Why Community Involvement in the Remedial Selection Process Makes the Uniform Environmental Covenant Act Good for the Environment and Just for the Public

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The last two issues of *LUCs Wire* have covered what one author called the "lively debate over the Uniform Environmental Covenants Act (UECA)."[1] *LUCs Wire's* first Point/Counterpoint featured a reprint of Paul S. Kibel's criticism of UECA and UECA's drafters. Kibel alleged that:

Most significantly, UECA does not set forth criteria or procedures to determine when it is inappropriate for an environmental agency to reduce cleanup costs by approving less comprehensive cleanups and by prohibiting otherwise lawful land uses.

His argument is true, yet hollow because of the limited scope and purpose of UECA. UECA is not supposed to set forth criteria or procedures to determine when it is inappropriate for an environmental agency to approve less comprehensive cleanups because such criteria and procedures are established in the *remedial selection process* by statutes, regulations and policies. If one is concerned about government agencies approving less comprehensive cleanups, then one should focus on improving community involvement during the remedial selection process – not UECA. By the time an environmental covenant is being drafted, it is too late to determine the extent of cleanup at a site.

In the same *LUCs Wire*, we reprinted the reply to Paul Kibel by the drafters of UECA, William Breetz and Kurt A. Strasser. Their article, *Why the Uniform Environmental Covenants Act Makes Sense; a Reply to Paul Kibel*, defended UECA, and countered many of Kibel's arguments against UECA as being outside of the scope and purpose of the model act.

In response to the Breetz and Strasser UECA defense, Andrea Ruiz-Esquide, has written a thoughtful clarification of many of Kibel's UECA criticisms. Yet, in the fourth paragraph of her reply, she reveals a basic misunderstanding of the relation of UECA to the remedy selection process – a misunderstanding which is remarkably similar to Mr. Kibel's misunderstanding of UECA's relation to the remedy selection process:

While UECA represents a significant improvement over disparate and often unpredictable state ***remediation programs*** *[emphasis added] it suffers from a significant*

[1] I contend that this is not really a legitimate debate about the merits of UECA. Rather, I believe that Mr. Kibel and Ms. Ruiz-Esquide are more concerned about the misuse or overuse of risk-based cleanups, something over which UECA has no jurisdiction.

failure; the exclusion of the public from the creation, implementation, and enforcement of these [environmental covenant] instruments.

Herein lies Ms. Ruiz Esquide's essential mistake; *UECA is not a state remediation program, nor is it meant to be.* UECA is a tool to enforce decisions made by state remediation programs. Basically, UECA was drafted to correct a problem that was occurring at the end of the remedial program process – a problem with traditional property law. This age old property law problem made it difficult to enforce environmental covenants needed to protect the type of remedies that were selected.

What propelled me to write this Counterpoint Op Ed piece is that Ms. Ruiz-Esquide dismisses the extensive public input that leads up to the selection of a remedy as cumbersome and failing to meaningfully involve the public:

True, most states do provide for notice and comment periods in their state-run cleanup programs, and many call for public hearings at some point in the remediation process. These requirements vary greatly from state to state, however and are often the result of ad hoc, not statutorily mandated policies. Moreover, commentators have described how traditional "notice and comment" procedures for public participation are lengthy, cumbersome, and often fail to involve the affected public.

I believe Ms. Ruiz-Esquide is mistaken to the extent that she believes that community involvement (CI) is not mandated during the remedy selection process; that CI is limited to notice and comment, and that public input in federal and state superfund and brownfield cleanups is not early and meaningful enough to determine the level of cleanup and future land use.

It is a technically correct observation that there is no CI in the actual drafting of an environmental covenant. But this is a misplaced concern considering the larger scheme of the entire cleanup process. Breetz and Strasser made this point in passing, saying that:

A large body of federal law articulates the standards for environmental cleanups as well as the required notice and consultation in the process; they are extensive and detailed. Those federal procedures also require extensive notice and opportunity to comment in the remedy selection process. Many states have similar laws.

In this article, I will document how extensive and detailed community involvement is throughout the entire remedial selection process. The consideration of remedial alternatives and the selection of a remedy is the process that decides the future land use of a site – whether it will be residential and unrestricted in use or commercial and restricted in its future use. If the site is to be cleaned up to serve a commercial redevelopment, then the site will need an environmental covenant that prevents, for example, future digging at the site that might breach the engineered containment of the contamination on site. A cleanup that needs such an environmental covenant is called a risk-based cleanup action (RBCA).

For the past 20 years, I have spent a large part of my career supporting a policy that favors cleaning sites up to unrestricted levels of contamination, but that allows for a RBCA where a RBCA makes sense. Although Mr. Kibel and Ms. Ruiz-Esquide may have a legitimate concern that RBCAs are being overused, attacking UECA is not the proper venue to redress that concern. Environmentalists must recognize the reality we are faced with, that hundreds of RBCAs have already been completed and they need environmental covenants that are enforceable. Without enforceable environmental covenants, it is likely that at some future time a developer, owner, or lessee will not be aware that a RBCA has been completed on a property and will use that property in a way that is incompatible with the remedy and therefore expose people to hazardous substances. UECA makes environmental covenants enforceable. I enthusiastically support UECA because it has (for better or worse) become critical to the protection of public health and the environment.

Community Involvement in the Remedy Selection Process Determines Future Land Use

In this reply, I focus on CI during the remedy selection process, because the remedy selection process determines future land use and whether sites will be cleaned up to unrestricted levels or whether engineering controls[2] will contain contamination onsite and thus require institutional controls (ICs)[3] that may include environmental covenants in order for cleanup agencies to prevent future incompatible land uses from damaging the remedy.

Bear with me as I explain some of the central, yet arcane details that a novice to this issue may not understand. One form of ICs – proprietary ICs – are restrictions on the deed to the property that prevent incompatible land uses from breaching engineering controls used at RBCAs.[4] If the remedy that was selected (with community input) included the

[2] A commonly-used engineering control encapsulates the contamination in concrete beneath the foundation of a building, driveway, sidewalk, or parking lot of a cleaned up and redeveloped site.

[3] This Web site uses the term "land use controls" (or LUCs) as synonymous with institutional controls (or ICs). There are different types of ICs; one type of an IC is an environmental covenant. When environmental covenants are used as an IC, they need an enforcement law modeled after UECA to resolve a property law obstacle that prevented environmental covenants from running with the land and being enforceable far into the future.

[4] ICs, also known as LUCs, are administrative or legal mechanisms used to protect public health and the environment from residual contamination at Superfund sites, military bases, or other contaminated properties or former brownfields. LUCs are designed to limit land use and on-site activity that might interfere with the containment of residual contamination after completion of a response action. LUCs are typically used in tandem with physical or engineering measures such as fences and containment caps. EPA's IC Web page states: "Institutional controls are actions, such as legal controls, that help minimize the potential for human exposure to contamination by ensuring appropriate land or resource use. Although it is EPA's expectation that treatment or engineering controls will be used to address principle threat wastes and that groundwater will be returned to its beneficial use whenever practicable, ICs can and do play an important role in remedies."

use of an engineering control that encapsulated the contamination beneath the foundation of a new structure built on the cleaned up site, then excavation below a certain depth would constitute an incompatible land use that violated the IC recorded on the deed to the property. Such an excavation might breach the containment unit. One big problem with ICs has been enforcing them; traditional property law presents a number of obstacles to enforcing ICs that restrict future land use on private property.[5] Therefore, states began drafting a patchwork quilt of environmental covenant laws to get around the property law problem. However, these laws were not uniform and did not trump the property law enforcement problem.[6] Therefore, once a RBCA remedy was chosen, states had no way to ensure that the ICs would be enforceable into the future. To protect public health and the environment, a national uniform environmental covenant act (UECA) was needed to ensure that the ICs will be enforced so that engineering controls will be not be breached by incompatible future land uses.

State laws modeled after UECA are not triggered unless a RBCA has been chosen as the cleanup remedy for a site. As I stated earlier, the choice of whether to use a RBCA or whether to clean up a site to pristine, residential levels of contamination is made during the remedy selection process. *Because of this, all of the key decisions affecting environmental protection, land use, and environmental justice – concerns that I share with Ms. Ruiz-Esquide and Mr. Kibel – are made during the remedy selection process (and **not** during the drafting of an environmental covenant as specified by UECA).* This is because the law requires that the community, and not the remedial cleanup agency, shall decide what the future land use should be. Once the community makes this decision, the remedial cleanup agency must conform its remedy to meet the future land use desires expressed by the community's consensus.

The community should come to a consensus on future land use because they live there. There is another reason though; for a long time, EPA struggled with the issue of "how clean is clean."[7] The issue consumed the agency's policy analysts for years and was only resolved when EPA realized that it should let the community make that tough decision. I served in the Superfund division and the Environmental Protection Agency from 1985 through 1990. I was there when EPA added extensive opportunities to Superfund's implementing regulation, the National Oil and Hazardous Substances Pollution Contingency Plan (or NCP) to *mandate* early and meaningful community involvement at

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[5] See: *Property Law for Dummies: Easements are Easy; but are they Enforceable?* at: http://www.lucs.org/news.cfm?id=219 ; *Property Law for Dummies: Real Covenants Don't Eat Quiche (and They Don't Run with the Land Either)* at: http://www.lucs.org/news.cfm?id=222 .

[6] See: *Property Law for Dummies: the UECA; a National Approach to State and Local Enforcement of Controls* at: http://www.lucs.org/news.cfm?id=227 .

[7] See Stephen Merrill Smith, *CERCLA Compliance With RCRA: The Labyrinth*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10518 (Dec. 1988).

almost every stage of the remedial selection process. The NCP requires that a Community Involvement Coordinator (CIC) shall work extensively to involve the public in the determination of future land use and the selection of a remedy.[8] To illustrate how CI is mandated throughout the remedy selection process, I provide an EPA diagram of how CI begins at site discovery and provides the public with many opportunities for early and meaningful input throughout the *entire* remedy selection process. See: http://www.epa.gov/superfund/action/community/pipeline.pdf.

EPA defines CI as follows:

Community involvement is the process of getting community members actively involved in planning for and cleaning up a Superfund site. Community involvement is founded on the belief that people should know what EPA is doing in their community and be able to have some input into the decision making process. Superfund community involvement is not a public relations effort to sell the Agency or its plans and it is not just a one way communication of information. Community involvement ... is the process of engaging in dialogue and collaboration with community members. The goal of Superfund community involvement is to advocate and strengthen early and meaningful community participation during Superfund cleanups. Superfund community involvement staff will strive to:

- Keep the community well informed of ongoing and planned activities.
- Encourage and enable community members to get involved.
- Listen carefully to what the community is saying.
- Take the time needed to deal with community concerns.
- Change planned actions where community comments or concerns have merit.
- Explain to the community what EPA has done and why.[9]

Before Mr. Kibel and Ms. Ruiz Esquide reject EPA's commitment to CI as so many happy empty words, they should know something about EPA's workers. There are hundreds upon hundreds of people within EPA (*and* within state and local environmental protection agencies) who genuinely care about the environment. EPA in general – and state environmental protection agencies in particular – are tough places to work these days. The people who work there do so largely because they care about the environment. They *want* to involve the community and a good CIC *can* involve the community by using the tools from the NCP that I have outlined below.

Most of these tools are mandated by the NCP for Superfund sites. However, some of the CI tools I discuss – especially Community Visioning – could not be mandated by law and so they are strongly encouraged by the EPA guidance documents that explain how to comply with the NCP. I focus on the NCP because it is the model by which almost all other cleanups were formulated. Therefore, many state superfund programs follow the NCP closely because it was used as a template to draft many state superfund regulations.

[8] See 40 CFR § 300.430(c)(2)(i); 300.415(n)(3)(i); and 300.415(n)(4)(i).

[9] See http://www.epa.gov/superfund/action/community/

Brownfield cleanups have to follow NCP community involvement procedures, or EPA's brownfield office will not sign a memorandum of understanding (MOU) or a memorandum of agreement (MOA) with that state. There are 21 MOA states and 5 MOU states; in these states, EPA is satisfied that (among other things) their CI follows the NCP. Moreover, in non-MOU/MOA states, if EPA's brownfields office is not satisfied that a brownfield funding application will provide early and meaningful community involvement that mirrors the NCP, EPA will not grant the applicant's funding.

Granted, there is room for more states to adopt the NCP's CI procedures, but UECA is not the venue to address that concern.

Mandatory Community Involvement Activities from the National Contingency Plan

The key mandatory requirements of the NCP are Community Interviews, the Community Involvement Plan, Technical Assistance Grants, Technical Outreach Services for Communities, the Information Repository, the Administrative Record, and public notice and comment opportunities.

Community Interviews

Community Interviews are required by the NCP.[10] The NCP requires the Agency to "conduct community interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs, and to learn how and when citizens would like to be involved in the Superfund process."

The CIC conducts interviews after the site is formally listed on the National Priority List (NPL) and before the remedial investigation/feasibility study (RI/FS) begins. The RI is the study of the nature and extent of contamination and the FS is the study of the remedial alternatives best suited to cleanup what was uncovered by the RI. The interviews are necessary for developing the Community Involvement Plan, which must be a final document before the RI/FS can begin. Therefore, at this very early stage, the CIC begins reaching out to the community by scheduling interviews that constitute formal information gathering sessions consisting of are one-on-one interviews conducted in the citizen's home or office; occasionally the CIC may also use phone interviews or Focus Groups.

The Community Involvement Plan

The Community Involvement Plan (CIP) is the foundation for the Community Involvement Program. The CIP is required by the NCP.[11] It specifies the outreach

[10] See: 40 CFR § 300.430(c)(2)(i); 300.415(n)(3)(i); and 300.415(n)(4)(i).

[11] The NCP, at 40 CFR §300.430(c)(2) (ii)(A-C), requires that a CIP be in place before remedial investigation field activities start. "The lead agency shall provide for the conduct of the following

activities that EPA will use to address community concerns and expectations, as learned from the community interviews. The CIP outlines how the CIC will involve the community in site cleanup. It identifies the community's issues, needs, and concerns. The CIP identifies specific activities, outreach products, or programs that the CIC will use to address the concerns. For example, if groundwater contamination is an issue, identify it as such, and state that "EPA will conduct a series of workshops with a hydrogeologist to explain groundwater."

Technical Assistance Grants and Technical Outreach Services for Communities

EPA provides technical assistance for communities to help citizens understand and comment about site-related information. By law EPA must inform communities about Technical Assistance Grants (TAGs) and assist them in applying for these grants. EPA also informs citizens about obtaining assistance through other programs, such as the university-based Technical Outreach Services for Communities (TOSC) program and the Department-of-Defense-based Technical Assistance for Public Participation (TAPP) program.

The purpose of informing communities about the availability of independent technical assistance programs is to help communities understand and participate in decisions affecting hazardous waste cleanup. Because each community is unique, the CIC must determine (e.g., through community interviews) the best method of informing the community of the availability of technical assistance and the difference between TAGs, TOSC, and TAPP.

Information Repository

An information repository is a record storage that contains all correspondence, reports, and documents pertaining to the site, as well as general cleanup program information. At an information repository, people can research the site and the law pertaining to the cleanup, learn how to participate in the cleanup process, and copy any information found at the repository. The NCP requires the lead agency to "[e]stablish at least one local information repository at or near the location of the response action."[12] The availability of the administrative record must be announced through the publication of a Public Notice in a local newspaper of general circulation.

The Administrative Record

The administrative record is a paper trail for the public to follow. The Administrative Record is an official collection of documents (e.g., site eligibility determination, an analysis of reasonable alternatives, site assessment review, the cleanup plan, and

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community relations activities, to the extent practical, prior to commencing field work for the remedial investigation ... ."

[12] 40 CFR § 300.415(n)(3)(iii) and 40 CFR § 300.430(c)(2)(iii)

responses to public comments) explaining the actions taking place at a site. The Administrative Record must be made available at a location convenient to the public – usually the Information Repository. The administrative record must include an analysis of cleanup alternatives, which will include information about the site and contamination issues (e.g., exposure pathways and identification of contaminant sources); cleanup standards; applicable laws; alternatives considered; documentation of the community's future land use visions and consensus (if a consensus was reached), and the proposed cleanup that will support the agreed-upon redevelopment.

Public Notice and Comment

There are many points during the remedial selection process where the Administrative Procedures Act[13] requires governmental cleanup agencies to give the public notice of an action that the cleanup agency plans to take so that the public may comment on and change or even stop the agency's planned action. To see the many notice and comment opportunities during the remedial selection process, refer again to the diagram at: http://www.epa.gov/superfund/action/community/pipeline.pdf.

There are several important opportunities for the community to express its desires for future land use and the remedy that it wants selected (i.e., whether an engineering control, institutional control and environmental covenant will be used as the remedy or whether the site will be cleaned up to unrestricted or residential levels). These important notice and comment opportunities are 1) after EPA completes the remedial investigation and feasibility study and EPA's proposed cleanup plan (i.e., the cleanup alternatives considered and the proposed selection of a cleanup alternative plan); 2) the proposed consent decree on how an enforcement-driven cleanup is to proceed if it is being conducted pursuant to a court-ordered settlement; 3) the Revised Proposed Plan and Discussion of Significant Changes (after EPA has responded to its first round of comments on the proposed plan); 4) Pre-cleanup decision[14] significant changes, and 5) Post-cleanup decision[15] significant changes. It is important to note that the community may demand public meetings after several of these notice and comment opportunities if the community is dissatisfied with EPA's actions or response to the public's comments. If the public remains dissatisfied with EPA's decisions or response to comments, the public may take legal action against EPA.

Encouraged Community Involvement Activities from EPA Guidance

The key CI tools that EPA guidance calls for CICs to employ are: Community Visioning, Focus Groups, Redevelopment Planning, and the Community Involvement Impact Analysis.

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[13] 5 U.S.C. § 553.

[14] The correct technical name of this is "pre-Record of Decision" (or Pre-ROD).

[15] The correct technical name of this is "post-Record of Decision" (or Post-ROD).

Community Visioning

This tool is a process that a good CIC will use to enable citizens to realize their vision for the future of the site. The visioning process should be implemented before decisions are made. A visioning process can last one day, several days, or months depending on the complexity of issues facing the community. Visioning is best used when addressing large areas of land, such as federal facilities, watersheds, and mining sites. It is vital to help communities think of long-term strategies for future land use. EPA should begin the process in the earliest stages, most likely as a set of questions during the Community Interviews.

Through early involvement of those who must implement the vision, a CIC can motivate citizens to work actively towards the future they desire. The overall goal of the visioning process is to empower communities and provide a method of comprehensive goal-setting. A good CIC will conduct surveys and focus groups during the visioning process to gather feedback from community members and refine the process.

Redevelopment Planning

CICs are encouraged to work with a variety of community members, local planners and elected officials to identify and integrate long-term community needs into the reuse plans for the site. By considering a community's vision of reasonably anticipated future land uses for Superfund sites, EPA can tailor cleanup options to accommodate community goals. Redevelopment planning should begin when interviews with key community stakeholders occur, including interested citizens, community advocates, elected and appointed city officials, city planners, and city council members, and representatives from local economic or community development corporations and zoning boards.

One way a CIC may encourage public involvement during the remedy selection process is to develop partnerships for reuse by supporting the formation of Community Advisory Groups (CAGs). CAGs are committees made up of citizens with diverse community interests that provide a public forum for discussing community concerns about sites - including how the community wants to reuse a site.

Community Involvement Impact Analysis

A CIC uses a Community Involvement Impact Analysis to determine whether community involvement efforts at cleanup sites are working and, if not, why not. The analysis consists of written questionnaires and focus groups conducted in communities with contaminated sites to understand how residents feel about community involvement efforts in their area. Although a CI impact analysis is not required by the NCP, CICs typically use the impact analysis project when they have a site community that is highly contentious or when they believe that the CI tools they have tried to use are not working with a community. Based on the Impact Analysis, focus groups may be appropriate if the questionnaire demonstrates a strong sense of conflict in the community. A CIC will use a

focus group when the CIC senses that he or she needs to delve more deeply into the issues revealed by the written questionnaire.

Focus Groups

Focus groups are facilitated discussions about the site and the community by small groups of stakeholders. A focus group usually consists of three separate group sessions of seven to 12 individuals. Each group is somewhat homogenous (e.g., one group may contain residents living near the site with children at home). Although appearing informal, focus group discussions are structured around a series of questions carefully designed to help people talk freely. Focus groups are useful to understand stakeholders' opinions on site activities, why stakeholders feel as they do, and stakeholders' needs and expectations. By holding separate focus group sessions with different groups, the CIC can find out exactly how each group feels, and why. This helps the CIC address group concerns and find common ground to unify the community.

Conclusion

Critics of UECA are aiming their guns at the wrong target. They are rightly concerned that risk-based cleanups may be overused and that community involvement during the remedial selection process should be improved and made mandatory in many more state and local remedial programs to ensure better environmental protection and address environmental justice concerns. But it is wrong to take aim at UECA; because so many risk-based cleanup actions have already been completed, national adoption of UECA is critical to the protection of public health and the environment at hundreds upon hundreds of cleaned up and redeveloped sites.

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