

2016 ADEM BROWNFIELDS CONFERENCE

**THE UNIFORM ENVIRONMENTAL COVENANTS ACT—
DOES ONE SIZE FITS ALL?**

**TAILORING AN ENVIRONMENTAL COVENANT THAT
ACTUALLY FITS YOUR SITE.**

**-D. Bart Turner, Partner
Kazmarek Mowrey Cloud Lasetter LLP**



Tailoring an Environmental Covenant to fit your Site

- ❑ What is an Environmental Covenant and why do I need one ?
- ❑ Is there a form I can follow ?
- ❑ What information should be included ?
- ❑ Timing ?
- ❑ Does perpetuity really mean forever ?
- ❑ Mechanics of finalizing the covenant
- ❑ Now that it is recorded, is there anything left for me to do ?

Why do I need an Environmental Covenant ?

- Site is enrolled in the Voluntary Cleanup Program and undergoing a remedial action designed for the Site.
- The selected remedial action will achieve cleanup goals less stringent than unrestricted residential use.
- The remedy utilizes institutional and/or engineering controls as a part of the corrective action;
- To ensure that the remedy selected is protective of human health and the environment in *perpetuity*;
- You can't receive the Letter of Concurrence without it

The Uniform Environmental Covenants Act

There is a convenient form to follow, however...

- The Template is just a starting point



ADEM Env
Covenant Template

Why Bother Tailoring ???

- The ADEM Template is a very good starting point and includes all of the elements required by the statute.
- Sufficiency and utility of the Environmental Covenant is only as good as the detailed information included.
- Site-specific information from the environmental consultant, lawyer, and related legal description.
- If it is confusing today, what about 10 years from now ?

Environmental Covenants--- Key Components

- ✓ Grantor (Owner) and Property Description
 - Legal Survey Deed Description
- ✓ Description of the Hazardous Waste Identified through the assessment activities and media (e.g., soil and/or groundwater)
- ✓ Description of Remedial Action and all of the assessment activities, reports, and ADEM approvals through the process.
- ✓ “Identified Contaminants”--- those that remain at the Site at safe and protective levels for human health and the environment.
- ✓ Coordinate with environmental consultant and/or environmental lawyer for these key components.

To encumber or not encumber...

That is the question

Deed Restrictions---What are they and why use them ?

➤ Institutional and/or Engineering Controls

- Examples of Engineering Controls: Cap and Cover; vapor recovery system; bio-swales, etc.
- Examples of Institutional Controls: Restrictions on Use (non-Residential); Groundwater Use Restrictions; Prohibitions on Excavation (construction worker protections); Restricting Access.

➤ Considerations:

- Ensure the remedies in the RAP comport with the use restrictions
- Whether the controls address the attendant risk ?
- Current and Future Use of the Site
- Long-term management of these restrictions

Perpetuity is forever... Until it is not

- Fully appreciate the significance of the Environmental Covenant and the related restrictions.
 - Groundwater Use Limitations--- now in need water.
 - Expansion and Development Considerations
 - Possibly include a Soil Management Plan
 - Gentrification of a Neighborhood (Commercial v. Industrial)
 - Subdividing a parcel encumbered by a covenant
 - Accuracy of the Legal Description

Finalizing the Covenant--- What's left to do ?

- Mechanics of Finalizing the Covenant:
 - Coordinate with ADEM and obtain approval before executing;
 - Execution, Recording with Probate Court and Filing with ADEM
 - Timing
- Anything left to do ?
 - Compliance Certifications
 - Notifications--- change in use or work affecting impacted areas
 - Potential Transaction and Notice of Change of Owner



"And, if you don't have an attorney, we have millions of them."

Questions? Ask now or contact us by email
bturner@kmcllaw.com