March 6, 2017

Governor Mark Dayton
Members of the Minnesota Senate

Re: Senate File 695

Dear Governor Dayton and Senate Members.

We appreciate the opportunity to convey our comments on S.F.695.

This bill proposes significant changes in judicial review of a narrow area of the work of the Minnesota Pollution Control Agency. The specific court involved is the Minnesota Court of Appeals, our state's intermediate appellate court.

The first matter is the deference that the court is to give factual determinations of the MPCA. The present law of our state is that "agency" decisions are not to be reversed or modified unless they are affected by an error of law, the result of improper procedure, arbitrary or capricious, or unsupported by substantial evidence in view of the entire record as submitted.

Our state Supreme Court has instructed the Court of Appeals that in connection with technical matters and subjects within the expertise of the MPCA, the Court of Appeals is to grant deference. *See In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738,* 763 N.W.2d 303 (Minn. 2009).

This deferential standard for judicial review has been in effect for decades, and is observed by federal courts in their consideration of federal administrative action and in virtually all other states. In fact this limited-review approach is the rule when appellate courts decide appeals from trial courts. It is, so-to-speak, the essential nature of the system.

With regard to the MPCA, a large part of the reason for this limited judicial review is that the court recognizes that much of the work of the MPCA is technical, calling for specialized training and experience. A related reason for the deference is the recognition that the executive branch of government has its constitutional role and that the judicial branch should respect that role in the delicate task of reviewing its decisions.

Another matter of significance in Court of Appeals review of agency action is the setting. The Court of Appeals is an appellate court. In no case does it actually hear witnesses or receive documents and exhibits. Its courtrooms are not set up for this. The Court of Appeals considers the material and evidence submitted to the trial court or the agency. Not having seen or listened to the witnesses, the Court of Appeals defers to the factual determinations of the trial court or agency. This is a common-sense approach based on who is in the best position to evaluate the factual dispute.

A third consideration is practical. The lower court and the agency are charged with decision-making responsibility. The parties take that process seriously. The trial court or agency process is not a practice run and the Court of Appeals is not an opportunity for a fresh new effort. The time and expense of the process is itself a limit on the scope of the Court of Appeals review.

S.F. 695 changes this established role of the Court of Appeals in reviewing much of the work of the MPCA. It provides that the Court of Appeals:

> [Is to] examine the administrative record and without deference to the commissioner, must independently determine from the record whether certain technical matters and procedures are followed.

Further, S.F. 695 provides that if there is any expert opinion in the record that contradicts the scientific validity of the MPCA's action, the Court of Appeals must undertake its review with the assistance of qualified independent experts. Details are set forth in the bill regarding panels of independent experts.

Finally, the bill contains a detailed prohibition against the MPCA taking positions that have not been adopted in the formal rulemaking process. We do not separately address this provision.

It is apparent that the factual review provisions represent a dramatic departure from the manner in which the Court of Appeals currently reviews MPCA action. There is no deference; factual determinations are subject to a do-over. The time delay, the expense of experts, the expense of MPCA and Court of Appeals decision making and processing of disputes will exact a toll on the MPCA, the Court of Appeals, and the involved parties.

This type of change is akin to throwing sand in the gears of the judicial system and the MPCA. This hampers the functioning of a good government and compromises our public institutions. This can exact an irreparable cost on our state. It is worth noting that the Court of Appeals has broad review responsibilities and that the same judicial-review framework applies in all Court of Appeals review settings. This includes its review of decisions of counties, cities, and school districts. When the review framework is modified for one state agency, here the MPCA, some effects of that modification will be sought by disgruntled litigants in other settings or may without any change in the law be carried over by the Court of Appeals. A sobering prospect.

Thank you again for this opportunity. We would be happy to provide testimony or to answer questions.

Sincerely,

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