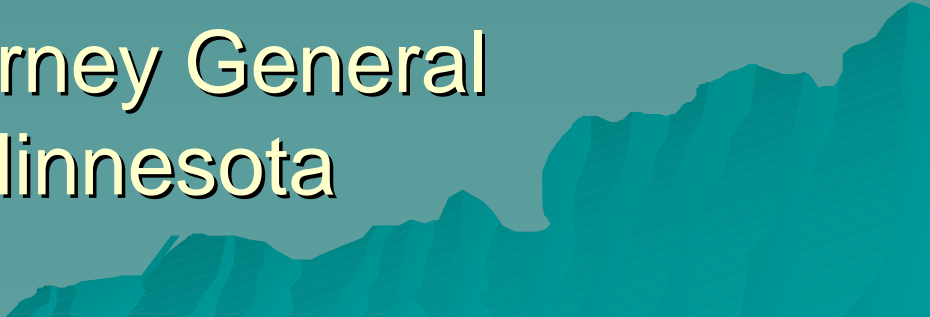


Institutional Controls Roundtable:
State Solutions to IC Issues
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Restrictive Covenants and Other
Forms Used By Minnesota
Pollution Control Agency

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Need for Institutional Controls in Minnesota's Cleanup Programs

- Assure long-term protectiveness of Superfund and Brownfield cleanups where remedy selection is based on exposure risk and future property use
- Superfund Consent Order provisions for future site ownership were not adequate
- Delisting State Superfund Sites with containment remedy or other residual contamination
- Assuring MPCA authority to take cleanup actions at closed municipal landfills not owned by the State

Development of Covenant and Easement Forms by MPCA

- First restrictive covenant for State Superfund Site recorded in 1994 to allow delisting of site
- Model easements and restrictive covenants developed for Landfill Cleanup Program—first controls recorded in 1995
- Model restrictive covenant form developed for Superfund and VIC Programs in 1997, and updated periodically

Legal Authorities for Minnesota Institutional Controls

- State Superfund Law--Minnesota Environmental Response and Liability Act of 1983 (MERLA)—key amendments affecting institutional controls
 - 1988—allowed State to acquire interests in real property, including easements, for cleanup purposes
 - 1992—“Land Recycling Act”—encouraged voluntary cleanup for reuse and redevelopment
 - 1997--defined “institutional controls;” authorized State to acquire restrictive covenants
 - 1998--required State to consider future property use in setting cleanup standards

Covenants, Easements and Affidavits

- Covenants are primary legal instrument to restrict the future use of property and assure protectiveness of “risk-based” cleanup
- Easements are most important when State needs long-term access to install and operate cleanup and monitoring equipment on property
- Affidavits—provide notice of residual contamination and warning about future activities, but not legally enforceable

Legal Character of MPCA Restrictive Covenant

- Covenant is an interest in real property
- MPCA is the holder or grantee of the interest—MPCA “owns” the interest
- Owner of property is grantor
- Grant of covenant is “voluntary”
- Covenant is “non-possessory” interest
- Validity of interest and perpetual duration provided by reference to Minnesota Conservation Easement Law

Provisions of MPCA Model Restrictive Covenant

- “Whereas” clauses—background of the covenant
 - Name of owner
 - General location of property
 - Legal status of property as Superfund Site, VIC/Brownfield Site, or Closed Landfill
 - enforcement actions taken by MPCA regarding site
 - MPCA-approved cleanup plan for site
 - Acknowledge owner’s agreement to covenant

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- Declaration of restrictions: introductory language specifying that covenant “runs with the Property” and is binding on grantor and future owners
- Definitions
 - Owner—includes grantor and future owners
 - Property (legal description)
 - Any subset of Property that is “Restricted Area”

Provisions of MPCA Model Restrictive Covenant (cont'd)

- Restrictions
 - generally intended to avoid exposure to contamination and prevent disturbance of cleanup installations and structures
- Two types of Restrictions
 - use of property for some purposes may be limited or prohibited
 - activities conducted at the property may be limited or prohibited

Provisions of MPCA Model Restrictive Covenant (cont'd)

- Use restrictions
 - use may be limited to commercial or industrial purposes
 - residential or similar uses may be prohibited
- Activity restrictions
 - disturbance of contaminated soil/subsoil
 - well installation and ground water extraction
 - interference with or disturbance of cleanup structures or installations

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- MPCA Approval Required for Actions Inconsistent With Restrictions
 - restrictions are not absolute
 - uses or activities limited by covenant require prior written approval by MPCA; approval is subject to conditions
 - no approval required for activities not likely to affect or cause exposure to contaminated media (building repair, utility work, fencing and signs)
 - MPCA must decide within 60 days; but request is not approved by default

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- Affirmative Obligations Under a Covenant
 - primarily involves maintenance and repair of structures and surfaces covering contaminated material
 - could include operating, maintaining, replacing remedial equipment, or monitoring contamination
 - raises distinction between ownership responsibilities and cleanup liability

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- Duration of covenant
 - “unlimited”—perpetual duration provided under Conservation Easement Law
 - covenant may be modified or terminated by MPCA
 - covenant establishes process for owner to apply to MPCA for modification or termination and requires sampling to show that contamination no longer threatens public health or environment

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- MPCA Rights to Enforce Covenant
 - grant of rights necessary to enforce restrictions and affirmative obligations
 - court enforcement
 - rescinding liability assurance
 - right to enter Property to inspect and verify compliance with covenant
 - could include right to take cleanup action or monitor contamination

Provisions of MPCA

Model Restrictive Covenant (cont'd)

- Emergency Procedures
 - allow Owner to take immediate actions that might require disturbance of contaminated media in emergency situations
 - Owner must immediately notify MPCA
 - disturbance must be minimized and precautions taken to avoid exposure
 - a plan to restore protectiveness must be submitted and implemented

Provisions of MPCA Model Restrictive Covenant (cont'd)

- Require disclosure of restrictions and affirmative obligations
 - must be incorporated in future deeds, mortgages and other conveyances of property interest
- Recording In Real Property Records
 - generally done by owner as condition of final MPCA approval of cleanup plan, liability assurance or site delisting

Additional provisions to consider in a Restrictive Covenant

- Reporting Requirements
 - Require owner to notify agency of a breach of the covenant and state how and when it will be remedied
 - Periodic report by owner on compliance with the covenant, status of affirmative obligations, monitoring results, etc.
- Right of agency to remedy breach of covenant (take cleanup actions) and recover costs if necessary to maintain remedy protectiveness
- Provide local government with authority to enforce covenant

Sources of MPCA Legal Authorities for Covenants and Easements

- Minnesota Environmental Response and Liability Act of 1983 (MERLA), Minn. Stat. secs. 115B.01-20.
 - “Institutional controls” defined in sec. 115B.02, subd. 9a.
 - Authority to acquire property interests, including covenants, sec. 115B.17, subd. 15.
- Land Recycling Act of 1992, Minn. Stat. secs. 115B.175-179.

Sources of MPCA Legal Authorities for Covenants and Easements

- Minnesota Conservation Easement Law, Minn. Stat. ch. 84C.
- Minnesota Pollution Control Agency, Voluntary Investigation and Cleanup Website (guidance on institutional controls, model documents, etc.)
<http://www.pca.state.mn.us/cleanup/vic.html>