1.0 Introduction

Over the past few years, the Minnesota Superfund law, known as the Minnesota Environmental Response and Liability Act (MERLA), has been amended to clarify the application of cleanup liability to specific parties and provide statutory mechanisms to obtain liability protections. A number of these amendments offer incentives to promote investigation and cleanup activities under oversight and approval of the Voluntary Investigation and Cleanup (VIC) Program. These amendments also promote and facilitate the transfer and development of property by authorizing the Minnesota Pollution Control Agency (MPCA) Commissioner to provide information and technical assistance to any person requesting assistance regarding contaminated property. This document summarizes the major state and federal laws which apply, or could apply, to a voluntary party who wishes to obtain approval of investigation and cleanup reports and other written assurances through the VIC Program. These assurances include a “no action” letter or agreement, an “off-site source determination” letter, a “no association determination” letter, or a Certificate of Completion. Specific information on these assurances can be found in Guidance Document #4, Types of Written Assurances.

2.0 State Superfund Provisions

What are the provisions of the state Superfund law directly pertaining to the VIC Program?

A. Requests for Review, Investigation and Oversight.

The MPCA Commissioner may, upon request, assist an owner or other interested party in determining whether real property has been the site of a release or the threatened release of a hazardous substance, pollutant, or contaminant and give guidance in the development and implementation of response actions. Minn. Stat. § 115B.17, subd. 14(a). The person requesting assistance must pay the MPCA for its costs of providing such assistance. Minn. Stat. § 115B.17, subd. 14(b). MERLA expressly provides that, when a person investigates a release or threatened release in accordance with an investigation plan approved by the Commissioner pursuant to Minn. Stat. § 115B.17, subd. 14, the investigation does not “associate” that person with the release or threatened release for purposes of Minn. Stat. § 115B.03, subd. 3(d). Minn. Stat. § 115B.17, subd. 14(c). Completion of a voluntary investigation or cleanup often results in a no action letter or a technical assistance approval letter being issued to the interested party. These letters acknowledge that the investigation or cleanup by the interested party meets MPCA requirements including the standards of thoroughness and accuracy outlined in VIC Program Guidance Documents.
B. Land Recycling Act.

Persons who undertake and complete response actions in accordance with a voluntary response plan approved by the MPCA Commissioner, and who are not otherwise responsible for the release or threatened release under MERLA §§ 115B.01 to 115B.18, are protected from MERLA liability under the Land Recycling Act. Minn. Stat. § 115B.175, subd. 1. The Land Recycling Act defines the circumstances under which the MPCA Commissioner can approve voluntary response action plans and certify completion of voluntary cleanup actions that are eligible for the statutory liability protection. Minn. Stat. § 115B.175, subs. 3 and 5.

The Land Recycling Act allows the MPCA Commissioner to approve partial response action plans (plans that do not address all identified releases or threatened releases), but additional conditions and requirements must be met. Minn. Stat. § 115B.175, subd. 2. Liability protection applies to the party who undertakes and completes response actions and to the owner of the identified property (if those parties are not responsible for the release or threatened release), as well as to financing parties and successors and assigns of any person to whom liability protection applies. Minn. Stat. § 115B.175, subd. 6.

Voluntary response actions may also be undertaken by persons who are responsible for the release under MERLA. However, the voluntary response actions performed by a responsible person must address all releases or threatened releases (a partial cleanup is not allowed), and the responsible person is not eligible for statutory liability protection. Minn. Stat. § 115B.175, subd. 6(a). The responsible party may be eligible for a no action letter or agreement from the MPCA Commissioner. Statutory liability protection extends to persons who acquire the identified real property after completion of the voluntary response actions, persons providing financing for response actions or development at the identified real property after completion of the response actions, and successors or assigns of persons to whom the liability protection applies. Persons who undertake cleanup under the Land Recycling Act do not associate themselves with, aggravate or contribute to any release or threatened release identified in an approved voluntary response action plan provided the response actions are conducted in accordance with an MPCA approved plan. Minn. Stat. § 115B.175, subd. 4.

The MPCA Commissioner may issue determinations that future actions proposed to be taken at real property subject to a release or threatened release will not constitute conduct associating the person with the release or threatened release for purposes of Minn. Stat. § 115B.03, subd. 3(d). Minn. Stat. § 115B.178, subd. 1(a). The MPCA Commissioner may also determine that past actions taken at the real property did not constitute conduct associating the person requesting the determination with the release or threatened release for the purposes of Minn. Stat. § 115B.03, subd. 3(d). Minn. Stat. § 115B.178, subd. 1(b).

The MPCA Commissioner may also issue a written determination or enter into an agreement to take no action against a person who owns real property subject to a release of a hazardous substance, pollutant, or contaminant, if the MPCA Commissioner finds that the release originates from a source on adjacent or nearby real property and the owner is not otherwise responsible for the release. Minn. Stat. § 115B.177.
For more information on the types of written assurances issued by the VIC Program, please see Guidance Document #4, *Types of Written Assurances*.

**What other provisions of the state Superfund law are especially relevant to the VIC Program?**

A. Definition of “Owner of Real Property.”

MERLA, the Minnesota Superfund law, governs liability for a cleanup of releases of hazardous substances. MERLA imposes strict liability for cleanup costs and natural resource damage on “responsible persons” who are legally responsible for a release. Facility owners constitute one category of responsible parties. “Owner of real property” is defined broadly by MERLA to include a party “who is in possession of, has the right of control, or controls the use of real property, including without limitation a person who may be a fee owner, lessee, renter, tenant, lessor, contract for deed vendor, licensor, licensee, or occupant....” *Minn. Stat. § 115B.02, subd. 11.* It should be noted that the state or a state agency is not an owner of real property solely because it holds title to the property in trust for taxing districts as a result of forfeiture of title for nonpayment of taxes. *Minn. Stat. § 115B.02, subd. 11(4).* However, ownership of the facility, by itself, does not make the owner responsible for a release from that facility under MERLA. An owner of the real property is entitled to the benefit of the “innocent landowner” provisions of MERLA.

B. Owner Liability.

Owners of real property, as defined by MERLA, are not responsible for a release from a facility located on the property unless the owner:

(a) was engaged in the business of generating, transporting, storing, treating, or disposing of a hazardous substance at the facility or disposing of waste at the facility, or knowingly permitted others to engage in such a business at the facility;

(b) knowingly permitted any person to make regular use of the facility for disposal of waste;

(c) knowingly permitted any person to use the facility for disposal of a hazardous substance;

(d) knew or reasonably should have known that a hazardous substance was located in or on the facility at the time right, title, or interest in the property was first acquired by the person, and engaged in conduct associating that person with the release; or

(e) took action which significantly contributed to the release after that person knew or reasonably should have known that a hazardous substance was located in or on the facility. *Minn. Stat. § 115B.03, subd. 3.*

Other provisions of Section 115B.03 clarify that the state, a state agency, or a political subdivision is not a responsible party solely by acquiring property through exercise of eminent domain powers, and that a person who acquires such property from an entity exercising such powers is also not a responsible party solely by reason of that acquisition. *Minn. Stat. § 115B.03, subd. 5.*
Of course, parties who acquire property through eminent domain can become responsible parties by “associating with” or “contributing to” a release, as provided in Minn. Stat. § 115B.03, subds. 3(d) and (e), as described above.

C. Lender Liability.

With respect to lender liability for property where there is a release, MERLA provides that a mortgagee is not a responsible party solely because the mortgagee becomes an owner of real property through foreclosure or by receipt of the deed to the mortgaged property in lieu of foreclosure. Minn. Stat. § 115B.03, subd. 6(a). Further, a mortgagee of real property where a facility is located or a holder of a security interest in facility assets or inventory is not an operator of the facility solely because the mortgagee or holder has an unexercised capacity to influence the operation of the facility to protect its security interest in the real property or assets. Minn. Stat. § 115B.03, subd. 6(b). Also, a contract for deed vendor is not a responsible party solely as a result of the termination of the contract for deed. Minn. Stat. § 115B.03, subd. 7. Once again, these liability protections apply only so long as the lender does not “associate with” or “contribute to” a release after taking title to the property.

D. Petroleum Exclusion.

The MERLA definition of hazardous substance does not include petroleum and, therefore, a release solely of petroleum is not subject to the MERLA cost recovery liability provisions. Minn. Stat. § 115B.02, subd. 8. Releases of petroleum are subject to Minn. Stat. § 115C, the Petroleum Tank Release Cleanup Act. (See Part 4.0 C. of this document and Guidance Document #5, VIC Program Interaction with Other Regulatory Programs.)

3.0 Federal Superfund Provisions

What are the federal Superfund laws applicable to the VIC Program?

Under a Memorandum of Agreement with the U.S. Environmental Protection Agency (EPA), dated May 2, 1995, the MPCA is designated the lead agency for VIC Program sites. EPA has no role in the VIC Program in terms of review, oversight or approval of investigation activities and response actions; however, sites for which “no association” determinations are issued, and additional characterization or cleanup may be necessary, are outside the scope of the Memorandum of Agreement. These sites may be referred to the Site Assessment Unit for possible listing on CERCLIS.

CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq.), the federal “Superfund” law, imposes strict liability for cleanup costs and natural resource damages relating to a release of hazardous substances on, among other parties, the “owner” of the facility at which the release occurred. 42 U.S.C. § 9607. In general, any person who is currently the owner of the facility is a responsible party under CERCLA, although some defenses may be available.

A. Definition of “Owner,” and Owner Liability.

The CERCLA definition of “owner” does not include a unit of state or local government which acquires ownership involuntarily through bankruptcy, tax delinquency, or other circumstances,
unless the governmental unit has caused the release or threatened release of a hazardous substance from a facility. 42 U.S.C. § 9601(20)(D). The CERCLA definition of “owner” also excludes lenders who, without participating in the management of a facility, hold indicia of ownership primarily to protect a security interest in the facility. 42 U.S.C. § 9601(20)(A). The EPA has promulgated rules explaining the range of activities, including foreclosure and resale, that a secured creditor may engage in to protect its security interest without being considered to be participating in management. 40 C.F.R. Subpart L, §§ 300.1100 to 300.1105. However, these rules were invalidated by a federal court in 1994. Congress may resolve liability issues related to lenders in the reauthorization of CERCLA.

B. Defenses for Owners.

CERCLA also includes certain defenses to liability for owners. An owner has a defense to liability when the release is caused solely by a third party, if the owner exercised due care with respect to the hazardous substance concerned, and took precautions against foreseeable acts or omissions of the third party and their consequences. 42 U.S.C. § 9607(b). However, a current owner cannot use the defense that a previous owner caused the release unless the current owner acquired the property after the disposal or placement of the hazardous substance in, at, or on the property, and the current owner did not know and had no reason to know that the hazardous substance was located on the property. 42 U.S.C. § 9601(35)(A). In effect, the current owner must show that it exercised “due diligence” to discover contamination when it acquired the property and that no contamination was discovered. 42 U.S.C. 9601(35)(B). An owner who acquires property without the knowledge of the release, but later obtains actual knowledge of the release, is not entitled to the “third party” defense if the owner subsequently transfers ownership of the property without disclosing such knowledge. 42 U.S.C. § 9601(35)(C). Likewise, an owner who acquires property without liability, and later causes or contributes to the release or threatened release, is not entitled to the third party defense. 42 U.S.C. § 9601(35)(D).

The government is entitled to a defense from liability when it involuntarily acquires property in the absence of a “contractual relationship.” 42 U.S.C. § 9601(35)(A)(ii).

4.0 Other State and Federal Provisions

What other state or federal environmental laws are or may be applicable to investigations or cleanups under the VIC Program?

A. Water Pollution Control Act Notification Provision, Minn. Stat. § 115.061.

The notification provision of the Water Pollution Control Act requires that every person notify the MPCA immediately of the discharge of any substance under that person’s control which, if not recovered, may cause pollution to state waters. With respect to owners of real property, substances “under a person’s control” could be construed to include all substances located on that property. The provision also requires that the responsible person recover the substance as rapidly and as thoroughly as possible and immediately take other action as necessary to minimize or abate the pollution. The penalty for violation of the statute could include the cost of cleanup. Also, failure to comply with the requirements of the statute could potentially “associate” a person with the release for purposes of MERLA liability.
B. Hazardous Waste Regulations.


   RCRA is the federal act which governs how hazardous waste is managed by currently operating businesses and other organizations. RCRA requires corrective action for all releases of hazardous waste from any solid waste management unit at a treatment, storage, or disposal facility seeking a RCRA permit, regardless of when the hazardous waste was placed at the unit. 42 U.S.C. § 6924(u). RCRA also requires corrective action beyond the facility boundary. 42 U.S.C § 6924(v).


   Under the state hazardous waste regulations, generators and transporters of hazardous waste that spills, leaks, or otherwise escapes from a container, tank, or other containment system including its associated piping, must immediately notify the agency and must recover the hazardous waste as rapidly and as thoroughly as possible and take any other action needed to protect human health and the environment. Minn. Rules pt. 7045.0275, subpts. 2 and 3. With respect to owner liability, the Rules contain provisions similar to RCRA which require that an owner or operator of a facility seeking a permit for treatment, storage, or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment at the facility, including corrective action beyond the facility boundaries. Minn. Rules pt. 7045.0485.

   For more information on how RCRA regulations can affect the VIC Program, please see Guidance Document #5, VIC Program Interaction with Other Regulatory Programs.

C. Petroleum Tank Release Cleanup Act, Minn. Stat. ch. 115C.

State law provides that a person is responsible for a release of petroleum from a tank if that person owns or operates the tank at any time during or after the release. Minn. Stat. § 115C.021, subd. 1. The Petroleum Tank Release Cleanup Act provides for an “innocent owner” exception to liability for those who do not know or have reason to know of the tank’s existence when it was acquired, and did not contribute to the release after the owner knew or reasonably should have known of the tank’s existence. Minn. Stat. § 115C.021, subd. 2.

Unlike MERLA, cleanup liability for leaking petroleum tanks attaches to the owner of the tank rather than to the owner of the real property where the tank is located. The Petroleum Tank Release Cleanup Act includes lender liability provisions similar to MERLA, under which a mortgagee is not responsible for a release from a tank solely because the mortgagee becomes the owner of real property on which the tank is located through foreclosure of the mortgage or by receipt of the deed in lieu of foreclosure. Minn. Stat. § 115C.021, subd. 4(a). Further, a mortgagee of real property where a tank is located or a holder of a security interest in a tank is not an operator for the tank solely because the mortgagee or holder has an unexercised capacity
to influence the operation of the tank to protect its security interest. Minn. Stat. § 115C.021, subd. 4(b). Also like MERLA, the MPCA Commissioner may, upon request, assist in determining the existence of a release, and assist in or supervise the development and implementation of response actions. Minn. Stat. § 115C.03, subd. 9. Such assistance may include the issuance of a written determination that an owner or prospective buyer of real property will not be a responsible person under Minn. Stat. § 115C.021, if the release came from a tank not located on the property. Assistance may also include a written confirmation that the real property was the site of a release and that the tank from which the release occurred has been removed prior to purchase of the real property, and that the agency has issued a site closure letter. The written determination or confirmation provided extends to successors and assigns of the person to whom it originally applied, if the successors and assigns are not otherwise responsible for the release. Minn. Stat. § 115C.02, subd. 9(c). The requesting party must pay the MPCA for its costs in providing such assistance. This assistance is provided by MPCA staff in the Voluntary Petroleum Investigation and Cleanup Program.

In the case of a release, the MPCA Commissioner may order tank owners who are responsible parties to take corrective actions. Minn. Stat. § 115C.03. However, unlike MERLA, responsible parties, as well as non-responsible parties, may be reimbursed by a state-administered fund for up to 90 percent of the corrective action costs incurred, up to a limit of $1,000,000. The fund is administered and claims are paid by the Petroleum Tank Release Compensation Board, an organization that is independent of the MPCA.

D. Environmental Lien Law, Minn. Stat. §§ 514.671 to 514.676.

The environmental lien law authorizes the MPCA to investigate and clean up a Superfund or leaking tank site, and then attach a lien to the property in an amount equal to the MPCA’s costs recoverable under Minn. Stat. §§ 115B.04 or 115C.04. The lien covers all costs of investigation and cleanup. Further, the statute requires that the MPCA may only make use of the environmental lien when the owner of the property is a responsible party as defined in Minn. Stat. §§ 115B.03 or 115C.021.

E. Harmful Substance Compensation Board, Minn. Stat. § 115B.25 et seq.

In 1995, the Harmful Substance Compensation Board was abolished by the legislature and its duties were transferred to the MPCA. The function of the Board is to consider claims made for property damage or personal injury that could have reasonably resulted from an exposure in Minnesota to a harmful substance released from a facility. Minn. Stat. § 115B.29. One compensable property damage loss is the reasonable cost of replacing or decontaminating the drinking water source and loss of market value of owner-occupied residential real property, up to $25,000. Minn. Stat. § 115B.34, subd. 2. Responsible parties are not eligible for compensation from the account for damage to property. Minn. Stat. § 115B.30, subd. 2.