

Members of the House Environment and Natural Resource Finance and Policy Committee:

As the person who filed the OLA complaint that led to the 2021 audit of the MPCA's Petroleum Program it's unfortunate that I can't attend Tuesday's hearing on HF1421. While I fully support this bill I have some concerns about the MPCA's ability to provide you with accurate information. The MPCA took every opportunity to mislead the OLA during their investigation and lied to the Legislative Audit Commission at the hearing. Attached are comments I am planning to send to the Audit Commission detailing these issues.

I also would like to provide comments specific to HF1421. Not all petroleum releases are the same and therefore behave differently when released into the environment. Leaded gasoline contains toxic compounds that are not biodegradable and are similar to trichloroethylene, which was recently banned, so natural bioremediation is not an applicable cleanup technology. This suggests that MN Statutes and MPCA rules require these sites to be cleaned up regardless of risk level. Because leaded gasoline was phased out in the 1970s that means every one of the 4700 known leaded gasoline sites closed with little to no cleanup have been around for at least 50 years. These sites include those in Paynesville, Alexandria, and Foley. However, the MPCA decided to close these sites under the biodegradation clause in 115C so in addition to defining low risk the use of biodegradation needs to be clearly stated. Even with biodegradation non-leaded gasoline components can persist for decades if not longer too.

Given the amount of groundwater contamination at leaded gasoline sites today suggest they will be around for at least 100 more years, if not longer. This essentially makes them forever chemicals to everyone living today. However, claims made by the AG in their lawsuit with 3M over PFAS chemicals concerning the degradation of drinking water aquifers are not considered for petroleum sites. My whistleblower lawsuit and complaint to the OLA clearly show these statutory requirements were blatantly ignored by the MPCA for petroleum sites. The question before the legislature is, are drinking water aquifers considered resources worth protecting as per the current statutes, or could they remain contaminated for 100 or more years? The MPCA petroleum program has classified 1000's of sites that continue to contaminate drinking water aquifers as low risk.

The MPCA has essentially done nothing about addressing the OLA audit recommendations. Kirk Koudelka's policy group has been meeting since 2019 and they still can't reconcile PRP's interpretation of low-risk sites because it's so far outside the state of practice of every other MPCA program. The extreme difficulty they have is defining low risk sites in a way that won't demonstrate malfeasance with the 4700 closed leaded gasoline (GAP) sites, or make the sites in Paynesville/Alex/Foley/Blaine etc. look like total failures. They also lied about the scope of contractor issues which is also detailed in the attachments.

A looming public health issue are the 100s -1000s of private drinking water wells contaminated by closed leaded gasoline sites, which the MPCA did not sample, were contaminated or drilled after site closure or were the result of contractor incompetence and/or fraud. This was the basis for the Gasoline Additive Project (GAP) which only occurred after my 6-year battle with the MPCA that cost me my career, and a significant portion of my retirement benefits. However, the MPCA is intentionally foot dragging this project because they fear the backlash from finding wells where unsuspecting citizens have been drinking water over health standards for decades (documentation is available). The timeline for completion of the GAP is 10-15 years, which means these citizens could be drinking contaminated water for even longer. However, the MPCA has only committed to sampling wells, not re-assessing risk and cleaning up these sites. This could easily cost taxpayers in excess of \$100 million, notwithstanding the \$10 million just to sample them.

The availability of public data on closed sites is also an important issue. This can easily be demonstrated by going to PRP maps online and looking at any of the 21,000 sites. What little information available is often missing, or entirely false. The data says nothing about how much contamination was left in the ground, where it is now or how long it will take to degrade. The fact is the MPCA never required this data which is a factor to consider when addressing HF1421 requirements to develop guidelines to incorporate consideration of potential future uses of contaminated properties.

Technical staff conducted an evaluation of site assessment methodologies in 2014 and found significant faults with Petroleum program guidance and policy, which are still in use today. This is a result of not listening to scientists who have consulted EPA on these issues, and not following Risk Based Corrective Action (RBCA) criteria developed by EPA and used by 49 other states. Yes, Minnesota is the only state not to use RBCA, and their claims of an equivalent method are demonstrably false. This is one reason for the complete failure to protect human health and why the GAP project was needed. Despite the failings of policy pointed out by staff MPCA management aggressively denied them and retaliated against staff who attempted to elevate the issue with senior MPCA leadership.

In addition, there are serious concerns about the Whistleblower statue and state policies on retaliation which are not in the bill. I'd like to request the Audit Commission allow the OLA to move forward with the topic "additional protections for whistleblowers" which was tabled in 2020. My case perfectly demonstrates the complete lack of accountability for code of conduct and ethics policies, and the respectful workplace policy. These issues are also detailed in my lawsuit and discovery findings. I am not alone in my complaints about staff harassment for doing their job, nor is this confined to PRP. Friends of mine working on PFAS have been subject to illegal harassment and intimidation by MPCA management. My case also demonstrates there is no effective human resources function at the MPCA when it comes to management. In fact, multiple supervisors who have dozens of complaints filed against them that were summarily dismissed by HR without any investigation have been promoted. This is carte blanche permission for supervisors and managers to engage in retaliatory behavior against staff

attempting to do their assigned jobs.

Most concerning to me was the AG's office who aggressively sued 3M claiming they violated multiple rules and statues by not cleaning up PFAS. Yet the AG aggressively defended the MPCA against my lawsuit claiming the MPCA violated the very same statutes. To date the AG has not investigated any of my well documented claims suggesting there is no mechanism to hold state agencies accountable for adhering to the same rules as everyone else. This is eerily similar to the events in Flint MI where the state engaged in active belligerence to minimize public health risks of unsafe drinking water. Addressing these issues is not a simple undertaking, and can't be addressed by legislation alone. To quote the Flint investigation recommendations:

"Create a culture in state government that is not defensive about concerns and evidence that contradicts official positions, but rather is receptive and open-minded toward that information. View informed opinions—even if critical of state government—as an opportunity for re-assessing state positions, rather than as a threat."

If there's one takeaway from my lawsuit against the MPCA it is this.

Attached for reference is a draft of a letter to the Audit Commission, my original complaint filed with the OLA, and my Whistleblower complaint. If you have any questions or would like documentation referenced in the letter to the Audit Commission let me know.

Respectfully,

Mark Toso
715-781-4887

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: EMPLOYMENT

Mark Toso,

Plaintiff,

SUMMONS

vs.

Minnesota Pollution Control Agency,

Defendant.

THIS SUMMONS IS DIRECTED TO THE MINNESOTA POLLUTION CONTROL AGENCY, THROUGH THE OFFICE OF MINNESOTA ATTORNEY GENERAL KEITH ELLISON, 445 MINNESOTA STREET, SUITE 1400, ST. PAUL, MINNESOTA 55101.

1. YOU ARE BEING SUED. The Plaintiff has started a lawsuit against you. The Plaintiff's Complaint against you is attached to this Summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no court file number on this Summons.

2. YOU MUST REPLY WITHIN 21 DAYS TO PROTECT YOUR RIGHTS. You must give or mail to the person who signed this summons a **written response** called an Answer within 21 days of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this Summons located at:

Law Office of Sivertson and Barrette, P.A.
1465 Arcade Street
Saint Paul, MN 55106-1740

3. YOU MUST RESPOND TO EACH CLAIM. The Answer is your written response to the Plaintiff's Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiff should not be given everything asked for in the Complaint, you must say so in your Answer.

4. YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS.

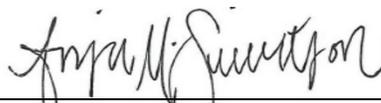
If you do not answer within 21 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiff everything asked for in the Complaint. If you do not want to contest the claims stated in the Complaint, you do not need to respond. **A default judgment can then be entered against you for the relief requested in the Complaint.**

5. LEGAL ASSISTANCE. You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. ALTERNATIVE DISPUTE RESOLUTION. The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

The object of this action is to recover damages for retaliation in violation of the Minnesota Whistleblower Act.

**LAW OFFICE OF
SIVERTSON AND BARRETTE, P.A.**



Alf E. Sivertson (#122233)

alf.sivertson@sivbar.com

Anja M. Sivertson (#398908)

anja.sivertson@sivbar.com

1465 Arcade Street

Saint Paul, MN 55106-1740

Phone: (651) 778-0575

Facsimile: (651) 778-1149

**ATTORNEYS FOR PLAINTIFF
MARK TOSO**

Date: November 12, 2021

STATE OF MINNESOTA**DISTRICT COURT****COUNTY OF RAMSEY****SECOND JUDICIAL DISTRICT****CASE TYPE: EMPLOYMENT**

Mark Toso,

Plaintiff,

vs.

**COMPLAINT AND
JURY DEMAND**

Minnesota Pollution Control Agency,

Defendant.

The Plaintiff, Mark Toso, for his cause of action against Defendant Minnesota Pollution Control Agency, states and alleges as follows:

1. Plaintiff Mark Toso (“Toso”) is a resident of Roberts, Wisconsin.
2. Defendant Minnesota Pollution Control Agency (“MPCA” or “Agency”) is a state agency responsible for administering environment permitting, compliance, enforcement, remediation, and outreach programs to help Minnesota protect its environment. The MPCA has offices in seven cities across Minnesota.
3. The MPCA operates the Petroleum Remediation Program (“PRP”) and Emergency Management Unit (“EMU”). The PRP is charged with conducting the prompt investigation, cleanup, and closure of petroleum tank release sites across Minnesota. The PRP receives the bulk of its funding through the Minnesota Petrofund (“Petrofund”).
4. The EMU coordinates contamination prevention and preparedness, as well as organizes the Agency’s efforts for oil and hazardous material emergencies. The PRP and EMU are part of the MPCA’s remediation division.

5. Since 1992, Toso worked for the MPCA's remediation division in St. Paul as a hydrogeologist. From 1993 to 2009, Toso primarily worked in the EMU and then assumed a dual role within the PRP and EMU in 2010. In 2013, the PRP required Toso's expertise on a series of complex release sites. Accordingly, Toso's position was transferred to the supervision of the PRP, but his duties remained unchanged at the EMU. At the MPCA, Toso was responsible for the technical oversight of hydrogeologic evaluations, remedial investigation and risk assessments at petroleum, chemical, biofuel, RCRA, CERCLA, state superfund and crude oil release sites.

6. Toso also served as the primary technical support for the MPCA's Emergency Response Team at hazardous material incidents. Toso's other duties included policy development, writing guidance documents, training, and providing technical assistance for the water quality, enforcement, permitting, and environmental review programs. Throughout his career with the MPCA, Toso oversaw the cleanup of some of the most heavily contaminated sites in Minnesota including refineries, major pipeline releases, and large chemical storage facilities.

7. Toso is a nationally recognized subject matter expert on leaded gasoline. Throughout his career he has given numerous presentations to national audiences and has authored various articles on the unique dangers of leaded gasoline, ethanol, and MTBE releases. Toso was selected to serve on national workgroups that advised states and the Environmental Protection Agency ("EPA") on the investigation and remediation of gasoline and other motor fuels in the environment.

8. There are over 20,000 petroleum leak sites in Minnesota which have been closed by the MPCA. Approximately 30 percent, or close to 6,000 sites, are located within designated public drinking water source management areas. Nearly 5,000 closed locations include leaded gasoline sites.

9. Leaded gasoline releases pose a unique threat to drinking water aquifers and wells. All leaded automotive gasoline contains two additives called ethylene dibromide (“EDB”) and 1,2-dichloroethane (“DCA”). These additives, which are also referred to as lead scavengers, are added to gasoline to remove lead from engines. EDB is highly toxic and has a laboratory detection level 10 to 100 times above the drinking water standard. Accordingly, wells located near leaded gasoline sites cannot be considered safe even if EDB is not detected through testing. DCA is a chlorinated compound that is very similar to Trichloroethylene (“TCE”). In 2020, Minnesota banned most TCE use due to its dangerous cancer-causing agents.

10. Biodegradation is a process in which materials are degraded naturally over time by bacteria or other biological elements. Bioremediation is a practice that uses biodegradation to break down contaminants from polluted sites. Like TCE, DCA presence in leaded gasoline is extremely resistant to biodegradation compared to other petroleum compounds.

11. Pursuant to Minn. Stat. § 103H.001, “it is the goal of the state that groundwater be maintained in its natural condition, free from any degradation caused by human activities,” and, “where such prevention is practicable, it is intended that it be achieved.” The MPCA “shall identify and develop best management practices to ensure that the program is consistent with and is effective in achieving the goal of section 103H.001.” Minn. Stat. § 103H.101, subd. 7.

12. Where polluted groundwater is detected, the MPCA is required to use best practices to prevent or minimize the source of pollution. Minn. Stat. § 103H.275, subd. 1. Under Minn. Stat. § 103H.005, subd. 4, best management practices are “practicable voluntary practices that are capable of preventing and minimizing degradation of groundwater considering economic factors, availability, technical feasibility, implementability, effectiveness, and environmental effects.”

13. The EPA has set forth best practices for state agencies to utilize in responding to leaking underground storage tank sites (“LUST sites”) that contain lead scavengers. According to the EPA, states undertaking corrective action at LUST sites should (1) begin to monitor and report the presence of lead scavengers; (2) analyze EDB and 1,2-DCA using EPA Methods; (3) remediate lead scavengers, aggressively when such constituents could threaten a source of drinking water; and (4) share information on the presence and remediation of these constituents.

14. The EPA also issued a directive for states to utilize risk-based corrective action (“RBCA”) in responding to sites where LUST systems have released petroleum products into the environment. *See* “OSWER Directive 9610.17: Use of Risk-Based Decision-Making in UST Corrective Action Programs.” According to the OSWER Directive:

Once a UST release is confirmed, the key decision to be made at all stages of the corrective action process is what action is required in order to protect human health and environment quality. Only when it can be determined that all necessary risk-reduction action has been completed or alternative measures have been taken can a site be closed out.”

The risk-based decision-making model also emphasizes the importance of defining the public’s actual and potential exposures to harm. The American Society for Testing and Materials (“ASTM”) also encourages the use of RBCA as best practice for managing petroleum release sites.

15. The MPCA and PRP have represented to the public that it has cleaned up tens of thousands of contaminated petroleum release sites across the state. The Agency has repeatedly assured the public, Minnesota legislature, and federal agencies that it has adhered to the EPA and ASTM risk-based corrective action for site closures. Over the years, these representations have resulted in the MPCA receiving significant funding from the state as well as the EPA and other entities that support LUST management programs.

16. However, in approximately 2000, the PRP removed its longstanding mandate to actively remediate (or cleanup) contaminated drinking water aquifers. Now, when closing a site,

under the Agency's new "pathway elimination" approach, the MPCA focuses primarily on eliminating the pathways between the source of contamination and well receptors. As a result, the PRP's principal method for managing release sites is to replace the impacted water supply well and leave the contaminated soil and groundwater – including polluted drinking water aquifers – to biodegrade without any active remediation or monitoring. The MPCA operates under the assumption that biodegradation will rapidly occur, but it does not conduct any testing to ensure that is the case. Biodegradation can take decades and even upwards of more than a century to break down contaminants. Meanwhile, the pollution remains a risk to human health and the environment.

17. The prioritization of well replacement under the pathway elimination policy has also influenced the PRP's risk assessment of petroleum release sites. Specifically, PRP policy indicates that while a site may contain hazardous groundwater contamination, it is the presence of an impacted well that defines whether a site poses a risk of harm to the public. Accordingly, the PRP maintains that risk is mitigated by well replacement and that any future public exposure to the remaining groundwater contamination would be addressed through site redevelopment.

18. Consequently, under its pathway elimination policy, the PRP has uniformly classified thousands of petroleum release sites across the state as "low risk" solely because the Agency either replaced an impacted well or the site did not contaminate a drinking water well. Contrary to the Agency's public proclamations claiming responsibility for the cleanup of over 20,000 sites, many of these sites were ultimately closed with limited or no cleanup whatsoever even though they contaminated aquifers which are, or could be, actively utilized by nearby private and municipal wells. During most of these site closures, the Agency did not utilize best practices or sample nearby private and municipal wells which were likely exposed to toxic contaminants.

19. To justify its practices, the PRP relies on Minn. Stat. § 115C.03, subd. 1(a) which states that “passive bioremediation must be used for petroleum tank cleanups whenever an assessment of the site determines that there is a low potential risk to public health and the environment.” However, in closing thousands of sites as “low risk,” the MPCA did not follow best practices in its site assessment or management. This led to closures of sites that clearly posed a significant risk to public health and the environment – including dangerous leaded gasoline sites that are highly resistant to biodegradation and that would not be considered low potential risk by RBCA or the EPA. This conduct runs afoul of the Agency’s various legal obligations including, but not limited to, its requirement to implement best management practices to prevent groundwater contamination under Minn. Stat. § 103H.001, *et seq.*

20. The MPCA’s practices have resulted in widespread contamination of drinking water resources that pose significant risks to private wells, groundwater development, and municipal water supplies. As a result, Minnesotans face serious threats to their health and will likely bear the financial burden of rectifying the MPCA’s mistakes. While the ramifications are extensive, notable issues include the following:

- a) Even though leaded gasoline compounds are highly resistant to biodegradation, the PRP relied on the bioremediation provision of Minn. Stat. § 115C.03 to close approximately 5,000 leaded gasoline sites without engaging in aggressive remediation efforts. The PRP was aware that these sites contaminated over 145 public drinking water wells, including wells for the cities of Alexandria, Foley, and Blaine. In closing these leaded gasoline sites as “low risk,” the PRP has subjected citizens to a high risk of exposure to toxic and carcinogenic chemicals known to cause serious health issues.
- b) In addition to the threats facing municipal water supplies, there are potentially hundreds of contaminated private water wells with pollutant values exceeding health standards. Thousands of citizens could be impacted as a result. When the PRP closed thousands of sites as “low risk” – including sites located within high risk drinking water areas as designated by other state agencies – citizens were never notified by the PRP of potential risks to their wells due to nearby site closures. In the years following PRP site closures, various entities outside the MPCA including

the Minnesota Department of Health (“MDH”) and private well drillers have reported wells that were contaminated by closed PRP sites. Despite these discoveries, the PRP has not taken any urgent action to remedy the contamination or to correct the practices that led to these situations.

- c) By failing to clean up contaminated drinking water aquifers under the pathway elimination approach, these impacted resources will not be available in the future without extensive abatement efforts and expenditure of significant state and private resources. While the PRP maintains that future redevelopment will resolve any issues with the left in place contamination, the PRP does not have a public notification system or readily accessible information describing the location of and relevant risks associated with contaminated sites. This leaves parties engaging in redevelopment without the requisite knowledge to take appropriate action. Additionally, installation of new drinking water wells and operation of nearby high-capacity wells can greatly influence the distribution of contamination, but PRP policy does not consider these actions as redevelopment. Consequently, relying on redevelopment cannot offset the substantial risk of leaving contamination in place. Indeed, these practices have already led to a multitude of wells becoming contaminated after final MPCA site closure and wells unknowingly being installed in contaminated aquifers.
- d) The PRP’s reliance on pathway elimination for corrective action is fiscally irresponsible as future costs associated with removing contamination left by the Agency far exceed the expense of active remediation. This was the case in Paynesville, Minnesota where for years PRP scientists urged management to remediate the site because of the high probability of a leaded gasoline plume reaching municipal wells. However, PRP officials repeatedly misrepresented to the city and legislature that there was minimal risk to the water supply and chose well replacement as the only corrective action. The city ultimately hired its own environmental firm to assess the situation. This firm, along with the MDH, determined that the city’s water supplies were threatened. The taxpayers ultimately covered approximately \$4.5 million in costs associated with site investigation and the installation of a water treatment system to remove chemicals from the water supply. Had the PRP employed best practices from the outset and actually remediated this site, corrective action would have resulted in costs 5 times lower than what the taxpayers ultimately had to cover.

21. In 2013, the PRP commenced an internal review of petroleum release sites that had been open for ten or more years. The review began in response to an agency wide directive to implement continuous improvement projects. The objective of this initiative, which was referred to as the “Legacy Site Review Project,” was to understand why the sites remained open and to develop a strategy for their closure. It was during this project that Plaintiff Mark Toso (“Toso”),

along with other PRP hydrologists on the hydro team, identified many of the Agency's problematic practices as outlined above. Throughout the Legacy Site Review Project, Toso submitted numerous critical site summaries to PRP management and outlined various issues with the PRP's practices.

22. Despite the technical recommendations of Toso and the hydro team, PRP manager, Michael Kanner ("Kanner") and other members of leadership elected to close the legacy sites without pursuing the necessary remediation efforts or meaningful policy changes that the team identified. In making this determination, PRP management ignored the extensive policy, work quality, and technical issues uncovered by the legacy workgroup and hydro team. Consequently, in December 2014, Toso and his colleagues determined that they needed to formally elevate their concerns to the Remediation Division Director, Kathy Sather ("Sather"). On December 23, 2014, Toso and his colleague, Tom Higgins, met with their supervisor, Chris McLain ("McLain") and informed him that the hydro team was preparing to raise concerns to senior MPCA officials about Kanner and decisions made by PRP leadership that were posing threats to public health and the environment. Kanner subsequently became aware of the hydro team's plans.

23. On December 31, 2014, it was decided among the hydro team that Toso would serve as the leader in facilitating meetings with and reporting concerns to management. As a result, Toso subsequently enlisted the assistance of MPCA Organizational Improvement staff member, Milt Thomas ("Thomas") and requested his guidance on the best course of action to report concerns to Sather. Thomas, and his colleague, Kathy Jensen, decided to create an anonymous survey for the PRP hydrologists to complete. Their objective in creating the survey was to facilitate the hydro team in providing management with an unbiased and anonymous assessment of their concerns.

24. In January of 2015, while discussions were underway with Thomas and Jensen, Toso raised concerns with Kanner and another Remediation Division manager, Sandeep Burman (“Burman”), regarding the PRP’s third-party consultants who conduct site investigations and testing. Specifically, Toso informed them that many of the consultants were submitting poor quality work and did not possess the technical expertise to work on sites. Toso provided an example of field technicians who did not know how to properly fill a standard volatile organic compound (“VOC”) groundwater sample. Toso explained that this was problematic because technical staff repeatedly raised this issue to no avail and the PRP was knowingly relying on faulty data in making important risk and corrective action decisions at sites.

25. On January 27, 2015, McLain emailed Toso informing him that he was going to set up a meeting to discuss communication expectations. Toso asked McLain whether Kanner was involved with this request and if this meeting was disciplinary in nature. McLain confirmed that Kanner was involved with the decision to set up the meeting but that it was not disciplinary. McLain and Toso subsequently met on February 5, 2015. During the meeting, McLain showed Toso a draft, disciplinary “Letter of Expectation” and informed Toso that McLain would have to first review and approve any future communications that Toso wished to send to Kanner. Toso told McLain that he would comply with this directive. McLain told Toso that he would not issue the letter to him at this time.

26. By February 19, 2015, the hydro team completed the survey that the Organizational Improvement staff created. The results unveiled an overwhelming concern among the technical staff that decisions made by PRP management posed risks to human health and the environment. On February 27, 2015, Toso shared the survey results with Sather.

27. Eleven days later, on March 10, 2015, McLain gave Toso a “Letter of Expectation” in which he alleged that Toso’s behavior in the workplace was “combative, accusatory, disrespectful, and is disruptive to staff.” McLain’s letter also instructed Toso to “avoid making harsh, overly negative, or accusatory criticisms of agency Staff, program staff, management, and external parties.” The letter threatened further disciplinary action should Toso fail to abide by its directives. Toso told McLain that he complied with his February 5, 2015, directive and asked him to provide specific examples of alleged misconduct. McLain was unable to provide Toso with any feedback or specific examples of inappropriate behavior. Toso then informed McLain that he believed he was being retaliated against for arranging the hydro group’s upcoming meeting with Sather to discuss concerns about the PRP. McLain denied that retaliation was occurring and told Toso that his behavior had been “going on for a long time.” Prior to this meeting, in his decades-long career with the MPCA, Toso was never criticized for inappropriate behavior, nor had he ever received a letter of expectation.

28. On March 11, 2015, Toso and his hydrologist colleagues from the PRP met with Sather to discuss their concerns. During this meeting, Toso reported to Sather that the PRP’s practices did not comply with the law and were posing a risk of harm to the public. After the meeting, on March 31, 2015, Toso emailed Sather and asked whether she would like to have written documentation of specific site examples. Sather responded that she would but advised Toso not to spend too much time compiling the information.

29. After the group meeting, Sather directed hydro group members to meet individually with Employee Assistance Program representative, Todd Kohl (“Kohl”). Sather informed the hydro team that Kohl was a trustworthy, neutral third party who would listen to their concerns. Toso subsequently met with Kohl on approximately three occasions over the next few months.

During their first meeting together, Kohl aggressively told Toso that Toso did not know what he was getting himself into. Throughout their meetings, Kohl continued to be abrasive in his questioning of Toso and had a hostile demeanor. Toso informed Kohl that he would continue raising safety concerns to PRP management because there were serious issues occurring within the program that needed to be addressed.

30. On March 31, 2015, Toso emailed Sather requesting an update on the status of the complaint. Toso also informed Sather that the issues the hydro team discussed with her were still ongoing and that they could provide her with documentation if needed. Sather responded saying that she would be interested in understanding the ongoing issues but did not expect staff to spend time on preparing documentation. On July 28, 2015, Toso met with Sather and told her that PRP management was not providing her with accurate information about site closures and that the hydro team had evidence that management was not following policy, therefore putting human health and the environment at risk. One day later, on July 29, 2015, McLain met with Toso and informed him that he revised his work plan to remove all references for working on policy. For decades, Toso specialized in and worked on policy development for the MPCA.

31. On August 14, 2015, after the meetings with Kohl concluded, Toso sent Sather the requested documentation regarding the March group meeting. In his email to Sather, Toso outlined the issues with the PRP's management of the Paynesville site and its failure to remediate hundreds of other high-risk sites. Toso informed Sather that the PRP's representations that the Paynesville municipals wells were not at risk were misleading. Toso wrote, "we are legitimately confused about the direction of our program, or if we are even required to follow policy and rules/statutes."

32. Toso also provided Sather with the MDH findings on the Paynesville site which recommended remediation due to the viable threats to the city's water supply. Sather immediately

forwarded Toso's email to PRP management and met with McLain and Kanner that same day and then again on August 20, 2015, to discuss Toso's email. On or around August 20, 2015, McLain informed Toso that he was going to receive an achievement award for his work on the Legacy Site Review Project, but that HR would also be following up with him to issue disciplinary actions for the August 14, 2015, email he sent to Sather regarding the Paynesville site.

33. On August 25, 2015, Toso met with Sather to request an update on the status of the PRP's response to the hydro team's concerns. Sather told Toso that she believed the hydro team was only raising concerns in an effort to get Kanner fired like EMU employees allegedly attempted to do in the past with their manager. Toso told Sather that this was not the group's intention and that they were just attempting to work towards a resolution with their concerns about PRP practices. Toso also explained to Sather that the group felt that the process was moving very slowly considering that their survey was completed in December of 2015.

34. That same day, McLain informed Toso that his travel request to attend the annual National Tanks Conference was denied. For several years, Toso worked alongside EPA scientists on the Technical Forum on Fuels in Groundwater which was a national workgroup that researched leaded gasoline. This workgroup met annually at the National Tanks Conference and Toso was set to present an update on his own research. Toso's travel to this event was fully funded by the workgroup. McLain notified Toso that McLain, Sather, and Kanner decided to pull Toso's travel request despite their previous approval. In his email notifying Toso of this determination, McLain wrote, "I'm sure you can figure out why." Throughout his career with the MPCA, Toso's travel requests for this conference were never denied. It turned out that Toso received a national award for his contributions to the science of site assessment and risk evaluation at LUST sites at this

conference. However, due to his absence, Kanner accepted the award at the conference on Toso's behalf.

35. On September 10, 2015, Toso filed a FOIA request for all written and electronic communication between MPCA staff and management concerning his August 14, 2015, email to Sather and his travel request denial. Seven days later, on September 17, 2015, Toso was called into a meeting with HR representative, Ryan Anderson ("Anderson") for questioning regarding the email he sent to Sather about the Paynesville site. On November 3, 2015, Anderson emailed Toso informing him that his FOIA request was denied.

36. On or around December 29, 2015, Sather summoned Toso into her office for a meeting. During the meeting, Sather handed Toso an official written reprimand that was signed by McLain. The reprimand accused Toso of engaging in employee misconduct by making misrepresentations in his August 14, 2015, Paynesville email to Sather. McLain also claimed that Toso's conduct was inappropriate and negatively impacted the program and the Agency. Toso asked Sather for specific examples of what misrepresentations she alleged he was making but she was unable to provide any examples.

37. During this meeting, Toso told Sather that he sent the Paynesville email to her in response to her request for additional information and as part of the hydro group's presentation of the issues within the PRP. Toso explained that the MPCA did not have a retaliation free mechanism nor communication channels for employees to report suspected code of conduct and ethics violations despite state policy requiring that the Agency have one in place. Toso further explained to Sather that this was why the hydro group reached out to Thomas for guidance on the best way to address these issues.

38. Toso also informed Sather that he was aware that Thomas was disciplined by his manager for his efforts in assisting the hydro team. Toso told Sather and McLain that he believed the written reprimand was issued in retaliation for his organization of the complaints presented to Sather during the March 11, 2015, meeting. The meeting concluded and PRP management never provided a determination to the hydro team regarding the concerns they began raising in 2014. At this point Toso never received any type of disciplinary action in his 24 years of employment with the MPCA. Toso ultimately grieved his disciplinary action, but the write-up was upheld by human resources supervisor, Kellie McNamara (“McNamara”).

39. On February 17, 2016, McLain issued Toso his annual performance review for 2015. For the first time in his career with the MPCA, Toso’s overall performance rating was reduced to “provisional” following years of receiving positive and exemplary ratings. McLain also included unfounded, critical commentary throughout the review and issued unsatisfactory ratings for various performance categories. During the performance review meeting, Toso informed McLain that he believed he was being retaliated against for raising concerns about PRP practices. McLain denied that Toso was being retaliated against.

40. While half of Toso’s job duties included his work in the EMU, the MPCA only permits the assignment of a single supervisor who, in Toso’s case, was McLain. On February 19, 2016, the EMU supervisor, Dorene Fier-Tucker (“Fier-Tucker”) provided McLain with feedback on Toso’s performance. In her assessment, Fier-Tucker praised Toso for his “respectful, collaborative, open, and honest” communications with his colleagues and others. Among other commendations, Fier-Tucker informed McLain that Toso is the subject matter expert on pipeline releases for the MPCA and that the EMU staff are instructed to consult with Toso exclusively for

technical assistance on these matters. McLain refused to consider Fier-Tucker's feedback and did not amend Toso's performance review.

41. On March 22, 2016, Toso and his union representative met with HR Director, Colleen Naughton ("Naughton") to appeal his performance review. During the meeting Toso provided Naughton with Fier-Tucker's feedback and the union representative informed Naughton that the negative review was retaliatory. After the meeting, Naughton informed Toso that his appeal would be assigned to an HR staff member who would review the information and set up a meeting with Toso. According to Naughton, the HR staff person would make a final determination on the appeal. Naughton also instructed Toso to send her written documentation in support of his appeal. Consequently, on March 28, 2016, Toso submitted additional documentation to Naughton, including Fier-Tucker's positive performance assessment of Toso. HR never followed up with Toso to schedule a meeting to discuss a resolution to his appeal. Instead, on May 12, 2016, Naughton called Toso and told him that they stood by McLain's assessment and would not make any substantive changes to the review. Naughton also informed Toso that HR could not do anything to help him because they "are a part of management too."

42. On March 29, 2016, MPCA Commissioner, John Stine ("Stine") emailed an announcement to all MPCA employees about the environmental crisis in Flint, Michigan. In his email, Stine cited to a portion of a report on the crisis which described how government agencies charged with protecting drinking water in Michigan "stubbornly worked to discredit and dismiss others' attempts to bring the issues of unsafe water, lead contamination, and increased cases of Legionellosis (Legionnaires' disease) to light." Stine then instructed MPCA employees to "not hesitate to immediately and directly contact me or our leadership team to communicate concerns about any action or inaction by the MN Pollution Control Agency."

43. Consequently, on June 15, 2016, Toso responded to Stine's message with the following email:

Dear Commissioner Stine:

In your email below you asked "am I doing everything possible to protect human health and the environment in my work?" My answer would be no because I believe that decisions made in my program (Petroleum Remediation) might be endangering human health and the environment and also may not be using public funding sources wisely. I also have concerns about transparency and accountability to the public and outside parties with many decisions made in the program. As you suggest below I would appreciate the opportunity to meet with you to present my concerns which will include well documented examples and written records.

I know you are very busy but I do not make these allegations lightly. As you stated "Flint could happen anywhere" and I see many parallel issues with the Flint crisis within the MPCA that I don't believe you are aware of. I fear this information would be very detrimental to the MPCA if it were to be discovered by outside parties before we have a chance address them.

I would appreciate if you kept this in confidence until we have a chance to talk. I also would like to have MAPE business agent Dave Kamper attend our meeting, if possible. He would not speak to the issues I am raising; I simply would prefer to have him present to make me feel more comfortable telling you what I know. Please let me know when you would be available.

Thanks.

44. On July 28, 2016, Toso emailed Stine to inquire whether he received his message and again welcomed the opportunity to meet with him. Stine never responded to Toso. At this point, Toso was becoming increasingly concerned about the negative impact of PRP practices on public safety and the backlash he was facing from management for reporting these issues. The Minnesota Management & Budget Statewide Operating Policy 0103-01, *Code of Conduct*, requires state agency leaders to design mechanisms for employees to feel comfortable "about raising ethical issues and bringing forward complaints/allegations of wrongdoing through retaliation-free channels." However, the MPCA did not have these required policies in place.

45. Consequently, Toso volunteered to work on the Meet and Confer Committee, which was comprised of representatives from the union, the Commissioner's office, and human resources. As committee members, Toso and other staff strongly advocated for the implementation of a retaliation-free reporting process for MPCA employees and worked on this initiative throughout 2016. Toso's efforts ultimately resulted in the creation of the "Procedure for Assistant Commissioner Review of Ethical and Scientific Concerns," which is also referred to as the Scientific, Ethical and Legal Process ("SEL process"). The pilot program for the SEL process was launched on October 17, 2017.

46. During Toso's work on the SEL process initiative, McLain issued Toso additional negative performance appraisals for 2016 and 2017. In his reviews, McLain noted that he believed Toso had a negative and poor attitude toward the PRP. Toso subsequently disputed McLain's ratings and informed him that he believed his criticism was "a continuation of retaliation for attempting to discuss serious reservations about program policy and inconsistency." McLain never addressed Toso's concerns of retaliation.

47. In accordance with the new SEL process, on October 19, 2017, Toso requested a meeting with Assistant Commissioner, Kirk Koudelka ("Koudelka"). On November 8, 2017, Toso filed an official complaint using the SEL process form. Toso's complaint outlined numerous issues, including his concerns that (1) the PRP's policies and practices were not in compliance with rules and statutes; (2) public funding resources were not being used wisely; (3) PRP policies were endangering public health and the environment; and (4) that management was retaliating against staff for raising concerns. Toso met with Koudelka that same day. During their meeting Toso reported these concerns to Koudelka and thoroughly explained the issues with PRP practices as outlined in paragraphs 8-21 above.

48. Twenty-one days later, on November 29, 2017, McLain informed Toso that Toso was being transferred back to the EMU and that while he could complete his current PRP projects, Toso would no longer be assigned future work on regular PRP release sites. Within hours of informing Toso, McLain announced Toso's transfer to his colleagues in an email disseminated to the entire remediation division. Toso was blindsided by this news.

49. Nevertheless, between approximately November 2017 and February 2019, Toso continued to engage Koudelka through the SEL process and report concerns to him regarding the Agency's unlawful conduct. On two occasions during this process Koudelka outright dismissed Toso's complaints via email. During this time, Toso also raised issues with other individuals in leadership including Deputy Commissioner, Michelle Beeman ("Beeman") and PRP supervisor, Jessica Ebertz ("Ebertz"). Specifically, on November 27, 2018, Toso reported numerous issues to Ebertz regarding the PRP's management of a site located in Backus, Minnesota. This site included a residential drinking water well that was contaminated with leaded gasoline compounds for many years and utilized by a resident who died from cancer. Toso explained to Ebertz that the site needed to be remediated and that there would be significant cost and time savings if the PRP followed the recommended procedures made by Toso and the hydro team following the Legacy Site review. Ebertz provided a curt response to Toso stating in part that "[site]closure means risks have been addressed," and further instructed Toso to refrain from discussing the topic further because the "conversation is outliving its constructiveness."

50. On January 24, 2019, Toso met with Beeman and his colleague, Jim Pennino. During the meeting Toso explained how the PRP's practices were endangering public health and how he has been subjected to retaliation for raising concerns. Beeman responded and repeated Sather's previous statements that the hydro team was simply attempting to oust Kanner from

management. Beeman also told Toso that there was a lot more to his disciplinary action than Toso was aware of and that the 2015 hydro team survey was highly biased.

51. On January 25, 2019, Toso sent a follow-up email to Beeman regarding their meeting and copied Koudelka. Toso reiterated that serious risks to human health were not being addressed nor communicated. Toso also informed Beeman that PRP management previously issued a directive to technical staff to stop reviewing groundwater data during the Vapor Intrusion Project. Toso explained how this data identified concerning levels of contamination, including contamination from leaded gasoline, that called for many sites to be re-evaluated for re-opening. Toso wrote, “Michelle, I’m not trying to be a problem employee. I have strong feelings about these issues and I care for my work, and my reputation. I’m also advocating for the science which you know can lead to discovering issues which can be difficult to deal with.” Nearly 15 months after Toso filed the SEL complaint, on February 4, 2019, Koudelka informed Toso via email that he was closing out the SEL process on his complaint and that PRP leadership would continue discussions on how to improve practices.

52. On February 11, 2019, Toso responded to Koudelka’s email. Toso wrote, in part, “it’s been 4 years since MPCA leadership were formally alerted to human health risks yet the only commitment you are willing to make is an unspecified timeline to consider how to handle closed sites which certainly have contaminated wells...when we find contaminated wells what are you going to tell the citizens who were allowed to consume drinking water over the health-based standard for 4+ additional years. Please tell me how this is not like Flint?” Toso also reiterated that he was subjected to retaliation and harassment from management for reporting concerns about the program. Koudelka never responded to Toso.

53. On February 26, 2019, Ebertz removed Toso as the lead hydrologist on a petroleum release site that he had worked on for over two years. Ebertz falsely accused Toso of causing the project team to miss a performance measure deadline as the basis for his removal. Toso emailed Ebertz and explained why her position was unfounded and that “the Scientific and Ethical concern process states that it is unlawful for the MPCA to retaliate or intimidate against any person from making a good faith report.” Toso informed Ebertz that he felt there was no other reasonable explanation for removing him from the project.

54. On February 28, 2019, Toso reported to McNamara that he was experiencing retaliation and harassment for filing an SEL complaint. Toso copied Koudelka, Fier-Tucker, and HR representative, Vonnie Phillips (“Phillips”) on the report. McNamara never met with Toso to discuss his report, nor did anyone within HR aid or provide a resolution to Toso regarding his concerns of retaliation with Ebertz.

55. In March of 2019, McLain informed the hydro team that Koudelka was ordering the PRP to review nearly 5,000 closed leaded gasoline sites and to sample nearby drinking water wells to identify contamination exceeding health standards. McLain suggested to Toso that this was the result of his complaints over the past five years. The Commissioner’s Office did not provide guidance to the PRP on how to execute this complex endeavor which ultimately became known as the Gasoline Additive Project (“GAP”).

56. In a subsequent meeting between Koudelka, Sather, McLain, and the hydro team, Koudelka was asked why the PRP was now moving forward with a multi-million dollar well sampling project. Koudelka stated that the GAP became necessary due to recent changes in drinking water standards and new risk assessment methodologies. Toso told Koudelka that his statement was not true and that the GAP was a result of PRP’s past failures to adequately protect

human health by sampling wells and remediating high-risk sites from the outset. Koudelka sternly told Toso that the PRP was going to go with Koudelka's messaging to explain the need for the GAP. Sather was asleep for most of this meeting. For many months thereafter, Koudelka and the PRP continued to misrepresent the need for GAP to the Commissioner's Office and to the state Petrofund Board, who provided the initial \$500,000 in funding to start the project.

57. In April and May of 2019, Toso attempted to set up a meeting with Deputy Commissioner, Peter Tester ("Tester") to discuss his concerns with the PRP, the failed SEL process, and the ensuing retaliation he experienced for reporting concerns to management. On May 30, 2019, Toso met with Tester and discussed these issues. The following day, on May 31, 2019, Toso provided supporting documentation to Tester including a six-page document entitled "Summary of Issues and Actions" which outlined the PRP's unlawful practices and detailed the grave impact of its conduct for public health and the environment. At the conclusion of this summary, Toso wrote:

As a nationally recognized technical expert with over 26 years of experience directing the cleanup of petroleum contaminated sites at the MPCA I do not feel that these serious human health issues have been adequately addressed. No staff should ever have to endure years of harassment and disciplinary actions to force MPCA management to do their job of protecting the right of every citizen to a clean source of drinking water. This complaint is eerily reminiscent of the Flint water crisis, except for the accountability of management, who, ironically, are now poised to take credit for solving the very problem they created.

58. On June 10, 2019, Toso met with Tester, McNamara, and other MPCA staff to discuss the failed SEL process. Tester requested that Toso provide additional information regarding the past and current ethical issues within the Agency. Consequently, on June 13, 2019, Toso emailed Tester and McNamara documentation and summaries describing threats to public safety and the intimidation and retaliation he experienced since bringing forward concerns to management.

59. In 2019, Laura Bishop (“Bishop”) assumed the role as the new MPCA commissioner. To keep the incoming administration apprised of the issues within the PRP, on July 18, 2019, Toso provided Bishop with the summaries he previously gave to Tester and described how the PRP was failing to protect public drinking water resources. Toso also informed Bishop that agency leadership was misrepresenting the rationale for the multi-million-dollar GAP to the Petroboard and to her Office. On July 23, 2019, Bishop responded to Toso and informed him that she would be following up with him to better understand how his complaints were being addressed by management. However, Bishop never followed up with Toso as promised.

60. Meanwhile, throughout 2019 and 2020, the PRP continued to engage in the same faulty practices that gave rise to the need for the GAP. For example, in early June of 2020, the PRP determined that it would not pursue immediate remediation at a high-risk leaded gasoline site located in Alexandria, Minnesota. This decision was made contrary to the overwhelming consensus among PRP scientists that the site mandated remediation. Likewise, the MDH previously conducted a source water assessment on the site and determined that the city’s municipal wells were vulnerable.

61. Between June 24, 2020, and July 24, 2020, Toso submitted various reports via email to Sather, Ebertz, and other PRP management describing why the Alexandria site required prompt remediation and how the PRP’s failure to abide by its legal obligations was endangering human health and the environment, in addition to wasting state resources. Toso also informed management that well testing alone under the GAP would not protect the public if the PRP continued to employ the unlawful practices that led to the GAP’s implementation in the first place. Toso specifically explained how the GAP could take 10 or more years to complete which would

subject citizens to longer exposure to contamination. Likewise, Toso described how the GAP fails to consider the critical issue of resource protection:

As long as a drinking water aquifer is contaminated there is always the risk of contamination impacting an existing, or new private well that are not monitored for VOCs. Sampling existing wells does not eliminate this future risk, only cleanup or other active risk reduction measures will prevent future groundwater users unknowingly being exposed to these dangerous chemicals.

62. Toso also explained to management that he was experiencing retaliation for reporting concerns and insisting that the PRP change its practices. While Toso was raising these concerns with management, on or around July 9, 2020, Ebertz filed another false complaint against Toso for purported work performance issues. On August 3, 2020, Toso forwarded these communications to Bishop and described the ongoing threats to the public due to the PRP's conduct. Toso wrote, "Commissioner Bishop, you are the last hope to resolve this issue within the agency. Please take these allegations seriously..."

63. Bishop never responded to Toso. Consequently, Toso emailed her on August 19, 2020, and informed her that he would be leaving the agency because he could not "continue to work under hostile conditions where scientists are marginalized for speaking up and management are more concerned with self-promotion than protecting human health and the environment." Toso urged Bishop to meet with him so that he could explain the technical issues with PRP's practices and how they are posing risks to the public. Bishop responded to Toso's email the same day and informed him that a meeting would be set up.

64. On September 2, 2020, Toso met with Bishop and Phillips. During the meeting Toso explained the problems he had been raising with management since 2015 and detailed the retaliation he experienced, and was continuing to experience, as a result. Because the meeting only lasted one hour, Toso provided Bishop and Phillips with a written summary of the issues later that

day. The meeting concluded with Bishop instructing Toso to provide Phillips with additional documentation of his retaliation concerns. Between September 3, 2020, and September 10, 2020, Toso provided Phillips with numerous examples of retaliation and included supporting documentation.

65. Toso subsequently met with Phillips on October 2, 2020. During the meeting Toso requested that the retaliatory disciplinary actions and negative reviews be removed from his personnel file. Toso also described to Phillips how his work environment became a major source of stress in his life and that he wanted to be made whole after enduring years of retaliation from PRP management. Phillips told Toso that he wanted to converse with PRP management before they met again. On October 5, 2020, Toso emailed Phillips and expressed concern about Phillips engaging PRP management. Toso explained to Phillips that the reason he went to the Commissioner was because attempts to resolve issues with PRP leadership over the last six years were unproductive.

66. On October 26, 2020, Toso met with Phillips. During the meeting, Phillips informed Toso that the Commissioner's Office stood by the Agency's response to Toso's reports and SEL process complaint. Phillips also told Toso that the MPCA decided not to investigate Toso's reports of retaliation. At one point during the meeting, Phillips suggested to Toso that an early retirement could provide a solution to these issues. The following day on October 27, 2020, Toso emailed Phillips his concerns with the Agency's response. Toso specifically informed Phillips that the retaliation he experienced from the MPCA violated the Minnesota Whistleblower Act, the MPCA's code of conduct and SEL process, and the MMB's statewide operating policy. In conclusion, Toso wrote:

As I told you and commissioner Bishop I do not wish to leave the agency but I've been denied interview opportunities for supervisory roles, marginalized and excluded from

duties which I'm uniquely qualified, and endured negative comments and ridicule by management in front of other staff as retaliation over the past 6 years. Your statements that I'm a valuable highly qualified employee do not agree with the agency's pattern of retribution that resulted in changes to my work plan and transfer of my position out of the Remediation Division. This has the appearance of isolation as a means to end my 28 year career at the MPCA. Instead of employing my expertise to resolve problems the MPCA would prefer I retire to they can maintain the status quo.

Phillips did not respond to Toso's email and the MPCA took no further action to address Toso's concerns of unlawful retaliation. Throughout the fall of 2020, Toso submitted official complaints regarding the MPCA's illegal conduct to the Office of the Legislative Auditor and the MMB. In approximately late 2020 or early 2021, an MMB representative informed McNamara that Toso raised concerns with the MMB about retaliatory conduct on the part of the MPCA. McNamara never followed up with Toso about these concerns.

67. On February 9, 2021, Fier-Tucker informed Toso that Ebertz and McLain submitted a complaint to her regarding Toso's involvement with the GAP. According to Fier-Tucker, Ebertz and McLain disproved of Toso's criticisms of leadership decisions and the GAP. On March 10, 2021, management removed Toso from the GAP despite being the only leaded gasoline subject matter expert at the MPCA.

68. In March of 2021, Toso gave a presentation to PRP management and explained how its practices were failing to protect groundwater resources and endangering the public. On March 17, 2021, Toso forwarded a copy of that presentation to Fier-Tucker and informed her that he was subjected to retaliation after the presentation. Toso also wrote, "technical staff like myself are trying to improve the program, which we can't do unless we acknowledge that it needs to be fixed. Anyone attempting to do that is described as degrading the program and mgmt.. And they successfully use that excuse to punish and remove staff that speak up when they see something wrong. This is the same old story with silencing technical staff."

69. A few weeks later, Toso was removed from the MSP Airport Site which he had worked on for the past 28 years. Thereafter, Ebertz and McLain continued making false claims to Toso's manager about Toso's work performance. Accordingly, on May 13, 2021, Toso emailed Fier-Tucker and wrote that management's behavior "crosses legal, moral and ethical boundaries...I am requesting again that the agency intervene and stop the intimidation and retaliation against me..." The MPCA took no action in response to Toso's report.

70. On May 24, 2021, Toso emailed Fier-Tucker his intent to resign effective June 3, 2021. Toso informed Fier-Tucker that "the MPCA's ongoing retaliation against me for raising concerns about the health and safety of the public has become intolerable. I have no choice but to end my employment with the agency."

**COUNT ONE
RETALIATION IN VIOLATION OF THE
MINNESOTA WHISTLEBLOWER ACT**

71. Toso realleges paragraphs 1 through 70 as if fully set forth herein.

72. Toso made reports to Defendant, which included, but are not limited to, the reports described above regarding what he in good faith believed to be violations of federal law, state law, or rules adopted pursuant to law.

73. After Toso made good faith reports to Defendant regarding what he believed were law violations on the part of Defendant, Defendant engaged in acts of retaliation and penalizing conduct toward Toso that included, but is not limited to, his constructive discharge in violation of the Minnesota Whistleblower Act, Minn. Stat. § 181.932, subd. 1(1).

74. As a direct and proximate result of Defendant's illegal conduct, Toso was constructively discharged, he has and will incur wage and benefits loss, he has and will experience

mental anguish and emotional suffering, and he is now forced to incur attorney fees and litigation costs to recover his losses.

WHEREFORE, Plaintiff Mark Toso prays that he may have and recover against the Minnesota Pollution Control Agency as follows:

1. For his general and special damages in an amount in excess of \$50,000;
2. For his costs of suit, including attorney fees, pursuant to Minn. Stat. §181.935; and
3. For such other and further relief as the Court deems just and equitable.

**LAW OFFICE OF
SIVERTSON AND BARRETTE, P.A.**



Alf E. Sivertson (#122233)

alf.sivertson@sivbar.com

Anja M. Sivertson (#398908)

anja.sivertson@sivbar.com

1465 Arcade Street

Saint Paul, MN 55106-1740

Phone: (651) 778-0575

Facsimile: (651) 778-1149

**ATTORNEYS FOR PLAINTIFF
MARK TOSO**

Date: November 12, 2021

ACKNOWLEDGMENT

The undersigned hereby acknowledges that sanctions may be awarded pursuant to Minn. Stat § 549.211 for any violation of this section by the undersigned.



Anja M. Sivertson



Allegation Form

Minnesota Office of the Legislative Auditor (OLA)

You may use this form to report allegations or complaints regarding possible misuse of state money or resources. You are not required to provide your name or contact information, but this information will allow our office to follow up with you or seek additional information, if necessary. We will not share your identity with anyone outside our office without your prior consent.

First Name: Mark

Last Name: Toso

Daytime Phone: 715-781-4887

E-mail Address: mark.toso@state.mn.us

Do you authorize our office to disclose your name to the organization(s) or individual(s) that are the subject of your complaint or allegation?

Yes

No

1. Please describe what occurred that you think was inappropriate.

The Minnesota Pollution Control Agency (MPCA) Petroleum Remediation Program (PRP) management (Supervisors, Manager, Director) continue to actively dismiss the collective advice of their technical staff (Hydrologists), a key component of administrative decision-making, which resulted in the public's exposure to contaminated drinking water supplies in excess of applicable health-based standards. This was primarily due to differences in the application of policy, along with management insistence that the program continue to employ outdated and scientifically flawed risk assessment methodologies opposed by technical staff. In addition PRP staff are compelled to utilize poor quality data which does not meet MPCA or EPA standards from unqualified consultants, who also receive reimbursement from the state. These factors led to sites, even those which were known to have contaminated drinking water aquifers, to be closed from further remediation activities without any actual cleanup. There were also serious staff concerns about the legal interpretation of statutes and rules and pressure by management to compel staff to close sites in the interest of meeting arbitrary quotas.

After a 5+ year process that elevated these issues to the Commissioner's office the PRP was ordered to review over 5,000 closed PRP sites and to sample and identify drinking water wells that are contaminated over health standards. These wells are impacted because they were

never sampled initially (as they should have), became contaminated after final MPCA site closure because the sources of contamination were not cleaned up, or wells were unknowingly installed in contaminated aquifers due to lack of a public notification system.

This situation demonstrates an inadequate risk assessment and cleanup policy, a lack of any quality assurance program; and questionable management and leadership practices. The number of impacted drinking water wells is unknown at this time, but there are an abundance of documented examples of contaminated wells discovered at previously closed sites, so it is almost certain that 100s to 1000s of drinking water wells could be impacted. This review is known as the Gasoline Additive Project (GAP) and is a multi-year, multi-million dollar initiative that would not have occurred if the MPCA had followed established EPA protocols and those of other MPCA remediation programs. In my opinion this project is moving far too slowly given the certainty that private wells are contaminated. However despite these known issues PRP cleanup policy remains unchanged and continues to justify site closure decisions based on outdated and fundamentally flawed science. This resulted in the squandering of millions of taxpayer dollars and knowingly allowing citizens to be exposed to dangerous levels of contamination.

In addition, the MPCA has actively engaged in staff intimidation and retaliation when confronted with challenges to these decisions in an effort to prevent the fundamental changes required for the Agency to accept its stated mission to protect human health. These actions directed against staff prevented the implementation of the GAP for at least 5 years, furthering the risk to those consuming contaminated water. Only through the unrelenting efforts by staff (primarily myself) to convince the Commissioner's office that their management were being less than truthful did they order the GAP which began in 2019. However despite repeated complaints to human resources MPCA management has never been held accountable for their failure to uphold the Agency's mission to protect human health or for the intimidation and retaliation of staff. This lack of accountability has even led to a promotion of a PRP supervisor who was actively engaged in retaliation and continues to support the current flawed policies that necessitated the GAP. This situation is not unique to the Remediation Division. The State of Minnesota does not have an Executive Performance Management Plan that would curtail this type of behavior and develop the Executive skills needed to deliver public programs with integrity.

2. When (or over what period) did this occur?

This issue had its roots in the mid-1990s with complaints by former PRP staff, highlighted in a 1995 Pioneer Press Article "Pollution Levels Assailed". However the most significant change occurred around 2000 when the PRP removed the requirement in policy to cleanup drinking water (resource) aquifers and replaced this with the "pathway elimination" approach. This approach states that replacing a contaminated drinking water well is the only action required to close a site. In other words, no cleanup of soil or groundwater (including a drinking water aquifer) is necessary and allows leaving contamination in place that in almost all cases does not have any technical, cost or feasibly impediments to cleanup. The consequence is that impacted groundwater resources will not be available in the future without extensive

abatement efforts requiring the expenditure of significant state resources. It should be noted that PRP is funded by the Minnesota Petrofund which provides funding as requested, so these actions are not constrained due to resources or staff as it is with other programs. Essentially the Petrofund is an unlimited source of funding. On 5/15/19 the Petroboard approved an initial \$500,000 in FY 2020 funding requested by PRP for the GAP.

There are several issues with the current closure policy to point out in this summary (details are in the attachments). The PRP program does not believe that future development is a consideration (risk factor) when closing a site, despite the definition of risk as *the probability of a future event*. The assumption in current management decision-making practices is based solely on current use. In essence, what occurs today, with the distribution of contamination and current utilization of drinking water aquifers will remain that way in perpetuity. This practice not only ignores the science of remediation, but also, an abundance of closed PRPs sites that were later discovered by others (MDH, well drillers) to have contaminated drinking water wells. This unequivocally demonstrates the underlying stated policy premise to be false, yet it remains in policy today. In addition neither the US EPA nor Minn Stats 115C define well replacement as a corrective action; therefore, the statement that the program is following a "Risk Based" site closure is false. PRP and the MPCA have repeatedly lied to EPA, the legislature, and the public that it is following EPA's risk based guidance, and they have intentionally confused site "cleanup" with site closure (as in statements that PRP has "cleaned up 20,000 sites" when in fact they were just closed without cleanup). In fact, very few PRP sites have been cleaned up to *any* extent, thus requiring millions of additional dollars from the MN Petrofund to re-evaluate sites for human health risks a second time under the GAP. Cleanup of many of these sites to protect future groundwater supplies now will undoubtedly cost taxpayers millions, perhaps more.

These concerns led to a unanimous complaint by 11 PRP technical staff (Hydros) to the Remediation Division Director, Kathy Sather, in 2015. The complaints also included an anonymous survey of staff by the MPCA Organization and Development staff which documented overwhelming concern about human health impacts (specifically drinking water) and management's refusal to address them. This followed a project initiated in 2013 to determine why some sites were still open after 10 years, rather than closed in 3 years as was the program's goal. The identified issues were many, with a significant amount due to interpretation of policy, inability to convince management to cleanup sites, and thus perpetuating expensive investigations (Paynesville, Alexandria, Pelican Rapids for example). Poor oversight, unacceptable data and contractor performance were also identified as another reoccurring concern. Rather than treat this as the Continuous Improvement Project it was PRP management elected to close these sites, rather than address the underlying issues. Progress made to identify and remedy these issues and conform to EPA standards and the latest science were inexplicitly halted in 2015, after the project exposed serious risks to 1000s of drinking water supplies across the state due to the pathway elimination policy. Staff concerns about this policy and the possibility that closed sites would have to be cleaned up were also rejected by Division Director Sather, and staff (principally myself) were subject to retaliation as a means to further suppress staff from seeking these critical human health protection changes.

In 2018 PRP management directed staff to cease identifying leaded gasoline sites that could pose a drinking water risk under the vapor intrusion (VI) project (another look back at closed sites project). This occurred a year after I started conversations with the commissioner's office where we discussed the VI project findings and the number of wells that are at risk multiple times. In other words management (and possibly senior leadership) aggressively opposed staff collecting data that could be used to identify private wells that we know are very likely contaminated. In 2019 these sites were incorporated under the GAP, which occurred only because of my persistence in arguing this with the commissioner's office (verified by their decisions during the entire 2 year process discounting technical staff expertise and the risk). However the underlying policy that resulted in inadequate risk assessments and the lack of site cleanup that lead to public exposure to unsafe levels of contamination have never been addressed.

3. Who was involved? (Please be specific--provide the names of agencies, parts of agencies, or the names and positions of individuals, if you know them.)

All are or were at the MPCA –

Michael Kanner, PRP manager (retired 8/6/2019)
Kathy Sather, Remediation Division Director (current)
Chris McLain, PRP supervisor (my supervisor from 2013 - 11/29/2017)
Jesse Ebertz, PRP supervisor, and as of 6/2020 acting PRP manager
Kirk Koudelka Assistant Commissioner (2013? - present)
John Stine, Commissioner (2013? - 1/2019)
Peter Tester, Deputy Commissioner (1/2019 - present)
Laura Bishop, Commissioner (1/2019 - present)

4. Do you believe this action violated a law, rule, or other standard? If so, please explain.

Yes. The application of the program goes so far as to suggest an act of unpromulgated rulemaking. See the included document [PRP Rules and Statutes](#) for the full list of applicable state and federal laws, rules, and standards. These include:

Minn. statutes 115.01 subd 6, 22; 115.061; 115C.06 subd. 2; 115C.02 subd. 4; 115C.03 subd. 1a, 3; 115C.04 subd. 1a;

MPCA rules 7050.0185; 103H.001; 103H.101.

Federal 40 CFR Part 280; § 280.60; § 280.64; § 280.66; § 280.67; OSWER Directive 9610.17

Retaliation directed towards staff violated Minn Stats 181.932, MPCA's Code of Conduct (i-admin8-05) which is an unedited version of MMB statewide operating policy 0103-01 that requires staff to report violations, and requires agencies to have retaliation-free mechanisms for employees to report suspected code of conduct and ethics violations. This reporting standard did not exist until 10/13/2017 with implementation of the MPCA's Ethical/Scientific

concern summary form for assistant commissioner review (i-admin10-72, created 10/13/2017). This process was developed by staff, in part, to address this specific complaint. By ignoring, and in some cases sanctioning retaliation the MPCA does not have a legitimate ethic or code of conduct policy in violation of MMB 0103-01. The lack of a State Executive Performance Management Plan further supports and promotes this type of behavior.

Most notable are Minn statues and MPCA rules requiring the cleanup of releases and the protection of resources (115.061 and the MPCA degradation prevention goal 103H). The interpretation and application of statues and rules by other MPCA programs (even other cleanup programs) differ significantly from PRP, which is the only MPCA program to apply their own unique interpretation.

The argument made by PRP for having a unique legal interpretation versus other MPCA cleanup programs (such as Superfund) is 115C.03 Subd. 1a. which states "Passive bioremediation must be used for petroleum tank cleanups whenever an assessment of the site determines that there is a low potential risk to public health and the environment." This statute has 2 key components that the MPCA's PRP program management refuse to acknowledge:

Only sites that have a low *potential* (not existing) risk are required to use passive bioremediation, which is using natural processes to degrade petroleum in place (also called the "do nothing" approach). This suggests that the legislative intent claimed that high risk sites should be cleaned up using other more direct methodologies; however, low potential risk was not defined in statue. The Legislature did define "high risk" in 103H, but this definition is also not considered by PRP management. By use of scientific invalid practices, PRP effectively classifies all sites without a currently utilized contaminated drinking water well as "low risk." The result is that contaminated aquifers, even those currently utilized by private or municipal wells that are not yet impacted are not classified as "high risk" as they would be under EPA guidance and these sites can be closed with no effective cleanup under 115C.03 Subd. 1a. This is not the definition of risk, especially when the statute states *potential* risk. The number of sites where this has occurred is well into the 1000s (there is no accurate count, potentially in violation of CFR § 280.67). Even sites in MDH or DNR designated high risk areas are not cleaned up under the pathway elimination (well replacement) policy, which falsely claims to be a corrective action (potential violation of federal § 280.66 and Minn Stats 115C.02 Subd. 4).

In addition, 115C.03 Subd. 1a can only apply to compounds which are "readily biodegradable." It appears the most common petroleum release impacting drinking water aquifers and wells are leaded gasoline releases. All leaded automotive gasoline contains 2 important additives, ethylene dibromide (EDB) and 1,2-dichloroethane (DCA). EDB is extremely toxic with a laboratory detection level 10-100x above the drinking water standard (i.e. we can't assure a well is safe even if EDB is not detected). DCA is a chlorinated compound similar to TCE which was recently banned, and like TCE is very resistant to biodegradation compared to other petroleum compounds. Therefore leaded gasoline sites cannot be classified as low risk under this statute when drinking water supplies are threatened. This is why the GAP project is focusing exclusively on leaded gasoline releases (however these issues are not exclusive to leaded gasoline). There are over 5000 leaded gasoline sites that were closed as low risk, many

with limited or no cleanup. These include sites that were known to have contaminated over 145 public drinking water wells, including wells for cities of Alexandria, Foley, and Blaine. Of serious concern are the unknown number of private wells, many of which were never sampled or considered at risk due to the inappropriate application of 115C.03 Subd. 1a at leaded gasoline release sites. Given the toxicity of the contaminants and potential for harm, it seems unreasonable and even negligent that the MPCA would treat these issues in such a manner.

5. How do you know about what happened? (Did you see it first-hand or hear about it from others?) How certain are you that wrongdoing occurred?

I have first-hand knowledge and was directly involved in all aspects of this complaint. I was on the 2013 Legacy site review project and wrote several critical site summaries with other staff that identified human health issues, participated in technical staff discussions with Kathy Sather in 2015 and was a member of the staff workgroup attempting to revise PRP policy in 2015. I submitted complaints directly to the MPCA commissioner numerous times in 2016 (all were ignored), and to the current deputy commissioner on 5/31/19, the commissioner on 7/23/19 (no response to either). My email with the commissioner on 8/23/2020 culminated in meeting on 9/2/2020, but this matter, including the illegal retaliation currently remains unaddressed. This followed an unsatisfactory experience with the MPCA's Ethical/Scientific concern process from 2017-2019 that, while culminating in the GAP, did not change any of the fundamental issues with policy nor hold management accountable for this monumental failure to protect public health.

I've filed several complaints with HR about retaliation from 2015-present that resulted in negative performance reviews that also include false statements, travel request denials, a written reprimand, changes to my work plan, and transfer of my position out of the Remediation Division. I've also been denied interview opportunities for supervisory roles, marginalized and excluded from duties which I'm uniquely qualified, and endured negative comments and ridicule by management in front of other staff. Details are provided in supporting documentation.

I was one of two staff primarily working with the Commissioner's office meet and confer team in 2017 that requested a formal process for employees to report suspected code of conduct and ethics violations. We worked with MPCA executives to create this process keeping within the bounds ordered by the commissioner. I submitted a claim on 11/8/2017 under what was deemed a pilot project. I believe there were 2 other complaints submitted, one was addressed internally and the other was also describe as a failure by staff in their evaluation forms.

I have over 28 years' experience at the MPCA as a hydrogeologist overseeing and directing the clean-up of the most heavily contaminated sites in the state (refineries, major pipeline releases, and large chemical storage facilities). I've given numerous presentations to national audiences and written articles about the unique dangers of leaded gasoline, ethanol and MTBE releases and I've served on national workgroups that advised states and the EPA on the investigation and remediation of gasoline and other motor fuels in the environment. I've received national recognition for my work in 2015, which ironically I could not be present to accept due to retaliation resulting in the denial of my travel request. I am extremely confident in all these accusations of wrongdoing, and the risks they present to the public.

- 6. What witnesses, documents, or other evidence might support your allegation? (If you have supporting documents, please send or deliver them to joel.alter@state.mn.us or Joel Alter, Office of the Legislative Auditor, 140 Centennial Building, 658 Cedar Street, St. Paul, MN 55155.)**

I've written extensively about this complaint in email exchanges with management and the assistant commissioner. Included are a sampling of emails, letters and other documentation supporting this complaint (more is available). This is a complex issue that spans 7 years and includes technical and legal subject matter. A good starting point would be the 5/31/19 email "Re: My Scientific and Ethical Complaint Experience" attachment sent to Deputy Commissioner Peter Tester which is based on my original scientific and ethical complain process submittal (no action was taken by Tester). More recent examples of ongoing wrongdoing are contained in the 7/24/2020 email exchange with Kathy Sather concerning a recent Site Decision Committee (SDC) process. The scientific and ethical complaint email exchanges with Kirk Koudelka (and the summary form submitted to HR) also provide context on the resistance staff faced to bring about changes. My recent emails to HR requested by the Commissioner in our 9/2/2020 meeting documenting retaliation are also included. To date the MPCA refuses to investigate any of these accusations against management or senior leadership or correct the illegal retaliation in my personnel file.

- 7. Have you reported this allegation to a government office other than the Office of the Legislative Auditor?**

No However this is a serious time sensitive case that may warrant reporting to government officials beyond the OLA.

Yes

- 8. If you said "Yes" to the previous question, please indicate the office(s) to which you reported the allegation and any action(s) the office(s) took, to your knowledge.**

- 9. If you have additional comments about this allegation, please offer them below.**

If you have any questions or need additional documentation please let me know. Given all that has occurred I am not concerned with this information becoming public, or the MPCA becoming aware of my discussion with the OLA.

Attachments to be sent via email:

PRP Rules and Statutes.docx

1/27/15 "RE Consultants" email

2/19/2015 "PRP Hydro Survey results" email w/ attachments

2/27/2015 "RE: Survey Summary" email
3/10/2015 "PRP Hydro/Dir Meeting Agenda" email w/ attachment
11/7/2015 "Re Ethical Scientific Concerns Meeting" w/ attachment
12/12/2017 "RE: Ethical/Scientific Concerns Meeting1" w/ attachment
2/11/2019 "RE: Response on your concerns with PRP" w/ attachments
5/15/2018 "RE: PRP Program Concerns" w/ attachment
5/17/2018 "FW: Missing Groundwater Field Parameters"
1/23/2019 "RE: Ethical/scientific concern process"
1/25/2019 "Fw: Leaded gas sites"
2/5/2019 "evaluation form" w/ attachment
2/26/2019 "RE: Evaluation" (note - this meeting never occurred)
7/18/2019 "Scientific and Ethical Complaint"
5/31/2019 "Re: My Scientific and Ethical Complaint Experience"
8/3/2020 "Important Public Health Issue to Discuss"
9/2/2020 "RE: Important Public Health Issue to Discuss"
9/2/2020 "RE: Important Public Health Issue to Discuss1"
9/3/2020 "Retaliation example #1"
9/4/2020 "Retaliation example #2"
9/9/2020 "Retaliation example #3"
9/10/2020 "Retaliation examples #4 and #5"

Thank you for taking time to complete this form.

Members of the Legislative Audit Commission:

2/17/2023

As the individual who filed the complaint that led to the February 2022 Program evaluation of the Minnesota Pollution Control Agency's (MPCA's) Petroleum Remediation Program (PRP) I would like to provide additional context. Because the OLA conducted a program evaluation they did not investigate additional critical issues documented in my complaint filing. In addition, I wish to correct some inaccurate and misleading statements made by the MPCA to the OLA. With this response I will show and provide documentation of the following:

- MPCA continues to misrepresent to the public, the legislature, and federal agencies that petroleum sites have been cleaned up and that all risks to the public's health and safety were adequately assessed before site closure. These include numerous false statements to the Legislative Audit Commission;
- Some of the concerns investigated by the OLA are highly technical however the OLA did not consult outside experts to evaluate the scientific rigor of the MPCA's work or the adequacy of risk assessments or clean-ups conducted for individual sites. This provided the agency an opportunity to mislead the OLA on multiple occasions;
- The OLAs findings, despite their unfamiliarity with the subject verify that PRP policy is not risk based and therefor does not comply with state statues and rules;
- The PRP interpretation of applicable rules and statues differs from other MPCA remediation programs especially concerning drinking water resource protection. These concerns were outside the scope of the evaluation but jeopardize critical future drinking water resources;
- Poor quality work and unqualified contractors has been a perennial issue in the PRP for decades and goes beyond reporting to the actual data itself, much of which should be considered invalid. Despite the MPCA's statements to the commission of a more rigorous vetting process these poor-quality work and data issues also involve their own contractors and could be considered fraud;
- The MPCA intentionally mislead the commission by claiming future public health issues from extensive contamination not cleaned up would be prevented by their "belt and suspender" approach. The MPCA does not have a policy or practice of informing adjacent property owners of contamination affecting their property, only the property where the leak occurred. In some cases groundwater contamination can affect properties more than a mile away. This aspect was not part of the OLA's evaluation;
- Depositional testimony by MPCA officials verify the Gasoline Additive Project (GAP), a 10 year \$10+ million-dollar project to locate contaminated private wells near 4700 closed and reportedly cleaned up leaded gasoline sites would not have occurred except for a persistent 6-year effort on my part that resulted in countless retaliatory actions which ultimately cost me my career and a significant portion of my retirement benefits;

- Additional critical issues that were not investigated by the OLA include a culture of intimidation and harassment of staff, and the failure of state law and policies that in practice do not provide any protection for state agency staff reporting public health issues.

As a scientist with over 35 years of experience with petroleum contamination, including almost 29 years as a hydrologist at the MPCA¹ I commend the OLA for their work on a highly technical subject matter. I agree with all their recommendations, however the technical nature and limits to the scope of their audit resulted in significant gaps in their understanding of several critical issues. The OLAs review was limited to the past 5 years of the program, thereby missing 1000's of prior site closure decisions that continue to jeopardize human health.

The OLA audit included surveying staff, however many of the survey questions were overly general and open to interpretation. For example, the OLA reported 100% of MPCA staff surveyed stated that the work the program completes is protective of human health. The MPCA has always been quick to respond to human health issues when there is a known impact (such as a contaminated drinking water well)². However, the principal concern described in my 10/21/2020 OLA allegation form³ was the MPCA does not consider future impacts to human health. The OLA's findings support this when they stated: *...program guidance primarily instructs staff to consider only how the property is currently used; it does not generally require staff to assess site risks in the event the property's use changes in the future* (pg 24). This is the fundamental basis of risk based corrective action (RBCA), and a requirement of state statute and rules⁴. The proper use of RBCA can allow contamination in specific settings to remain in place to degrade over time, thus reducing cleanup costs by only cleaning up sites that could present a future risk.

RBCA was developed by the American Society for Testing and Materials (ASTM) with support from USEPA in 1995 and was intended to help state agencies make cleanups faster, less expensive and more effective⁵. Currently 49 states use the ASTM RBCA with Minnesota as the outlier⁶. The MPCA's claims of an equivalent risk-based policy are demonstrably false, nor are they technically risk based⁷. The definition of risk is the probability of a future event, and as the OLA pointed out the MPCA does not consider future changes in land use or factors such as climatic variations or operation of high-capacity wells that can easily change the distribution of groundwater plumes. Nor do they consider the installation of new wells into contaminated groundwater left at closed sites to be a risk.

The OLA reported that several staff members said it is difficult to know how a property will be used in the future. The tools and methods in RBCA are specifically aimed at reducing this uncertainty, thus providing a scientifically sound justification to cleanup, or not cleanup a site. The OLA reported that one supervisor suggested considering future property use would require all sites to be cleaned up to the highest standard (pg 25). This is a gross misrepresentation of RBCA and demonstrates MPCA leadership lacks a basic understanding of actual risk-based processes.

The MPCA provided the OLA with several methods by which property owners or buyers could learn about petroleum contamination at properties they own or may purchase (p 26). These include property disclosures, what's in my neighborhood and the brownfields program. The MPCA written response stated these were part of a "belt and suspenders" approach to protect future exposures. Unfortunately, this subject was outside of the scope of the OLA's evaluation which allowed the MPCA to intentionally mislead the commission. The fact is the "belt and suspenders" approach inherently flawed as the

property disclosure only applies to the property where the leak occurred not on adjacent properties. However, groundwater contamination does not respect property lines. At most sites groundwater contamination extends well beyond the property boundary. These plumes can approach a mile in length⁸ so an existing (or new) well can be contaminated without the property owner even aware of the nearby leak site. The MPCA's belt and suspenders approach does not protect or inform off site property owners of risks from groundwater contamination when sites are closed without cleanup despite impacting drinking water aquifers, nor does the MPCA work with the Minnesota Department of Health on setting well advisory areas that would alert anyone drilling a new well in contaminated areas.

In addition citizens or real estate persons seeking public information on closed sites *might* be able to find out what product was spilled, if groundwater is contaminated, and if free flowing (LNAPL) gasoline was present in wells at closure. However for many older sites this information is incomplete, or of very poor quality. There is no information on how long the contamination will last, the size of the contaminated area, or if a drinking water aquifer is impacted. The status of MPCA files is such that it is practically impossible for the average citizen to get information or let alone understand what happened at these sites, including often non-existent rationale for site closures. Even staff at MPCA have difficulty understanding what actually occurred. This is a huge programmatic failing that would have been prevented with the use of RBCA, which necessitates better record keeping and disclosures beyond just the property where the spill occurred when contamination is not cleaned up.

The OLAs discussion of MPCA's legal requirements were primarily limited to specific sections of Stats 115C, overlooking Section 115C.06 Subd. 2. *Duty to notify and take action for release. This chapter does not limit a person's duty to notify the agency and take action related to a release as provided in section 115.061⁴.* This suggests that additional rules and statutes apply. These include Minn. Stat. ch. 115 and 116; Minn. Stat. ch. 103H Groundwater Protection; Minn. R. 7060, Underground Waters; Minn. R. 7050, Waters of the State. Curiously these statute and rule references were recently removed from PRP guidance where they had been since the late 1990s.

The above-mentioned statute and rules emphasize resource protection by requiring cleanup and protection of aquifers, but were outside the scope of the OLA audit. There are 1000s of sites inappropriately classified as low risk (under 115c) that were not cleaned up and closed since program inception in 1987 that contaminated drinking water aquifers currently used by municipalities and private citizens.

Failure to protect future drinking water resources was a principal allegation by the Attorney General in the 3M lawsuit that stated: *3M knew or should have known that the discharge of PFCs would pollute groundwater and surface water of the State, making them unavailable to the citizens of the State for their normal and designated uses, including as sources of drinking water and habitat for fish which may be consumed as food.* All other remediation programs in the MPCA incorporate resource protection into their cleanup decisions. Therefore, PRP state of practice of classifying impacted drinking water resource aquifers as low risk when no wells are currently impacted is a unique interpretation not shared by the rest of the agency⁹. Staff frequently questioned the lack of resource protection in policy to PRP management and requested a legal opinion but were dismissed, or if they continued reassigned. Minnesotans have a right to know why the very Agency that is charged with protecting them are not abiding by their own standards.

The OLA recommended that the MPCA define the characteristics of PRP release sites it considers to be a low potential risk and ensure that it addresses those sites in the manner prescribed by law. This was repeatedly a topic of discussion with management¹⁰ where staff stated they believed any impacted drinking water aquifer could not be classified as low risk under the law. In addition, low risk sites, as defined by 115c mandates the use of natural bioremediation¹¹. Leaded gasoline additives do not readily biodegrade and therefore leaded gasoline leak sites could not be subject to the natural bioremediation mandate and classified as low risk, yet they were at nearly 4700 sites. This includes multiple closed sites that are currently contaminating drinking water aquifers in Blaine, Paynesville, Foley, Pelican Rapids, to name just a few.

There are other unique PRP policies that diverge from other MPCA cleanup programs. PRP does not follow the same vapor intrusion guidance, nor do they use the same soil cleanup levels even with the same contaminants¹² (for example benzene, which can be a petroleum and a non-petroleum contaminant in Superfund). The question is why are these standards for identical chemicals considered protective of human health in one program but not another? The question likely comes down to costs to the state (costs to industry notwithstanding).

The PRP continues to use scientifically flawed methodology to justify leaving contamination behind despite known failures and studies from other states that prove otherwise¹³. This has been extensively discussed with management by technical staff and was summarily dismissed because it could impact site closure timelines. The idea that groundwater plume will remain stable or that we can accurately measure groundwater travel times has been disproven by 1000s of sites over the course of 30 years. Again, this is all based on current not future conditions, contrary to risk-based assessment methodology. Blaine, Alexandria and Paynesville are excellent case studies where millions of taxpayer dollars were spent attempting to justify not cleaning up sites. Often the cost of cleaning up a site (and thereby eliminating any risk) is less than on-going investigation, or reopening the site in the future.

Poor quality data and unqualified contractors has been a perennial issue in PRP for decades. This is not exclusive to reports, it also concerns the collection of critical data necessary to make site decisions. Because of the pressure to close sites staff often are forced to use questionable data, data that other MPCA programs and EPA would consider flawed and unacceptable. For example, the drinking water standard for the leaded gasoline additive 1,2-DCA is 1 part per billion (ppb). The typical laboratory detection level is 0.5 ppb so any loss due to sampling error (actually very easy to do) would indicate a well is clean, rather than exceeding health standards. I have personally observed poor sampling methodology on too many occasions to list, even with state contractors¹⁴ so it's not unrealistic to assume a significant amount of site data is corrupt. Yet according to the PRP manager in 2015 all of the state's contractors are qualified¹⁵.

The OLAs survey of PRP staff indicated that 57 percent of respondents (13) said that the overall quality of consultant work had a negative impact on their ability to make scientifically sound decisions. (p 39). It should be noted that this survey included 8 hydrologists and 15 project managers. However only the hydrologists are qualified to answer this question, suggesting the possibility that all of them agreed. This discrepancy in staff qualifications applies to other survey questions too.

The MPCA stated to the OLA and the commission that they have higher standards to prevent poor quality work from their own contractors, but that's not true. A glaring example of poor work by a state contractor was the state funded investigation into contamination of the City of Paynesville's municipal

wells¹⁶. The staff notes mention poor quality work multiple times. They also state the contractor was unable to properly perform a pilot test, errors that had significant impacts on the potential remediation system's ability to demonstrate effectiveness. Rather than hire more qualified contractors the MPCA used the failed test as a means to deem cleanup as technically infeasible to the city and legislators. This was patently false, the site should and could have been cleaned up, a recommendation that staff repeatedly made in their comments. It's unknown but highly likely the contractor was paid for this work.

The MPCA reported to the OLA that 84 percent of release sites first reported in fiscal years 2017 through 2021 had been subject to a corrective action or other mitigation activity, with the vast majority (94 percent) of corrective actions being excavations. This is highly misleading. Virtually all sites have minor amounts of contaminated soil excavated as it's necessary to remove the leaking tanks or piping. This occurs prior to a site investigation and risk assessment so it's not technically a corrective action. In almost all cases this soil removal is a fraction of the remaining contamination and doesn't reduce the risk. The question should be not how much was removed but how much remains. This is a question the MPCA cannot answer as they never had nor ever asked the data. The MPCA also has no data on how long the contamination will take to biodegrade.

The OLA stated that while the PRP has established measurable objectives regarding how quickly work is completed at sites, there are no measurable objectives that address whether the program's work has effectively accomplished its primary goal related to environmental protection and public health. (p 31) This focus entirely on meeting the arbitrary 80% closure in 3 years goal eventually led all 11 technical staff to identify major issues with site closure decisions that put Minnesotans at risk in 2014¹⁷. This shift away from risk-based cleanup and resource protection began in earnest in 2000 when a major policy change raised the bar so high the agency effectively stopped cleaning up sites to meet the closure goal. PRP management would tell staff things like ABC – always be closing, or you need to take more risks to close sites. The Agency's priority was clear. Site closure numbers took precedence over cleanup. Because the OLAs audit only covered the past 5 years these issues were not identified.

The MPCA also informed the OLA of methods used by PRP to ensure that staff conduct quality work. One method was the Site Decision Committee (SDC). However SDCs have been used by management, who do not possess technical expertise themselves, to force site closures and intimidate staff to modify technical conclusions.^{18, 19} The MPCA also described "look back" projects as another example, one of which is the Gasoline Additive Project (GAP) which began in 2019.²⁰ Rather than a self-imposed look back project the GAP was a direct result of a 5-year effort on my part to force the MPCA to sample wells that are at risk near closed leaded gasoline sites. The MPCA publicly stated the reasons for the GAP were due to new risk assessment methods, new laboratory detection limits and lower drinking water standards. These are false. The RBCA methodology received only minor update (plus PRP does not follow it), current laboratory methods are still 10 times the drinking water standards for EDB (so a well can exceed the standard even when nothing is detected) and the drinking water standard for 1,2-DCA was lowered in 2013, six years prior.

The overwhelming opinion of technical staff in 2015 suggested GAP is required to protect Minnesota citizens because there are nearly 5000 leaded gasoline sites that were closed without an adequate drinking water risk assessment. The concerns range from not sampling for lead scavengers, ignoring the results and claiming low-risk (biodegradation) as a closure rationale, not sampling nearby private wells or wells that became contaminated post closure, or the installation of new wells into contaminated

groundwater after site closure. The first 2 emphasize the OLAs concerns with poor-quality consultant work and the PRPs focus on closing sites, the last 2 emphasize the OLAs concerns that the MPCA does not consider future impact to human health. These are also the result of not following RBCA. The agency even ignored a 2010 EPA memo encouraging states to aggressively clean up leaded gasoline sites.²¹ The justification for closing sites based entirely on Pathway Elimination, or the replacement of contaminated wells was also suggested in an attempt to close the Paynesville site¹⁶.

The GAP is a 10-year \$10+ million project with the singular task of sampling private wells. Not considered or included in the project are additional costs of reopening and cleaning up these sites which could be in the \$100s of millions, a major undertaking clearly not without justification. The number of contaminated wells is unknown, but the record indicates PRP management agree that private wells exist today that are contaminated from closed leaded gasoline sites, which is the real reason for the GAP. We know this because of the number of contaminated wells that have been found by other means. It's not just a matter of if, it's how many. However, the broader policy issues with resource protection and cleanup are not being considered at these sites, so this process will have to be continuously repeated as contamination spreads and new wells are installed.²² There are also staff concerns with the project timeline that maybe related to the fact that the project is directed by the very management who created it.²³

Research under the GAP identified 15,000 domestic wells within ¼ mile of a closed site, but the actual number is likely more than 3 times higher. There are approximately 150 contaminated public and municipal drinking water wells just like Alexandria and Paynesville, but this number too is on the low end as PRP recordkeeping on contaminated public and private drinking water wells is poor²⁴.

I first brought these issues up with the MPCA leadership in 2015, then the commissioner's office. Only after I helped create a system for filing a technical complaint was I provided the opportunity to discuss my concerns with Assistant Commissioner Kirk Koudelka. Despite all the evidence provided, and my position as the MPCAs subject matter expert on leaded gasoline Koudelka twice dismissed my claims that there could be 100's of contaminated private drinking water wells.²⁵ Only after repeatedly arguing my case for 2-years and threatened to quit and go public did Koudelka finally order the GAP in 2019. The order as far as I know was verbal with little specifics. The project was placed under the oversight of a PRP supervisor whose actions supporting past closure criteria helped create the problem. This led staff to express serious concerns about the timeframe to complete project^{22,23}. Voicing concerns that the GAP include actual risk assessments rather than just sampling wells, and the lack of urgency to prioritize wells more at risk led to my removal from the GAP in February 2021. By ignoring staff concerns the MPCA was content with allowing citizens to drink contaminated water for an additional 10 years, after already being exposed for 20 or more years.

My efforts to get the MPCA to do the right thing came at a huge personal cost. I was subject to constant harassment and retaliation for bringing issues of public health to MPCA leadership from 2015 until I left the MPCA in June 2021. Issues involving retaliation were outside the scope of the OLA audit but can be found in the whistleblower complaint²⁶. These are just a summary of the retaliation I endured, not a comprehensive list.

Despite statues and policies designed to prevent it I was unable to find an avenue to remedy to retaliation within the state system. MPCA's Human Resources had on multiple occasions refused to investigate, Koudleka stated retaliation was not his responsibility²⁵ and the commissioner's office

ignored my pleas. Depositional testimony from HR staff verified I was reporting protected activities under state statutes. After my initial inquiry to the OLA I learned of the existence of a Chief Ethic officer at Minnesota Management and Budget (MMB), where I filed a complaint.²⁶ The chief ethics officer stated they delegate retaliation complaints and respectful workplace violations to agencies and they would only act if retaliation was directed by an agency head. Therefore, under this framework it's acceptable for an agency head to knowingly overlook illegal retaliation and respectful workplace violations by all management levels under them. The evidence for this in my case is overwhelming and suggests a major loophole within the statutes and policies.

However, these illegal harassment issues are not exclusive to my case. There is a culture of retaliation and retribution at the MPCA. I personally know several staff that continue to be subject to harassment by their supervisors. One egregious case was the inspiration for the creation of the statewide respectful workplace policy; however, this supervisor was not disciplined but rather promoted to manager where they kept harassing staff. There are many ex-MPCA staff that can testify to the same treatment which while not exclusive was primarily directed at scientists.

My case against the state clearly documents not only deficiencies in MMB and agency policy but also in the whistleblower statute. The MPCA, in legal filings, did not dispute I engaged in protected activities for which they retaliated against me, they just argued after enduring 6+ years of constant retaliation I voluntarily left and therefore they have no liability. In addition, the state Attorney General, despite knowing that statutes and rules were violated by the MPCA aggressively defended them (these include environmental statutes and rules designed to protect human health). Because the whistleblower statute does not protect active state employees, and that resigning due to retaliation is more difficult to prove in court I settled my case prior to trial. However I still lost a significant portion of my State retirement benefits. Ultimately, I sacrificed my career and financial well-being to protect citizens rights to clean drinking water because it was the right thing to do. As a public servant it was also my duty. Despite settlement of my suit this is Minnesota's own version of the Flint, Michigan crisis. Like Flint, this is an unimaginable failure of government where the MPCA has stubbornly worked to discredit and dismiss scientists attempts to bring issues of unsafe drinking water to light.

Respectfully,

Mark Toso
MN Registered Professional Geologist #30195

References available upon request

1. My work experience, including research and articles on leaded gasoline additives and biofuels can be found on my LinkedIn profile <https://www.linkedin.com/in/mark-toso-017a346a/>
2. <https://www.pca.state.mn.us/sites/default/files/c-prp1-01.pdf> Impact to a drinking water supply well above a drinking water standard is considered a high risk requiring immediate action. Typically, the Emergency Response Unit provides emergency services under an internal site transfer policy.
3. **OLA allegation form.pdf** The complaint form I filed with the OLA on 10/21/2020.

4. **Rules and Statutes Applicable to PRP.pdf** A summary sheet used by staff in policy work. Note this document was provided to the OLA on 10/21/2020.
5. <https://eponline.com/articles/2000/12/01/the-rbca-success-story.aspx>
6. **ASTM training.pdf, ASTM sekely.pdf** 10/17/16, 10/12/16 Emails between PRP technical staff discussing RBCA being used in 49 states but not Minnesota. One staff member stated: *Our risk-based approach, with its release in 1996, is our own design and is unlike any other state. It does not follow RBCA.* The advertisement for training states: *ASTM, in cooperation with USEPA, provides training on the RBCA process to 49 state UST agencies*
7. **ASTM Higgins.pdf** 12/31/14 Email between PRP hydros discussing PRP policy and the pathway elimination approach are not risk based. Additional details on PRP managements push back on staff attempts to revise cleanup policy are also discussed. One staff member stated: *I get email's probably twice or three times a year from one of the principle contractors EPA uses for RBCA training. Let's just say they are just itching to give a presentation in Minnesota.*
8. The source of the leaded gasoline scavenger 1,2-DCA in the Blaine municipal wells was traced back to a previously closed PRP site 0.8 miles away (Leak Site #19106).
9. **Re7060.pdf** 7/1/15 staff (A. Sekely) email discussing rule 7060.0500 (Nondegradation Policy) which for economic reasons is not applied in PRP. Discussion also includes low risk sites, and management demands that any policy changes continue to justify past closure decisions.
10. **PRP hydro comments.pdf** 10/25/16 Hydro staff group comments to management on groundwater policy. This stated: *We request a legal opinion or review of the new guidance in relationship to rule and statute.* This was never granted.
11. Stats. 115c specifically states natural bioremediation, which is the reliance on biological processes alone for contaminant reduction, as opposed to natural attenuation, which also incorporates physical and chemical processes. The statutory definition was misinterpreted by the OLA.
12. **Updated SRV.pdf** 5/6/21 email from a remediation division supervisor (A. Hadiaris) stating that PRP does not have to use the same soil cleanup standards as other programs.
13. **WISCONSIN CLOSURE PROTOCOL STUDY. A Retrospective Study of LUST Site Closures between 1999 and 2000.** Wi DNR, April 2009. <https://dnr.wi.gov/doclink/rr/RR805.pdf>
14. **TALES remarks for Leak #14072, Blaine Municipal Wells 3, 4, & 5** Comments by MAT on 4/9/14 stating: *I also instructed the sampler in how to properly fill a VOA vial...Some of the groundwater samples may be lower in concentration as a result.* This work was done by a state contractor.

- 15. reConsultants.pdf** 1/22/15 email discussing contractor performance is a perennial issue with management and other staff (T. Higgins). PRP manager (M. Kanner) statement that all contractors are qualified. I was disciplined for attempting to bring this issue to management's attention.
- 16. Paynesville Comments Highlighted.pdf, Paynesville remarks summary.pdf** Staff comments from the TALES database (public record by not widely known to be available). Poor work by the MPCA's contractor is mentioned several times which resulted in a failed pilot test (normally a simple procedure for qualified consultants). This failure was later used by management to falsely deem cleanup as technically infeasible in discussion with legislators and the city. Staff mention the need to cleanup this site with other remedial technologies that were dismissed by management.
- 17. PRP Survey.pdf** Anonymous survey by created by MPCA Organizational and Development staff as a means to express concerns with PRP cleanup policy. Note only 1 of the original 11 hydros present in 2015 was still in PRP when the OLA conducted their audit.
- 18. Higgins legacy.pdf** 3/31/15 email (T. Higgins, hydro) discussing PRP management decision to coerce him into changing his recommendations to further investigate a site impacting a drinking water aquifer that was in violation of cleanup policy in order to close the site (1-01 is the general policy document, NFA is No Further Action).
- 19. SDC Alex.pdf** 7/24/20 A SDC for a one of the 20 sites in Alexandria where 1,2-DCA has been detected in the municipal wells for decades. Decision by management to disregard the hydro's recommendation for cleanup and require unnecessary additional work. This work was completed in June 2021 which verified the previous data, wasting approximately \$20,000. This email also describes major policy issues with sites in Alexandria and elsewhere, and despite recent minor policy changes and the GAP there was no fundamental change with the state of practice.
- 20. <https://youtu.be/Q956EJ65tP0>** Public announcement of the GAP in 2021. This presentation contains several false statements. The statement at the 2:10 mark that it was assumed gasoline additives biodegrade is of note. I gave a presentation on the resistance of 1,2-DCA to biodegradation at the National Tanks Conference in 2008, following a similar article in a national publication in 2007. MPCA also knew these compounds did not biodegrade previously.
- 21. EPA lead memo.pdf** 5/21/10 Memo to all 50 states in 2010 encouraging states to "Remediate lead scavengers, aggressively when such constituents could threaten a source of drinking water". Note they state "could threaten" drinking water, not already impacted. This is a fundamental aspect of RBCA. My participation on a national workgroup (the ASTSWMO group mentioned in the GAP youtube video) that advised EPA culminated in this memo.
- 22. Lead scavenger well sampling project.pdf** 4/17/19 Email to GAP project staff and MPCA management requesting clarification on the only verified goal of sampling private wells once. This should include cleanup of sites that could result in drinking water impacts in the future.

- 23. EJ vs Sensitive priorities GAP.pdf** 3/16/21 Email discussing prioritization concerns with the GAP that didn't emphasize sampling private wells with a greater risk of contamination and slow walking the process.
- 24. Drinking water well list.pdf** 5/21/18 Email (A. Sekley) verifying the MPCA does not keep an official list of public and private drinking water wells impacted by petroleum compounds.
- 25. Koudleka1.pdf, Koudleka2.pdf** Series of emails in early 2019 with assistant commissioner Koudleka about my official complaint that ultimately led to the GAP.
- 26. Mark Toso v. MPCA.pdf** Complaint and jury demand filed against the MPCA on 11/12/2021. Includes specific examples of disciplinary and retaliatory actions directed against me for bringing issues of public health to MPCA management and executives. Many of these concern contractor qualifications and risk based site assessment criteria later confirmed by the OLA.
- 27. MMB complaint.pdf, MMB response.pdf** Email conversations with states Chief ethic officer in late 2020 and early 2021 stating *To fall within MMB's scope under the policy, the complained-of behavior must involve misconduct by the agency head against the employee. Complaints that do not involve misconduct by the agency head but instead involve the behavior of others which an agency head allegedly fails to properly respond to, are not within MMB's scope as the complaint process is not intended to be, and does not include, an appeal to MMB.*