1.0 Purpose

This document provides a description of the types of written assurances that are available to voluntary parties upon approval of a voluntary investigation or response action by the Minnesota Pollution Control Agency (MPCA) staff in the Voluntary Investigation and Cleanup (VIC) Program. These assurances can be issued in a variety of forms, such as determination letters, agreements, or certificates and can address technical, administrative, or liability matters. This document does not provide a comprehensive description of all the assurances, rather a summary of the most common types of determination letters, agreements or certificates currently issued under Minnesota law.

2.0 Objective

The objectives of this document are:

- to provide prospective voluntary parties with information on the types of written assurances available to them upon the completion of investigation and, if necessary, response actions under the VIC Program;

- to explain MPCA policies pertaining to the laws governing the written assurances issued by the VIC Program, particularly the Land Recycling Act of 1992 and its 1993, 1994, and 1995 amendments;

- to allow the MPCA staff more time to focus on the site-specific technical issues and to minimize the amount of time discussing questions regarding liability protection that are asked of MPCA staff during telephone calls and meetings; and

- to help the MPCA staff provide consistent and timely responses to requests for written assurances.
3.0 Types of Written Assurances

There are five broad categories of written assurances that can be issued by the MPCA Commissioner or designated MPCA staff following completion and the approval of a voluntary investigation or Response Action Plan (RAP). These categories include:

- Technical Assistance letters;
- No Action letters or No Action Agreements which provide a Covenant Not To Sue;
- Off-Site Source Determination letters;
- Certificates of Completion (Full and Partial Cleanups); and
- No Association Determination letters.

Except for No Action letters or Agreements, these assurances are issued under discretionary authority expressly provided under Minnesota Statutes. No Action letters or Agreements are also discretionary, but are issued pursuant to the authority of the MPCA to exercise discretion in its enforcement action. These assurances can be “combined” and in some case it is appropriate to request multiple assurances.

3.1 Technical Assistance Letters

A Technical Assistance letter is used when MPCA staff has reviewed technical plans or reports submitted to the VIC Program related to voluntary investigation activities and response actions. These letters are issued in cases where the voluntary party is interested in obtaining MPCA staff technical assistance. This type of written assurance may be used, for example, when the voluntary party is interested in having an official MPCA determination on the adequacy of a voluntary investigation and cleanup or in having the MPCA staff serve as a third party reviewer (e.g., to allow a current and former property owner to settle a dispute regarding the condition of a site or the need for cleanup). It may also be used in situations where other types of assurances do not apply or when no contamination was discovered. Technical Assistance letters can apply to any technical report or plan, including the approval of a Phase I Report, a Phase II Investigation Work Plan, or a RAP.

A Technical Assistance letter will list the specific reports or information upon which the letter has been issued. Often, MPCA staff comments will be found in attachments to the Technical Assistance letter. Examples include clarifications regarding the spatial extent or media covered by the letter, or recommendations to re-sample or seal monitoring wells or unused drinking water wells at the site. Modifications may also be attached to Technical Assistance letters. Modifications are conditions that must be met in order to gain full MPCA technical approval of a report or plan. Examples of modifications include requirements to remediate contamination
currently inaccessible on a site when it becomes accessible in the future (for example, when a building is torn down and the area beneath it can be reached), to investigate and remediate ground water (at sites where the letter was issued for soil but ground water contamination was documented), or to record information regarding contamination detected at the site on the property deed.

A Technical Assistance letter is generally not issued when the voluntary party is interested in assurances from the MPCA Commissioner regarding future MPCA administrative actions and liability protection. A Technical Assistance letter may be the only type of written assurance available to certain voluntary parties depending on whether the parties meet statutory qualifications for other assurances.

### 3.2 No Action Letters or Agreements

No Action letters or Agreements provide a degree of assurance regarding future Superfund administrative or enforcement actions by the MPCA, in addition to providing technical comments and approvals. No Action letters are issued by the MPCA Commissioner or designate. They can be issued to a voluntary party regardless of whether the party is a responsible person or not, as defined by the Minnesota Superfund law. The assurances provided in No Action letters or Agreements apply to the parties identified in the Request For Assistance form and successors and assigns. Cases where No Action letters may be issued include properties where:

- Contamination is detected, but levels are not significant as determined by the MPCA staff, and as a result no cleanup is required. A No Action letter issued in this circumstance may state that a release of hazardous substances was detected, but levels in ground water were, for example, below the Minnesota Department of Health Recommended Allowable Limits. A Phase I Investigation Report must also be reviewed and approved by the MPCA staff to be eligible for this No Action letter.

- The property has been remediated, as approved by the MPCA Commissioner, and no additional cleanup is required. Sites that fit in this category may receive what is commonly referred to as a “No Further Action” letter.

Within the above two categories, a No Action letter may be tailored according to site specific conditions. A Limited No Action letter may be issued depending on the completeness of the investigation or cleanup performed, the specific boundaries of the investigation or cleanup, or an abbreviated list of contaminants analyzed. Cases where Limited No Action letters have been issued include:

- Sites where only soil is investigated and remediated. In these cases, a Limited No Action letter will address only the soil investigation and response actions and will contain disclaimers stating that ground water was not investigated or remediated.
- Sites where only a discrete area of the property is investigated and remediated. An example of this would be where only the area of a proposed building expansion was investigated and cleaned up, but other areas of the property were not addressed. In these cases a Limited No Action letter will only address the expansion area and will contain disclaimers stating that the other areas of the property were not investigated or cleaned up.

- Sites where only a limited number of contaminants are investigated or cleaned up. In these cases, a Limited No Action letter will address only the contaminant(s) that were investigated and will contain disclaimers regarding other contaminants that have been detected or may be present.

A No Action letter states that based on the review of the submitted documents (and perhaps site visits and representations made by the voluntary party or environmental consultant), the MPCA Commissioner will refrain from taking specific administrative or enforcement action. In general, the MPCA Commissioner will refrain from taking administrative action, provided voluntary investigation, and cleanup activities are being or have been completed to the satisfaction of the MPCA staff and in a timely manner. Depending on the status of the site with respect to the Superfund process, the No Action letter may state that the MPCA Commissioner will refrain from referring the release to the U.S. Environmental Protection Agency’s Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) list, from preparing a Hazardous Ranking System (HRS) score, and from recommending that the site be placed on the state Superfund list known as the Permanent List of Priorities (PLP) for the specific release documented during investigation of the site. Sites already on the CERCLIS list, or which already have an HRS score would be halted at that stage of the Superfund administrative process, and would not proceed to listing on the PLP.

All No Action letters will incorporate some standard disclaimers and limitations which define the application of the MPCA assurances to the specific circumstances addressed in the letter. Most disclaimers serve to inform the party receiving a No Action letter about the actions the MPCA may still take regarding the site. The disclaimers generally include a “new information” provision reserving the authority of MPCA to take other action if information obtained after issuance of the letter warrants it. In addition, comments and modifications, like those appended to Technical Assistance Approval letters, may be found on an attachment to the No Action letter. Even with these disclaimers and limitations, it has been MPCA staff’s experience that these letters have been sufficient to allow property transactions and redevelopment to occur.

The voluntary party can enter into a No Action Agreement with the MPCA Commissioner in lieu of being issued a No Action letter. This Agreement, also referred to as a Response Order by Consent or Consent Order, usually contains a Covenant Not To Sue and incorporates an approved RAP as an exhibit. A No Action Agreement, which requires the signature of both the voluntary party and the Commissioner, is used when cleanup actions will be taken, or in situations where outstanding issues remain at a site such as long-term ground water monitoring or maintenance of a remedial action. (As a result, these Agreements are only signed, if requested
by the voluntary party, at the point in the investigation and cleanup process following the
approval of a voluntary RAP [See Guidance Document #18, Response Action Plan/Response
Action Plan Implementation Report]). The vast majority of voluntary parties have chosen, and
the MPCA staff prefer, the use of a No Action letter instead of an Agreement because a letter can
be issued more quickly and involves less transaction cost.

3.3 Off-Site Source Determination Letters

A third type of written assurance is known as an Off-Site Source Determination letter. An Off-
Site Source Determination letter may be issued when the voluntary party who owns property has
demonstrated, to the satisfaction of the MPCA staff, that the contamination on the subject
property results from an off-site source (a neighboring property). A letter for an off-site source
may be issued for a property where it is demonstrated, by approved Phase I and Phase II
Investigation Reports that:

- ground water (and sometimes soil at the soil/ground water interface) is contaminated;
- there is no on-site source of the contamination; and
- a likely source of the contamination exists nearby and is hydraulically upgradient of the
  subject property.

An Off-Site Source Determination letter will state that the MPCA will not take cleanup
enforcement action against the voluntary party. However, the statute authorizing these letters
requires the owner of the property to cooperate with the investigation and cleanup of the release
by providing, for example, access in the future to the responsible party or the MPCA. Sometimes
access will require that the owner grant an easement for installation and maintenance of remedial
equipment, such as monitoring wells, on the property. In addition, the property owner will be
required to avoid actions, possibly including development activities, that would interfere with
future response actions or contribute to the release.

3.4 Certificates of Completion

The Land Recycling Act of 1992 (the Act) provides that persons who undertake and complete
voluntary cleanup actions approved by the MPCA Commissioner, and who are not otherwise
legally responsible for the contamination, are protected from MERLA liability for cleanup. In
1993, the Act was amended to allow responsible persons (RPs) to conduct cleanups and gain
liability protection for their successors, lenders, and other parties who are not otherwise
responsible for the release. The Act also extends this liability protection to other parties
associated with the property or with development occurring on the property, if those parties are
also not otherwise responsible for the contamination. These parties may include property owners,
trustees, lenders, and their successors and assigns. While RPs cannot obtain liability protection for themselves under the Land Recycling Act, RPs are eligible for a full Covenant Not To Sue for future cleanup liability when they conduct and complete a voluntary response action plan approved by the MPCA Commissioner.

Protection from cleanup liability takes effect when completion of the response actions is certified by the MPCA Commissioner, that is when the MPCA Commissioner issues the **Certificate of Completion**. Issuance of the Certificate of Completion coincides with the approval of the Response Action Implementation Report. (Please see Guidance Document #18, *Response Action Plan/Response Action Plan Implementation Report*) Land Recycling Act assurances apply only when a RAP is approved and implemented. A RAP is required only when the MPCA has determined the property is the site of a release or threatened release that needs to be addressed to protect human health, welfare, or the environment. Thus, if a property is determined not to require a response action, the property is not eligible for Land Recycling Act assurances of liability protection under a Certificate of Completion.

The Land Recycling Act allows the MPCA Commissioner to approve a partial RAP (a plan that addresses some but not all contamination at a particular property), provided the response action includes all actions needed to carry out any reuse or development of the property in a manner that protects public health, welfare, and the environment. Therefore, the MPCA Commissioner may in these situations issue a Certificate of Completion of a partial response action.

A partial RAP is approvable only when the response actions are being conducted by persons not otherwise responsible for the release or threatened release. (A Land Recycling Act cleanup by a responsible party must address all releases and threatened releases at the property.) A partial RAP will require the owner of the property to enter into an Agreement to cooperate with any additional cleanup actions needed to complete a full cleanup of all remaining contamination. Such cooperation includes granting access to the property for investigation and cleanup actions including installation of wells, equipment, and structures needed for a cleanup. Completion of cleanup work under an approved partial RAP will qualify those taking the actions (and other eligible persons) for protection from cleanup liability for any remaining contamination not required to be addressed under the partial RAP.

It is important to note that before the MPCA Commissioner approves either a complete or partial RAP, the voluntary party must investigate all releases and threatened releases at the property. This means conducting both soil and ground water investigation activities. It is also important to note that while the voluntary party is protected from future cleanup liability when a partial RAP is approved and completed, the MPCA may later need to conduct response actions or direct responsible parties to conduct response actions at the property to address the remaining release(s). In the event the person(s) responsible for the release does not conduct the remaining response actions, the MPCA staff in the VIC Program may refer the release to the Superfund administrative process by placing the release on the CERCLIS list and PLP and taking appropriate enforcement actions.
3.5 No Association Determination Letters

With the enactment of 1993, 1994, and 1995 amendments to the Land Recycling Act, the MPCA Commissioner can issue, upon request from a voluntary party, a **No Association Determination** letter. Because the letter will be issued only for actions at a property that is subject to a known release or a threatened release, the voluntary party will need to conduct an investigation (see Guidance Documents #8, *Phase I Investigation*, #11, *Phase II Investigation Workplan*, and #12, *Phase II Investigation Report*) that demonstrates the presence of contamination and submit the investigation results to the MPCA staff in the VIC Program for approval. The environmental conditions at the property will need to be characterized comprehensively enough to identify any conditions to be included in the determination to assure cooperation with future response actions and avoidance of actions contributing to the release. In addition, No Association Determinations are not available to those voluntary parties who do not have an ownership interest in the property.

The No Association Determination letters may be issued under different sets of circumstances; each accompanied by special requirements. These circumstances and their requirements include:

- **Proposed actions at a site such as investigation, cleanup actions, or construction for purposes of developing property or expanding existing operations.** The MPCA Commissioner will review the proposed actions and decide whether to issue a No Association Determination to the party. The determination may be subject to terms and conditions deemed reasonable by the MPCA Commissioner. If a No Association Determination is issued, the actions taken by the voluntary party, in accordance with the provisions of the determination, will not associate the party with the known release, thus protecting the voluntary party from future cleanup liability. It is important to note that Site Safety and Contingency Plans may need to be in place to respond to unexpected problems that may arise during such actions.

- **Continuation of a current business operation.** The MPCA Commissioner will require that the voluntary party provide sufficient information about the current and planned operation to demonstrate that such actions would not be expected to associate the person with the release. For example, the information could show that the business operation is now using a different process or process materials from those identified with the known release. Moreover, to qualify for a No Association Determination, the proposed actions must result in either a benefit to the environment or economic improvement to the property. An economically beneficial action could include sale, refinancing, or similar action that would create new economic activity or help assure continuation of existing activity.
• **Certain actions taken in the past.** No Association Determinations or Agreements for past actions involve MPCA Commissioner review of historical site activity relative to liability concerns. Any determination will be limited to the represented facts of the past actions and will not apply to actions that are not represented or disclosed. Therefore, a request for a No Association Determination for certain actions taken in the past would require the submittal of evidence, in the form of a legal affidavit, that the owner did not engage in conduct associating that person with the release, and that the circumstances of property acquisition were such that the owner did not know that a hazardous substance was located in or on the facility at the time the property was first acquired. The investigation at the site must also be extensive enough to identify all suspected releases based on the historical information. The determination may be subject to terms and conditions deemed reasonable by the MPCA Commissioner.

It is important to point out that provisions of the Land Recycling Act protect voluntary parties from associating themselves with the known release when voluntary investigation activities and response actions are approved by the MPCA Commissioner or delegated MPCA staff. Therefore, the No Association Determination is reserved for actions other than approved investigations and response actions.