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Overview of Transactional Considerations in Revitalization of Federally Owned Environmentally Impaired or Impacted Property

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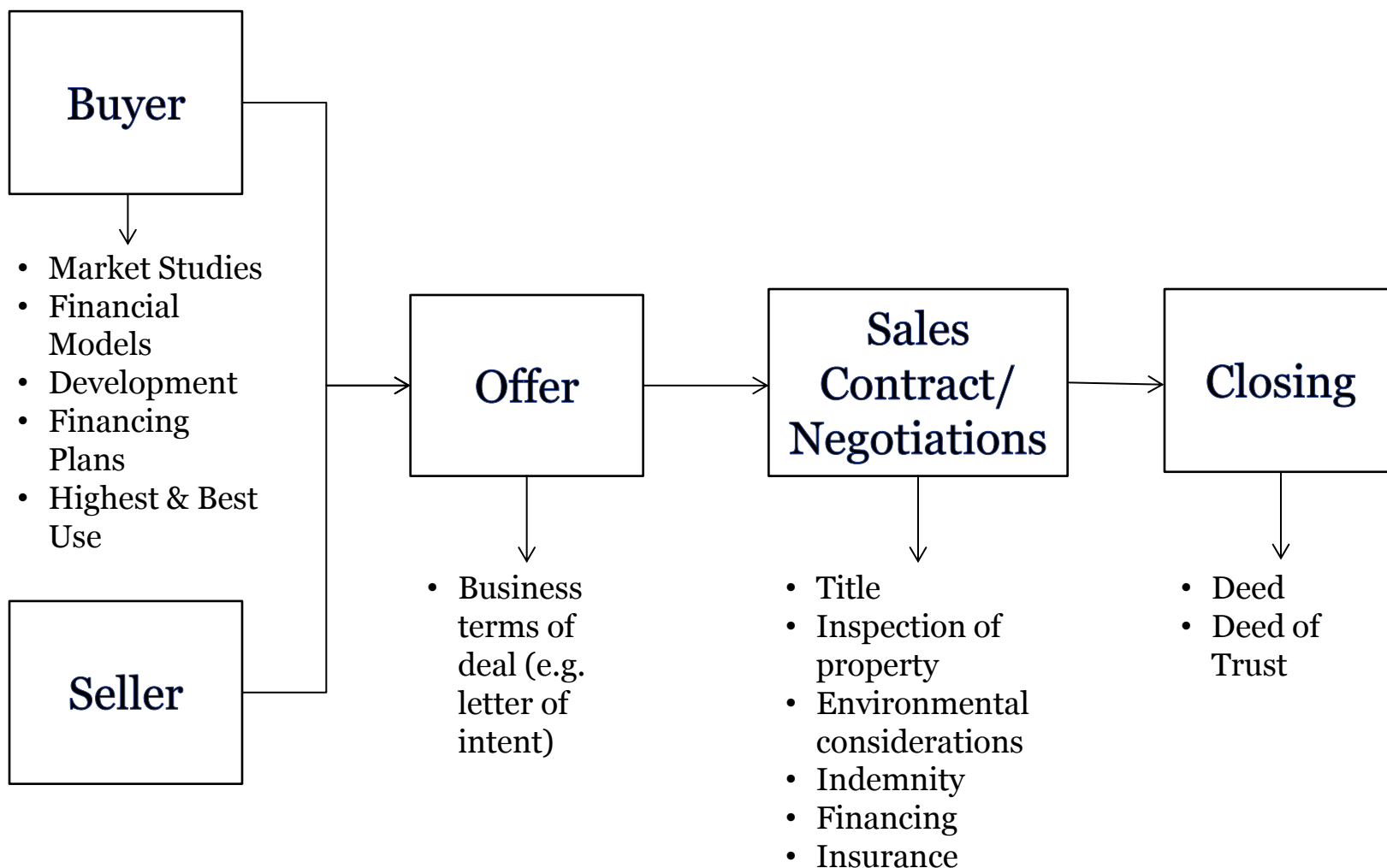
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Introduction and Agenda

- Introductions
- Agenda: lifecycle of this real estate transaction
 - “The Deal”
 - Parties
 - Potential transaction structures
 - How is this different from a typical real estate transaction
 - Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 120(h)
 - Institutional controls
 - Stakeholders/community considerations
 - Other challenges and considerations – what happens next?

Typical Transaction for Private Developer



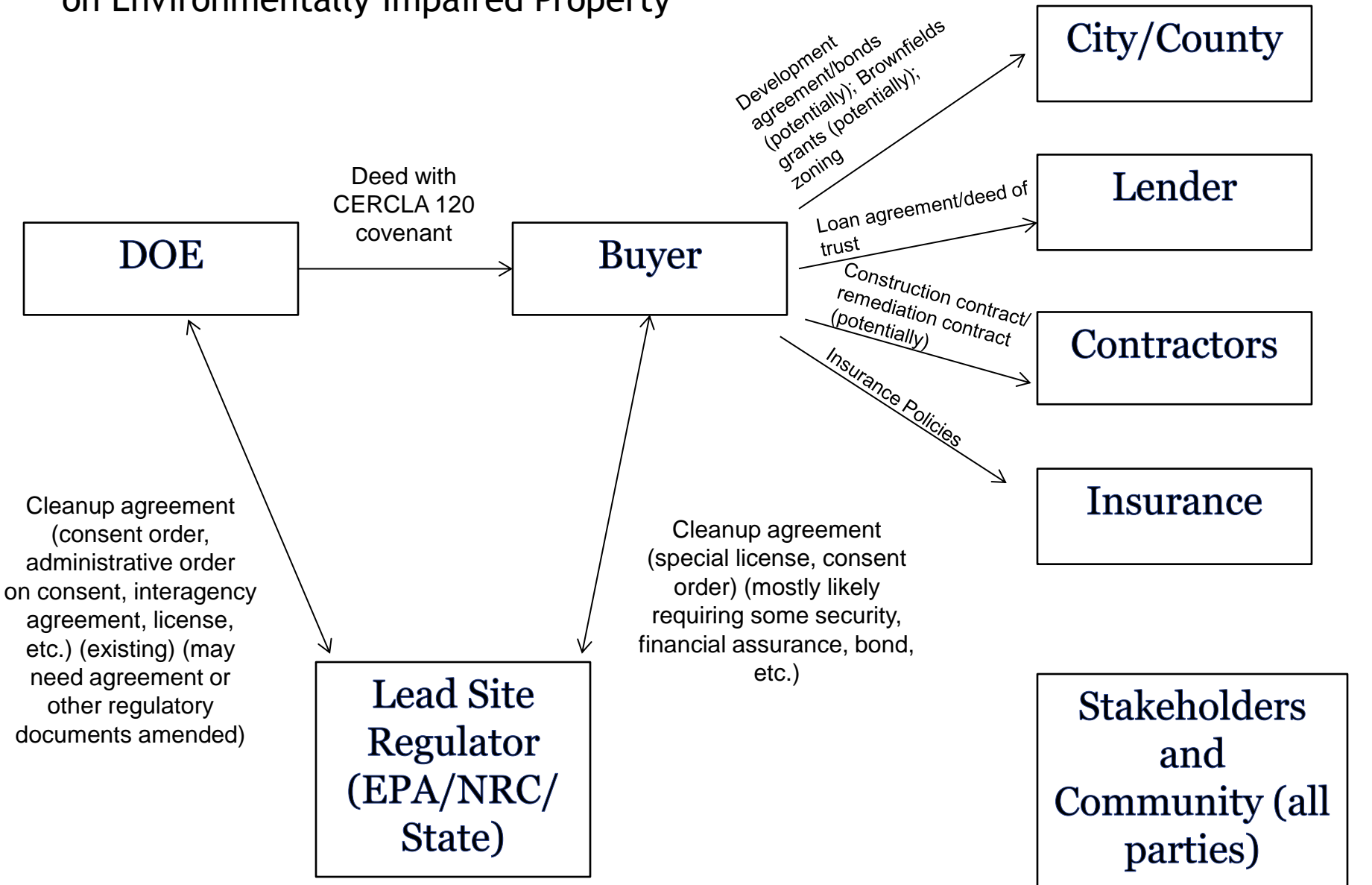
The Deal for This Transaction

- Hypothetical assumptions:
 - Buyer: private party (not a governmental entity)
 - Parcel:
 - Federal property in urban mixed-use setting (i.e. commercial and residential uses)
 - Environmentally impaired from historic activities
 - Federal agency (DOE) is performing remediation on contaminants that affect both the soils and the groundwater (volatile organic compounds, metals)
 - Soils have been remediated to a commercial/industrial use for closure
 - Groundwater contamination plume only affects a portion of the property
 - Current end use upon which the closure is based (commercial/industrial) does not meet the desired land use of the buyer, which is mixed-use/residential (same as surrounding neighborhood)
 - Note: Site not on the National Priorities List (NPL)
 - There would be other considerations and resources if a property is on the NPL for disposal (see EPA's website on Superfund Redevelopment Initiative)

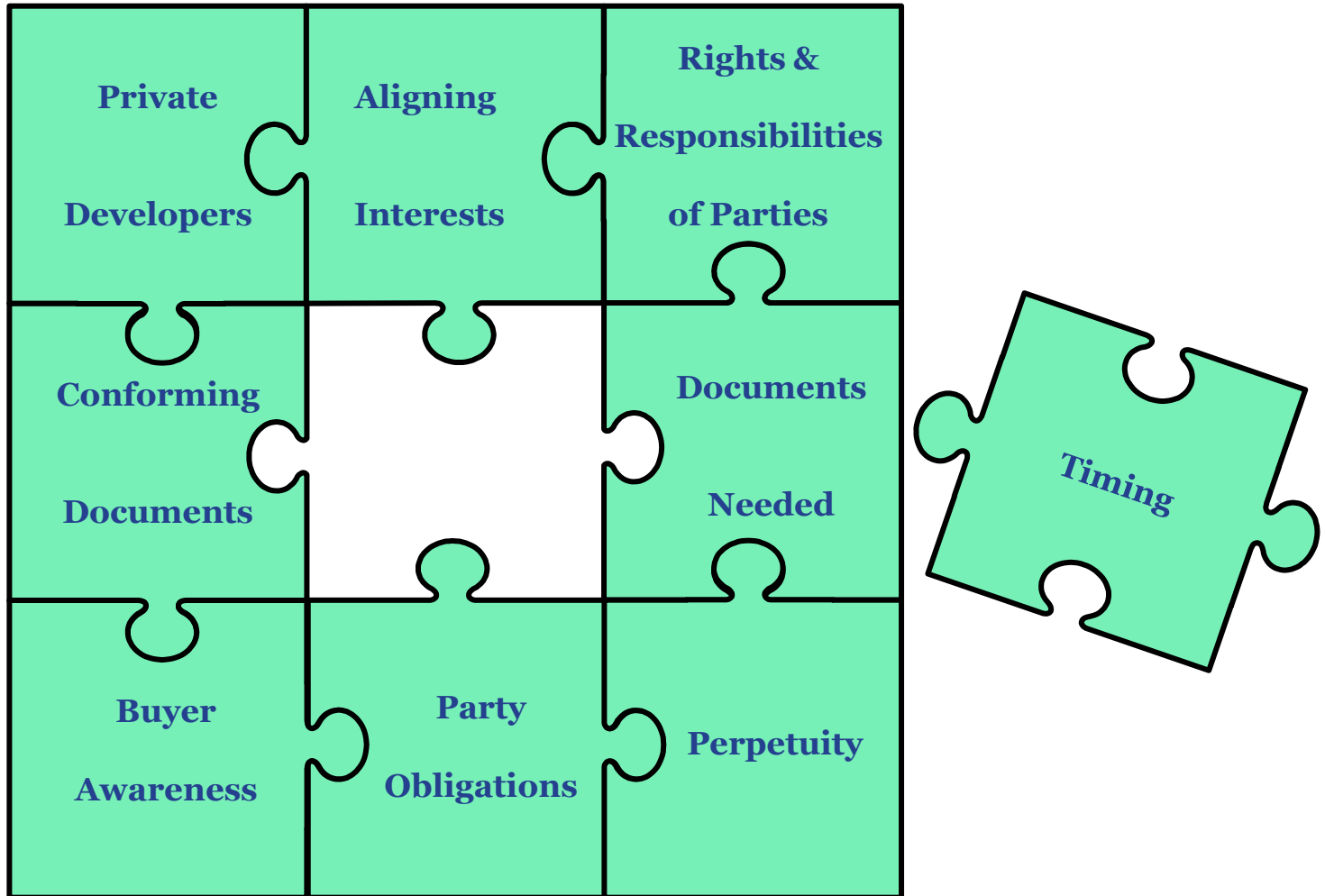
Potential Parties to the Transaction

- Buyer (private party)
- DOE & U.S. government
- Regulator
 - Possibility of multiple regulators involved (i.e. State Water Quality Commission and the State Health Department)
- Lender / financing party
 - Assuming that the buyer needs to pay fair market value
- Insurance Company
 - Title insurance, property insurance, environmental insurance
- Local municipality
 - development agreement with buyer
- Stakeholders/community

Potential Transaction Structure for Federal Property Transfer with a Private Party on Environmentally Impaired Property



Challenges to Structuring a Transaction



Different from Typical Property Transactions

- CERCLA 120(h)
- Institutional controls
- Stakeholders/community considerations

Federal Real Property Transfer Requirements

Overview of CERCLA 120(h)

- CERCLA section 120(h)(3)(A) requires the federal government on deeds related to real property owned by the U.S. on which any hazardous substance was stored for one year or more, known to have been released, or disposed of provide:
 - Notice of:
 - The type and quantity of such hazardous substances
 - The time at which such storage, release, or disposal took place
 - A description of the remedial action taken, if any
 - Covenant warranting that:
 - All remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer
 - Any additional remedial action found to be necessary after the date of such transfer shall be conducted by the U.S.
 - A clause granting the U.S. access to the property in any case in which remedial action or corrective action is found to be necessary after the date of such transfer

Federal Real Property Transfer Requirements

Finding of Suitability for Transfer (FOST)

- FOST is prepared by the federal government agency (here by DOE) to support the grant of this covenant
- The FOST usually contains information on the following items:
 - Property description
 - An analysis and list of environmental investigations, surveys and reports related to a particular parcel
 - Discussion of environmental issues associate with the property, including information on completion of remedial activities
- A property can be transferred via FOST once construction and installation of an approved remedial design has been completed, and remedy has been demonstrated to be operating properly and successfully
- Long term pumping and treating or operations and maintenance obligations does not preclude the transfer of the property
 - See 42 USC 9620(h)(3)(B)
- A FOST is prepared by the federal government agency (here by DOE) to support the grant of this covenant

Federal Real Property Transfer Requirements

Finding of Suitability for Early Transfer (FOSET)

- FOSET is prepared by the federal government agency (here by DOE) where the federal government wants to transfer real property; however, not all remedial activities have been completed
- FOSET supports a request for a covenant deferral
 - The covenant is deferred until such time that remedial activities have been completed
- FOSET has different requirements than a FOST under CERCLA:
 - It requires concurrence from the Governor of the State in which the property is located
 - If the site is listed on the NPL, the FOSET must be concurred upon by both the Governor and Administrator of EPA
- Why would a buyer accept early transfer?

Wayne, New Jersey, FUSRAP Site

From Vacant Land to Playground



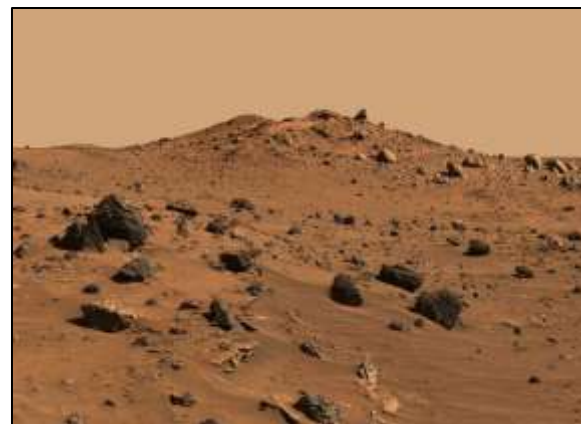
Overview of Institutional Controls

Considerations for Legacy Management Sites

- Institutional controls (IC) are administrative or legal restrictions that:
 - Minimize the risk of exposure to residual contamination
 - Protect human health, environment, and remedy
- ICs are developed during the remediation prior to closure
 - Each of the laws and regulations have some requirements for ICs where:
 - Residual contamination is left in place
 - Does not meet the standard for unlimited use and unrestricted exposure
- There are different categories of ICs depending upon how they will be implemented or enforced
 - In most cases, these categories are tied to a type of legal instrument

Institutional Controls Program

- Since DOE Office of Legacy Management (LM) sites are diverse in historic operations and in remaining residual contamination, the IC program is flexible in structure to address:
 - Diverse regulatory authorities
 - Requirements that support the current Long-Term Surveillance and Maintenance plans
 - Diversity of sites that are in the portfolio (current and transitioning)
- ICs at LM sites follow the applicable policies and guidance associated with the underlying regulatory authority



From Salmon, Mississippi to Mars

Regulatory Authorities and Programs

- Regulatory drivers include:
 - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - Resource Conservation and Recovery Act (RCRA)
 - Uranium Mill Tailings Radiation Control Act (UMTRCA) Title I
 - UMTRCA Title II
 - Nuclear Waste Policy Act (NWPA) Section 151
 - State Water Quality Standards
- Additional sites were remediated and LM manages them today under the following programmatic frameworks:
 - Formerly Utilized Sites Remedial Action Program (FUSRAP)
 - DOE Decontamination and Decommissioning (D&D) Program
 - Nevada Offsites
 - Manhattan Engineering District/Atomic Energy Commission (MED/AEC) Legacy Sites

Wide Range of Activity Use Restrictions

- Soil
- Groundwater
- Land Use
- Compliance monitoring
- Access

DOE Policy 454.1

- Applies the term “IC” which includes:
 - Legal instruments (e.g., land-use restrictions, etc.)
 - Physical or engineering controls (e.g., fences, signs, disposal cells, etc.)
 - Methods for providing information to people (e.g., fact sheets, interpretive displays, etc.)
 - Mechanisms that:
 - Minimize the risk of human exposure to contaminants
 - Maintain the remedies at a site
- Utilizes this broader application to encompass the diverse nature of measures used throughout DOE in a consistent yet flexible policy framework
- All ICs require a site-specific determination based upon the risk to human health and the environment

DOE Guide

- Under *DOE Guide 454.1-1, Institutional Controls Implementation Guide for Use with DOE P-454.1, Use of Institutional Controls*, LM is specifically tasked with the identification, implementation, evaluation, maintenance, and documentation of ICs, including communication of ICs' failures and resolutions
- In addition, LM has the responsibility to ensure that:
 - ICs remain in place as long as they are needed at LM sites
 - These controls and measures remain in effect even if there is a change in ownership or land use

EPA Guidance (CERCLA/RCRA)

- To comply with CERCLA and RCRA, LM follows EPA policy and guidance with respect to ICs
- There are two main guidance documents and a number of policies that address planning, implementing, maintaining, and enforcing ICs with respect to site cleanup under CERCLA and RCRA at federal facilities
- EPA defines ICs as non-engineered instruments, such as administrative or legal controls that help to minimize potential exposure to contamination or protect the integrity of a response action by limiting land or resource use

Covenant Laws and Restrictions

- Federal and state law requirements for environmental restrictions or controls and covenants as part of closure
- Model Uniform Environmental Covenants Act (UECA)
 - Proposed to address growing brownfields issues
 - A brownfield “...means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant”
 - Enacted in 23 States and the District of Columbia and U.S. Virgin Islands (introduced in Alaska in 2018)
 - However, most states do have some type of restrictive easement or covenant law to address protection of human health and the environment from residual contamination to be left onsite
 - “Runs with the land”

Challenges in a Real Estate Transaction

- ICs are usually developed during the cleanup and closure process, which may or may not consider future land use
- Post-closure plans may not have contemplated any future land use. Additional management plans may need to be developed in order to accommodate the future land use
- Cleanup levels acceptable for closure by the federal agency may not meet what the buyer wants for its end use
 - DOE closes the site for industrial use and buyer wants to use it for mixed use
- Environmental risks and liabilities change over time with changes in:
 - Land use
 - Cleanup standards
 - Emerging contaminants
 - Other regulatory changes
 - Growing and changing communities
 - Additional ICs may need to be developed, which causes a risk to the federal agency of changes to those original ICs and additional responsibilities or obligations maybe identified. This is especially true for LM sites where obligations and responsibilities can be into perpetuity. (i.e. air space)

Stakeholders and Community Considerations

- Changing interests of current community
- Change community – variations in knowledge
- Technological changes
- Use of resources changes over time
- Beneficial Reuse considerations

Other Considerations and Challenges

- What happens next?
- The federal government is the ultimate guarantor of these transactions
- There is no end to the regulatory or public interactions required with these properties
- The agreements will likely be modified at some point in time

Questions



Weldon Spring, Missouri, Site



Spook, Wyoming, Site

Disposal Site Remediation Completed (1990s)