

# Summary

## Petroleum Remediation Program

### Key Facts and Findings:

- The Minnesota Pollution Control Agency’s (MPCA’s) Petroleum Remediation Program seeks to protect people and the environment by overseeing responses to leaks and spills from petroleum storage tanks. (p. 6)
- The Petroleum Remediation Program relies on consultants to conduct investigations and take other actions at petroleum release sites. (p. 7)
- By law, consultants and contractors who work on petroleum release sites must be registered by the Petrofund Board; however, registration requirements are minimal. (pp. 35-36)
- While MPCA has implemented several strategies in an attempt to improve consultant performance, according to MPCA staff, some consultants performed poor-quality work at petroleum release sites. (pp. 38-40)
- MPCA has limited authority to directly hold consultants accountable for poor performance. (p. 41)
- The Petroleum Remediation Program concentrates its efforts on petroleum release sites that it determines pose a high risk to human health and the environment. (p. 16)
- Program guidance directs MPCA staff to primarily consider how a property is currently used—rather than how that property could be used in the future—when making decisions about how to respond to a release. (p. 24)
- Statutes prescribe the way in which MPCA must respond to release sites that are a “low potential risk”; however,

neither statutes nor the Petroleum Remediation Program define low potential risk. (p. 27)

- Statutes dictate how quickly MPCA must review certain plans for work at release sites; however, it is unclear whether MPCA must collect those plans. (p. 29)
- The majority of respondents to our surveys of consultants and program staff agreed that the Petroleum Remediation Program is meeting its goal to protect human health and the environment. (p. 33)

### Key Recommendations:

- The Legislature should direct MPCA to collaborate with the Petrofund Board to study whether and how to establish technical qualifications for consultants working on Petroleum Remediation Program sites. (p. 43)
- The Legislature should direct MPCA and the Department of Commerce to collaborate in holding consultants more accountable for poor-quality work on release sites. (p. 43)
- MPCA should consider additional steps the agency could take to reduce risks resulting from future changes to petroleum-contaminated properties. (p. 25)
- MPCA should define the characteristics of release sites it considers to be a low potential risk and ensure that it addresses those sites in the manner prescribed by law. (p. 28)
- The Legislature should clarify state law with regard to whether MPCA is required to collect plans for certain types of site work. (p. 30)

**While consultants are responsible for conducting investigations and clean-up work related to a petroleum release, MPCA has limited authority to directly hold consultants accountable for poor performance.**

## Report Summary

Petroleum products—such as gasoline or heating fuel oil—play an integral role in everyday life. However, if petroleum is inadvertently released into the environment—from a leaking storage tank, for example—the release can threaten human health and the environment.

The Minnesota Pollution Control Agency’s (MPCA’s) Petroleum Remediation Program oversees key aspects of the state’s response to releases from petroleum storage tanks. To do so, MPCA program staff first identify the individual or entity who is responsible for addressing the release—referred to as the “responsible party.” Next, the release is typically investigated, after which program staff decide whether the contamination needs to be cleaned up or otherwise remediated. Finally, if certain criteria have been met, program staff close the case for the site.

**MPCA’s Petroleum Remediation Program seeks to protect human health and the environment by overseeing responses to releases from petroleum storage tanks.**

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### **The Petroleum Remediation Program relies on consultants to conduct investigations and take other actions at petroleum release sites.**

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MPCA staff do not directly investigate petroleum releases or clean up (or otherwise mitigate) petroleum contamination. Rather, environmental consultants—who are typically hired by the responsible party—perform these activities. The consultant conducts field work at the release site and submits reports to MPCA with recommendations about how to address the release. Petroleum Remediation Program staff review the reports and determine what additional actions are needed at the site.

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### **By law, consultants and contractors who work on release sites must be registered by the Petrofund Board; however, registration requirements are minimal.**

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Statutes require all consultants and contractors who work on petroleum tank

releases to register with the Petroleum Tank Release Compensation Board—also called the Petrofund Board.<sup>1</sup> If unregistered consultants or contractors perform work at a release site, those consultants or contractors—as well as the responsible party—may be subject to penalties.

By law, to register with the Petrofund Board, consultants must meet only the following requirements: (1) obtain, maintain, and demonstrate professional liability coverage; (2) certify knowledge of and agree to abide by certain laws; (3) agree to make records available for inspection; and (4) agree to include a signed statement with each claim submitted to the board that costs are accurate. The Petrofund Board has not adopted rules requiring the certification of consultants, nor does it consider a consultant’s technical qualifications as part of the registration process.

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### **According to MPCA staff, some consultants have performed poor-quality work at petroleum release sites.**

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Many MPCA program staff said that the overall quality of consultant work has negatively affected the Petroleum Remediation Program’s ability to meet its overarching goal. In our survey of MPCA program staff, over one-half of respondents said that the overall quality of consultant work had a negative impact on the program’s ability to protect human health and the environment.<sup>2</sup> Additionally, 57 percent of respondents said that the overall quality of consultant work had a negative impact on their ability to make scientifically sound decisions about release sites. A majority of staff identified other specific concerns, including consultants who do not follow program guidance and concerns about the quality of the data some consultants provide.

Despite these concerns, a majority of staff survey respondents indicated that consultants adequately performed certain

<sup>1</sup> *Minnesota Statutes* 2021, 115C.11, subd. 1(a). The Petrofund Board is staffed by the Department of Commerce and oversees state reimbursements to responsible parties for work conducted at release sites.

<sup>2</sup> We received a response from each Petroleum Remediation Program hydrologist and project manager, for a 100 percent response rate.

tasks. For example, about three-quarters of respondents said that consultants often or always adequately investigated release sites and evaluated site risks. Several staff members stated that consultant performance varies from one consultant to the next.

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**MPCA has limited authority to directly hold consultants accountable for poor performance.**

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The Petroleum Tank Release Cleanup Act does not give MPCA authority to directly hold consultants accountable for poor performance. Instead, the act explicitly gives the Department of Commerce and the Petrofund Board the authority to impose consequences on consultants. For example, the Department of Commerce has authority to impose monetary penalties on consultants. Further, the Commissioner of Commerce and the Petrofund Board, rather than MPCA, make decisions about a consultant’s registration status.

While MPCA may request that consultants do additional work to address deficient performance, the consequences of doing so fall on the responsible party and the state, rather than the consultant who performed poorly. We recommend that the Legislature direct MPCA and the Department of Commerce to collaborate in holding consultants more accountable for poor-quality work on petroleum release sites. We also recommend that the Legislature direct the MPCA and the Petrofund Board to study whether and how to establish technical qualifications for consultants working on petroleum release sites.

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**The Petroleum Remediation Program concentrates its efforts on the petroleum release sites that it determines pose a high risk to human health and the environment.**

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The Petroleum Remediation Program takes a risk-based approach to addressing contamination from petroleum storage tanks. In other words, depending on the risks identified at the release site, the Petroleum Remediation Program may or

may not direct responsible parties to clean up the petroleum contamination. In accordance with program guidance, release sites that staff determine pose a high risk to human health or the environment should be remediated to reduce risks. When risks are low and contamination is stable, program guidance states that contamination should be left in place to naturally degrade.

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**Statutes prescribe the way in which MPCA must respond to release sites that are a “low potential risk”; however, neither statutes nor MPCA define low potential risk.**

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According to state law, MPCA is required to address petroleum releases using passive bioremediation at any site it determines to be a “low potential risk.”<sup>3</sup> In other words, for sites that are low-risk, statutes prohibit the agency from actively cleaning up or remediating the site. In contrast, statutes do not indicate whether or how MPCA should remediate releases that are high-risk.

Neither state law nor MPCA define what characteristics or site conditions would make a site a low potential risk. In response to our survey, Petroleum Remediation Program staff varied with regard to the site characteristics that would lead them to consider passive bioremediation to be an appropriate approach for a release site. Further, staff comments led us to question whether they used passive bioremediation for all low-risk sites, as required by law.

We recommend that MPCA explicitly define the characteristics of sites that are a low potential risk to the public’s health and the environment. MPCA should also ensure that staff’s site management decisions consistently adhere to the passive bioremediation requirement in law.

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**Program guidance directs MPCA staff to primarily consider how a property is currently used—rather than how that property could be used in the future—when making release site decisions.**

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As a result of the program’s risk-based approach, program staff may decide to close

**While MPCA oversees consultant work on petroleum release sites, the Department of Commerce—rather than MPCA—is granted authority in law to penalize consultants for poor performance.**

<sup>3</sup> *Minnesota Statutes* 2021, 115C.03, subd. 1a.

The Petroleum Remediation Program largely does not consider how a property may be used in the future when determining whether and how to address a petroleum release.

a release site's case when some petroleum contamination is still present at the site. However, the conditions that are present at a release site when staff decide to close the case could change in the future, such as if a property owner decides to redevelop the site. Those changes could introduce new risks.

When program staff determine whether a release poses a risk to human health or the environment, program guidance primarily directs staff to consider only how the property is *currently* used. Several staff members said it is difficult to know how a property will be used in the future when making site decisions. On the other hand, some staff said they often or always consider the future use of a property. We recommend that MPCA ensure staff take a consistent approach regarding the extent to which they consider how a property may be used in the future when they make site decisions.

Further, a few staff described limitations to not considering a property's future use—limitations that could put human health at risk. While MPCA staff described several ways that individuals could learn about petroleum contamination at properties they own or are hoping to purchase, several staff explained how these existing mechanisms are

not foolproof. We recommend that MPCA consider additional steps it could take to reduce risks resulting from future changes to petroleum-contaminated properties.

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#### Aspects of state law regarding how MPCA reviews plans for work at petroleum release sites are unclear.

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Statutes direct MPCA to review certain plans for release site work within a specific timeframe. For example, statutes require MPCA to review a plan within 60 days for “excavation basin soil sampling, excavation of contaminated soil, treatment of contaminated soil, or remedial investigation tasks” or explain why more review time is needed.<sup>4</sup>

Statutes clearly outline timelines for MPCA to review certain plans; however, it is not clear whether MPCA is required by law to *collect* such plans. While the Petroleum Remediation Program collects many documents from consultants, MPCA has chosen not to collect “plans” for many of the activities outlined in law. We recommend that the Legislature clarify what it expects of MPCA with regard to these requirements, including whether MPCA is required to collect plans for the types of work described in law.

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<sup>4</sup> *Minnesota Statutes* 2021, 115C.09, subds. 2a(a) and 2a(c).

## Summary of Agency Response

*In a letter dated February 15, 2022, Minnesota Pollution Control Agency Commissioner Katrina Kessler said that MPCA “appreciates the OLA’s feedback and is dedicated to finding and implementing improvements.” She commented that the agency “concurs with the OLA’s findings that additional improvements are needed in the work of some environmental consultants”; however, she added that MPCA does not allow poor-quality consultant work “to impact our ability to ensure contaminated sites are properly addressed.” The commissioner commented that the “Petroleum Remediation Program implements a risk-based approach” to release sites and stated that MPCA “will revise our guidance to define low-risk sites...” and implement a database designation that will enable it to better track high-risk and low-risk sites. Finally, Commissioner Kessler stated that MPCA “agrees future risk should be further reviewed and new tools considered to ensure consistency across sites,” noting that this was an issue “previously identified by staff and supported by leadership as one of the three ongoing continuous improvement projects for consistency in cleanup.” Overall, the commissioner stated that MPCA is “committed to working collaboratively to ensure we fulfill our mission of protecting human health and the environment.”*