.environmentalcovenants.org/ueca/DesktopDefault.aspx?tabindex=3&tabid=88> (Last visited February 6, 2009).

9/<http://www.environmentalcovenants.org/ueca/DesktopDefault.aspx?tabindex=1&tabid=71> (Last visited February 6, 2009).

enforceable institutional controls. As a result, the Brownfields Act leaves crucial questions to judicial interpretation and the common law. This does not create the certainty needed to return remediated properties to the stream of commerce and to protect the public and the environment.

Under the Brownfields Act and the Technical Requirements for Site Remediation (commonly known as the “Tech Regs”), properties in New Jersey may be remediated to a standard less protective than an unrestricted use standard. N.J.S.A. 58:10B-13. In such situations, engineering and institutional controls are used. N.J.A.C. 7:26E-8.1. When a property is remediated to a standard less protective than unrestricted use and engineering and/or institutional controls are used, the Brownfields Act requires that a deed notice be recorded. N.J.S.A. 58:10B-13a(2). The deed notice must follow the exact wording of the language provided for in the Tech Regs. N.J.A.C. 7:26E-8.2d(1).

Deed notices have been criticized as ineffective in providing for restrictions on the use of land. *See generally*, National Research Council, *Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites*, 2000, pp. 9, 52-53; EPA Guidance, *The Use of Institutional Controls under the RCRA Corrective Action Program*, May 1, 2003, p.7; GAO Report, *Hazardous Waste Sites Improved Effectiveness of Controls at Sites Could Better Protect the Public*, January 2005, p. 25, 32-33 ^{10/}. Deed notices are considered to be only informational. EPA Guidance, *The Use of Institutional Controls under the RCRA Corrective Action Program*, May 1, 2003, p. 7; GAO Report, *Hazardous Waste Sites Improved Effectiveness of Controls at Sites Could Better Protect the Public*, January 2005, p. 6. They are not seen as adequate to protect engineering controls and the public in perpetuity. This criticism is true of the deed notice established by New Jersey under the Brownfields Act and the Tech Regs.

The first crucial requirement for a viable and enforceable restriction on the use of land is that the restriction create a valid real property servitude. Because the Brownfields Act does not expressly state that a deed notice creates a real property servitude, the deed notice does not satisfy this requirement. As a result, it is impossible to be confident that the deed notice will survive in perpetuity. Where the statute is silent, as the Brownfields Act is, the common law of property will govern. This is problematic because the common law rules for determining the validity and enforceability of a servitude depend on the form of the servitude (*i.e.*, whether it is a restrictive covenant, easement, etc.). *See Petersen v. Beekmere*, 283 A.2d 911, 916-918 (N.J.Super.Ch. 1971). Thus, the rules governing restrictive covenants differ from those governing easements and the rules governing easements depend upon the type of easement in question. *Ibid*. Moreover, uncertainty as to the type of servitude results in uncertainty regarding such fundamental characteristics as its duration, whether it will be liberally or narrowly construed, who may enforce it, and whether it can be enforced at all. *Ibid*. Since the type of servitude that might be created by a deed notice, if it creates a servitude at all, is unclear, it is unclear what common law rules are applicable.

In contrast, an environmental covenant under UECA is not mired by the uncertain application or construction of common law rules. Instead, UECA expressly provides that an environmental covenant creates a valid real property servitude. UECA §§2(4), 5(a).

The second crucial requirement is that the restriction run with the land and survive in perpetuity. The Brownfields Act nowhere states that a deed notice will run with the land and bind subsequent owners. The result of the Act's silence is a lack of clarity and predictability leaving the courts to interpret whether a deed notice will survive in perpetuity and the extent to which it will bind third parties. Again, this creates a situation in which it is difficult for those intending to restrict a property's use in perpetuity to predict whether a deed notice will remain valid and enforceable.

It is unlikely that a deed notice would be found to run with the land and survive in perpetuity. Common law generally requires that restrictions touch and concern the land and that there be privity between successor parties in order for restrictions to run with the land. *See Petersen v. Beekmere*, 283 A.2d at 917-918; *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A. 2d 52, 55-56 (N.J. Super. Ch. 1961). The touch and concern doctrine requires that there be a dominant and servient real property estate and that the restriction touch and concern both estates. There must be a servient estate that is burdened by the restriction and a dominant estate that benefits from it. *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d at 55-56. In the case of a deed notice under the Brownfields Act, the touch and concern doctrine will never be satisfied because the notice only touches and concerns the burdened property; there is no "dominant estate" that can be said to benefit from the burden.

Likewise, it is unclear under existing law whether the common law requirement of privity of estate would be satisfied with respect to all successors to the burdened property. In general, the common law privity of estate doctrine requires that there be a relationship between the original and successor parties in a transaction. *Petersen v. Beekmere*, 283 A.2d at 917-918. This cannot be guaranteed at the outset with a deed notice. Instead, it would depend on each future transaction.

The outcome of these issues with regard to deed notices under the Brownfields Act is uncertain because the courts have not yet considered the validity and enforceability of such deed notices. Since the statute is silent and the courts have not yet addressed important issues, it is impossible to be certain whether engineering or institutional controls can be protected in perpetuity by the deed notice.

In contrast, UECA removes this common law uncertainty by clearly articulating rules and standards. UECA expressly provides that environmental covenants run with the land and survive in perpetuity. UECA §§2(4), 5(a). In addition, UECA expressly provides that its environmental covenants remain valid and enforceable regardless of whether they touch and concern real property or whether there is privity of estate or contract. UECA §5(b). As a result, UECA creates a real interest in the property and ensures the sustainability of the covenant. It also ensures that the covenant is binding on subsequent owners and all others who hold an interest in the property, including tenants.

Moreover, Section 5(b) of UECA expressly provides that an environmental covenant cannot be defeated by standard common law defenses to restrictions on the use of real property. It states that an environmental covenant that is otherwise effective is valid and enforceable even if (UECA §5(b)):

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to a person other than the original holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;
- (6) the benefit or burden does not touch or concern real property;
- (7) there is no privity of estate or contract;
- (8) the holder dies, ceases to exist, resigns, or is replaced; or
- (9) the owner of an interest subject to the environmental covenant and the holder are the same person.

By negating these common law issues or defenses, UECA supports the survival of a valid environmental restriction in perpetuity and allows for a broader use of environmental covenants or equivalent restrictions than might otherwise be provided under the common law.

In contrast, current New Jersey law fails to protect the deed notice from these common law issues or defenses. Indeed, because the Brownfields Act leaves all of these issues to judicial interpretation, as noted above, it invites assertion of common law defenses that, in all likelihood, defeat the validity and enforceability of the deed notice. For example, as addressed above, a deed notice does not touch and concern the land or satisfy privity of estate. Therefore, it is unlikely to survive such challenges or defenses. In contrast, Sections 5(b)(6) and (7) of UECA expressly precludes the application of the touch and concern and privity of estate doctrines to defeat environmental covenants.

Likewise, Section 5(b)(3) and (4) of UECA address the problem posed by the common law's restrictions against nominal and negative servitudes that would prevent future enforcement. Generally, the common law allows servitudes that serve a limited number of purposes and the law is reluctant to recognize servitudes that fall outside of the accepted range. *Puddington v. Vielbig*, 142 Atl. 171, 172-173 (N.J. Ch. 1928). Similarly, Section 5(b)(5) addresses the potential unenforceability under common law of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Generally, the common law disfavors restrictions on the use of land that create obligations to perform affirmative acts. *Furness v. Siquett*, 159 A.2d 455, 458-459 (N.J. Super. Ch. 1960). Environmental protection may require that affirmative obligations be imposed on the burdened real property owner or on the covenant holder or both. Section 5(b)(5) makes clear that the validity and enforceability of an environmental covenant is not jeopardized by the fact that it is affirmative in nature.

These provisions of UECA ensure that any environmental covenant created under it will be a valid and enforceable covenant, even though the requirements of various common law doctrines cannot be met. By specifically stating that an environmental covenant need not comply with these common law requirements, UECA has removed the uncertainty regarding the ability of covenants to provide long-term protection and survive in perpetuity.^{11/}

Condemnation proceedings provide another good example of the inadequacy of the deed notice compared to an environmental covenant under UECA. If, for instance, a property is condemned some time after a property has been remediated using engineering controls and a deed notice has been recorded, it is uncertain whether the deed notice would survive the condemnation because the Brownfields Act fails to provide for the event of condemnation and does not create a property interest. In contrast, UECA expressly provides safeguards that must be satisfied prior to termination of an environmental covenant due to condemnation. UECA §9(a)(5).

The third requirement of a valid and enforceable restriction on the use of land is that it encourages proper monitoring and enforcement of the restrictions and/or affirmative obligations.

Even if a deed notice under the Brownfields Act were deemed to overcome the many problems addressed above, it fails to provide for adequate monitoring and enforcement. It grants no enforcement powers to third parties. N.J.A.C. 7:26E-8 and Appendix E. Even if third parties, such as a public interest organization, community group, future tenant, or operator, are aware of a deed notice, they have no right to enforce any use restrictions or affirmative obligations created by it, because the deed notice does not grant any property rights. National Research Council, *Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites*, 2000, pp. 50-51. As the NJDEP model deed notice states, the notice is “not intended to create any interest in real estate in favor of the Department of Environmental Protection, nor to create a lien against the

^{11/}We note that many of these common law impediments have been statutorily addressed in the New Jersey Conservation Restriction and Historic Preservation Restriction Act (“the Conservation Restriction Act”), N.J.S.A. 13:8B-1, *et seq.* One of the primary reasons for enactment of the Conservation Restriction Act was to avoid such common law impediments as privity of estate or contract, the need for a dominant estate or tenement, and the inability to assign enforcement rights. *See* N.J.S.A. 13:8B-4. Unfortunately, the Conservation Restriction Act is severely limited with regard to the types of properties that can be the legitimate subject of a conservation restriction. The Conservation Restriction Act applies only to conservation restrictions “appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as a suitable habitat for fish or wildlife * * *.” N.J.S.A. 13:8B-2b. Many, if not most, brownfield sites would not be able to satisfy these requirements. Therefore, the Conservation Restriction Act cannot be relied upon as authority to create permanent protective covenants and restrictions on most remediated sites.

property, but is merely intended to provide notice of certain conditions * * *.” N.J.A.C. 7:26E, Appendix E.

The deed notice is enforceable only by NJDEP and at its sole discretion. N.J.A.C. 7:26E-8 and Appendix E. NJDEP has stated that “[m]onitoring the protectiveness of the remedy is critical in light of potential exposure in the event that the property use changes to one inconsistent with the restrictions specified in the remedy.” McCarthy, “State to Issue Fines for Failure to Monitor, Report on Controls at Contaminated Sites,” 38 BNA Environment Reporter 2098 (September 28, 2007). Unfortunately, for a variety of reasons, NJDEP’s system of monitoring compliance with deed notices does not work. NJDEP has said that because of the large number of remediated sites and its own limited resources, it has had to rely on self-monitoring and self-reporting to ensure that controls remain protective over time. *Ibid.*

In 2006, there were so many parties in violation of the monitoring and reporting provisions of the deed notice that NJDEP had to grant an amnesty period to allow the parties to bring themselves into compliance.^{12/} NJDEP sent letters to at least 2,100 parties notifying them that they must comply with the monitoring and reporting requirements or be subject to civil penalties. *Ibid.* Of these 2,100 parties, only about 840 brought themselves into compliance within the amnesty period. *Ibid.* In 2007, NJDEP launched enforcement actions against approximately 950 parties who had failed to provide the required biennial certifications under their deed notices and began investigations of an additional 300 parties. *Ibid.* Then Commissioner Jackson stated that the “state’s system that allows self-reporting for monitoring of these contaminated properties is broken * * *” and “seriously undermines the department’s ability to ensure protection of public health and the environment.” NJDEP Press Release, “DEP Takes Enforcement Actions against Responsible Parties for Failure to Meet Contaminated Site Monitoring Requirements.” She also stated that the problem with enforcement of deed notices “underscores the need for reforms to DEP’s Site Remediation Program.” McCarthy, “State to Issue Fines for Failure to Monitor, Report on Controls at Contaminated Sites,” 38 BNA Environment Reporter 2098 (September 28, 2007). This evidence shows that NJDEP is an unreliable enforcer of the requirements contained in the deed notice.

The Brownfields Act places the entire burden of monitoring and maintaining engineering and institutional controls on the property owner and/or operator. N.J.S.A. 58:10B-13d. The property owner is the party responsible for notifying any person who intends to excavate on the site of the nature and location of contamination existing on the property and of any conditions or measures necessary to prevent exposure to contamination (N.J.S.A. 58:10B-13h) and the deed notice can only be enforced against the property owner (N.J.A.C. 7:26E-8.2 and Appendix E).

^{12/} See NJDEP Press Release, “DEP Takes Enforcement Actions against Responsible Parties for Failure to Meet Contaminated Site Monitoring Requirements,” September 24, 2007, available at http://www.state.nj.us/dep/newsrel/2007/07_0041.htm (Last visited February 6, 2009); McCarthy, “State to Issue Fines for Failure to Monitor, Report on Controls at Contaminated Sites,” 38 BNA Environment Reporter 2098 (September 28, 2007).

The deed notice itself places restrictions and obligations, including monitoring, reporting, and repairing any damage to, breach, or failure of the remedial controls, on the party responsible for the remediation, and the property owner and/or occupier. N.J.A.C. 7:26E, Appendix E. However, the deed notice fails to give the responsible party access to the property to fulfill these obligations or to give the property owner a right of enforcement against the responsible third party for monitoring, maintenance, and repair of remedial controls in place on the site. *Ibid.* Moreover, it is unclear whether the obligations placed on non-owners by the deed notice are enforceable, given that the Brownfields Act places the monitoring and maintenance burdens on property owners and/or operators, regardless of whether they are responsible for the contamination or the remediation.

Therefore, neither the Brownfields Act nor the deed notice contain effective mechanisms to allow the property owner to ensure proper compliance with the deed notice. Rather, there is an incentive to turn a blind eye to or cover up any damage to engineering controls so as to avoid the burden and cost of being responsible for repair of the engineering control. *See* N.J.S.A. 58:10B-13; N.J.A.C. 7:26E-8.2 and Appendix E. We note, that while the Brownfields Act does provide that penalties may be assessed for deed notice violations, the poor enforcement history of NJDEP undermines the resulting incentive for the property owner to comply with the deed notice requirements.

Moreover, the fact that only NJDEP may enforce deed notices makes the effectiveness of deed notices in remediations that are not required or overseen by NJDEP particularly dubious. For example, it is unclear whether a deed notice would be applicable to a site remediation overseen by a federal agency because the federal agency would need to relinquish all enforcement powers to NJDEP. Likewise, it is unclear whether the deed notice is applicable in civil suits regarding remediation of a contaminated site under RCRA, like those brought by Hackensack Riverkeeper. UECA overcomes these problems by providing that it applies to state, federal, and private remediations. UECA §2.

UECA has several provisions that remedy the problems with notice, monitoring, and enforcement of deed notices under the Brownfields Act. For example, UECA places no restrictions on who the holders of the covenant may be; in fact, it removes most common law impediments regarding who can hold a valid interest in the land. UECA §5. UECA also allows for enforcement by any “person to whom the covenant expressly grants power to enforce.” UECA §11(a)(3). Therefore, under UECA, state and local governments, and other third parties who are holders, have explicit rights to enforce the restrictions and affirmative obligations of covenants.

UECA allows for multiple holders of the covenant each of whom have a valid interest in the real property. UECA §3(a). Therefore, even if one holder is not able to enforce it, or chooses not to do so, another holder can enforce it.

One of the most important reasons that deed notices are not effective is that, over time, the underlying motivation for a deed notice has a tendency to be forgotten. Such amnesia is frequent, indeed, probably almost universal. For example, at the Oak Ridge Reservation in Tennessee, just a

few years after placing a deed restriction on the use of contaminated groundwater, a well was drilled to irrigate a golf course. National Research Council, *Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites*, 2000, pp. 52-53. Similarly, at Love Canal in New York, several years after placing warning notices on the deed, a school and homes were built on top of the hazardous chemical waste site. *Ibid.* The only way to overcome such problems is to provide for multiple enforcers, as UECA does, in the hopes that the existence of several watchful eyes will better ensure enforcement of use restrictions and protection of the engineering controls.

In addition to its other notice and enforcement provisions, UECA encourages, but does not require, the creation of a database that records all environmental covenants established under the act. UECA §12. The purpose of this database is to act as a secondary form of notice, in addition to the recording of the environmental covenant in the land records, as a means of protecting and enforcing engineering controls. This provides a second record of environmental covenants and the engineering controls the covenants are intended to protect that is easily accessible to the community. New Jersey should adopt this section of UECA as well as the other provisions.

While the Brownfields Redevelopment Task Force maintains the Brownfields Site Mart (“Site Mart”), the Site Mart does not accomplish the same goals. The purpose of the Site Mart is to act as a “multiple listing service for brownfields properties” and to encourage developer interest in such properties.^{13/} Therefore, the Site Mart does not provide notice to the community and ensure long-term protection of engineering and institutional controls.

Unlike the registry provided for under UECA, the Site Mart is not intended to list all sites that have utilized engineering and/or institutional controls to prevent exposure to contamination left in place on the site. The Site Mart is an inventory only of brownfields sites. N.J.S.A. 58:10B-23. Since, as noted above, less than half of the contaminated sites in New Jersey are brownfields sites, the Site Mart necessarily cannot serve the function of listing all remediated sites. Moreover, the Brownfields Act provisions regarding the creation and maintenance of the Site Mart state that “as used in this section, ‘brownfield site’ means any former or current commercial or industrial site that is currently vacant or underutilized * * * and ‘New Jersey Site Mart’ means interactive database accessible on the Internet that provides information to developers, property owners, and State and local planners, about brownfields sites in order to facilitate the sale and redevelopment of those properties.” N.J.S.A. 58:10B-23.2c. Therefore, under the Brownfields Act, once a site has been developed and utilized, the site will be removed from the Site Mart database, regardless of whether institutional and/or engineering controls have been utilized on the site and need continuing protection.

^{13/}
NJ Site Mart FAQ at
<http://www.njsitemart.com/sitemart/cwp/view.asp?a=325&Q=208421&sitemartNav=|4013|4036>
(Last visited February 6, 2009).

In addition, listing in the Site Mart is not mandatory and must be consented to by a property owner.^{14/} As a result, even all brownfield sites are not likely to be listed in the Site Mart. Therefore, the Site Mart will not effectively provide notice to the community of remediated sites that have used engineering and/or institutional controls to prevent exposure to contamination left in place.

In sum, UECA will effectively cure the existing monitoring and enforcement problems described above. The grant of interests in the real property and a right to enforcement to parties beyond NJDEP will create additional stakeholders who have a motivation to monitor the land records and activities on the site and enforce the restrictions if they are violated. Furthermore, a registry of all environmental covenants will provide an additional safeguard to ensure continuing notice to the community at large of the property use restrictions and obligations and establish a central registry of the engineering controls in place in New Jersey.

* * *

When the remedy chosen for real property leaves contamination on the site, it is essential to impose restrictions on use of the site, require continued monitoring of the site, and/or require construction of permanent containment or other remedial structures on the site in order to protect human health and the environment. In these circumstances, environmental covenants are crucial to make these restrictions and requirements effective in perpetuity. Environmental covenants can do so only if their legal status under state property law and their practical enforceability are assured. UECA provides the mechanisms, which are currently missing from New Jersey law, that will allow for the creation of valid enforceable environmental covenants.

Thank you for your attention to these comments. Please contact Carolyn Smith Pravlik or Alicia Alcorn with any questions.

Sincerely,

^{14/}
NJ Site Mart FAQ at
<http://www.njsitemart.com/sitemart/cwp/view.asp?a=325&Q=208421&sitemartNav=|4013|4036|>
(Last visited February 6, 2009).

Marna Brown
February 6, 2009
Page 13

s/ Bruce J. Terris

Bruce J. Terris
Carolyn Smith Pravlik
Alicia Clark Alcorn
Terris, Pravlik & Millian, LLP
1121 12th Street, N.W.
Washington, DC 20005-4632
(202) 682-2100

s/ Edward Lloyd

Edward Lloyd
Columbia Law School
435 West 116th Street, Room 831
New York, NY 10027
(212) 854-4376/4291

cc: Hon. Robert Torricelli
Kevin Coakley
Liza Walsh
Michael Daneker
William Matsikoudis
David Isabel
Sam Della Fera