

**MINNESOTA POLLUTION CONTROL AGENCY
SITE REMEDIATION SECTION**

**DRAFT GUIDELINES
GUIDANCE ON INCORPORATION OF PLANNED PROPERTY USE INTO
SITE DECISIONS**

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Send Comments to:

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NOTICE

THIS DOCUMENT IS A WORKING DRAFT. The Site Remediation Section of MPCA is developing guidelines for evaluating risks to human health and the environment at sites that may require investigation or response actions pursuant to the Minnesota Environmental Response and Liability Act, Minn. Stat. § 115B.01 to 115B.24 (MERLA).

DEVELOPMENT OF A SITE REMEDIATION SECTION SITE EVALUATION MANUAL. The attached document and other documents will be incorporated into a Site Remediation Risk-Based Site Evaluation Manual which will contain guidelines for conducting MERLA-related evaluations, including risk evaluations under the State Superfund program and the MPCA Voluntary Investigation and Cleanup (VIC) Program.

MPCA staff intends to use the policies and procedures in the manual as guidelines to evaluate the need for investigation or remedial actions to address releases and threatened releases of hazardous substances or pollutants or contaminants under MERLA, and the scope and nature of such actions. These policies and procedures are not exclusive and do not have the force and effect of law. MPCA staff may use other policies or procedures to evaluate the need for or adequacy of response actions under MERLA, including procedures set forth in outstanding MPCA Requests for Response Action and Consent Orders. The final standard for all such evaluations is the MERLA statutory requirement that such actions must be reasonable and necessary to protect the public health and welfare and the environment.

The Minnesota state superfund program, governed by MERLA and the supplementary rules, the federal superfund program, governed by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the federal regulations in the National Oil and Hazardous Substance Contingency Plan (NCP) work together to clean up various sites.



~ Continuation ~

Under CERCLA, failure to act consistently with the NCP can result in a party not recovering its response costs from a Responsible Party (RP). There is no NCP consistency requirement in MERLA, although under MERLA, the costs must be reasonable and necessary. The guidance documents are intended to function in a similar manner to the NCP. However, because the guidance documents do not require every procedural specification of the NCP, parties are advised to consult an attorney early in the cleanup process, if they intend cost recovery under CERCLA, which specifically states that the party seeking reimbursement must show that its costs are “consistent” with the NCP.

For removals, investigations and National Priority List sites, the federal and state governments must act consistently with the NCP. Note that CERCLA requires “consistency,” or “accordance,” as distinguished from “compliance,” with the NCP. This infers some flexibility in selecting the appropriate remedy while following the basic requirements of the NCP. The extent of flexibility is still debated in courts. The NCP provides that a party does not have to comply with every single requirement of the NCP verbatim, but that the response action, when evaluated as a whole, be in “substantial compliance” with the NCP and result in a CERCLA-quality cleanup. The courts have emphasized that the community relations aspects are a part of the NCP response action, including the right of the public to participate in the remedial action selection process.

The preamble to the NCP recognizes government programs, like the Minnesota program under MERLA, which has similarities to the NCP, that achieve the same objectives but are not congruent with the NCP in every respect. EPA believes that these governmental bodies, consistent with CERCLA intent, should have flexibility to implement response actions and bring cost recovery actions for those response actions as long as the response actions are not inconsistent with the NCP, even if achieved by different methods. EPA believes that is not necessary to define what actions are “not inconsistent with the NCP,” and will make determinations on a case-by-case basis.

Users of this document are responsible for confirming with the MPCA Site staff the version of the working draft to be used.

EXECUTIVE SUMMARY

The nature of decision-making regarding how to investigate, evaluate and remediate environmental contamination at Superfund sites, “Brownfield” properties, and other contaminated sites is evolving. In response to these changes, the Minnesota Pollution Control Agency’s (MPCA) Site Remediation Section (SRS) staff are developing a manual that outlines a risk-based approach to decision making during site investigation and remedy selection. The Risk-Based Site Evaluation Manual (the Manual) will provide a tiered process for making decisions by evaluating risks to public health and the environment at sites under the Superfund and Voluntary Investigation and Cleanup (VIC) Programs. Each tier requires increasing amounts of site-specific data collection and analysis. This Guidance on Incorporation of Planned Property Use (Property Use Guidance Document) is a working draft chapter from the Manual under development. Decisions on ground water use will be presented in a separate document.

The purpose of this Property Use Guidance Document is to summarize how planned property use may be incorporated into the investigation and cleanup decision-making process at Superfund and VIC Program sites as required by state Superfund law. Planned use of the property will be taken into consideration when setting cleanup standards and selecting response actions. Because local governments generally have primary jurisdiction and responsibility in making property use decisions the involvement of local governments and input from owners and affected citizens will be imperative in identifying planned property use.



“Property use” means the activities that occur on a property. Risk on or near the property is determined by receptors exposed to the contamination at the property. Knowing the planned use of contaminated property, and nearby property that may be affected, is important when reasonably estimating potential risk posed by the site contamination and selecting the appropriate remedial actions. When it is determined that residual contamination will remain on-site as part of a remedial action, institutional controls may be used, if necessary, to ensure that the remedy remains protective of public health and the environment. Exposure to contamination can be reduced or controlled by: 1) decreasing contaminant levels; 2) reducing the volume of the contamination; 3) reducing the mobility of the contamination; and/or 4) restricting and controlling activities or access by possible receptors on the property or surrounding properties.

Institutional controls are one method whereby exposure to contamination can be controlled as part of a remedial action. The purpose of incorporating an institutional control in a MPCA approved response action is to: 1) assure that response actions remain protective of public health and the environment by limiting uses or activities on the property that could result in exposure to hazardous substances that remain on the property after response actions are completed; 2) serve as a mechanism to notify appropriate parties (e.g., local units of government, prospective purchaser, lenders, tenants, etc.) of the presence of residual contamination and accompanying controls; and/or 3) ensure long-term mitigation measures or monitoring requirements (e.g., engineering controls) are carried out and maintained. In developing remedial actions that include institutional controls, the following issues need to be evaluated: 1) the type of institutional control to be used; 2) the effectiveness of the institutional control; and 3) the authority, capability and willingness of the appropriate entity (or entities) to implement, maintain and monitor the institutional control.

A variety of institutional controls exist. The institutional control recommended depends on the type of receptor and the potential for exposure to the residual contamination. This draft document provides guidance on the use of institutional controls within MPCA authority to require or seek, i.e., real property notification/affidavits, contractual agreements (including consent orders), easements and environmental restrictive covenants. Guidance regarding application of other types of institutional controls is not provided in this document because they are not within MPCA authority to require or seek and are enforced by other agencies, units of governments or other entities. If the entity responsible for the other institutional controls agrees to implement and maintain the institutional control to ensure the protectiveness of the remedy they can be considered as alternatives to the institutional controls within MPCA authority.

Institutional controls should be considered measures that enhance or assure the integrity of response actions. Institutional controls, as defined and applied in the state Superfund law, are not themselves considered remedial or cleanup actions but can be a factor to consider in making a “no further action” decision. Institutional controls will not be used as the sole method of addressing a release if there are response actions that are cost-effective and technically feasible. The MPCA will continue in its preference for measures that eliminate or reduce the need for use restrictions and long-term monitoring/maintenance activities. General guidance on the application of the institutional controls within MPCA authority to require or seek is summarized in the following *simplified* table.

[Note: for a more detailed table see ATTACHMENT 2 of this Working Draft Document]

Property Use	Residual Soil Contamination	Institutional Control (s)
Residential or Unrestricted Commercial	Meets residential criteria. Remotely accessible contaminant levels may be allowed to exceed residential criteria if cross media contamination is not of concern.	None or Real property notification/affidavit. Easement if monitoring is required.
Industrial or Restricted Commercial	Meets industrial/restricted commercial criteria. Remotely accessible depth may exceed criteria if cross media contamination is not of concern.	Real property notification/affidavit. Easement if monitoring is required.
	Residual contaminant concentration or accessibility vary based on site-specific considerations.	Environmental restrictive covenant
Recreational	Meets recreational criteria. Remotely accessible depth may be allowed to exceed criteria if cross media contamination is not of concern.	Real property notification/affidavit. Easement if monitoring is required.
	Residual contaminant concentration or accessibility vary based on site-specific considerations.	Environmental restrictive covenant

Note: Ecological, special property uses (e.g., food production) and cross media transfer (e.g., leaching to ground water, surface water impacts, soil vapor) issues are not addressed as part of this table.

Remotely accessible generally means one of the following conditions: 1) contamination located at a depth of greater than twelve (12) feet below the ground surface; or 2) contamination completely covered by an existing building or other permanent structure which does not have earthen floors. Note: Site specific conditions may influence contamination accessibility determinations.

1.0 INTRODUCTION

Effective August 1, 1995, the Minnesota Superfund Law, also known as the Minnesota Environmental Response and Liability Act (MERLA), explicitly states in Minn. Stat. 115B.17, subd. 2a: “In determining the appropriate cleanup standards to be achieved by response action taken or requested under this section to protect public health and welfare and the environment from a release or threatened release, the commissioner shall consider the planned use of the property where the release or threatened release is located.” The purpose of this document is to summarize how this statutory requirement regarding planned use of property may be incorporated when setting cleanup goals and selecting response actions at Superfund and VIC Program sites. In doing so, this document contains: 1) guidance regarding characterizing exposure as it relates to property use; 2) identification of institutional controls that are available to control property use in conjunction with site remediation; 3) guidance regarding conditions under which institutional controls can be incorporated as part of a remedy; and 4) a glossary of key terms including “planned use of property” and “institutional control”, as well as descriptions of various property use and contamination accessibility categories.



This document focuses on the incorporation of planned property use into remedial action decisions and associated institutional controls and briefly identifies institutional controls that apply to ground water use, such as special well construction areas and drinking water advisories. This document is only one part of the Risk-Based Site Evaluation Manual being developed and does not contain guidance on soil vapor, ground water or ecological evaluations. There will be cases where site remediation is driven by soil vapor, ground water, surface water and/or ecological impact concerns. If soil vapor, groundwater, surface water and/or ecological impacts are of a concern at a site, refer to the Site team for additional guidance. The cleanup goals selected, and the remedial actions required to obtain the cleanup goals, should be appropriately protective of all potentially impacted media.

The purpose of implementing any response action under MERLA is to protect public health, welfare and the environment. This objective has not been altered or eliminated as the result of the statutory directive to consider the planned property use in the remedy selection process. The MPCA staff shall continue to select only those response actions that meet the “threshold criterion” of providing adequate protection for the public health, welfare and the environment. The planned use of the property will be one of the criteria that will be considered when setting cleanup goals and selecting a response action under the process generally set forth in a Request for Response Action (RFRA), or Consent Order issued under MERLA or VIC Program remedy approval. This means that the planned use of the property will be one of the factors considered, but will not be the over-riding factor in selecting response actions. There will be circumstances when the MPCA staff will also consider the current and planned use of neighboring properties, particularly where an industrial parcel is located adjacent to or surrounded by residential properties. Other criteria used to select cleanup goals and remedies include: 1) long-term reliability (effectiveness); 2) implementability (technical feasibility); 3) short-term risks; 4) cost of implementation (including operation, maintenance and tracking costs); and 5) community acceptance. The MPCA will continue to have a preference for cleanup (or response action) measures that eliminate or reduce the need for property use restrictions and engineering controls. This often requires the implementation of response actions that involve the treatment and/or removal of the contamination. Remedies that reduce or eliminate risk by addressing source areas (hot spots) through the implementation of removal actions or interim response actions, will be strongly considered in the decision process. Also, it is important to understand that when contamination remains at a site after completion of a response action, the Responsible Party(ies) will generally retain some risk of future liability for additional response actions.

2.0 SITE CHARACTERIZATION TO DETERMINE PROPERTY USE

The characterization of the site involves identification and description of: contaminant(s) present; the property use and activities associated with the site, and nearby properties; potentially impacted environmental media; potential exposure pathways; and potential receptors. Property use is characterized by the activities that occur on the property and the type of receptors present. The type of activities and presence of receptors also characterizes the potential for exposure. Knowing the planned use on and near the property is therefore very important in reasonably estimating potential risk posed by exposure to contamination. Other factors such as the volume, concentration and location of any residual contamination will also directly influence the potential for exposure.

During the site evaluation process the planned use of the site and nearby property if appropriate, shall be examined to determine how ground water, surface water, soil, sediment or other media at the site may result in exposure. This evaluation includes consideration of activities which may not be occurring now but which are consistent with the foreseeable use(s) of the site and the surrounding environment and may reasonably be expected to occur. Specific site information that should be provided includes:

1. Name(s) of the property owner(s);
2. A map and description of the property, including the location (street address and lat./long.), a recorded and registered survey plan for the property or a reference to a registered or recorded survey plan of the property;



3. A map and description of soil contamination and the spatial distribution of contaminants (include off-property locations if appropriate);
4. A map and description of the planned property use (e.g., residential, commercial, industrial, recreational, agricultural, or undeveloped/vacant) and activities (e.g., outdoor activities, camping, fishing, irrigation, etc.) on the site and surrounding areas. If the site is accessible describe the potential for exposure to contaminated airborne soil and dust or direct contact with contaminated soil; and
5. Documentation of the planned use and activities on the site and surrounding areas as provided in plans adopted by local units of government, public development authorities, and community-based planning and development organizations, including description of the zoning designation(s).

As an aid to site decision-making these first five information items must be submitted to the MPCA. The remaining items may be necessary for a more highly site-specific evaluation. In any case, any available information should be submitted.

1. Documentation and description of existing restrictions or institutional controls. Reference to existing documentation (e.g., reports) is acceptable. Note: limitations or restrictions will not be considered unless restrictions /controls are in place and have been recorded;
2. Property specific development plans, specifications, site activities and/or proposed actions, including information such as:
 - proposed construction or placement of buildings, roadways, parking lots or other structures;
 - proposed soil excavation for utilities, basements, foundations, and trees or landscaping purposes;
 - dewatering activities (during construction);
 - creation, restoration or modification habitat, retention ponds, wetlands, etc.; and
 - a description of any current or anticipated response actions at the property;
3. Information about sensitive subpopulations (e.g., children, elderly, infirm, etc.) living/working on or near the property. Special community concerns may also be considered;
4. A description of any federal/state property and water use designations (e.g., quad maps, Minnesota Rule ch. 7050, Department of Natural Resources protected waters maps, National Wetland Inventory maps, etc.);
5. Information on the potential vulnerability of ground water to soil contamination, use of ground water, location of all drinking water wells, locations of other wells (including not-in-use wells), location of Wellhead Protection Areas, recharge areas and other areas identified for protection; and
6. Ecological or natural resource issues such as on-site habitats and ecological receptors and the site's proximity to wetlands or other surface waters, to flood plain, nature preserves, critical habitats, and endangered, threatened or special concern species.

3.0 INCORPORATION OF PLANNED PROPERTY USE INTO SITE DECISIONS

The MPCA will continue to provide an opportunity for public participation in remedy selection to ensure that response actions are acceptable to affected citizens and local governments. Because local governments have primary jurisdiction and responsibility in adopting zoning and property use controls, early and frequent opportunities for local government and citizen involvement will be important in identifying planned property use for the site and surrounding areas when making response action decisions. In the event that the planned future use of the property is undetermined the MPCA should actively pursue a determination from the appropriate local unit of government as to the future property use designation for the site and surrounding areas. In the absence of a property use determination, the MPCA will select cleanup goals and response actions that allow for flexible and beneficial use of the property.



Determining the planned use on and around the property is important in reasonably estimating potential future risk posed by exposure to contamination at the site and in selection of appropriate remedial actions. The MPCA does not have authority to make local property use decisions. Local governments have primary jurisdiction and responsibility in making property use decisions. The involvement of local governments and affected communities is critical in determining planned property use. If there is a planned use of the property which is acceptable to the interested parties and the community, the remedial action may reflect this use. Otherwise, a range of possible planned property use scenarios should be considered when evaluating the remedial action alternatives.

Property use is characterized by the type of receptors present and activities that occur on the property. Several property use categories have been developed to facilitate cleanup decisions. The property use categories, based on type of receptor and activities, include: agricultural, residential, unrestricted commercial, restricted commercial, industrial, and recreational. Please refer to the glossary for a more complete description of the property use categories. In general, the property use categories are characterized as follows:

- *Agricultural* - use of property for farming.
- *Residential and unrestricted commercial property use* - unrestricted human use of property by children and adults as residents, customers, guests, etc. and high exposure potential. An exposure scenario, including a child as well as an adult receptor, consistent with residential activities is utilized in calculating acceptable soil concentrations for these categories. Use of property for commercial use to house, educate, or provide care for children, the elderly, the infirm or other sensitive subpopulations is considered unrestricted commercial use.
- *Industrial and restricted commercial property use* - commercial use of the property in which exposure is largely limited to an adult worker and access by the general public is restricted or infrequent. The on-site worker represents the most heavily exposed receptor and is utilized in calculating acceptable soil concentrations.
- *Recreational property use* - public use of property with unrestricted access by the general population and an exposure frequency lower than residential property use. A recreational exposure scenario, including a child and an adult receptor, is utilized in calculating acceptable soil concentrations.

Standard exposure scenarios for the different property use categories have been developed by the MPCA. The standard exposure scenarios are based on reasonable maximum exposure (RME) activities. These activities may not be presently occurring but their occurrence is consistent with the current or planned property use. For example, the standard exposure scenario for industrial/restricted commercial property use includes outdoor as well as indoor work activities. Likewise, the standard exposure scenario for recreational property use includes exposure to soil in play areas. The standard scenarios should be reasonably conservative for most sites. If the standard scenarios are not applicable to the site under consideration a site-specific RME scenario may need to be evaluated.

The location of the contamination directly influences the potential for exposure to contamination on the site. Contamination accessibility categories have been developed to facilitate site-decisions. The accessibility categories include: accessible, potentially accessible, and remotely accessible. For complete descriptions of these various accessibility categories please refer to the glossary. In general, the accessibility categories are characterized as follows:

- *Accessible contamination* applies to contamination located less than four (4) feet below the ground surface.

- *Potentially accessible contamination* applies to contamination located four (4) to twelve (12) feet below the ground surface or contamination less than four (4) feet from the ground surface which is completely covered with an impervious surface (e.g., pavement).
- *Remotely accessible contamination* applies to contamination located at depths greater than 12 feet or any depth of contamination covered completely by a permanent structure.

The accessibility categories are based upon the prevalence of activities which would disturb soil. For example, activities which would disturb soil within four feet below the surface are fairly common (e.g., landscaping, fence installation, footing installation) whereas activities which would disturb soil between four and twelve feet below the surface are less prevalent (e.g., foundation installation). The potential for future changes in accessibility should also be considered when applying the accessibility categories. These general accessibility categories should be applicable for most sites. If the generic accessibility categories are not applicable to the site under consideration (e.g., development plans include disturbance of soil deeper than twelve feet) site-specific accessibility categories should be evaluated.

The potential for exposure to contaminated ground or surface water (e.g., dewatering or other ground water extraction) may be quite different than the potential for exposure to contaminated soil. Potential contact with contaminated soil is usually restricted to the immediate vicinity of the release. Since soil vapor, ground and surface water have higher potential to migrate, the potential contact with contaminated air or ground or surface water may extend beyond the property boundaries and has the potential to impact a larger population of receptors. The concept of planned property use, generally, refers to human use of the property, except where the use is specifically for ecological or environmental purposes, such as a nature preserve or a wildlife management area, where habitat exists, exposures to ecological receptors are likely to be similar regardless of property use (i.e., there is no residential or industrial exposure scenario for ecological receptors). Therefore, soil vapor, ground and surface water and ecological impact or protectiveness of remedies for the environment must be evaluated on a site-specific basis.

4.0 INSTITUTIONAL CONTROLS

Risk on or around a property is influenced by the potential for exposure in relationship to the contamination at the property. Exposure to the contamination can be reduced or controlled by: 1) decreasing contaminant levels; 2) reducing the volume of the contamination; 3) reducing the mobility of the contamination; and 4) restricting and controlling activities, or access on the property or surrounding properties. Institutional controls are one method whereby exposure to contamination can be controlled. Types of institutional controls that are available for incorporation in response actions are listed below. State statutes and rules relating to the MPCA's authority to acquire property interests or enter into agreements establishing institutional controls as part of an approved site remedy are listed in Attachment 1. Many of the institutional controls listed below are administered by local units of government or other state agencies. For this reason, it is imperative that the input and communication with the local and state government representatives, local elected officials and citizen groups be facilitated throughout the site evaluation and remedy selection process when it becomes clear that response actions are necessary.

Section 5 and Attachment 2 provide information and recommendations about the type of institutional controls that could be used to enhance or assure the integrity of response actions in the event that residual contamination remains on site. Examples of the institutional controls within MPCA authority to require or seek include:

- **Real property notification/affidavit (real property contamination disclosure):** An affidavit filed with the county recorder or registrar of titles disclosing circumstances regarding contamination or disposal. In some cases a real property notification/affidavit is required by statute or rule (see Minn. Stat. § 115B.16,

subd. 2 (property used as hazardous waste disposal site or site with extensive contamination); Minn. Rules pt. 7045.0496 (closed hazardous waste disposal units); and Minn. Rules pt. 7045.0494 for closed hazardous waste disposal unit).

- **Environmental restrictive covenant:** A restriction (such as a prohibition of use for residential purposes) or a condition (such as a requirement to obtain MPCA approval before excavating or dewatering certain areas) placed on the use of property which is binding on current and future owners. The restriction is generally obtained by agreement of the property owner and may require consent of other parties with interest in the property. The MPCA is authorized to acquire interests in real property which include restrictive covenants for response action purposes by Minn. Stat. § 115B.17, subd. 15; and to enter into agreements granting MPCA interests in property related to partial response action plans under Minn. Stat. § 115B.175, subd. 2. A document creating a restrictive covenant may also include language creating an easement.
- **Easement:** A right to enter and/or use a property or a portion of a property owned by another, which is binding on current and future owners. An easement may include the right to locate, maintain and operate remedial equipment or structures on the property. An easement is generally obtained by agreement of the property owner and may require consent of other parties with an interest in the property. The MPCA is authorized to acquire an interest in real property, including easements, by Minn. Stat. § 115B.17, subd. 15; and to enter into agreements granting MPCA interests in property related to partial response action plans by Minn. Stat. § 115B.175, subd. 2. An easement may also be acquired from an unwilling owner by MPCA through use of eminent domain authority (condemnation).
- **Agreements:** A restriction or a condition relating to property may be included in a contractual agreement which is binding on the parties to the agreement, e.g., consent orders/decrees, access agreements, “no action” agreements, stipulation agreements and voluntary response action agreements. The MPCA is authorized to enter into various kinds of agreements by Minn. Stat. §§ 115B.071; 115B.175; 115B.177; and Minn. Stat. §§ 115.3(e); 115.071; 116.03, subd 2 and 116.07, subd. 9. Alternatively, the agreement may require the owner to observe certain use restrictions, to allow access by MPCA during his/her ownership of the property, to notify MPCA before any change in ownership, and to obtain similar agreements from the successor owner. An agreement may require the owner to provide for continued enforcement of its terms by new owners. However, unless new owners agree to be bound, the successor owners generally will not be bound by the requirements of the agreement. A written agreement may also be used to require an owner to execute and record a restrictive covenant or easement.

Listed below are other institutional controls that require action by a unit of government or agency other than the MPCA. Currently, building codes, zoning ordinances, other county or municipal ordinances, and watershed district controls, may not be generally useable at Superfund or VIC sites as the sole institutional controls. However, if the entity responsible for the institutional control agrees to implement and maintain the institutional control to ensure the protectiveness of the remedy the institutional control can be incorporated into a response action approved by the MPCA.

- **Building code:** The statewide building code (authorized by Minn. Stat. §§ 16B.61 and 16B.62) is adopted by the Commissioner of Administration and administered and enforced by certain state entities, cities, counties, and towns. The commissioner must administer and amend the state code so that it provides reasonable safeguards for health, safety, welfare, comfort and security of the residents of Minnesota. This code could be useful in cases where contamination has the potential to affect buildings (e.g., requiring monitoring or venting systems to be installed in basements to address gas migration).
- **Property use planning and zoning ordinances:** Municipalities and counties are authorized to adopt land use plans that restrict the ways property may be used (e.g., residential, commercial, industrial, recreation), and to zone for certain other purposes (e.g., shore line conservation, flood control). Minn.

Stat. § 462.357 (municipal); Minn. Stat. § 394.25 (county). These units of government may also grant variances and special and non-conforming use permits.

- **Other county or municipal ordinances:** In addition to zoning ordinances, counties and cities are authorized by statute to adopt other ordinances (e.g., Minn. Stat. §§ 103I.111 and 471.92 relating to regulation of wells; Minn. Stat. §§ 394.25, subd. 8, and 471.62, authorizing counties and cities to adopt, by reference, codes pertaining to public health, safety, or welfare).
- **Watershed district controls:** Watershed districts adopt watershed district management plans and are authorized to adopt a variety of controls, including: regulation of the use of streams, ditches, or water courses to prevent pollution; and control of property use and development in the flood plain and the greenbelt as well as and open space areas of the watershed district (Minn. Stat. ch. 103D).
- **State Well Code:** The Minnesota Department of Health (MDH) enforces the well code which prohibits well construction in some areas and imposes well construction requirements designed to protect well users and the aquifers from which they draw water. The MDH may designate an area where contamination is detected as a “special well construction area”. MDH may ban well construction in that area or impose special requirements for construction, maintenance, sealing, and water quality monitoring of wells in that area (Minn. Stat. § 103I.101, subd. 5(7); Minn. Rules pt. 4725.3650).

Local water management plans and ordinances, shore land management statutes and ordinances, and flood plain management requirements may also exist. Utilization of these controls should be evaluated on a site-specific basis.

In some circumstances engineering controls, compliance monitoring, and institutional controls can be used collectively to ensure that releases are adequately controlled, thus minimizing unacceptable risk to public health and the environment. Engineering controls often involve the use of containment remedies (e.g., caps, vaults, ground-water gradient control systems, methane gas capture/venting systems) designed to reduce, control or interrupt exposure from releases and eliminate additional releases. In these cases, continued maintenance and care of the engineering controls, data collection, evaluation and reporting are required.

5.0 SELECTION AND IMPLEMENTATION OF INSTITUTIONAL CONTROLS

The purposes of incorporating institutional controls in an MPCA approved response action are to: 1) assure that response actions remain protective of public health and the environment by limiting uses or activities on the property that could result in exposure to contaminants that remain on the property after response actions are completed; 2) serve as a mechanism to notify the appropriate parties (i.e., local units of government, any prospective purchaser, lender, tenants and other interested parties) of the presence of residual contamination and accompanying controls; and 3) ensure long-term mitigation measures or monitoring requirements (e.g., engineering controls) are carried out and maintained.

Institutional controls are intended to be part of the response action and should be considered measures that enhance or assure the integrity of response actions. Institutional controls are not themselves considered remedial or cleanup actions but can be a factor to consider in making a “no action” decision. Institutional controls will not be used as the sole method of addressing a release if there are response actions that are cost-effective and technically feasible. The MPCA will continue to have a preference for measures that eliminate or reduce the need for property use restrictions and long-term monitoring/maintenance activities. This often requires the implementation of response actions that involve the treatment and/or removal of the contamination. Remedies that reduce or eliminate the risk of exposure by addressing source areas (hot spots) through the implementation of removal actions, consolidation or interim response actions, will be strongly considered in the decision process.

In developing remedial actions that include institutional controls, the following need to be determined: 1) the type of institutional control to be used; 2) the effectiveness of the institutional control; and 3) the authority, capability and willingness of the appropriate entity (or entities) to implement, maintain and monitor the institutional control. Section 4 identified a variety of institutional controls. This section focuses on the institutional controls within MPCA authority to require or seek. These institutional controls take the form of: 1) easements; 2) real property notification/affidavit; and 3) environmental restrictive covenant. Recommendations regarding the other types of institutional controls are not included in this section because they are not within MPCA authority to require or seek. The institutional controls outside of MPCA authority should be considered on a site specific basis.

The institutional control recommended depends on the type of receptor, the potential for exposure, as well as the extent, magnitude and location of residual contamination. Attachment 2 identifies recommended institutional controls based on the property use categories and characteristics of the residual contamination. The recommendations presented in Attachment 2 should be applicable to most sites. Site-specific considerations may lead to a higher or lower level of control to ensure protectiveness. In the event that the planned use of the property is undetermined, site specific cleanup goals and response actions that would allow for flexible and beneficial use of the property shall be selected.

If institutional controls are necessary to ensure the protectiveness of a site remedy, concise specifications regarding limitations on property use and activities as well as residual contamination characteristics, will be necessary for development of a decision document or VIC assurance. Vague and broad descriptions of uses and activities or residual contamination can become overly inclusive resulting in unnecessary limitations on the property. For example, if disturbance of residual contamination below five feet in a specific area is the activity that is intended to be prohibited, then this precise activity should be identified. A general prohibition of activities disturbing soil is not practical and therefore discouraged. Completion of remedial actions may be necessary before specific wording can be determined. MPCA staff must review and approve the language to be included in the institutional control document prior to filing. Remedial actions that include institutional controls will not be considered completed until the institutional control(s) is implemented and/or recorded.

Under a remedy in which residual contamination remains on the property and the use of an institutional control is required, the person(s) responsible under MERLA will continue to be liable for cleanup of the residual contamination if additional response actions are required at a later time. If the property is subject to an easement or environmental restrictive covenant, the current and successor property owners must abide by any restrictions that apply to their property and comply with the requirements imposed by the institutional controls. If the property is subject to an environmental restrictive covenant, any change in use, including habitat creation, restoration, or modification, may require prior approval by the MPCA to ensure protection of public health and the environment. This may require additional investigation and/or cleanup actions. The property owners or operators may be liable for additional response actions or may be subject to enforcement action by the MPCA if they do not comply with property use restrictions or other institutional controls.

Easement:

An easement assures the right of MPCA staff or its contractors, to enter and/or use the property (or a portion of the property). An easement may include the right to inspect, install, maintain and operate remedial equipment and structures. If monitoring is required as part of the remedy, an access agreement or easement may be needed. An easement is a transfer to MPCA of an interest in real property by the property owner through covenants that run with the property (i.e., it binds current as well as subsequent owners of the property). A model easement is provided in Attachment 3. MPCA access and easements are not addressed by a real property notification/affidavit. Access and easement provisions may be combined in the same document with an

Environmental Restrictive Covenant rather than in a separate access agreement or easement. However, if an Environmental Restrictive Covenant is not required, a separate easement will be needed.

Real Property Notification/Affidavit:

When contamination is left only at a location which is considered remotely accessible, a real property notification/affidavit may be sufficient. There will be cases where potential soil vapor, ground water, surface water or ecological concerns will directly influence decisions regarding soil cleanup and selection of the type of institutional control. Those cases are not addressed in the Property Use Guidance document.

A real property notification/affidavit constitutes notice to any party seeking to acquire interest in the property that contamination exists and states that if there are any questions concerning the contamination, the interested party(ies) should contact the MPCA for further details. This document is used only as a mechanism to notify interested parties and does not require the owner of the property to take any action with regard to the contamination. However, an owner with notice of contamination may become responsible for cleanup by conduct that associates the owner with or contributes to the release of contamination (e.g., implements uses or activities that adversely affect the protectiveness of the response action without prior approval by the MPCA). If an owner removes or remediates the contamination under a MPCA-approved remedial action plan the owner is entitled to record an affidavit indicating the actions taken.

The information required in a real property notification/affidavit is specified in the model provided in Attachment 4. A remedy decision document, cleanup agreement (e.g., consent order, no action agreement, voluntary response action agreement) or VIC assurance should include the following filing requirements:

- The real property notification/affidavit shall be recorded by the property owner with the appropriate County Recorder or Registrar of Titles within <#> days of the property owner's receipt of MPCA approval of the language in the real property notification/affidavit; and
- A certified copy of the real property notification/affidavit as recorded shall be submitted by the property owner to the MPCA within <#> days of its date of recording.
- A certified copy of the real property notification/affidavit as recorded shall be submitted to the chief municipal officer or zoning officials of the community(ies) in which the property is located by the property owner within <#> days of receipt of the certified copy by the MPCA. The property owner shall file with the MPCA proof of all required filings within <#days> of the filing date.

Amendments to the real property notification/affidavit shall be recorded and/or registered with the appropriate County Recorder or Registrar of Titles, the MPCA and community official(s) as listed above.

Environmental Restrictive Covenant:

When uses of or activities on a property must be restricted to assure that a remedy remains protective, a real property notification/affidavit alone may be insufficient and an Environmental Restrictive Covenant is recommended. The level of restrictions specified in the Environmental Restrictive Covenant will depend upon the extent to which site activities must be limited to assure protectiveness (i.e., exposure to and/or leaching of the residual contamination must be controlled) in addition to restricting the property use designation.

An Environmental Restrictive Covenant is a transfer to MPCA of an interest in real property by the property owner through covenants that run with the property (i.e., it binds current as well as all subsequent owners of the property). The covenant is entered into voluntarily by the property owner as a condition of the MPCA approving a remedy (or delisting a site from the PLP) where contamination remains at the site. An



Environmental Restrictive Covenant does not prohibit the property owner from performing additional cleanup, but is intended to protect public health, welfare and the environment assuming no further remedy is implemented. This agreement also assures that subsequent purchasers of the property are aware of and bound by the restrictions.

The site-specific information required in an Environmental Restrictive Covenant is specified in the model provided in Attachment 5. The MPCA Commissioner or Commissioner delegate must sign the document, indicating MPCA acceptance of the property interest, prior to filing. The decision document, agreement (e.g., consent order, no action agreement, voluntary response action agreement), or VIC assurance should include the following requirements:

- The Environmental Restrictive Covenant shall be recorded by the property owner with the appropriate County Recorder or Registrar of Titles within <#> days of the property owner's receipt of the Environmental Restrictive Covenant signed by the Commissioner or Commissioner's delegate;
- A certified copy of the Environmental Restrictive Covenant as recorded shall be submitted to the MPCA by the property owner within <#> days of its date of recording; and
- A certified copy of the Environmental Restrictive Covenant as recorded shall be submitted to the chief municipal officer, zoning officials and building inspection officials of the community(ies) in which the restricted area is located by the property owner within <#> days of receipt of the certified copy by the MPCA.
- The property owner shall file with the MPCA proof of all required filings within <#days> of the filing dates.

Amendments to and/or releases from the Environmental Restrictive Covenant shall be recorded and/or registered with the appropriate County Recorder or Registrar of Titles, MPCA and community(ies) offices as listed above.

6.0 MONITORING OF COMPLIANCE WITH INSTITUTIONAL CONTROLS

Information on the status of response actions, institutional controls and assurances will be tracked electronically. Under certain circumstances the MPCA will also require completion of a Site Status Update Form (located in the Remedy Selection section of the Manual). Completion of the form by the property owner may be required if community concern over the planned use or implemented institutional control is high or if the potential for a change in the property use is anticipated. If it is determined that there is a high need for tracking of an institutional control because the relative risks associated with the Site are high, tracking requirements may be included as a component of the implemented institutional control. In the event that the property is sold it will be necessary for both the buyer and the seller to complete copies of the Site Status Update form and submit the forms to the MPCA.



ATTACHMENT 1: Statutory Authority for Institutional Controls

Statutes and rules relating to the MPCA's authority to require or seek agreement to establish institutional controls, including property use restrictions on a property, are as follows:

Real property contamination disclosure/notification: Minn. Stat. § 115B.16, subd. 2:

Recording of affidavit. Before any transfer of ownership of any property which the owner knew or should have known was used as the site of a hazardous waste disposal facility as defined in section 115A.03, subdivision 10, or which the owner knew or should have known is subject to extensive contamination by release of a hazardous substance, the owner shall record with the county recorder of the county in which the property is located an affidavit containing a legal description of the property that discloses to any potential transferee:

- (a) that the land has been used to dispose of hazardous waste or that the land is contaminated by a release of a hazardous substance;
- (b) the identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable; and
- (c) that the use of the property or some portion of it may be restricted as provided in subdivision 1.

An owner must also file an affidavit within 60 days after any material change in any matter required to be disclosed under clauses (a) to (c) with respect to property for which an affidavit has already been recorded. If the owner or any subsequent owner of the property removes the hazardous substance, together with any residues, liner, and contaminated underlying and surrounding soil, that owner may record an affidavit indicating the removal of the hazardous substance. Failure to record an affidavit as provided in this subdivision does not affect or prevent any transfer of ownership of the property.

Minn. Stat. § 115B.16, subd. 4 provides: that any person who knowingly fails to record an affidavit required by Minn. Stat. § 115B.16, subd. 2(b) is liable under Minn. Stat. §§ 115.04 and 115B.05 for any release or threatened release resulting from the violation.

Statutes and MPCA Rules restricting post closure use of solid and hazardous waste management facilities:

Minn. Stat. § 115B.16, subd. 1:

No person shall use any property on or in which hazardous waste remains after closure of a disposal facility as defined in section 115A.03, subdivision 10, in any way that disturbs the integrity of the final cover, liners, or any other components of any containment system, or the function of the disposal facility's monitoring systems, unless the agency finds that the disturbance:

- (a) is necessary to the proposed use of the property, and will not increase the potential hazard to public health or the environment; or
- (b) is necessary to reduce a threat to public health or the environment

Violation of this statute makes the violator subject to a civil penalty up to \$100,000 and makes the person liable under Minn. Stat. § 115B.04 and 115B.05 for any release or threatened release of any hazardous substance resulting from the violation. The fines may be imposed and recovered in a civil action brought by the county attorney or the Attorney General.

Minn. Rules pt. 7035.2655 requires post closure care of a solid waste management facility to continue for 20 years and prohibits the landowner from allowing post closure use of the property to disturb the integrity of final cover, liner, or other component of the containment or monitoring systems.

Minn. Rules pt. 7045.0492 requires post closure care of a hazardous waste management unit to continue for 30 years and prohibits post closure use of the property on or in which hazardous wastes remain which disturbs the integrity of the final cover, liners, or other component of the containment or monitoring systems.

Minn. Rules pt. 7045.0494 requires the owner or operator of a closed hazardous waste disposal unit to submit to the local land use authority: 1) a survey plat indicating the location and dimensions of disposal areas, along with a prominently displayed note stating the obligation to restrict disturbance of the site; and 2) a record of the type, location, and quantity of hazardous waste disposed of in each area.

Minn. Rules pt. 7045.0496 requires a contamination notification/disclosure for property containing a closed hazardous waste disposal unit. This rule also requires the owner or operator to record, through a notation on the deed to the facility property or some other instrument which is normally examined during title search, certain information about the property.

Acquisition of interest in property, including easements and restrictive covenants: Minn. Stat. § 115B.17, subd. 15:

The statute provides:

The agency may acquire, by purchase or donation, an interest in real property, including easements, restrictive covenants, and leases, that the agency determines is necessary for response action. The validity and duration of a restrictive covenant or nonpossessory easement acquired under this subdivision shall be determined in the same manner as the validity and duration of a conservation easement under chapter 84C, unless the duration is otherwise provided in the agreement. The agency may acquire an easement by condemnation only if the agency is unable, after reasonable efforts, to acquire an interest in real property by purchase or donation. The provisions of chapter 117 govern condemnation proceedings by the agency under this subdivision. A donation of an interest in real property to the agency is not effective until the agency executes a certificate of acceptance. The state is not liable under this chapter solely as a result of acquiring an interest in real property under this subdivision.

Agreements: Minn. Stat. § 115B.175

Minn. Stat. § 115B.175, subd. 2 requires an agreement as a condition for approval of a voluntary response action plan that does not require removal or remedy of all releases and threatened releases. The statute provides:

- (a) The commissioner may approve a voluntary response action plan submitted under this section that does not require removal or remedy of all releases and threatened releases at an identified area of real property if the commissioner determines that all of the following criteria have been met:
 - (1) if reuse or development of the property is proposed, the voluntary response action plan provides for all response actions required to carry out the proposed reuse or development in a manner that



- meets the same standards for protection that apply to response actions or requested under section 115B.17, subdivision 1 or 2;
- (2) the response actions and the activities associated with any reuse or development proposed for the property will not aggravate or contribute to releases or threatened releases that are not required to be removed or remedied under the voluntary response action plan, and will not interfere with or substantially increase the cost of response actions to address the remaining releases or threatened releases; and
 - (3) the owner of the property agrees to cooperate with the commissioner or other persons acting at the direction of the commissioner in taking response actions necessary to address remaining releases or threatened releases, and to avoid any action that interferes with the response actions;
- (b) Under paragraph (a), clause (3), an owner may be required to agree to any or all of the following terms necessary to carry out response actions to address remaining releases or threatened releases:
- (1) to provide access to the property to the commissioner and the commissioner's authorized representatives;
 - (2) to allow the commissioner, or persons acting at the direction of the commissioner, to undertake reasonable and necessary activities at the property including placement of borings, wells, equipment, and structures on the property; provided that the activities do not unreasonably interfere with the proposed reuse or redevelopment; and
 - (3) to grant easements or other interests in the property to the agency for any of the purposes provided in clauses (1) and (2).
- (c) An agreement under paragraph (a), clause (3), must apply to and be binding upon the successors and assigns of the owner. The owner shall record the agreement, or a memorandum approved by the commissioner that summarizes the agreement, with the county recorder or registrar of titles of the county where the property is located.

Agreements: Minn. Stat. § 115B.175, subd. 6a(d):

Minn. Stat. § 115B.175, subd. 6a(d) authorizes agreements between the MPCA and responsible persons who undertake complete cleanups of releases. The statute provides:

When the commissioner issues a certificate of completion for response actions completed by a responsible person, the commissioner and the responsible person may enter into an agreement that resolves the person's future liability to the agency under sections 115B.01 to 115B.18 for the release or threatened release addressed by the response actions.

Agreements: Minn. Stat. § 115B.177:

Minn. Stat. § 115B.177, subd. 1 provides for an **off-site source** determination or agreement as follows:

- (a) The commissioner may issue a written determination or enter into an agreement to take no action under sections 115B.01 to 115B.18 against a person who owns real property subject to a release of a hazardous substance, or pollutant or contaminant, if the commissioner finds that the release originates from a source on or adjacent or nearby real property and that the person is not otherwise responsible for the release.
- (b) A determination issued or agreement entered into under this section must be conditioned upon the following:
 - (1) agreement by the person to allow entry upon the property to the commissioner and the authorized representatives of the commissioner to take response actions to address the release, including in appropriate cases an agreement to grant easements to the state for that purpose;
 - (2) agreement by the person to avoid any interference with the response actions to address the release taken or at the direction of the agency or the commissioner and to avoid actions that contribute to the release;
 - (3) invalidation of the determination or agreement if the commissioner receives new information indicating that that property owned by the person is a source of the release or that the person is otherwise responsible for the release; and
 - (4) any other condition that the commissioner deems reasonable and necessary to ensure that the agency and commissioner can adequately respond to the release.

Under Minn. Stat. § 115B.177, subd. 2, an agreement entered into under this section may extend to successors and assigns of the person who signs the agreement if the successors and assigns are not otherwise responsible for the release and are bound by the conditions in the agreement.

Agreements and Consent Orders: Minn. Stat. § 115.03(e) (orders and agreements related to water pollution); Minn. Stat. § 115.071 (orders and agreements under any law enacted for the prevention, control, or abatement of pollution); Minn. Stat. § 116.03, subd. 2 (agreements); and Minn. Stat. § 116.07, subd. 9 (orders and agreements relating to waste):

Minn. Stat. §§ 115.03(e), 115.071, 116.03, subd. 2, and 116.07, subd. 9 provides the MPCA with broad authority to enter into agreements related to pollution, waste and “any of the work of the commissioner’s office.” There are many forms of agreements, including, but not limited to, consent orders/decrees, access agreements, “no action” agreements, and stipulation agreements. If the parties agree, the conditions of the agreement may include:

- **compliance with any statute or rule imposing land use restrictions or disclosure requirements**, such as Minn. Stat. § 115B.16, subd. 1 or 2 (discussed above) or other applicable statutes or rules;
- **a restrictive covenant.** For example, the owner of the property could agree to impose permanent restrictions on use of all or a portion of the property. The restriction would be filed separately with the county recorder and run with the land, so that it binds future owners.
- **an easement allowing MPCA access to the property.** An agreement containing a grant by the property owner of an easement to the MPCA would be filed with the county recorder; and
- **other land use restrictions or requirements tailored to the specific agreement.** These restrictions would only apply to those parties who are bound by the agreement. However, if one of the parties to the



agreement is a governmental unit with authority to adopt and enforce a needed institutional control (e.g., a zoning or drinking water ordinance), the agreement could include a term requiring the governmental unit to adopt and enforce that institutional control.

Overall authority to address long-term maintenance and monitoring: Minn. Stat. ch. 115B and the definition of “remedy or remedial action”, Minn. Stat. § 115B.02, subd. 16:

Minn. Stat. ch. 115B contains the authority for the MPCA to require, request, or approve plans for remedial actions. Under Minn. Stat. § 115B.02, subd. 16(a), the term “remedy” or “remedial action” includes but is not limited to:

Actions at the location of the release such as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances, pollutants or contaminants, or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, any monitoring and maintenance, and institutional controls, reasonably required to assure that these actions protect the public health and welfare and the environment.

Definition of “institutional controls:” Minn. Stat § 115B.02, subd. 9a:

Minn. Stat § 115B.02, subd. 9a defines “institutional controls” as follows:

“Institutional controls” means legally enforceable restrictions, conditions, or controls on the use of real property, ground water, or surface water located at or adjacent to a facility where response actions are taken that are reasonably required to assure that the response actions are protective of public health or welfare or the environment. Institutional controls include restrictions, conditions, or controls enforceable by contract, easement, restrictive covenant, statute, ordinance, or rule, including official controls such as zoning, building codes, and official maps. An affidavit required under section 115B.16, subd. 2, or similar notice of release recorded with real property records is also an institutional control.



ATTACHMENT 2: Property Use, Residual Contamination and Institutional Control Guide

NOTE:

- Application of this guidance assumes that site contamination and exposure potential have been adequately characterized.
- Institutional controls not within MPCA authority to require or seek are not included in this table, but should be considered on a site-specific basis.
- Recommendations presented should be applicable to most sites. Site-specific considerations may lead to a higher or lower level of control to ensure protectiveness.
- Soil vapor, ground or surface water impact considerations may result in stricter cleanup requirements and/or other institutional controls.
- Apply ecological-based criteria or evaluation to accessible contamination in ecological exposure areas (a).

Designated Property Use	Residual Contamination Characteristics (b, c)	Recommended Institutional Controls (d)
Any property use	Contaminant levels at all depths are less than human health or ecological-based screening criteria for all potentially impacted media (e).	None
Residential or unrestricted Commercial	Residual contamination meets RME-based residential use criteria at all depths.	<i>Easement</i> if monitoring or maintenance is required. Ground water controls depend on aquifer use. See Ground Water Guidance.
	<i>Accessible and potentially accessible</i> residual contamination meets RME-based residential use criteria. <i>Remotely accessible</i> residual contamination exceeds residential criteria.	<i>Easement</i> if monitoring or maintenance is required. <i>Real property notification/affidavit</i> describing residual soil contamination left at remotely accessible depth. Ground water controls depend on aquifer use. See Ground Water Guidance.
Unrestricted Commercial	<i>Accessible</i> residual contamination meets RME-based residential use criteria. <i>Potentially and remotely accessible</i> residual contamination exceeds residential criteria.	<i>Environmental restrictive covenant</i> restricting property use to commercial use, describing residual contamination, and restricting activities which may result in exposure to or disturbance of residual contamination. <i>Environmental restrictive covenant</i> should also require maintenance of residential-based accessible layer or engineering control. Ground water controls depend on aquifer use. See Ground Water Guidance



ATTACHMENT 2: Property Use, Residual Contamination and Institutional Control Guide (page 2 of 4)

NOTE:

- Application of this guidance assumes that site contamination and exposure potential have been adequately characterized.
- Institutional controls not within MPCA authority to require or seek are not included in this table, but should be considered on a site-specific basis.
- Recommendations presented should be applicable to most sites. Site-specific considerations may lead to a higher or lower level of control to ensure protectiveness.
- Soil vapor, ground or surface water impact considerations may result in stricter cleanup requirements and/or other institutional controls.
- Apply ecological-based criteria or evaluation to accessible contamination in ecological exposure areas (a).

Designated Property Use	Residual Contamination Characteristics (b, c)	Recommended Institutional Controls (d)
Industrial or restricted Commercial	Residual contamination meets RME-based industrial/restricted commercial use criteria at all depths. Residential based criteria or engineering controls applied to accessible residual contamination if exposure to general public is of concern.	If worker is receptor of concern (i.e., receptor at highest risk): <i>Real property notification/ affidavit</i> describing residual soil contamination and stating protectiveness of remedy is based on industrial/restricted commercial property use and exposure limited to adult workers. <i>Easement</i> if monitoring or maintenance is required. If exposure to general public is a concern: <i>Environmental restrictive covenant</i> describing residual contamination and requiring maintenance of residential-based accessible layer or engineering control. Ground water controls depend on aquifer use. See Ground Water Guidance.
	<i>Accessible and potentially accessible</i> residual contamination meets RME-based industrial/restricted commercial use criteria. Residential based criteria or engineering controls applied to accessible residual contamination if exposure to general public is of concern. <i>Remotely accessible</i> residual contamination exceeds industrial/restricted commercial criteria.	If worker is receptor of concern (i.e., receptor at highest risk): <i>Real property notification/ affidavit</i> describing residual soil contamination (including remotely accessible contamination) and stating protectiveness of remedy is based on industrial/restricted commercial property use and exposure limited to adult workers. <i>Easement</i> if monitoring or maintenance is required. If exposure to general public is of concern: <i>Environmental restrictive covenant</i> restricting land use to industrial/restricted commercial use, describing residual contamination, and requiring maintenance of residential-based accessible layer or engineering control. Ground water controls depend on aquifer use. See Ground Water Guidance.
	<i>Accessible</i> residual contamination meets RME-based industrial/restricted commercial use criteria. Residential based criteria or engineering controls applied to accessible residual contamination if exposure to general public is of concern. <i>Potentially and remotely accessible</i> residual contamination exceeds industrial/restricted commercial criteria.	<i>Environmental restrictive covenant</i> restricting property use to industrial/restricted commercial, describing residual contamination, and restricting activities which may result in exposure to or disturbance of residual contamination. If exposure to general public is of concern the <i>environmental restrictive covenant</i> should also require maintenance of residential-based accessible layer or engineering control. Ground water controls depend on aquifer use. See Ground Water Guidance.



ATTACHMENT 2: Property Use, Residual Contamination and Institutional Control Guide (page 3 of 4)

NOTE:

- *Application of this guidance assumes that site contamination and exposure potential have been adequately characterized.*
- *Institutional controls not within MPCA authority to require or seek are not included in this table, but should be considered on a site-specific basis.*
- *Recommendations presented should be applicable to most sites. Site-specific considerations may lead to a higher or lower level of control to ensure protectiveness.*
- *Soil vapor, ground or surface water impact considerations may result in stricter cleanup requirements and/or other institutional controls.*
- *Apply ecological-based criteria or evaluation to accessible contamination in ecological exposure areas (a).*

Designated Property Use	Residual Contamination Characteristics (b, c)	Recommended Institutional Controls (d)
Industrial or restricted Commercial	Concentration or accessibility of residual contamination based on site-specific industrial/restricted commercial scenario. Residential based criteria or engineering controls applied to accessible residual contamination if exposure to general public is of concern.	Variable. <i>Environmental restrictive covenants</i> if residual contamination levels are based on a limited exposure scenario, if activities which may result in exposure or disturbance of the contamination need to be restricted, or if engineering controls are required to limit exposure. If exposure to general public is of concern the <i>environmental restrictive covenant</i> should also require maintenance of residential-based accessible layer or engineering control. <i>Easement</i> if monitoring or maintenance is required. Ground water controls depend on aquifer use. See Ground Water Guidance.
Recreational	Residual contamination meets RME-based recreational use criteria at all depths.	<i>Real property notification/affidavit</i> describing residual soil contamination and basis of acceptable residual contamination levels (e.g., recreational property use). <i>Easement</i> if monitoring or maintenance is required. Ground water controls depend on aquifer use. See Ground Water Guidance.
	<i>Accessible and potentially accessible</i> residual contamination meets RME-based recreational use criteria. <i>Remotely accessible</i> residual contamination exceeds recreational criteria.	<i>Real property notification/affidavit</i> describing residual soil contamination (including remotely accessible contamination) and basis of acceptable residual contamination levels (e.g., recreational use). <i>Easement</i> if monitoring or maintenance is required. Ground water controls depend on aquifer use. See Ground Water Guidance.
	<i>Accessible</i> residual contamination meets RME-based recreational use criteria. <i>Potentially and remotely accessible</i> residual contamination exceeding recreational criteria.	<i>Environmental restrictive covenant</i> restricting property use to recreational, describing residual contamination, and restricting activities which may result in exposure to or disturbance of residual contamination. Ground water controls depend on aquifer use. See Ground Water Guidance.



ATTACHMENT 2: Property Use, Residual Contamination and Institutional Control Guide (page 4 of 4)

NOTE:

- Application of this guidance assumes that site contamination and exposure potential have been adequately characterized.
- Institutional controls not within MPCA authority to require or seek are not included in this table, but should be considered on a site-specific basis.
- Recommendations presented should be applicable to most sites. Site-specific considerations may lead to a higher or lower level of control to ensure protectiveness.
- Soil vapor, ground or surface water impact considerations may result in stricter cleanup requirements and/or other institutional controls.
- Apply ecological-based criteria or evaluation to accessible contamination in ecological exposure areas (a).

Designated Property Use	Residual Contamination Characteristics (b, c)	Recommended Institutional Controls (d)
Recreational	Concentration or accessibility of residual contamination based on site-specific recreational scenario.	<p>Variable. <i>Environmental restrictive covenant</i> if residual contamination levels are based on a limited exposure scenario, if activities which may result in exposure or disturbance of the residual contamination need to be restricted, or if engineering controls are utilized to limit exposure.</p> <p><i>Easement</i> if monitoring or maintenance is required.</p> <p>Ground water controls depend on aquifer use. See Ground Water Guidance.</p>

- For any property use scenario, if environmental impacts have occurred Natural Resource Damages may be assessed.
- Soil accessibility categories. Whenever and wherever reasonable doubt exists over the characterization of accessibility the more accessible category shall be selected. The potential for future changes in accessibility should be considered when applying accessibility categories. Note : Site specific conditions may influence contamination accessibility determinations.
Accessible contamination - contamination located from zero to four (4) feet below the ground surface where the surface is not completely covered by an impervious (e.g., pavement) or permanent structure. For buildings having earthen floors, the floor shall be considered accessible.
Potentially accessible contamination - contamination located at a depth of four to twelve (4 to 12) feet below the ground surface, or contamination located less than four (4) feet from the ground surface in an area completely covered by an impervious structure (e.g., pavement).
Remotely accessible contamination - 1) contamination located at a depth greater than twelve (12) feet below the ground surface; or 2) contamination completely covered by an existing building or other permanent structure which does not have earthen floors, regardless of depth.
- Individual chemical-specific criteria (e.g., SRVs, HRLs) may need to be modified to comply with additivity requirements.
- Development of remedial actions shall include consideration of 1) the type of institutional control to be used; 2) the ability and authority to implement and track the institutional control; and 3) the appropriate entity(ies) and their resolve and ability to implement, maintain and track the institutional control. Institutional controls shall not be used as a substitute for cleanup actions that are cost-effective and technically feasible.
- Agricultural property use requires a site-specific evaluation.

RME-based - the reasonable maximum exposure scenario based on activities which are consistent with the current and/or proposed property use designation.



ATTACHMENT 3: Easement

Purpose:

To be recorded with the county recorder or registrar of titles of the county in which the property is located, a grant to the MPCA of an interest in property, containing a legal description of the property, which:

1. Grants the MPCA the right to enter and/or to use property or a portion of a property owned by another, which is binding on current and future owners.
2. Grants the MPCA the right to take environmental response activities on the property, including the installation of structures and equipment on the property and sampling ground water monitoring wells.

The following MPCA model *easement* outlines several content requirements to be incorporated into the indenture. **The model language will require modification to become suitable for site specific application. All modifications are subject to the final approval of the MPCA.**

Once the MPCA has approved the final modifications to the document, the MPCA shall conduct or contract for a title search to determine that the persons proposing to sign the document are the legal owners of the property and to identify any other persons whose consent to the document (e. g. mortgagees) may be required.

Please paginate upon completion.

+++++

EASEMENT

THIS INDENTURE, made this ____ day of _____, 19__, between <Name>, party of the first part, and the STATE OF MINNESOTA, a sovereign body, by its Commissioner of the Minnesota Pollution Control Agency, party of the second part.

WITNESSETH:

WHEREAS, [recite the facts about the involvement of the MPCA with the property, such as through the Superfund Program or the VIC Program. The following text gives an example: <Name> has entered into the Voluntary Investigation and Cleanup Program of the Minnesota Pollution Agency pursuant to the Land Recycling Act and the Minnesota Environmental Response and Liability Act, Minn. Stat. ch. 115B (1996) (the "Act"), and has performed response actions related to <Site> which is located in Section ____, Township _____, Range _____, _____ Township, _____ County, Minnesota]; and

WHEREAS, the Commissioner has the authority to acquire an interest in real property necessary for environmental response actions under Minn. Stat. §§ 115B.17, subd. 15; and

WHEREAS, <Name> agreed to convey to the STATE OF MINNESOTA an Easement to certain described parcels of property that <Name> owns and which are hereinafter described.

NOW THEREFORE, the said party of the first part for valuable consideration does hereby grant a perpetual easement to the STATE OF MINNESOTA acting through its Commissioner of the Minnesota Pollution Control Agency (Commissioner) for the purposes and under the terms and conditions as hereinafter described in the following described premises situated at [street address, if available] in the County of _____ and the State of Minnesota, to-wit:

(TYPE LEGAL DESCRIPTION OF PROPERTIES)

THE PURPOSE AND INTENT OF THIS EASEMENT IS TO:

Permit the Commissioner and employees, agents and contractors of the Commissioner and the Minnesota Pollution Control Agency to enter the property and take environmental response actions (as that term is defined in Minn. Stat. § 115B.02, subd. 18) as the Commissioner deems necessary to carry out his duties and authorities under the Act, including access to existing response action equipment and structures, installation of structures and equipment deemed necessary by the Commissioner, and sampling ground water monitoring wells.

THE EASEMENT IS SUBJECT TO THE FOLLOWING COVENANTS AND CONDITIONS:

1. <Name> shall not take or allow others to take any action that interferes with environmental response actions of the Commissioner.
2. <Name> shall allow access pursuant to this Easement conditioned only upon presentation of proper identification.

This Easement and the covenants contained herein shall run with the land and shall be binding on all persons and entities who shall come into ownership or possession of the property as described herein.

IN TESTIMONY WHEREOF, the parties of the first part have hereunto set their hands the day and year first above written.

[OWNER]

By _____
<Name>

ACKNOWLEDGMENT

STATE OF MINNESOTA

COUNTY OF _____

On this ____ day of _____, _____, before me a notary public within and for said County and State, personally appeared _____ and _____ to me personally known, who, being duly sworn by me on oath, did say that he/she/they is/are the person(s) who signed the foregoing instrument and acknowledged that he/she/they signed the same as free act and deed for the uses and purposes therein set forth.

Notary Public, _____ County, MN
My commission expires



Accepted on behalf of the Minnesota
Pollution Control Agency
pursuant to Minn. Stat. §§ 115B.17, subd. 15

By _____
Sheryl Corrigan
Commissioner

ACKNOWLEDGMENT

STATE OF MINNESOTA

COUNTY OF RAMSEY

On this ____ day of _____, 19____, before me a notary public within and for said County and State, personally appeared _____, the Commissioner of the Minnesota Pollution Control Agency, to me personally known, who being duly sworn by me on oath, did say that he is the person who signed the foregoing instrument and acknowledged that he signed said instrument as the free act and deed of the State of Minnesota.

Notary Public, _____ County, MN
My commission expires

THIS INSTRUMENT WAS DRAFTED BY:

**[add name and address
of the attorney who
drafted this document]**

AG:64314 v1

ATTACHMENT 4: Real Property Affidavit

Purpose :

To be recorded with the county recorder or registrar of titles of the county in which the property is located, an affidavit containing a legal description of the property that discloses to any potential transferee or interest holder (e.g., buyers, sellers, lending institutions):

1. that the property has been used to dispose of hazardous waste or that the property is contaminated by a release of a hazardous substance;
2. the identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable;
3. that any person who is planning any activity which has the potential to disturb the response action or the contamination should contact the MPCA prior to commencement of the planned actions; and
4. that if the property was used as a permitted waste disposal facility, the use of the property or some portion of it may be restricted as provided in Minn. Stat. § 115B.16, subd. 1.

The following MPCA model *affidavit concerning real property contaminated with hazardous substances* includes information needed to identify and define the property and fully disclose the site conditions. **The model will require modification to become suitable for site specific application. All modifications are subject to the final approval of the MPCA.**

MPCA MODEL

**AFFIDAVIT CONCERNING REAL PROPERTY
CONTAMINATED WITH HAZARDOUS SUBSTANCES (Revised December 2000)**

STATE OF MINNESOTA)
) ss.
COUNTY OF [COUNTY])

[Name(s)] as owner of the real property described herein, being duly sworn, states the following under oath:

1. This Affidavit is made pursuant to Minn. Stat. § 115.16B, subd. 2 (2002), which requires that before any transfer of ownership of any property which the owner knows is subject to extensive contamination by release of a hazardous substance, the owner shall record with the county recorder of the county in which the property is located an affidavit containing a legal description of the property and disclosing to any potential transferees: a) that the property has been used to dispose of hazardous waste or that the property is contaminated by a release of a hazardous substance(s); b) the identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable; and c) that, if the property was used as a permitted hazardous waste disposal facility, the use of the property or some portion of it may be restricted as provided in Minn. Stat. § 115.16B, subd. 1 (2002).

2. [Name(s)] is the owner of certain real property (“Property”) located at [street address, if available] in [County] County, State of Minnesota, and legally described as follows:

[Insert legal description of property]

3. [Describe the use of the property that resulted in the contamination and recite any relevant subsequent history of the property, such as how the owner came to own the property.]

4. [Recite the facts about the involvement of the Minnesota Pollution Control Agency (“MPCA”) with the property, such as through the Superfund program or the Voluntary Investigation and Cleanup program.]

5. [Recite the facts about any site investigation and cleanup activities that occurred with respect to the property, including a description of the basis for the residual contamination levels.]



6. [State the legal description of the area where contamination remains, including a precise description of the identity, quantity, location and condition of the residual contamination remaining on the property (and off the property if appropriate) along with a registered or recorded survey of the area of contamination.]

7. [If the response action at the property included ongoing operation and maintenance structures or equipment, such as monitoring wells, recite the facts about the identity, location, and circumstances of those structures or equipment.]

8. [Recite any other relevant history of the property, if any, such as whether a certificate of completion was issued.]

9. Any person who is planning any use or activity which may adversely affect the protectiveness of the response action or which has the potential to disturb the areas of contamination [or response action structures and equipment described above] should contact the Minnesota Pollution Control Agency prior to commencement of the planned activities.

10. [Add only if applicable under the circumstances:] The response actions at the property were approved by the MPCA based on the assumption that the property was to be used for [type of property use]. If the property use is changed, the change could associate the property owner with the release or threatened release of hazardous substances [or pollutants or contaminants] and could result in a requirement for performance of further response actions at the property.

[OWNER]

By _____
<Name>



ACKNOWLEDGMENT

STATE OF MINNESOTA

COUNTY OF _____

On this ____ day of _____, _____, before me a notary public within and for said County and State, personally appeared _____ and _____ to me personally known, who, being duly sworn by me on oath, did say that he/she/they is/are the person(s) who signed the foregoing instrument and acknowledged that he/she/they signed the same as free act and deed for the uses and purposes therein set forth.

Notary Public, _____ County, MN
My commission expires

THIS INSTRUMENT WAS DRAFTED BY:

**[add name and address
of the attorney who
drafted this document]**

WORKING DRAFT

ATTACHMENT 5: Environmental Restrictive Covenant

Purpose :

To be recorded with the county recorder or registrar of titles of the county in which the property is located, an agreement containing a legal description of the property with the following purposes:

1. To establish restrictions on the use of the property or some portion of the property;
2. To disclose to any potential transferee (e.g., buyers, sellers, lending institutions): a) that the property has been used to dispose of hazardous waste or that the property is contaminated by a release of a hazardous substance or pollutant or contaminant; and b) the identity, quantity, location, condition and circumstances of the disposal or contamination to the full extent known or reasonably ascertainable; and c) that the use of the property or some portion of it is restricted;
3. To maintain required site conditions to assure that response actions remain protective of public health and the environment;
4. Ensure that long-term mitigation measures or monitoring requirements (e.g., engineering controls) are carried out and maintained; and
5. Ensure that subsequent property owners or lessees are bound by any requirements or restrictions pertaining to residual contamination when they acquire an interest in the property.

The following MPCA model *Environmental Restrictive Covenant declaration of restrictions and covenants* (Declaration) outlines several content requirements to be incorporated into the agreement. **The model language will require modification to become suitable for site specific application. All modifications are subject to the final approval of the MPCA.**

Once the MPCA has approved the final modifications to the Declaration, the MPCA shall conduct or contract for a title search to determine that the persons proposing to sign the Declaration are the legal owners of the property and to identify any other persons whose consent to the Declaration (e.g. mortgagees) may be required.

Attachment B

[Note: Leave three inches of blank space above text of document.]

**DECLARATION OF RESTRICTIONS AND COVENANTS
AND AFFIDAVIT CONCERNING REAL PROPERTY CONTAMINATED WITH HAZARDOUS
SUBSTANCES**

THIS DECLARATION AND AFFIDAVIT is made by <Owner> (“<Name>”). **The facts stated herein are stated under oath by <Individual> on behalf of <Name>, and are intended to fulfill the disclosure requirements of Minn. Stat. § 115B.16, subd. 2 (2002).**

WITNESSETH:

WHEREAS, <Name> is the fee owner of certain real property located in ____ County, Minnesota, as described herein (the “Property”); and

WHEREAS, <Individual> is the <Title> of <Name>, and is stating the facts herein solely in his/her capacity as <Title>; and

WHEREAS, a portion of the Property was the site of release(s) of certain hazardous substances or pollutants and contaminants; and

WHEREAS, [describe the use of the property that resulted in contamination and recite any relevant history of the property, such as how the owner came to own the property]; and

WHEREAS, [recite the facts about the involvement of the MPCA with the property, such as through the Superfund Program or the VIC Program. The following text gives an example: Pursuant to the Minnesota Environmental Response and Liability Act, Minn. Stat. §§ 115B.01-.24 (2002), [or the Land Recycling Act of 1992, as amended,] <Name> entered into Response Order by Consent (“Consent Order”) [or Voluntary Response Action Agreement (“Agreement”)] with the Minnesota Pollution Control Agency (“MPCA”) dated <date> concerning the Property]; and

WHEREAS, [recite the facts about any site investigation and cleanup activities that occurred with respect to the property]; and

WHEREAS, [state the location of the area(s) of the property where contamination remains, including a precise description of the identity, quantity, location and condition of the contamination remaining on the property (and off the property if appropriate) and may include a registered survey of the area of contamination]; and

WHEREAS, [describe the basis for allowing the residual contamination levels, and describe associated engineering controls or monitoring systems and remediation systems. Recite the facts about the identity, location, and circumstances of any ongoing operation and maintenance structures or equipment]; and

WHEREAS, [recite any other relevant history of the property, if any, such as whether a Certificate of Completion was issued]; and



WHEREAS, [*include if applicable:* under the Consent Order [*or* Agreement,] <Name> has agreed to place a Restrictive Covenant on [the Property] [*or*] [certain parcels of the Property which are hereinafter described] for the purpose of protecting public health or welfare or the environment.

NOW, THEREFORE, <Name> makes the following declarations as to limitations, restrictions and uses to which the Property may be put, and specifies that such declarations shall constitute covenants to run with the Property as provided by law and shall be binding on <Name>, its successors or assigns, all present or future owners of the Property, and all parties who now or hereafter have or hold any right, title or interest in the Property:

1. Definitions.

[a.] As used herein, “Owner” means <Name>, which is the grantor of the rights and covenants created in this Declaration, and includes <Name’s> successors and assigns, and all present and future owners of the Property:

[b.] As used herein, “Property” means the real property owned by <Name> located [at **street address, if available**] in _____ County, Minnesota, shown on Exhibit 1 hereto and legally described as follows:

[Insert legal description of property]

[c.] As used herein, “Restricted Area(s)” means those areas of the Property depicted and identified on the General Site Plan attached hereto as Exhibit <> and made a part hereof by reference, as follows: *(Do not include “Restricted Area(s)” definition if entire Property is restricted)*

Insert precise location/description of restricted area(s) and survey locations]



2. Use Restrictions.

Subject to the terms and conditions of this Declaration and the reservation and covenants contained herein, <Name> hereby declares and imposes the following restrictions (“Restrictions”) on the [Property] */or/* [Restricted Area]:

[Insert precise description of use or activity restrictions. The following text gives an example: No disturbance or alteration of any nature whatsoever, specifically including, but not limited to, grading, excavation, boring, drilling or construction, shall occur on, above, beneath or adjacent to the [Property] */or/* [Restricted Area(s)].

Any activity on or alteration of the [Property] */or/* [Restricted Area(s)] prohibited by the Restrictions shall not occur without the prior written approval of the Commissioner of the MPCA or her successor (the “Commissioner”). The Commissioner’s approval may include conditions which the Commissioner deems reasonable and necessary to protect public health or welfare or the environment, including submission to and approval by MPCA of a contingency plan for the activity or alteration, and such approval shall not be unreasonably withheld. The Restrictions do not apply to, and no prior approval of the Commissioner shall be required for, activities **[add only if Restrictions are limited to Restricted Area(s):** on that portion of the Property outside of the Restricted Area(s),] including maintenance or repair of existing buildings, structures, underground sewer, water, electrical or telephone services, or installation of fencing and signage, when such activities are not expected to or are not reasonably likely to result in disturbance of or intrusion into **[include applicable media:** [soil] [ground water] [and/or] [surface waters] **[add only if Restrictions are limited to Restricted Area(s):** within the Restricted Area(s).]

Within 60 days after receipt of a written request for approval to engage in any activities subject to the Restrictions, the MPCA shall respond, in writing, by approving such request, disapproving such request, or requiring that additional information be provided. A lack of response from the Commissioner shall not constitute approval by default or authorization to proceed with the proposed activity.



3. Maintenance Requirements. *(Include when applicable. If not included, renumber subsequent paragraphs and cross-references accordingly.)*

[Insert a description of the obligations which are necessary to ensure an acceptable level of risk. Such obligations may include: continued proper operation of remedial actions; periodic monitoring (e.g., ground water, surface water, air, soil); maintenance and repair of monitoring systems, permeable covers (e.g., vegetative ground cover), impervious covers (e.g., pavement); or specific procedures governing excavation activities to protect workers and site neighbors, and the erection and maintenance of fences to prohibit access of unauthorized persons to the site.]

4. Covenants.

<Name> hereby covenants that the Property shall not be held, transferred, sold, conveyed, occupied, altered, or used in violation of the Restrictions set forth in Section 2 [*add if applicable:* or the Maintenance Requirements of Section 3] of this Declaration.

5. Reservations.

Nothing contained in this Declaration shall in any way prohibit, restrict or limit Owner, from fully conveying, transferring, occupying or using the Property for all purposes not inconsistent with the Restrictions [*add if applicable:* or the Maintenance Requirements].

6. Duration; Amendment.

In accordance with Minn. Stat. § 115B.17, subd. 15 and Minn. Stat. § 84C.02(c), this Declaration and the covenants, grants and Restrictions [and Maintenance Requirements] herein are unlimited in duration unless terminated, released and/or amended with the written consent of the Commissioner or her successor, such consent not to be unreasonably withheld. Notwithstanding the foregoing, this Declaration and the covenants, grants and Restrictions set forth herein may be terminated, released and/or amended upon the occurrence and satisfaction of the following conditions:



a. **[include applicable media:** [soil] [ground water] [and/or] [surface water] sampling is conducted on the [Property] **[or]** [Restricted Area(s)] with prior written notice to and in accordance with a plan approved by the MPCA, such approval not to be unreasonably withheld; and

b. based on such samples the MPCA determines that contaminants in the **[include applicable media:** [soil] [ground water] [and/or] [surface waters] located within the [Property] **[or]** [Restricted Area(s)] no longer pose a potential threat to human health or welfare or the environment.

This Declaration and the covenants, grants and Restrictions [and Maintenance Requirements] herein may be amended if the MPCA finds that the conditions set forth in Section 2 or 3 of this Declaration are inadequate to protect public health or welfare or the environment **[if there is a document establishing clean-up levels for the property, add:** as set forth in <Name and date of document>.

If Owner and the Commissioner agree to amend this Declaration, or if the Commissioner decides to terminate or release this Declaration, the Commissioner shall, within 60 days after receipt of written request from the owner of the Property, execute and deliver to Owner an instrument in recordable form, amending, terminating, or releasing this Declaration.

7. Grant and Conveyance to MPCA: Right of Entry.

Subject to the terms and conditions of this Declaration, <Name> grants and conveys to the MPCA and its successors such rights and interest in the Property as are necessary and convenient to enforce the Restrictions set forth in section 2 of this Declaration [and Maintenance Requirements set forth in Section 3], including the right of the MPCA, its employees, its agents, contractors and subcontractors, upon reasonable notice to the then-current owner and at reasonable times, to enter from time to time upon the Property to inspect the [Property] **[or]** [Restricted Area(s)] and verify compliance with the Restrictions [and Maintenance Requirements]. The Restrictions declared and the rights and interest granted under this Declaration of



Restrictions shall run with the Property and bind <Name>, its successors or assigns, all present or future owners of the Property, and all parties who now or hereafter have or hold any right, title or interest in or to the Property.

8. Emergency Procedures. ***(Include when applicable)***

[<Name> covenants that the procedures set forth below shall be followed when an emergency requires immediate excavation of contaminated soil in the [Property] ***or*** [Restricted Area(s)] to repair utility lines or other infrastructure on the Property, or to respond to other types of emergencies (e.g., fires, floods):

a. notify the Minnesota Duty Officer immediately of obtaining knowledge of such emergency conditions; the current phone numbers for the Duty Officer are 1-800-422-0798 (Greater Minnesota only); (651) 649-5451 (Twin Cities Metro Area and outside Minnesota); fax (any location) (651) 296-2300 and TDD (651) 297-5353 or 800-627-3529.

b. limit disturbance of contaminated media to the minimum reasonably necessary to adequately respond to the emergency;

c. undertake precautions to minimize exposure to workers, occupants and neighbors of the Property to contaminated media (e.g., provide appropriate types of protective clothing for workers conducting the excavation, and establish procedures for minimizing the dispersal of contaminated dust); and

d. prepare and implement a plan to restore the Property to a level that protects public health and the environment. Submit to the MPCA a copy of such a plan for review and approval prior to implementation of the plan. Submit a follow-up report after the plan is implemented so that the MPCA can determine whether protection of the public health and the environment has been restored.]

9. Disclosures. ***(Include when applicable)***

[The Restrictions set forth in Section 2 [and the Maintenance Requirements in Section 3] of this Declaration shall be incorporated in full or by reference into all instruments conveying an interest in and/or a right to use the property (e.g., easements, mortgages, leases).]



In Witness Whereof, this instrument has been executed on this _____ day of _____.

[NAME OF OWNER]

By _____ (Signature)
[Name] _____ (print)
[Title] _____ (print)

State of Minnesota)
) SS.
County of _____)

<Name>, being duly sworn by me under oath, has signed and acknowledged the foregoing instrument before me this _____ day of _____, 20____, by <Name>, <Title and Company/Organization>, on behalf of <Name>, <Company/Organization>.

Notary Public

WORKING DRAFT

Accepted on behalf of

Minnesota Pollution Control Agency

Pursuant to Minn. Stat. § 115B.17, subd. 15

By _____
James L. Warner, P.E.
Director
Majors and Remediation Division
Delegate of the Commissioner of the
Minnesota Pollution Control Agency

State of Minnesota)
)SS.
County of Ramsey)

The foregoing instrument was acknowledged before me this _____ day of _____,
20____, by James L. Warner, under the authority of Sheryl A. Corrigan, the Commissioner of Minnesota
Pollution Control Agency, a Minnesota body politic, on behalf of the State of Minnesota.

Notary Public

THIS INSTRUMENT WAS DRAFTED BY:

**[Name and address of person or corporation
who drafted this document for the
Owner]**

AG: 2022248, v. 01

