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# Environmental Covenants:

A Modern Tool for Risk-Based Corrective Action  
Based on an Old English Property Law Concept



SpencerFane

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# Goals of this presentation

- Review background of Environmental Covenants
- Learn how Environmental Covenants can be used effectively in modern environmental cleanup and risk-based corrective action decisions
- Discuss requirements of Environmental Covenants, especially under Missouri law
- Understand process for effective Environmental Covenants to facilitate proper planning

# Introduction to Environmental Covenants

Early uses of restrictive covenants at environmental sites

Early example:

1985 industrial property transaction in Missouri; industrial contamination

Factory closing; buyer sought to acquire and reuse for other manufacturing purposes

Nature of Superfund liability: Property seller, property buyer each potentially liable

What each participant wanted from transaction

Covenants became key component of the solution



# Early days of Restrictive Covenants

- Environmental covenants as we currently know them did not exist; Restrictive covenants and other institutional controls were the tools of choice
- Restrictive covenants: Based on English real property law
  - Restrictions on use
  - Restrictions on alienation (sale)
  - “Bundle of sticks”
  - “Run with the land”
- Restrictive covenants in American property law
  - Example: Houston land use restrictions
  - Could be disfavored by courts



# Early uses of restrictive covenants at environmental sites

- Limit to nonresidential uses
- Bar use for schools, day care
- Limit groundwater uses
- Digging restrictions
- Rights of access: Monitoring, remediation, noninterference
- More extensive restrictions, as well
- Governed by state law
- Example: Missouri Registry of Abandoned or Uncontrolled Hazardous Waste Sites
  - “Deed Notice”
- Environmental Long-Term Stewardship



# Uniform Environmental Covenants Act

- Proposed by National Conference on Commissioners on Uniform State Laws
- Available for adoption by each state, subject to each state's needs and terms
  - More than 20 states have adopted some version
- Designed to standardize provisions for Environmental Covenants, obtain state legislatures' approvals of Environmental Covenants, overcome state courts' reluctance to not enforce restrictive covenants in certain situations

# Missouri Environmental Covenants

- Statute: 260.1000 to 260.1039, RSMo.
- 10 CSR 25-18.010(18)
- Role of MDNR
- Templates
- Types of restrictions
  - Groundwater use
  - Land use
  - Engineering controls
    - Soils management plan
    - Surface barriers
    - Limits on excavation
    - Site management plan



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# Missouri Environmental Covenant Requirements

- Grantor
- Grantee/Holder
- Department: MDNR, EPA
- Use controls
- Engineering controls



# Practical aspects

- Risk-based corrective action
- Regulatory approvals
- Incorporate into remedy
  - EPA guidance
- Who will enforce
- A real property ownership interest; the need to acquire it
- Focus early on Environmental Covenant
- Continuing obligations
  - Monitoring
- Clearly defined obligations vs. requirements yet to be specified
  - Later-developed documents such as excavation or soils management plans
  - Role of agencies



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# Impact on future transactions

- Binding on future owners, lenders
  - If recorded
- Will appear in title reports
- May require negotiations at time of sale



# Types of environmental covenants, restrictions

- Limit surface uses
- Limit groundwater use
- Maintain surface parking, “cap”
- Limits on excavation
- Soils management; Site management
- Informational requirements

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# Advantages

- More durable than local zoning restrictions
- Can be tailored to specific property needs
- More acceptable in property transactions than Orders on Consent



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# Questions?



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