Testimony on HF 1291, SF 1087 (Chamber bill)

February 2017

Chair, Members. Thank you for the opportunity to testify. My name is Kevin Reuther. I'm the Legal Director of the Minnesota Center for Environmental Advocacy, MCEA. For more than 40 years MCEA has used law and science to protect and defend Minnesota's environment and the health of its people.

As we all know, but sometimes need reminding, Minnesota is blessed with incredible environmental resources – plentiful water, clean air, forests, wetlands, wildlife – it's the reason many of us choose to live here. These resources are the foundation of a multimillion dollar recreation and tourism industry that supports thousands of jobs in our state.

A recent study found that in 2016 visitors to the Boundary Waters alone created nearly 1000 jobs in Northestern MN counties and generated over $57 million in economic impact.

The environment is unquestionably Minnesota's biggest asset. And the citizens of the state have entrusted you, our elected officials, with stewardship of this most important resource. The laws and policies that you enact, and the agencies of the executive branch implement, reflect the value we place on a clean environment.

Which brings us to this bill. HF 1291/SF 1087 is not an environmental protection bill. It is an environmental degradation bill. This bill weakens existing laws and policies that protect our environment. It will result in more, not less, pollution.

There are a number of concerning elements to the bill. I want to highlight 4 things in particular – (1) the mandatory timeline to issue draft permits; (2) the change to judicial review; (3) giving the regulated party authority to write its own environmental review; and, finally (4), the elimination of the EQB. None of these changes will further environmental protection; instead they do the opposite.

First, the bill hampers the ability of government agencies to do their job in writing good, protective permits by imposing unrealistic timelines in the name of streamlining. (Article 1, sec 1 as to DNR; Sec 7 as to PCA) As a reminder, we're talking about permits to pollute. Industry is required to apply for these permits because they are requesting permission to dump pollution into our waters and our air.

While the agencies have done admirably in completing permits under the existing 90 and 150 day goals (they meet these goals 97% of the time) projects are not "one size fits all" and requiring that they all be permitted on the same timeline makes no sense. Some projects are simply too big and complex to be adequately permitted in 150 days. Mandating that permits must be granted within a certain time frame without reference to the context, the industry, the project, or the environmental resources at risk is simply bad policy. Indeed, it will likely result in further delay rather than streamlining because permits that are rushed and superficially developed will not be protective of the environment (and likely not able to stand up to judicial review). Again, we the citizens of Minnesota have entrusted government

with stewardship of this very important asset, the environment. We need government to take the time required to make good decisions.

Second, the bill seeks to take away the rights of local governments and the public to have a thorough administrative review of DNR's decisions on mining. (Sec. 5 – looks innocuous, but isn't.).

This is unjustified special treatment for mining companies. In general, significant decisions affecting the environment made by agencies are subject to what is referred to as "contested case" proceedings – essentially a trial where parties with different perspectives can present their evidence and build a record to support or oppose an agency decision.

Since 1969 it has been the policy of the state to control the environmental effects of mining and preserve natural resources by requiring all mining companies to apply for and receive a permit to mine. Those permits must include, among other things, plans for how the land will be reclaimed and clear financial requirements that ensure the company will not leave tax-payers holding the bag if things don't go as planned. And since 1969 those permits have been subject to review in contested case proceedings. In other words, local governments and affected citizens could request that an administrative law judge review DNR's decisions on these critical matters in the permit to mine. This right was affirmed most recently in a decision by the Court of Appeals just last month, which involved Lake of the Woods County's challenge to HibTac's wetland replacement plan. (DNR's approval of wetland replacement under a mining reclamation plan is subject to review through a contested-case proceeding. *See* Minn.Stat. § 93.50 (2014) (providing for review under chapter 14). In re Hibbing Taconite Mine & Stockpile Progression, 888 N.W.2d 336, 341 (Minn. Ct. App. 2016))

HF 1291/SF 1087 would take that right away. It eliminates the rights of counties and the public to present evidence and have a trial before an administrative law judge. Instead, only what are called "certiorari appeals" would be allowed. Those are appeals to the appellate court based on the DNR's administrative record – there's not opportunity to build or challenge that record in a trial before a judge.

There is no basis for exempting agency decisions on mining from contested case proceedings. In fact, because of their complexity and significant environmental impact, mining projects are exactly the types of projects that deserve the review and scrutiny of this type of contested proceeding. Contested case proceedings provide the opportunity for affected parties to air and resolve disputes and build a solid record for permits that will actually protect the environment and meet the public interest. We therefore strongly object to this provision.

Third, the bill eliminates meaningful environmental review by letting the polluting industry itself write its own environmental review document. (Sec 14)

For four decades now, environmental review has allowed agency experts and the public to study the environmental impacts of big projects BEFORE they happen. Environmental review gathers information about the project and alternatives that can make a large, potentially destructive and damaging project

less polluting. It leads to better projects that can meet existing standards and be permitted. It also serves the important role of educating the public and gathering public input.

This bill takes environmental review out of the hands of the public and the agencies with expertise and puts it in the hands of the polluters. Under this bill, industries can write their own environmental review. As a result, all of the underlying data and communications will be in the hands of private industry rather than government. And that means hidden from the public. That is antithetical to more than 40 years of environmental regulation and turns the environmental review process on its head.

[There are other troubling changes to environmental review here as well. The whole point to ER is that the regulator studies the project and its impact BEFORE permitting so that the ER can inform the permit requirements. Making the agency begin permitting at the same time as it begins studying the impacts makes no sense. (Sec. 11). Likewise, Sec. 12 appears to be another give-away to mining companies, confusingly making approval of environmental review an automatic approval of wetland replacement plans. There is no reason to skip existing procedures for approving wetland replacement plans]

Finally, this bill—with no justification that we can determine—eliminates the sole state-wide entity that has had cross-agency jurisdiction to protect Minnesota's environment, the Environmental Quality Board. (Article 2)

How does elimination of the EQB help state government be a good steward of Minnesota's natural resources and its environment? It doesn't.

The EQB does important work that helps Minnesotans understand environmental problems and participate in resolving them. Take, for example, the EQB's recent effort with regard to frac sand mining. Confronted with a new and booming industry with potential for significant pollution and growing public concern and controversy, the EQB led an effort to develop rules to help local governments manage this new industry. Divisive battles that otherwise would have likely resulted in years of litigation have been avoided because of the EQB's leadership and ability to bring stakeholders together. Now is not the time to eliminate the state-wide body with these skills and expertise.

In sum, HF1291 does nothing to further the protection of Minnesota's most important asset, its environment. To the contrary, it places that asset more at risk. Proponents of this bill say that it does not change any environmental standards. And that is correct – this does not legislate new standards. But Minnesota's environmental standards are only as effective as their implementation and enforcement. And while this bill may not legislate new standards, it certainly hampers the public's and agency's ability to implement and enforce those standards.

We have entrusted you to be stewards of our environment –to work for its protection, not its destruction – and that requires a no vote on HF 1291/SF 1087.