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Testimony of Professor David Schultz Against SF 695
Committee on Environment and Natural Resources Policy and Legacy Finance
Room 1200 Minnesota Senate Bldg.
February 13, 2017

Dear Chairwoman Ruud and Committee Members:

My name is David Schultz and I am testifying against SF 695.

I am a professor of political science at Hamline University where among other classes, I teach environmental policy. I am also a professor of law at the University of Minnesota. I have taught, researched, and written on administrative law for more than 20 years. I teach administrative law in law school and serve on the Minnesota State Bar Association executive committee for the Administrative Law section, providing the yearly Minnesota case law update on the topic since 1999. I also have taught state constitutional law, since 1992. I testify today in my individual capacity and do not speak for my institutions where I am employed.

There are three reasons why I oppose SF 695.

1. There is a wonderful American saying that declares "If it ain't broke don't fix it." That adage applies here. Specifically, the current process for how the MPCA gathers and considers scientific evidence as the basis of formulating its rules is not broken. Instead, it works very well in terms of how the Minnesota APA anticipated how it wanted rule making to take place in terms of gathering data and evidence and there is no evidence here to suggest that the MPCA is either acting contrary to the law or that the legal-administrative procedure is broken and needs to be fixed.

2. Both at the federal level and at the state level courts have adopted a series of practices and legal precedents that ably and well-respect the role that judicial review plays in terms of judicial deference to administrative agencies. At the federal level the most famous case is *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), which was strongly and vigorously supported over time by Justice Antonin Scalia. *Chevron* and related precedents generally grant significant judicial deference to administrative interpretation of ambiguous statutes and also grant significant deference to their technical expertise.

At the Minnesota state level three cases articulate a similar standard.

> *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977) Administrative decisions "enjoy a presumption of correctness," and deference may be appropriate in light of an agency's technical expertise.
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> *St. Otto's Home v. Minnesota Department of Human Services,* 437 N.W.2d 35 (Minn. 1989) "Considerable deference" to a state agency's interpretation of ambiguities in its own state regulations.
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> *In the Matter of the Excess Surplus Status of Blue Cross and Blue Shield of Minnesota* and *Zachman, et al.,* 624 N.W.2d 264 (Minn.,2001). "The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority."

The power of these federal and state decisions is that they recognize the technical expertise of agencies in their subject area compared to that of the judiciary and therefore the courts are generally willing to defer to reasonable rules constructed by the former. These rules also reflect a respect for separation of powers and a reasonable deference on matters of policy to those in the executive department.

SF 695 for no good reason rejects that deference and presumption. It wrongly substitutes the judgement of judges for experts in the field, and it also creates an impermissibly complex process for rules to be made, incorrectly specifying a process for how scientific evidence should be considered. In general, I find it odd that in situations where many claim the courts are already overreaching, this bill would tell judges to act in ways that they have said that they do not want and it would in many ways give them the ability to substitute their judgment on technical-scientific manners over that of those who have expertise in their field.

3. Finally, my last objection is on state constitutional grounds. Given that the rules of deference that the Minnesota courts have created are legal precedent regarding how they will interpret and approach administrative agencies, I consider this legislation to be an effort by the legislature to unconstitutionally directly the court how to do its job, thereby violating Article III of the Minnesota State Constitution. In effect, it is a violation of the State Constitution's separation of powers clause.

In addition, one might also consider the provisions in this bill as an effort to dictate to the Court the rules of evidence it must use in adjudicating disputes, running contrary to the Court-adopted Rules of Evidence (such as Rule 702 on the role expert witnesses) and therefore also a violation of the separation of powers principle.

Thank you very much for considering my testimony.