

Remediation Division Institutional Control Guidance

1.0 Purpose

Institutional controls (ICs) are administrative or legal tools that help minimize the potential for exposure to contamination and/or protect the integrity of a response action. An IC limits how a property or its resources can be used and/or provides information that helps guide behavior on the property, to protect human health or the environment.

This guidance document provides information about tools that can be used to control land use or manage potential future risk at a site with residual contamination. It is intended for environmental professionals, developers, lenders, and land use planners involved in the investigation, cleanup, and redevelopment of contaminated properties in one of the MPCA's remediation programs. Having a clear understanding of how residual contamination is managed will ensure that response action decisions are made with full knowledge of the restrictions and responsibilities that an IC may entail.

2.0 Administrative and planning tools

A variety of administrative and planning tools may be used by local units of government and state agencies to control land or resource use, or to provide information about environmental conditions at a property to help guide land use decisions. If warranted, these tools can be stacked with other measures, such as ICs recorded with the property records, to provide more than one layer of protection for risk management.

2.1 Local unit of government controls

Land use decisions are made by local units of government through development of comprehensive plans and zoning ordinances. A comprehensive plan provides recommendations for how land should be used to meet the needs and desires of the community, whereas a zoning ordinance regulates land uses as recommended by the plan.

In some cases, the environmental condition of a property may not align with the local land use plan, and environmental response actions may be needed to make the property safe for the desired use. A local unit of government may require a property owner or developer to obtain an MPCA closure letter for the identified contamination prior to issuing a building or occupancy permit or making a requested zoning change. Although the MPCA uses a risk-based approach for response actions, local units of government may have their own cleanup requirements. The MPCA encourages proactive communication with the applicable local authority when planning response actions in support of a desired land use change.

The MPCA uses a risk-based approach for making risk management and cleanup decisions, based on the current or planned use of the property, as detailed in other MPCA guidance. The MPCA may require an environmental covenant and easement (ECE), as one part of a risk management decision for a property. An ECE may prohibit or restrict uses of a property that are authorized by zoning or other law but does not authorize a property use that is otherwise prohibited by zoning.

2.2 On-line tools for environmental information

The web-based tools described below provide information about MPCA remediation sites. Making information readily accessible for MPCA remediation sites helps manage future risk by raising awareness of potential contamination that may need to be addressed if a change to land or resource use is planned.

2.2.1 What's in My Neighborhood

The MPCA's [What's in My Neighborhood](#) is an interactive map that provides environmental information about properties that have some kind of relationship with the MPCA. People can search for, among other things, properties that have a history of investigation and cleanup with MPCA's remediation programs. Clicking on a site location results in a pop-up box that includes a link to more information.

2.2.2 Groundwater Contamination Atlas

The MPCA's [Minnesota Groundwater Contamination Atlas](#) is a map-based tool for learning about contamination at specific sites around the state. At the present time, listed Superfund sites and a handful of Petroleum Remediation sites are included in the atlas. Groundwater sampling data for these sites can be downloaded from the atlas.

2.2.3 Petroleum Remediation Program Maps

The MPCA's [Petroleum Remediation Program Maps Online](#) is an interactive map that shows petroleum leak sites in relation to wellhead protection areas, drinking water supply management areas, and source water assessments, as established by the Minnesota Department of Health (MDH).

2.2.4 Recorded institutional controls

The [Minnesota Geospatial Commons](#) website has information about ICs that have been recorded with the property records for MPCA remediation sites. A user can [download IC data](#) or view an [interactive map](#) that shows the location of MPCA institutional controls. See Section 3.0, below, for information about ICs that are recorded with county property records.

2.3 Conditions in MPCA assurance and closure letters

An MPCA assurance/closure letter for a remediation site describes the environmental condition of the property at the time the letter was issued, whether the contamination may affect future use of the property, and any conditions that must be complied with for the determination in the letter to remain valid. Common examples are:

- *This determination is contingent upon the continued commercial/industrial use of the site. Changes in land use can create new potential exposure pathways for soil or soil vapor contaminants and should be preceded by a concurrent evaluation of site conditions.*
- *The soil vapor determination conveyed in this letter applies only to the current building at the site. Future construction activities at the site should be preceded by a soil vapor investigation within the footprint of the proposed construction area, so a vapor mitigation decision for the new feature can be made based on concurrent data.*
- *Closure of the petroleum tank release site file does not necessarily mean that all petroleum contamination has been removed from this site. However, the MPCA has concluded that any remaining contamination, if present, does not appear to pose a threat to public health or the environment under current conditions. If future development of this property is planned, it should be assumed that petroleum contamination may still be present.*

While MPCA letters with conditional determinations are not legally enforceable documents, they carry some weight, as failure to comply with the conditions in the letter can invalidate a party's liability protection and/or negate the MPCA's no action/no further action or closure decision. In addition, these letters are easily discoverable during standard environmental due diligence and are therefore useful in communicating information about future risk. Assurance letters and other site-specific information can be accessed through the MPCA's [What's in My Neighborhood](#) interactive map. Records related to MPCA sites can be requested with an Information [Request](#).

2.4 Special well and boring construction areas

The MDH may establish a [special well and boring construction area](#) to control the extraction of groundwater in areas of regional groundwater contamination. For properties that fall within a boundary of a special well and boring construction area, this administrative control can be an effective alternative to an ECE that otherwise might be required to restrict extraction of groundwater.

2.5 Access agreement

For the purpose of this guidance document, an access agreement is a document between a property owner and the MPCA, which grants the MPCA and its contractors access to the property to conduct specific activities such as inspections, monitoring, environmental investigations, and installation of vapor mitigation systems or other remedial systems. An access agreement is often a short-lived arrangement. It does not give the MPCA an interest in the property; it does not apply to future property owners; and the document is not recorded against the property.

3.0 ICs recorded with the property records

Institutional controls that are recorded with the property records are commonly used by the MPCA as part of a risk management decision, to control future risk at a property due to residual contamination.

Institutional controls are an integral part of any risk-based cleanup program. Cleaning up a contaminated property to allow for unlimited use and unrestricted exposure is often not feasible due to technical and economic factors. The MPCA's remediation programs have long relied on a risk-based approach when making site cleanup decisions, which allows some contamination to remain in place, when appropriate for the current or planned land use. An IC is an important tool to ensure that such risk-based decisions remain protective over the long term.

Response action selection should consider whether an IC would be necessary for the site based on the proposed response actions and whether the property owner is willing to abide by any restrictions and affirmative obligations required by the IC. Another factor to consider is the potential for an engineering control or monitoring mechanism to fail and the impact this may have on receptors. An unacceptable risk stemming from failure of an engineering control or monitoring mechanism may indicate that the proposed response action is not sufficiently robust to manage future risk at the site.

An IC is not intended to be a sole remedy at a site, but rather part of a larger response action to protect human health and the environment. The MPCA may require an IC prior to issuing an assurance letter when residual contamination at a property exceeds the risk-based cleanup goals. This differs from the U.S. Environmental Protection Agency, which requires an IC when the completed response actions don't allow for unlimited use and unrestricted exposure.

The [Minnesota Geospatial Commons](#) website has information about ICs that have been placed on MPCA sites and is refreshed daily. A user can [download IC data](#) or view an [interactive map](#) that shows the location of MPCA institutional controls.

3.1 Types of ICs

The most common types of ICs used at MPCA remediation sites are a *real property affidavit* (affidavit) and an *environmental covenant and easement* (ECE). In certain situations, the MPCA may also require an easement or bond declaration. These ICs are further described below.

Refer to **Appendix A** for a table that provides a general framework for determining when an affidavit or ECE might be needed for an MPCA remediation site. The table provides guiding principles for understanding when an IC may be necessary and what type of IC is warranted. There may be site-specific situations that do not fit neatly into the framework. If unsure about the need for or type of IC, discuss the situation with MPCA project staff. Final decisions on the need for and type of IC are made by the MPCA.

3.1.1 Real property affidavit

A real property affidavit may be required when hazardous substances remain on a property at a level that warrants notice to future property owners, but no restrictions or affirmative obligations are required by the MPCA. The purpose of the affidavit is to provide notice to future property owners about the presence of contamination on the property. It is not a legally enforceable document, but rather serves as an informational notice on the property records.

The statutory basis for the affidavit can be found in [Minn. Stat. § 115B.16, subd. 2](#), which states in part: “Before any transfer of ownership of any property which the owner knew or should have known... is subject to extensive contamination by release of a hazardous substance, the owner shall record... an affidavit...” that discloses that the property is contaminated by a release of a hazardous substance. The affidavit must describe “the identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable”.

Use of the MPCA’s template [Affidavit concerning real property contaminated with hazardous substances](#) is required when an affidavit is necessary for a remediation site. See **Appendix B** for instructions for the affidavit template. See Section 3.2 for information about working with the MPCA’s IC templates.

Amending a recorded affidavit

If the circumstances that drove the need for the affidavit have changed, the property owner may record an amendment to the affidavit explaining that the affidavit is being amended to reflect current conditions.

Examples of circumstances that may warrant an amended affidavit include:

- New information has become available for the property, making the description of the contamination in the recorded affidavit inaccurate or incomplete.
- The contamination has been removed from the property.
- The contamination no longer exceeds a risk-based level.

Note that the original affidavit cannot be terminated or removed from the property records – it will always show up in property record searches. Rather, the amendment is used to update the property conditions and clarify the circumstances described in the original affidavit.

If an amended affidavit is needed for a remediation site, contact the MPCA project manager for instruction regarding the necessary content and structure of the amendment.

3.1.2 Environmental covenant and easement

Minnesota adopted the Uniform Environmental Covenants Act (UECA) in 2007. [Minn. Stat. § 114E](#) contains the UECA requirements, as adopted by the state of Minnesota.

An ECE is a legally enforceable document that grants the MPCA a nonpossessory interest in the real property. An ECE is required when the MPCA determines that land use limitations, activity limitations,

and/or affirmative obligations are needed at the property, to prevent future exposure to contamination and protect the integrity of response actions. Some examples include but are not limited to the following:

- *Land use limitations*: not allowing the property to be used for residential purposes or for a daycare or school, and restricting use of a property building to cold storage.
- *Activity limitations*: restricting disturbance of soil below a certain depth, restricting extraction of groundwater, and restricting disturbance or interference with response action equipment.
- *Affirmative obligations*: maintaining a soil buffer or engineered cap over contamination at depth, and ongoing operation and maintenance of a groundwater treatment or vapor mitigation system .

Use of the MPCA's template [Environmental covenant and easement](#) is required when an ECE is needed for a remediation site. The ECE template includes language that meets the requirements of UECA and also the requirement for a real property affidavit, so a separate affidavit is not needed. See **Appendix C** for instructions for filling out the ECE template. Note that Appendix C provides context for certain sections of the ECE template, to address questions commonly raised by outside parties. See Section 3.2 for information about working with the MPCA's IC templates.

An ECE often requires a subordination agreement from parties who hold a pre-existing interest or encumbrance in the property (i.e., an interest that pre-dates recording of the ECE). See **Appendix D** for information about subordination agreements and for answers to commonly asked questions.

3.1.3 Easement

An easement grants the holder a right to use or enter real property for a specific defined purpose. An easement grants the MPCA a nonpossessory interest in real property for the purpose of allowing access to conduct inspections, collect environmental samples, operate response action equipment, or other specific actions as defined in the easement.

An easement is included as standard language in Section 9 of the ECE template. An easement may also be a stand-alone document that is signed by the MPCA and property owner and recorded with the property records in the appropriate county office. Stand-alone easements are most commonly used by the MPCA's Closed Landfill and Superfund Programs.

3.1.4 Bond declaration

A bond declaration is required when state general obligation bonds have been used to improve a property, and the sale or use of the property is then restricted based on state and federal law. Bond declarations are mostly commonly used by the MPCA's Closed Landfill Program.

3.2 IC templates

- Use of the MPCA's templates for the [Affidavit](#) and [ECE](#) is required. Each template is a locked Microsoft (MS) Word document with certain editable sections and drop-down boxes. Edits to the locked text are not accepted.
- When preparing an IC, always start by downloading the template from the MPCA's webpage. This will ensure use of the most up-to-date version and minimize errors.
- The templates include prompts and directions for preparing the IC. If questions arise about the template language or the subordination agreement, please first refer to the appendices in this guidance document, as they contain answers to frequently asked questions. If questions remain after review of these resources, contact the MPCA project manager for your site.

- The cover page of each template contains instructions for routing the IC through the review and signature process. The cover page must remain with the IC until recording. This ensures that all parties involved in the process will have the information needed to efficiently carry out their role.

3.3 Recording the IC

The owner or owner's representative records the IC with the property records in the office of the County Recorder or Registrar of Titles, whichever is appropriate for the circumstance (see below). Many Minnesota counties allow electronic recording of ICs by working through an e-recording service provider that has been approved by the Electronic Real Estate Recording Commission. With e-recording, the property owner often receives the recorded document back from the county within a day or two, compared to several weeks for in-person recording. Contact the county in which the property is located for e-recording options and resources.

- If the IC pertains to Torrens property, it is recorded with the county registrar of titles.
- If the IC pertains to Abstract property, it is recorded in the office of the county recorder.
- If the IC pertains to property that has both Torrens and Abstract portions, it is recorded twice, with the county registrar of titles and in the office of the county recorder.

A scanned copy of the recorded IC (in full) must be submitted to the MPCA project manager before the final assurance letter(s) will be issued for the site. The document number and recording date must be clearly visible on the front page. If the ECE was recorded twice (i.e., for both Abstract and Torrens property), include the cover sheet that has the recording information from second ECE with the submittal.

Appendix A

Institutional Control Framework

This table is meant to provide a general frame of reference and guiding principles for understanding when an institutional control may be necessary and what type of institutional control is warranted. There may be site-specific situations that do not fit neatly into this framework. If unsure about the need for or type of institutional control, please discuss the situation with MPCA project staff. Final decisions on the need for and type of institutional control are made by the MPCA.

Land use	Contaminated media	Institutional control Not required	Institutional control required	
			Affidavit concerning real property contaminated with hazardous substances	Environmental covenant and easement
MERLA programs Single-family home	Soil	Soil is expected to be largely free of debris and meet risk-based criteria for unrestricted use from 0 to 12 feet.	Not applicable	Not applicable
	Groundwater	Minn. Stat. 513.55 (residential property disclosure requirements) requires that the seller disclose "...all material facts of which the seller is aware that could adversely and significantly affect: (1) an ordinary buyer's use and enjoyment of the property; or (2) any intended use of the property of which the seller is aware." In lieu of an IC, the Minnesota Association of Realtors Seller's Property Disclosure Statement should be used to notify future homeowners about the need for the owner to operate a treatment system for a private water supply well, to operate a vapor mitigation system to prevent vapor intrusion, or to provide notice of other environmental conditions as needed to meet the statutory requirement.	Not applicable	Not applicable
	Soil Vapor	In lieu of an IC, the Minnesota Association of Realtors Seller's Property Disclosure Statement should be used to notify future homeowners about the need for the owner to operate a treatment system for a private water supply well, to operate a vapor mitigation system to prevent vapor intrusion, or to provide notice of other environmental conditions as needed to meet the statutory requirement.	Not applicable	Not applicable
MERLA programs Multi-family residential Recreational Commercial/industrial	Soil	Soil contamination is less than risk criteria for type of property use, based on representative site-wide data, not isolated sample locations. Soil contamination 0 to 12 feet below ground surface does not pose a potential risk to receptors, based on current land use.	Soil contamination in potentially accessible zone is above risk criteria for type of land use, but concentrations are not so high or widespread as to warrant activity restriction(s). Decision made based on representative site-wide data, not isolated sample locations. Concentrated area of buried demolition debris (no asbestos containing material (ACM)).	Soil contamination in potentially accessible zone is above risk criteria for type of land use, and uncontrolled activities may present a risk to receptors. Restriction on soil disturbance and/or affirmative obligation to maintain cover or cap is needed to protect human health or the environment. Dump with household waste, buried debris with ACM, or industrial waste used as historical fill (e.g., ash layers).
	Groundwater	Groundwater contamination is less than drinking water criteria OR above criteria but access to groundwater is unlikely: <ul style="list-style-type: none"> Administrative control already in place, such as MDH Special Well and Boring Construction Area Urban site connected to municipal water supply for drinking water source, with unlikely potential for irrigation or industrial water supply well 	Groundwater contamination is above drinking water criteria. Site is connected to municipal water supply for drinking water source, but there is increased likelihood of potential future installation of irrigation well or industrial water supply well.	Groundwater contamination is above drinking water criteria. Site is not connected to municipal water supply. Restriction on groundwater extraction or affirmative obligation to treat groundwater for use as drinking water source is needed.
	Soil Vapor	Vapor mitigation system for on-site building(s) not required, based on current or planned property use. Note that if there is a change in future property use (e.g., commercial/industrial to residential, or a new daycare in the building, etc.) the need for a vapor mitigation system should be re-evaluated. Be aware that any previously issued MPCA assurance letter(s) for the site were based on the previous property use.	Not applicable	Vapor mitigation system required in on-site building(s). A restriction on system disturbance and affirmative obligation to operate and maintain the system is needed to protect human health.

**Appendix A
Institutional Control Framework**

Land use	Contaminated media	Institutional control Not required	Institutional control required	
			Affidavit concerning real property contaminated with hazardous substances	Environmental covenant and easement
Petroleum programs Single-family home	All media	<p>Site meets all program closure criteria. Residual petroleum contamination poses low risk to human health OR mitigation system(s) have been installed at the home to manage risk to home occupants.</p> <p><i>If ongoing operation of a vapor mitigation system or treatment system for a private water supply well is needed, notification to future homeowners is typically provided by the Minnesota Association of Realtors Seller's Property Disclosure Statement. See exception in column at far right.</i></p>	Not applicable	<p>When the single-family home is the source of the petroleum tank release that is driving the need for ongoing operation and maintenance of a groundwater remediation system or vapor mitigation system.</p> <p><i>This scenario is limited to a petroleum leak site associated with the home, such as from an on-site fuel oil tank release, when ongoing operation of a remediation/mitigation system is needed to manage risk to home occupants.</i></p>
Petroleum programs Multi-family residential Recreational Commercial/industrial	All media	Site meets all program closure criteria, including low risk to human health and the environment.	Not applicable	Ongoing operation and maintenance of a groundwater remediation system or vapor mitigation system is needed to protect human health or the environment.
Closed Landfill Program	All media	Not required if landfill or buffer property is owned by the state. For state-owned property, a <i>Land Use Plan</i> is developed instead.	Not applicable	Required if landfill or buffer property is not owned by the state.

APPENDIX B

Instructions and guidance for preparing an Affidavit Concerning Real Property Contaminated with Hazardous Substances

- **Heading:**
 - “Name of County” is the name of the county in which the property is located
 - “Preferred ID” is the nine-digit Brownfield Program site number (BFXXXXXXX) or the Superfund Program site number (SRXXXXXXX). Only one site number should be entered. If the property has a connection to both programs, use the site number of the program requiring the affidavit.
- **Preamble:** Name of affiant (i.e., the person who is making the sworn statement), their title, and the name of the company or other organization that they represent
- **Section 1:** Legal language that references the statute. This is locked text.
- **Section 2:** Name of property owner(s), property address, property identification number(s), and references to Exhibit 1 and Exhibit 2 (see below)
- **Section 3:** Summary of past use of the property that resulted in the contamination and any other relevant history of the property. Historical information about the property that is not relevant to the contamination is not needed. This section ends with a statement about how the current property owner came to acquire the property.
- **Section 4:** Statement about MPCA involvement with the property, such as through the Voluntary Investigation and Cleanup (VIC) Program, Superfund Program, etc., and whether/what type of an assurance letter is expected, following the recording of this affidavit.
- **Section 5:** Summary of the site investigation and cleanup (if any), including the risk-based rationale for leaving the contamination in place (e.g., type of property use, contamination not accessible, etc.). The primary purpose of this affidavit is to document existing conditions (see Section 6), not to present an exhaustive history of the investigation and cleanup. Typically, the investigation and cleanup can be summarized in one or two paragraphs. Section 5 ends with a reference to the project file, which can be consulted for more detailed information.
- **Section 6:** Description of the type, concentration, and location/depth of contamination remaining at the property. Available information should be summarized; do not present a sample-by-sample recitation of detected contaminants. If the contamination is located in a discrete area, that area must be shown and labeled on an exhibit.
- **Section 7:** Statement about whether the response action at the property includes ongoing operation and maintenance of response action equipment or monitoring wells. Describe the identity, location, and circumstances of remaining response action equipment or monitoring wells. If no response actions were conducted at the property, or if no response action structures or equipment remain at the property, so state.
- **Section 8:** Statement that the MPCA should be contacted prior to any use or activity that may disturb areas of contamination, affect the protectiveness of a response action, or interfere with response action equipment.
- **Section 9:** Statement that the MPCA’s response action decision assumed the property was to be used for a certain specified land use. Changes to the land use might cause the property owner to be associated with the contamination and require additional response actions at the property.

See Appendix E for instructions pertaining to the required exhibits.

APPENDIX C

Instructions and guidance for preparing an Environmental Covenant and Easement

- **Section 1:** Identifies the fee owner(s) of the property and the location, property identification number, and legal description of the property
- **Section 2:** States that the ECE runs with the land (i.e., future owners are bound by the ECE)
- **Section 3:** Provides MPCA a nonpossessory interest in the property, which is the right to use or restrict the use of another person's land. Holders of a nonpossessory interest in real property do not have title; the property owner retains full rights of ownership, subject to any encumbrances, such as easements, leases, and environmental covenants.
- **Section 4:** Identifies the MPCA program requiring the ECE and the reason why the ECE is needed.
- **Section 5:** Describes the past and current use of the property, summarizes the contamination that is driving the need for the ECE (e.g., contaminants and media of concern, location, and extent of contamination), and describes any response actions that were completed. For hazardous substances, this section fulfills the statutory requirement for a real property affidavit.
- **Section 6:** Defines terms used in the ECE
- **Section 7:** Lists the use limitations, activity limitations, and affirmative obligations
- **Section 8:**
 - Section 8.A provides a process for gaining MPCA approval to conduct a restricted activity
 - Section 8.B allows excavation of soil in a restricted area during an emergency without pre-approval from the MPCA, in accordance with the procedures described in this section. If the ECE does not include a soil restriction, Section 8.B should be deleted.
- **Section 9:**
 - The first paragraph provides MPCA and the city/county an easement and right of access to the property, to inspect the property and collect environmental samples, for the purpose of evaluating compliance with the ECE. The MPCA requires an easement as part of the ECE, as opposed to relying on a separate access agreement, because of the easement's longevity and enforceability, the consistency it provides, and because it will apply to future owners of the property. The unacceptable alternative would be MPCA individually negotiating access agreements for each site, during preparation of the original ECE and whenever the property ownership changes.
 - The MPCA liability language in the second paragraph mirrors [Minn. Stat. § 3.736](#) and cannot be changed. Liability for actions of an MPCA environmental contractor is defined by the provisions of the state contract and is not to be addressed in the ECE.
- **Section 10:** States that the ECE is perpetual and describes the process to amend or terminate the ECE. Refer to the [Minn. Stat. § 114.E](#) for details on how to amend or terminate an IC. Section 10 of the ECE also states that an amendment to the ECE is not binding on other interest holders unless the owner of that interest has consented to the amendment or agreed to waive the right of consent.
- **Section 11:** Requires disclosure of activity and use limitations and affirmative obligations into **all** instruments that convey an interest in and/or right to use the property (e.g., easements, mortgage, leases). This notice provision allows tenants the opportunity to be aware of any environmental issues at the property that require ongoing management by the property owner. The MPCA will not waive this requirement or apply it to only a subset of interest holders.

APPENDIX C

Instructions and guidance for preparing an Environmental Covenant and Easement

- **Section 12:** Establishes a timeline for recording the ECE and requires that a copy of the recorded ECE be provided to the entities listed below. This is a statutory requirement ([Minn. Stat. § 114E.30](#)) and cannot be waived. The statute doesn't dictate the manner of providing notice; for example, a copy of the recorded ECE could be sent via email, in lieu of delivering a physical copy. Posting the ECE in a common area for tenant viewing does not meet the statutory requirement.

Entities that must be provided a copy of the recorded ECE:

- Each person that signed the ECE
 - Each person holding a recorded interest in the property (e.g., easement, mortgage, recorded lease, etc.)
 - Each person in possession of the property (this includes all tenants, including residential tenants)
 - Each political subdivision in which the property is located
- **Section 13:** Provides contact information for the grantor and MPCA
 - **Section 14:** Describes means of enforcing the ECE
 - **Section 15:** Identifies the MPCA office where the project file is located
 - **Section 16:** Representations by the property owner regarding identification of fee owner(s) of the property, whether the property is subject to any interests/encumbrances, and whether any subordination agreements have been required by the MPCA. Refer to **Appendix D** for guidance on subordination agreements.
 - **Section 17:** Confirms that the ECE shall be interpreted in accordance with Minnesota law
 - **Section 18:** Requires an annual compliance report by July 1 of each year, confirming compliance with activity and use limitations and affirmative obligations. Requires the property owner to notify the MPCA as soon as possible if there is a breach of an activity or use limitation. These notices should be sent to instcontrols.pca@state.mn.us.
 - **Section 19:** Requires notice to MPCA if property ownership changes. Notices of conveyance should be sent to instcontrols.pca@state.mn.us.
 - **Section 20:** States that if one provision of the ECE is determined to be unenforceable, the remaining provisions remain valid.
 - **Section 21:** States that the effective date of the ECE is the date of MPCA signature. As per [Minn. Stat. § 114E.15\(a\)\(5\)](#), the environmental covenant does not meet the statutory requirement unless it signed by the MPCA prior to its recording.
 - **Signature page for grantor**
 - **Signature page for MPCA**
 - **Contact name and mailing address of person to whom the county should return the ECE after it has been recorded.**

See Appendix E for instructions pertaining to the required exhibits.

APPENDIX D

Subordination Agreements

The MPCA has two subordination agreement templates, one for [lenders](#) and one for [non-lenders](#). Use of these templates is strongly encouraged. Subordination agreements drafted by outside parties may result in a significant delay in MPCA's review.

Common questions about subordination agreements are addressed below.

1. *What is a subordination agreement?*

A subordination agreement, for the purpose of an ECE, is a legal document signed by an entity who holds a prior interest in the real property (i.e., an interest that pre-dates recording of the ECE), for the purpose of subordinating to the ECE their interest in the real property. Examples of a prior interest in the real property include, among other things, mortgages, leases, and easements already in place prior to the ECE being recorded. The subordination agreement for the ECE does not affect the priority of any financial interest that an interest holder may have in the real property, because there is no security interest created by the ECE (i.e., there is no financial interest in the ECE to "subordinate to").

2. *Why is a subordination agreement important?*

[Minn. Stat. § 114E.10 \(d\)\(1\)](#) says "an interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant". This means that the ECE doesn't automatically apply to any interests in real property that pre-date the recording of the ECE. By signing a subordination agreement, the interest holder agrees to abide by the land use and activity restrictions of the ECE, even if their prior interest would otherwise allow them to do something that would conflict with the land use and activity restrictions.

3. *Is a subordination agreement required?*

[Minn. Stat. § 114E.10 \(d\)\(2\)](#) says "this chapter does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant". However, [Minn. Stat. § 114E.15\(c\)\(2\)](#) states that the MPCA may require a person who holds a prior interest in the real property agree to subordinate their interest, when applicable. The MPCA requires certain persons to subordinate their prior interest, as described below, as a condition of MPCA approval of the ECE. Without MPCA approval and subsequent recording of the ECE, the final assurance letters will not be issued for the site.

4. *When is a non-lender subordination agreement necessary?*

The MPCA does not require a subordination agreement for all non-lender interest holders. For some types of interest, it's not a problem if the ECE doesn't apply to the interest holder. If an interest holder, in the course of exercising their interest, would not run afoul of the land use or activity restrictions, the MPCA does not require a subordination agreement from that interest holder.

Each non-lender interest in the real property should be evaluated through the lens described at left, to determine if a subordination agreement is necessary.

Here are a few examples where a subordination agreement is not required:

- A holder of a surface easement if the activity restrictions pertain to contaminated soil at depth.
- A holder of an easement on the property if the activity restrictions pertain to interfering with a vapor mitigation system inside the building.
- A tenant whose lease does not allow intrusive activities at a property (for a soil or groundwater restriction) or control over building systems (for a vapor mitigation system).
- A holder of mineral rights on an urban property (blanket exemption).

APPENDIX D

Subordination Agreements

Some types of interest in real property, however, may result in the interest holder running afoul of the land use or activity restrictions, in the course of exercising their interest. In these cases, the MPCA requires a subordination agreement from the interest holder.

Here are a few examples where a subordination agreement *is* required:

- A holder of a utility easement if the location and depth of the easement area intersects contaminated soil that is subject to an activity restriction.
- A tenant who has a ground lease (i.e., a long-term lease that allows the tenant to develop and control the property during the lease period).
- A tenant whose lease allows access to and control of building systems (for a vapor mitigation system) or other response action systems on the property.

Note that a lease agreement containing language about tenants being bound by the ECE is not an acceptable replacement for a subordination agreement.

5. *When is a lender subordination agreement necessary?*

The MPCA requires a lender subordination agreement from every lender. The sole purpose of requiring a subordination agreement from a lender is to ensure continuation of the ECE, if the lender should foreclose and obtain full control of the property. If a lender does not subordinate, they could terminate the ECE through their foreclosure action, as per [Minn. Stat. § 114E.40 \(a\)\(4\)](#).

If a lender's interest in the property is about to expire, such as through an imminent property transaction, refinancing, or balloon payment, the current property owner may request the MPCA to waive the requirement for a subordination agreement from that lender, provided that the ECE is recorded prior to the property transaction or refinancing. Documentation showing the imminent expiration of the lender's interest must be provided to the MPCA. If the expiration of interest is due to a property transaction or refinancing, it is expected that the prospective purchaser and/or new lender have requested an assurance letter from the Brownfield Program relative to their purchase or financing of the property. In all cases, a Brownfield Program supervisor will make the decision to waive or not waive the requirement for a lender subordination agreement.

6. *If the ECE automatically applies to future owners of the property (see Section 2 of the ECE), wouldn't the ECE automatically apply to the lender if they acquire the property in the future through foreclosure?*

Not if the lender has a prior interest (mortgage) that predates the ECE. If a lender has a prior interest, the ECE does not apply to the lender, unless the lender has signed a subordination agreement.

7. *Does signing the subordination agreement mean that an interest holder takes on responsibility for the ECE?*

[Minn. Stat. § 114E.10 \(d\)\(4\)](#) says "an agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant". This means that the person signing the subordination agreement does not become responsible for oversight of the ECE or carrying out the affirmative obligations of the ECE, simply by signing the subordination agreement.

8. *After the ECE is recorded, are subordination agreements needed from parties who acquire a new interest in the property?*

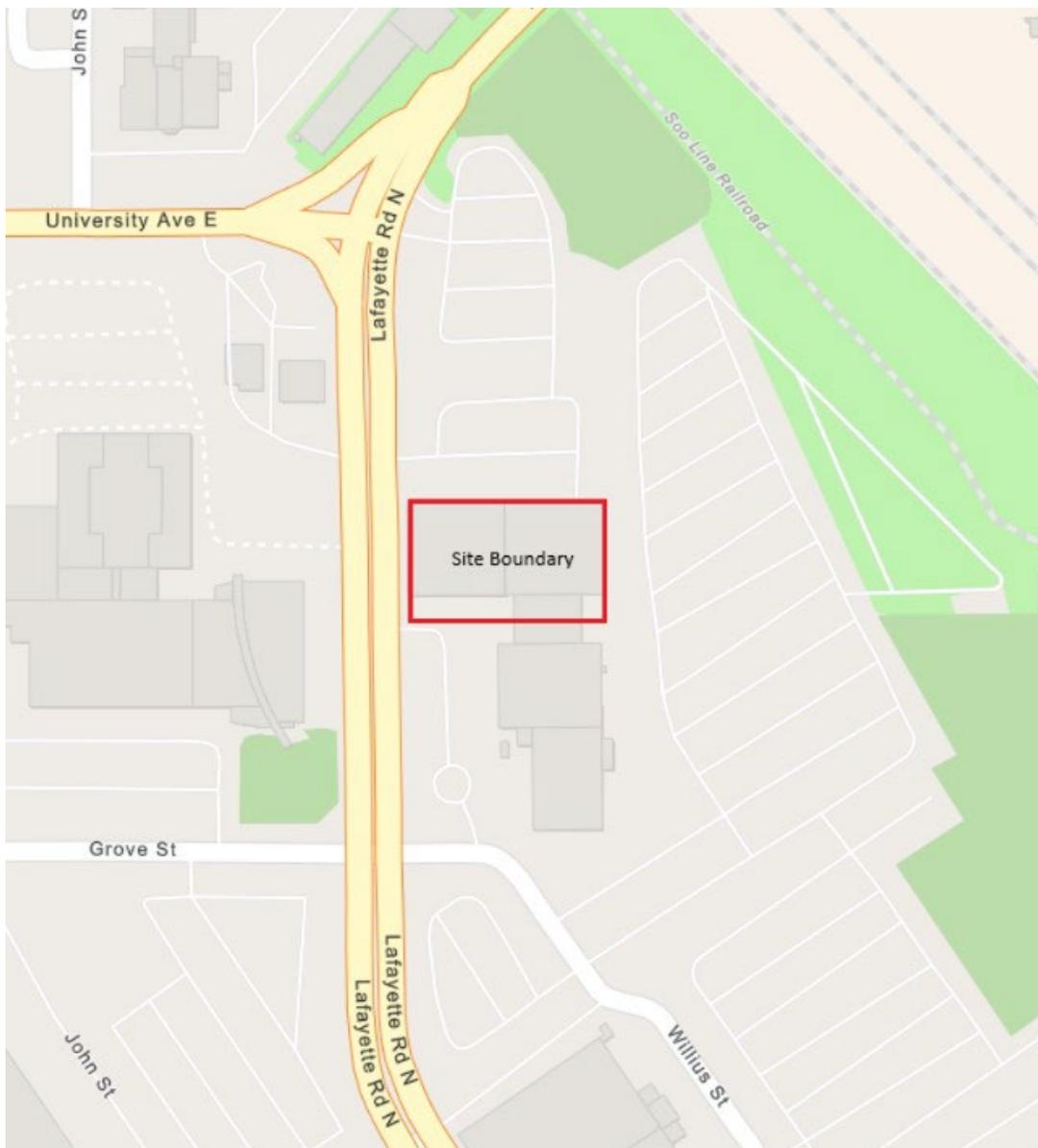
No. Once the ECE has been recorded with the county, the ECE automatically applies to new interest holders, so there is no need for them to subordinate their interest.

APPENDIX E

Instructions for Exhibits to Affidavit and Environmental Covenant and Easement

NOTE: Most county offices scan the submitted ECE in black and white, and even when recorded electronically, certain counties convert the file to black and white for storage.

- **Exhibit 1** is always a figure that shows the location of the property. The figure must be of a scale that clearly shows the site boundary and building footprint(s). Adjacent streets must be labeled. **Do not** use an aerial photograph as a basemap for Exhibit 1, as features will not be distinguishable in the recorded document. **Do not** use a survey map for Exhibit 1, as it contains unnecessary detail, and much of the text will not be legible when printed on 8.5" x 11" paper. Below is an example of a simple figure that was created using a navigation basemap in ArcGIS. Other basemaps that are typically acceptable include street maps, some topographic maps, and some parcel maps.



APPENDIX E

Instructions for Exhibits to Affidavit and Environmental Covenant and Easement

- **Exhibit 2** is always the full legal description of the property. The two most common types of legal descriptions are:
 - Metes & Bounds description (e.g., Commence at the NE Corner of the East ½ of West ½ of NE ¼ of SW ¼ of Section 2, Township 45, Range 15 West....)
 - Plat description (e.g., Lot X, Block XX, of the XXX Addition)

County property information websites do not typically contain the full legal description. The Electronic Certificate of Real Estate Value (eCRV), if available for a property, contains the complete and accurate legal description. Check the Department of Revenue website [eCRV Search](#) to see if an eCRV is available for the property.

If there is no eCRV on record, the legal description can be found on the property Deed, the Certificate of Title, a Registered Land Survey, and other legal documents.

Other exhibits for an ECE vary according to the specific situation. Common exhibits are listed below. The specific exhibits and numbering for a given ECE may differ from that listed below.

- **Exhibit 3** is often a figure showing the basic layout of a building vapor mitigation system. For all figures, do not rely solely on color to show different features, as this will not be retained in the recorded ECE. Use different line/polygon types and different dashes, dots, thickness, and fill types instead of colors.
- **Exhibit 4** is often the *Operation and Maintenance Manual* for a building vapor mitigation system.
- **Exhibit 5** is often a bulleted or numbered list of **all** interests and encumbrances that the property is subject to. A subordination agreement is typically required for just a small subset of the interests and encumbrances – but they all need to be listed. Typical interests and encumbrances include leases, easements, and mortgages. Do not include copies of these documents; a simple bulleted list and brief description is all that is needed. For multi-tenant buildings, leases may be presented as “Unrecorded leases to residential and/or retail tenants” or something similar.
- **Exhibit 6** is often subordination agreements. Refer to **Appendix D** for guidance on subordination agreements.

All pages in the IC must be printed on 8.5 x 11-inch paper.

Using a larger size paper, folded to 8.5 x 11 inches, can result in scanning errors at the county recorder’s office.

Make sure all exhibits are labeled.

Make sure all references to exhibits in the IC match the labels.