

Mississippi “One Call” and the Mississippi Uniform Environmental Covenants Act

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In July 2008, Mississippi became the 22nd state to adopt the Uniform Environmental Covenants Act (UECA). While the Mississippi Uniform Environmental Covenants Act (MUECA)¹ for the most part models UECA, it does have some significant changes that warrant discussion. MUECA was the first step toward unifying the various remedial programs within the Mississippi Department of Environmental Quality (MDEQ) into a “One Cleanup Program.” Like many states, environmental statutes and accompanying regulations have over time led to the creation of a multitude of remedial approaches. With the passage of the federal Brownfield Amendments, MDEQ saw a unique opportunity to establish and enhance the state response program by evaluating how sites were cleaned up under the jurisdiction of its uncontrolled sites, brownfields, and voluntary evaluation programs, and the underground storage tanks (UST) program.²

At that time, MDEQ’s approach to risk-based cleanups was seeing an increasing number of sites relying upon land use restrictions and engineering controls, particularly for the uncontrolled sites, brownfields, and voluntary evaluation programs. The UST Program, on the other hand, was managing cleanups in a slightly different way, focusing primarily upon free product removal and cleaning up the site to standards developed under standardized assumptions. These include (1) the likely intended future use

Editor’s note: The terminology for these restrictions varies from program to program and jurisdiction to jurisdiction. The most commonly used terminology includes “institutional controls,” “land use controls,” “environmental covenants,” and “activity and use limitations.” The program discussed in this chapter uses the terminology “institutional controls,” “land use restrictions,” “land use controls,” and “environmental covenants.” It is important to understand how this terminology may differ from that used in other programs or jurisdictions. See generally chapter 1.

of the UST site will not change and continue to be that of a gasoline station; (2) the constituents of concern are limited to benzene, toluene, ethylbenzene, xylene, and polycyclic aromatic hydrocarbons (PAHs); and (3) free phase hydrocarbons are considered present when one-eighth of an inch (1/8) is measured in a well. While both approaches work well for the sites that are managed in the individual programs, the differences are particularly evident in certain circumstances. For example, the approach to cleaning up petroleum contamination from a leaking underground storage tank (UST) is handled differently from that of cleaning up the same contaminants of concern from an aboveground storage tank (AST).³ This may result in the UST site obtaining a "No Further Action" (NFA) letter while the AST site may, with the same contaminants, be subject to land use controls coupled with long-term monitoring (from another MDEQ program), with both being equally protective. The MDEQ has been cognizant of these situations and has considered each site's conditions and circumstances when approving a corrective action plan.

The use of institutional controls as a form of remediation of contaminated sites is not new to Mississippi. For instance, the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act⁴ (hereinafter "Brownfields Law") authorizes "land use restrictions" as a form of remediation. For a brownfield site, a "Brownfield Agreement Order"⁵ and a "Notice of Brownfield Agreement Site"⁶ both include land use restrictions that are also posted on the deed. With the passage of MUECA, the Environmental Covenant also serves as the Notice of Brownfield Agreement Site. Similarly, for many years, owners of Uncontrolled Sites have negotiated "Restrictive Use Agreed Orders" with the MDEQ that include the placement, among other requirements, of certain land use and activity restrictions on the property. Additionally, the MDEQ UST Program's table of standards is based on those default assumptions discussed above. While all these programs have included institutional controls in some form in their decision-making, there has not been a standard methodology for their implementation.

In 2005, MDEQ began the process of evaluating strategies for creating a "One Cleanup Program." MDEQ planned to have several studies developed by a contractor and evaluated similar approaches in other states. Feasibility studies were developed for "Institutional Controls" and the "Mississippi One-Call System." The Institutional Control Feasibility Study was designed to research the issues necessary to evaluate the options available to the Mississippi Commission on Environmental Quality (Commission) in developing a consistent approach to implementing institutional controls for all MDEQ remedial programs. The study examined the implementation of institutional controls through environmental covenants. Additionally, the study assessed the development of a comprehensive groundwater use statute and how such a statute could be used as a form of an institutional control.

It became evident early in the process that activity and use limitations and controls would have to be an integral part of the unified approach. It was also evident that the continued move away from default "standards"

toward site-specific risk-based cleanup levels would put greater emphasis on ensuring that the activity and use limitations and controls remain in place over time. At the time, there was a great deal of interest in trying to utilize existing systems. MDEQ considered whether utilizing the Mississippi One-Call System⁷ (MOCS) was an effective approach since there was a common interest in protecting excavators and property from injury or damage. It was also a very practical, well-publicized system that seemed to serve the public well. At the same time, MDEQ considered adopting UECA so that it would give MDEQ greater assurance that activity and use limitations would "run with the land." MDEQ also wanted to consider ways of reducing costs inherent in any program that relies on long-term stewardship of sites. MOCS and UECA seemed to do so. For instance, MDEQ would avoid the steep cost of developing a program and related computer applications by piggybacking on the existing MOCS. MDEQ's existing approach to implementing activity and use limitations involved continuous renegotiations each time there was a property transfer involving a site with these controls. Since UECA had a provision for all activity and use limitations to "run with the land," MDEQ anticipated a reduction of existing internal costs. This chapter will explore the results of MDEQ's efforts to date and the material differences between MUECA and UECA and how the MDEQ has addressed implementing MUECA within the Institutional Controls activity.

Evaluating Mississippi One-Call

At many environmental cleanup sites, including those under the Commission's jurisdiction, residual contamination remains during cleanups or even after cleanup has been completed. State one-call systems are intended to provide protection against similar risks. State one-call systems help site excavators identify the location of buried utility lines by operating as a liaison between the excavator and the owners of the underground utilities. This one-call infrastructure was reviewed to determine if it could be effective in notifying these same site excavators of underground environmental contamination. Similar to the manner in which utility companies prevent damage to their underground facilities, the study analyzed whether MDEQ could enter cleanup sites that contain residual contamination or underground cleanup-related apparatus into the MOCS. Under such a system, MDEQ hoped to prevent individuals involved in excavating, grading, well drilling and other site activities from contacting contaminated soil, groundwater, or cleanup-related infrastructure. Without the entry of such sites into state one-call systems, excavators might unknowingly contact or otherwise disturb residually contaminated media or environmental cleanup equipment.

One of the key features of the effort was the development of a conceptual model for incorporating institutional controls (IC) into MOCS. In early 2005, MDEQ developed a Feasibility Study Report and Cost Analysis for incorporating and managing ICs within MOCS. The study was developed so that MDEQ and its stakeholders could evaluate the benefits and drawback associated with

using MOCS. The original intention for the MOCS portion of the study was to create or modify existing policy, law, or regulations that would allow for MDEQ sites with ICs to be incorporated into MOCS. The study considered

- information gained from experience with real estate law;
- information gained from interviewing MOCS representatives on the requirements for program participation;
- the existing Mississippi Code Ann., § 77-13-1 *et seq.*, Regulation of Excavations near Underground Utility Facilities, for the legal mechanisms of participation in and use of MOCS;
- the legal changes and/or additions proposed by other states such as Pennsylvania and California that were seeking to accomplish similar goals of incorporating ICs into their One-Call systems; and
- the comments and suggestions from the MDEQ Groundwater Assessment and Remediation Division (GARD) Senior Staff.

The One-Call System Cost Analysis included projected fixed and variable future costs associated with incorporating sites with ICs into MOCS by using

- information gained from the development of the conceptual model;
- information gained from interviewing MOCS representatives on the fee structure for program participation;
- information gained from interviewing MDEQ GARD Senior Staff in regard to future staffing needs to meet the projected workloads associated with entering sites with ICs into the MOCS database, and responding to MOCS location requests in which proposed excavation activities were expected to impact sites with ICs;
- information gained from interviewing the MDEQ Complaint Tracking System (CTS) manager in regard to future staffing needs to meet the projected workloads associated with routing MOCS location requests for sites with ICs to the appropriate regional offices;
- information gained from interviewing MDEQ field office managers in regard to their future staffing needs to meet the projected workloads associated with responding to MOCS location requests for sites with ICs; and
- the experience of team members in the principles and practice of cost analysis to present projected fixed and variable future costs information in a clear and concise manner.

MDEQ first considered becoming a member of MOCS by evaluating the current MOCS law and regulations. Membership in MOCS is currently open to owners/operators of underground facilities. In order to become a member firm, the owner/operator would have to complete and submit the membership application.

A membership in MOCS requires the following:

1. to not share, sell or disseminate the One-Call ticket information with any other entity in any form or fashion;

2. to abide by and comply with such rules and regulations as the Board of Directors may adopt, from time to time, for utilization of the statewide Notification Center by members;
3. to abide by and comply with the By-Laws of the Corporation; and
4. to pay promptly the fees prescribed by the MOCS Board of Directors.

The first obstacle that needed to be addressed was eligibility. Under the existing definitions of "owners," "operators," and "underground facilities," MDEQ does not qualify as a potential MOCS member firm. The staff at Mississippi One-Call System, Inc. indicated that MDEQ membership would require MOCS board approval. Early in the process, and through discussions with the MOCS program manager and members of MDEQ GARD staff, the board decided that MOCS and MDEQ could enter into a Memorandum of Agreement (MOA) to define "operator" and "underground facility" in a way that would qualify MDEQ as a member firm. Once a MOA was agreed to and MOCS Board approval was granted, MDEQ would qualify as a member firm. As negotiations continued on the language of the MOA, it became clear to MDEQ that there appeared to be problems associated with this strategy, namely regarding liability. These challenges are further discussed later in this chapter. The requirements under MOCS for utilities and operators that needed further evaluation were as follows:

§ 77-13-13. Advance notice of relieving excavator of certain liabilities.

Provided that an excavator gives notice of an excavation in accordance with Section 77-13-5, and performs the excavation in a careful and prudent manner, he/she is relieved of all liability to a utility should the advance notice be ignored or the location information provided be inaccurate.

§ 77-13-17(1). Operator responsibilities.

Any operator who fails to follow, abide by or comply with this chapter shall be responsible for the cost or expense the excavator shall incur as a direct result of the failure of the operator to follow, abide by, or comply with the provisions of this chapter.

Another obstacle involved the logistics of managing location requests within MDEQ for the entire State. MDEQ has an effective CTS where inspectors from the regional offices are sent out to investigate environmental complaints. The MDEQ's Office of Pollution Control currently divides the state into three regions and utilizes three field offices to manage its activities. In order to avoid unnecessary restructuring of the jurisdictions of existing MDEQ field offices, the MDEQ One-Call Response Regions would utilize the same regional boundaries and field offices. Each of the three MDEQ regional offices would appoint two staff members to serve as the primary and secondary Regional One-Call Representatives (ROCR). The ROCR's major responsibilities would be (1) to perform field visits to determine if proposed excavations were in close proximity to sites with ICs, (2) to mark

the boundaries of a site's ICs, and (3) to monitor excavation activities to ensure compliance with ICs. Based on conversations with regional office supervisors, it appeared the regional offices were adequately staffed and equipped to meet the demands of performing One-Call Responses. However, as the number of sites with ICs increases over time, the work load would also increase. Regional office supervisors estimated that they would need to hire one additional staff member each after the fourth year of implementation to meet MOCS response demands. This significant increase in cost results in a major obstacle that is discussed further in this chapter. The Feasibility Study also outlined the steps in the process of the system.⁸

The biggest obstacle to implementing the system centered on cost. While the cost of membership in MOCS is manageable, the infrastructure was significant, particularly after year four of implementation. The cost of membership in MOCS is based on the quantity of location requests received by a member firm. Member firms are charged per location message received, with a minimum fee of \$200.00 per year. The minimum fee is prorated for those who join later during the calendar year. In 2004, the cost per location message was \$1.41. As discussed earlier, the current staff that manages complaints at MDEQ can handle the work associated with the location requests; however, as the program grows, so does the cost. The table on the opposite page illustrates the costs for each year after initial implementation.

In the end, there were still far too many uncertainties associated with utilizing the MOCS as an additional layer of institutional control. First, and most obvious, was the enormous future cost of implementing the system. Five years out, the system could cost MDEQ hundreds of thousands of dollars, and the feasibility study only considered the first five years. Since the MOCS had been contemplated as an enhancement to MDEQ's existing approach to institutional controls, it did not make sense to make it one of the major costs, particularly with no specific funding source. Also, by reaching a MOA with MOCS where MDEQ is defined as an "operator" and "utility," it was determined that it was not in the best interest of the state or the MDEQ to accept the liability provisions of the One-Call Law found in Miss. Code Ann. § 77-13-17.

The study also analyzed groundwater usage and the practicality of creating a classification system. After reviewing other state programs on groundwater classification, the implementation of a program in Mississippi focused on water well permitting. Currently, only water wells with a diameter of greater than six (6) inches require a permit. This exemption allows hundreds of residential water wells to be installed with only limited regulatory control. A practical way for MDEQ to properly regulate ICs for groundwater would be a MDEQ regulation requiring all groundwater wells to be permitted. This would likely create a need to increase MDEQ staffing levels and allocate additional funds that was determined not to be viable in the current economic environment. The Study also reviewed a groundwater use notification process but it also required funding and staffing beyond current levels.

Summary of Projected Costs for IC Incorporation into MOCS

Year	Projected Future Cost to MDEQ
1	\$7,520.00
2	\$14,904.60
3	\$94,483.25
4	\$103,152.54
5	\$364,282.36
5-Year Total	\$584,342.75

MDEQ recognizes that groundwater regulations are an important part of ICs and has continued to study this option.

Finally, there was still a great deal of uncertainty on issues such as vapor intrusion, private property rights, bankrupt/abandoned facilities, and life cycle cost. MDEQ continues to evaluate alternatives, including a provision where the entity wanting to utilize institutional controls, in lieu of a complete cleanup to unrestricted use, be required to join the MOCS. Until these issues are better understood, MDEQ has been focusing its efforts on evaluating the best approach to long-term monitoring and maintenance of activity and use limitations associated with Environmental Covenants and will consider MOCS and groundwater classifications at some time in the future.

MUECA

MUECA, Miss. Code Ann. § 89-23-1 *et seq.*, provides significant added protections to environmental covenants that were not available in prior Mississippi law. It is intended to apply to covenants, easements, and profits in land. Although the Mississippi Legislature did not pass the MEUCA during its first opportunity in 2007, the additional time allowed MDEQ to fully explore and develop how it would implement the program. During this time, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) developed an information paper for state program managers that discussed a number of matters related to the potential use of UECA.⁹ The purpose of the paper was to share with state managers a number of issues that have arisen as states considered and adopted such statutes, including the UECA model. The white paper was particularly helpful to MDEQ in its evaluation of UECA. What has resulted from this development effort is a standardized template for both the covenants and the agreed orders. Although MUECA is essentially the same as UECA, there are a few significant revisions.

MUECA is divided into 14 sections. Section 1 simply states, "This chapter may be cited as the Mississippi Uniform Environmental Covenants Act." Section 3 of MUECA contains definitions. MUECA only applies to an "environmental covenant" that is defined as "a servitude arising under an

MDEQ oversight costs. MDEQ charges parties at a per hour rate for MDEQ involvement over time. Funding challenges still remain for sites that are not a part of these two programs or for sites that are bankrupt or abandoned. As of 2009, of all the identified properties with residual contamination issues, approximately 20 percent are either under a bankruptcy estate, abandoned by the owner or are sites that had early versions of ICs placed upon the properties. Of these earlier version IC properties, many will be required to revise the terms and conditions of the controls to include an environmental covenant when property ownership changes or site conditions warrant. Section 7 also provides in subsection (d) that the agency may refuse to sign the covenant for any reason, but in so doing the agency must set forth its reason for not signing in an Order; any person or interested party may appeal this Order to Chancery Court as provided in Miss. Code Ann. § 49-17-41.

Section 9 provides that an environmental covenant that complies with MUECA runs with the land. Section 9(a)(5) has been modified from UECA. MUECA allows for an environmental covenant to be modified or terminated if all parties that originally signed the covenant “approve by consent” the modification or termination. However, in the event that one of the original parties is unwilling or unable (e.g., cannot find the party), the proceeding moves directly to Chancery Court. Under MUECA, future modifications or terminations are subject to administrative procedures in Miss. Code Ann. § 49-17-41 like any other action of the Commission. This means that, unlike the original UECA, the Chancery Court will be hearing the matter *de novo* and may consider issues already decided by the Commission. Although this eliminates a formal deference to the Commission by the courts, the reality of these actions will likely find the courts giving significant consideration to the Commission’s position on the matter. In other areas of Mississippi environmental law, there are few, if any, situations where the Commission’s decisions are without deference. This could be a precedent for future legislation and regulations that would likely weaken the Commission’s authority.

Section 9(b) clarifies that common law doctrines may not be used to limit the enforceability of an environmental covenant. To that end, an environmental covenant that is otherwise effective is valid and enforceable even if (1) it is not appurtenant to real property; (2) it is 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. Section 9 also makes clear that MUECA does not invalidate any interest, whether or not designated as an environmental covenant, which is otherwise enforceable under Mississippi law.

MUECA also differs slightly from UECA regarding the execution of the covenant. MUECA includes “Commission” as a party that must sign every

environmental covenant. MUECA doesn't specifically spell out who the "agency" may be. It is written so that any agency (U.S. EPA, MDEQ, Mississippi Oil and Gas Board, etc.) can use MUECA for placing environmental covenants on contaminated properties. However, in Mississippi, the Commission is the primary State Board responsible for environmental protection; therefore, the Commission is a party to all environmental covenants, ensuring that cleanups are done in a manner consistent with state requirements.

Section 11 addresses other land use laws. MUECA does not authorize a use of real property that is prohibited by zoning laws. An environmental covenant may prohibit or restrict uses of the property that are authorized by zoning laws.

Section 13 states that a copy of the environmental covenant will be provided to the following parties: (1) each person that signed the covenant; (2) each person holding an interest in the real property subject to the covenant; (3) each person in possession of the real property subject to the covenant; (4) each municipality in which real property subject to the covenant is located; and (5) any other person the agency requires. The agency determines which party shall provide the notice and the manner of notice. Failure to provide this notice shall not make the covenant invalid but is enforceable by the Commission, that may take enforcement action against any person who fails to provide a copy of the covenant as required by the Commission.

Section 15 requires that the environmental covenant and any amendment or termination be recorded in every county in which any portion of the real property subject to the covenant is located. Except as provided in section 17(b), the environmental covenant is subject to the laws governing recording and priority of interests in real property.

Section 17 states that an environmental covenant is perpetual in term unless limited by its own terms or terminated by the occurrence of a specific event or by consent as provided in section 19. If the agency that signed the environmental covenant determines that the intended benefits of the covenant can no longer be realized, a court may terminate the covenant or reduce its burden under the doctrine of changed circumstances. A termination or modification must not adversely affect human health or the environment. Section 17 also provides that a tax sale, adverse possession, prescription, abandonment, waiver, lack of enforcement or acquiescence or similar doctrine cannot extinguish an environmental covenant.

Section 19 addresses amending and terminating the environmental covenant and a change of the holder. An amendment or termination must be signed by the agency, the current fee simple owner of the real property, each person that originally signed the covenant, and the holder. An assignment of the covenant to a new holder is an amendment. The holder cannot assign its interest without the consent of the other parties. The other parties who must agree to an amendment or termination can agree to replace the holder. A court may fill a vacancy of a holder. In the event that one of the original parties is unwilling or unable (e.g., cannot find the party) to sign the amendment, a court may find the person no longer exists or cannot be located.

method to ensure that the specific requirements and obligations within the covenant are undertaken. These affirmative actions often include ongoing groundwater monitoring and specific corrective action such as source removal.

Remaining Challenges

Although the passage of MEUCA provides another tool for MDEQ to encourage corrective action and property reuse, there are still remaining issues that go beyond what MUECA can do. These issues will likely be addressed through future state legislation, promulgation of new MDEQ regulations, or the courts. This last option is not preferred for two interrelated reasons. The first is the lack of any real substantive Mississippi court decisions that address environmental laws. The second reason is that most Chancery Courts do not hear a sufficient number of environmental cases. Therefore, each one is often a case of first impression. This may result in limited judicial review, which may then force the challenging party to take a matter to the Mississippi Supreme Court.

The most difficult issue that arises when developing ICs for a contaminated property involves off-site migration of contamination. Because the implementation of an environmental covenant is a voluntary act, any off-site environmental problems cannot usually be resolved solely with a covenant. This forces the party to either clean up the off-site contamination to unrestricted agency standards or to pursue an agreement with the impacted adjacent property owner. The likelihood of obtaining an agreement with an adjacent property owner is dependent upon a wide variety of factors and is, to some degree, unpredictable. Past experience has shown that each site has its own issues that will influence the willingness of an adjacent property owner to address the environmental issues practically. Some are satisfied with a reasonable payment while others look to maximize the opportunity. The party conducting the cleanup must weigh the costs of remediation of adjacent properties against the cost of obtaining an agreement. Another common obstacle involves orphan sites or sites that are *de facto* orphaned. With limited funds and no formal method to fund these corrective actions, these sites remain a challenge in Mississippi. Other issues, such as groundwater classification as a correction action tool, are being considered for future IC regulatory actions. Finally, the disparity between UST site cleanup limits and other sites with common contaminants also remains a major obstacle to effective corrective action. The MDEQ recognizes the issue and usually attempts to consider each site with these types of problems individually; however, even this strategy has its own set of challenges and limitations.

Conclusion

MUECA is one step further in improving Mississippi's efforts to reasonably address its contaminated sites. Along with other institutional controls, the

Commission, MDEQ, and the regulated community have an additional tool to solve the difficult questions arising from corrective action demands. However, there remain many unanswered questions, many site-specific challenges, and a lot of unfinished work for MDEQ to reach the goal of "One Cleanup Program." Mississippi is blessed with significant natural resources, wide-open spaces, and an underwhelming number of contaminated sites relative to most parts of the country. Regardless of the number of sites, it has and will need practical solutions to protect human health and the environment while encouraging redevelopment and reuse of properties. Although the MDEQ was unable to implement Mississippi One-Call, the lessons learned in the process were invaluable, and now that its toolbox is outfitted with MUECA, MDEQ is better prepared to face new IC challenges that lay ahead.

Notes

1. Miss. CODE ANN. §§ 89-23-1 *et seq.* (rev. 2008).
2. "Uncontrolled site" is an MDEQ term for a site, facility, plant, or location where hazardous or toxic wastes have been released into the environment and there is no federal environmental program that can handle the problem. The voluntary evaluation program, Miss. CODE ANN. 17-17-54, allows accepted parties the opportunity to participate in a program that will expedite the evaluation of site information.
3. AST sites are considered an uncontrolled site.
4. Miss. CODE ANN. §§ 49-35-1 *et seq.*
5. Miss. CODE ANN. § 49-35-5.
6. Miss. CODE ANN. § 49-35-17.
7. Miss. CODE ANN. §§ 77-13-1 *et seq.*
8. See Miss. DEP'T OF ENVTL. QUALITY, MISSISSIPPI ONE-CALL SYSTEM FEASIBILITY STUDY, fig. 1, at 14 (Sept. 1, 2005), http://www.epa.gov/superfund/policy/ic/pdfs/hess_study.pdf.
9. Ass'n of State & Territorial Solid Waste Mgmt. Officials, White Paper on the Uniform Environmental Covenants Act (Apr. 2006), http://www.astswmo.org/Files/Policies_and_Publications/Federal_Facilities/UECA-Paper.pdf.
10. State Oil and Gas Board, Miss. CODE ANN. §§ 53-1-1 *et seq.*
11. The use of the term "fresh waters" as opposed to just "waters" is reflective of the oil and gas industry practice of injecting certain produced fluids back into deep saline aquifers.