Minnesota Center for Environmental Advocacy

April 19, 2021

To: Minnesota Senators
From: Kara Josephson, Legislative Director, Minnesota Center for Environmental Advocacy
Re: SF 959 - Environment and Natural Resources Budget Bill, 2nd Engrossment

Dear Senators:

Thank you for your service to the people of Minnesota during this challenging time and thank you for the opportunity to testify on SF 959, 2nd Engrossment, the Senate Environment and Natural Resources budget bill. Minnesota Center for Environmental Advocacy (MCEA) is a nonprofit organization with almost 50 years of experience using law and science to protect Minnesota's environment and the health of its people. Our analysis of SF 959 finds many valuable provisions, but we have a number of concerns that we will address below. MCEA submitted similar written testimony to the Senate Environment & Natural Resources Finance Committee on April 5, and to the Senate Finance Committee on April 14.

ENVIRONMENT AND NATURAL RESOURCES BUDGET APPROPRIATIONS

Inappropriate shifts from general funds to dedicated funds

MCEA has concerns with the Environment and Natural Resource appropriations contained in SF 959. Not only does this bill include cuts to state agencies, perhaps more troubling are the permanent funding shifts from general fund dollars to other funds. In particular, there are several instances where general fund spending is cut and replaced with the Heritage Enhancement Account or "lottery-in-lieu" account. While "notwithstanding" clauses make these technically legal, it violates the purpose of the fund described in Minnesota Statutes 297A.94, which requires this money be used to supplement existing spending on natural resources and not substitute for existing dollars. In effect, Section 297A.94 is being chipped away rather than being repealed openly. This is bad public policy.

One particularly troubling example of this budgetary shift is on lines 21.21-21.29, which appropriates $387,000 from the Heritage Enhancement Account money in FY 22 and FY 23 to pay for a water appropriation permit applicant to hire a third party to do studies that dispute the Minnesota DNR's conclusion that a permit would damage a calcareous fen. This money is appropriated "notwithstanding" the limits in Section 297A.94. Requiring the state to pay for studies to dispute the conclusion of its agency personnel is bad public policy. Appropriating money from the Heritage Enhancement Account makes it even worse by paying for a private interest to attack the DNR's conclusion regarding sustainable water use using money that is dedicated to "activities that improve, enhance, or protect fish and wildlife resources, including conservation, restoration, and enhancement of land, water, and other natural resources of the state." (M.S. 297A.94)

Nearly $7 million taken from Permanent School Fund, Permanent University Fund, Counties, Towns, and School Districts

Lines 17.31 - 18.11 contain two appropriations from the minerals management account totalling $3.402 million in FY 2022 and 2023. No detail has been provided for these expenditures beyond

the description in these lines, namely "environmental research for mine permitting" and "projects to enhance future mineral income, and projects to promote new mineral-resource opportunities." MCEA has two concerns with these appropriations. First, money transferred from the minerals management account is an effective cut to the Permanent School Fund, Permanent University Fund and other taxing districts (including counties, towns and school districts.) Under Minn. Stat. 93.2236(b), if the balance in the minerals management account exceeds $3 million at the end of a quarter, the balance above $3 million is transferred to these funds. By appropriating $6.804 million during the biennium, this is a corresponding cut to these transfers. Second, the purposes are vague and should be paid by other means. "Environmental research into mine permitting" should be paid for by applicants for permits, and "promot[ing] new mineral-resource opportunities" is also something that the mining industry can and should pay for. Cutting the school and university funds to pay for a $6 million promotional campaign is a poor use of these funds.

ARTICLES 3 AND 4: ENVIRONMENT AND NATURAL RESOURCES TRUST FUND APPROPRIATIONS

Article 3 contains an unconstitutional allocation of $2 million for wastewater infrastructure funding in the form of two grants to the Public Facilities Authority and the Pollution Control Agency, and a separate appropriation for wastewater infrastructure at Father Hennepin State Park. As MCEA has previously testified and as the plain language of the constitutional amendment that established the Environment and Natural Resources Trust Fund (ENRTF) states, these are unconstitutional uses of the fund. The Minnesota Constitution allows for loans up to 5% of the corpus of the ENRTF for wastewater treatment, but does not allow the use of the Fund for grants.

MCEA strongly supports additional investments in wastewater infrastructure and has supported hundreds of millions of dollars in general obligation bonding for that purpose. We believe that this appropriation should be removed and general obligation bonds considered as an alternative. In fact, during the walk through of the bill in committee Senate staff identified that state park wastewater infrastructure has been traditionally funded with general obligation bonds.

We generally believe that ENRTF bills ought to travel as standalone legislation, but are encouraged by the inclusion of Articles 3 and 4 as they represent progress toward finally releasing ENRTF funds after nearly two years of gridlock. This would support hundreds of jobs and make important investments in scientific research and habitat protection and restoration across Minnesota. We hope that the Senate and House will be able to reach agreement on language and pass a badly needed package this session that respects the recommendations of the LCCMR.

ARTICLE 2: POLICY PROVISIONS

There are many provisions that MCEA supports in Article 2 or is neutral on, and in the interest of space, we will not exhaustively detail all of them. We appreciate the effort to resolve a backlog of policy provisions caused by the COVID-shortened 2020 session, particularly in regards to game and fish regulations and lands. We are particularly glad to see provisions that allow the School Trust Land administrator to utilize school trust lands for ecosystem services benefits, inclusion of tribal governments in statutes related to land conveyance, and language that would protect Minnesota's groundwater from being sold to distant users.

Some of the provisions we support include:
Section 1: Establishment of financial assurance account at State Board of Investment for financial assurance collected from permits to mine
Section 20: Allows conservation planning leases that use conservation easements for ecosystem services benefits
Section 21: Allows conveyance of land to tribal governments in addition to other governmental units, allows reimbursement for cultural resources review of conveyances
Section 79: Adds requirement that state agencies and local and regional governments must take into consideration the manner in which their plans are consistent with watershed management policy.
Section 83: Expands prohibition on new Mt. Simon-Hinckley Aquifer appropriations permits from metro counties to all counties
Section 84: Bulk transport or sale of water use permit more than 50 miles from the well is prohibited
Section 113: Allows recycling grants to tribal governments
Section 127: Includes ecosystem services market in school trust land purview

However, there are many provisions that MCEA opposes. We believe that all Minnesotans are entitled to clean air to breathe and clean water to drink, and many of the sections in Article 2 move us further away from that vision. Below, we have grouped together similar sections and provide our position and analysis.

MCEA opposes unnecessary and cumbersome legislative approval requirements for water fees.
Section 92: Requires legislative approval of new water pollution control and SSTS personnel training fees
Section 94: Requires legislative approval of water certification fees
Section 95 & 96: Eliminates agency authority to establish fees by rulemaking and requires legislative approval of water laboratory fees
Section 119: Requires legislative approval of increases in water permitting fees

User fees are a necessary component of funding state permit programs. The MPCA has not increased most water permit fees for more than 28 years. These fees cover the cost of reviewing applications, certifying personnel for wastewater treatment and water supply systems, and certifying laboratories. There is no need for an additional layer of approval.

MCEA opposes changes to water appropriation permitting that favor large industrial users over rare wetlands and other nearby well owners.

Section 82: Adds provisions to calcareous fens statutes that require a report at no cost to applicant if a water appropriations permit is denied and further third party review
Calcareous fens are among the rarest and most threatened habitats in Minnesota, and large water appropriation permits nearby can drain them of the groundwater they depend on. The provisions in Section 82 give applicants whose permits are denied because of the damage caused to a nearby wetland several additional “bites at the apple,” and require taxpayers to pay for third party analyses that may undermine the analysis conducted by the Minnesota DNR.

Section 85: No additional conditions on transferred water appropriations permits allowed
Section 85 prevents DNR from requiring testing or putting new conditions in a water appropriation permit that is being transferred. DNR should be able to review the adequacy of a permit at any time, including when it is transferred, in order to protect groundwater resources. The transfer of a permit should result in administrative review of the terms of the permit, and modification as necessary to prevent depletion of water supplies.

Section 86: Requires estimates of the impact of any groundwater management plan on land values in the area and requires strategies to address adverse impacts
Section 86 assumes that the impact of groundwater management plans on land values are negative and directs the DNR commissioner to study and address this one factor. Depleted groundwater tables, which groundwater management plans seek to prevent, also have negative impacts on property values, and that side of the question should also be included in any study of land values.

Section 87: Groundwater management gag rule prohibits sharing information about proposed groundwater management area plans to "direct factual responses"
Section 87 is a gag rule that prevents DNR from providing public information about a water management plan under development by limiting the information that DNR can provide to "direct factual responses." This provision is in direct conflict with the Data Practices Act, which requires public data to be provided upon request, including drafts, and also requires state staff to explain the meaning of data. Preventing a state agency from open communication with the public about its activities is just poor public policy. State policy should be to support greater transparency, not less transparency.

Section 88: Imposes arbitrary definition of "sustainable" as 20% reduction in stream flow
Section 88 defines "sustainable" use of groundwater to mean a change of 20 percent or less with regard to the "August median stream flow," which has nothing to do with what is actually sustainable in terms of long-term Minnesota water supplies. This arbitrary figure will prevent real preservation of sustainable water resources, which must be based on actual data from a particular water source and scientific evidence.

Section 89: Well interference cases given automatic contested case
Section 89 harms those hurt by well interference by forcing the DNR to consider the "condition of the impacted well," which requirement has the intent of forcing DNR to reduce any awards to individuals harmed if their wells are older. This provision will harm low-income persons who cannot easily afford new wells in favor of irrigators who want additional water. Similarly, the legislation favors parties who are interfering with existing wells by limiting the ability to contest the commissioner's award to parties ordered to pay an affected well owner.

MCEA opposes changes to public water laws that would make it unnecessarily easy for landowners to make public waters private.

Section 81: County Veto over Public Waters Corrections
Minnesota public waters belong to all Minnesotans. The State holds public waters in trust for the benefit of the people and has the obligation to protect public waters.The Legislature defined public waters broadly in Minn. Stat. § 103G.005, subd. 15 and all waters that meet the definition

of a public water are protected. In the 1970s, the Legislature mandated the Minnesota Department of Natural Resources (DNR) to publish an "inventory" (i.e., the Public Waters Inventory (PWI)) to list waters in Minnesota that met the statutory definition. The Legislature later gave DNR power to correct errors in the PWI.

The PWI is an important informational tool for protecting Minnesota's water resources. This amendment undermines the DNR's authority to correct errors in the PWI because, if a county objects, the DNR cannot list a water even though it meets the statutory definition of "public water." The DNR is the proper agency to determine what waters meet the definition of a "public water," based on the existing state law definition. If a county disputes the DNR's analysis, that dispute should be addressed by administrative procedures, and not by county veto. If this provision becomes law, it would limit the ability of the DNR to correct errors in the PWI, create uncertainty, and lead to litigation. MCEA opposes this language which weakens DNR's authority to protect public waters by ensuring the PWI's accuracy and giving counties the right to undermine a DNR decision to make the PWI accurate through a simple objection, rather than scientific proof.

MCEA opposes changes in the statutes and rules regarding how "ordinary high water levels" are set.

Section 90: Commissioner must provide written notice to local units of government when establishing an ordinary high water level
Section 91: Allows appeals of OHWL designations and requires a decision within 90 days
Ordinary High Water Levels for water bodies are complex to set and analysis may take longer than 90 days. Setting them requires a field study, geological information, and historical water level information. This time-limit and open-ended ability to appeal creates both uncertainty and public expense. Appeals should be based on a valid reason to contest the DNR's initial determination.

MCEA opposes giving industrial polluters 16 years to comply with stronger water quality standards.
Section 93: 16 year free pass for industrial polluters from complying with new water quality standards if they construct a treatment works
Section 93 gives industrial polluters a blanket 16-year exemption from complying with stronger water quality standards, if investments are made in wastewater treatment works. These provisions contravene the federal Clean Water and Clean Air Acts and will only result in regulatory uncertainty.

MCEA opposes exempting facilities that convert plastics into fuel from Minnesota rules regarding solid waste.
Sections 97 - 111; 117: "Advanced Recycling Facility" definitions and exemptions from solid waste and other rules
Section 109: Exempts "advanced recycling" feedstocks from solid waste definition
This broad swath of statutory language would create a whole new industrial category in Minnesota statutes and exempt it from a number of rules that generally apply to the recycling industry in Minnesota. Existing recycling operations have testified against these provisions, arguing that there is no reason to exempt "waste to fuel" operations from standards that others in the recycling industry have to meet.

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MCEA opposes legislative efforts to prevent or repeal air quality standards regarding motor vehicles, including the Clean Cars Minnesota rules.

Section 118: Eliminates MPCA authority to adopt standards of air quality including motor vehicles

Section 118 has been previously heard as SF 450, and would repeal the statutory authority of the MPCA to set standards for automobile emissions. Not only would this repeal the Clean Cars Minnesota rulemaking, it would prevent any future state regulations on automobile pollution. Transportation is the top source of greenhouse gas pollution in Minnesota, and the MPCA is properly using its authority to reduce that pollution.

MCEA opposes attempts to repeal common sense manure management practices in the general permit for concentrated animal feeding operations.

Section 120: Prohibits application and manure management conditions that were required by the MPCA's revisions to the CAFO general permit

Section 120 would prevent the MPCA from requiring permittees who choose coverage under the general feedlot permit to reduce nitrogen impacts from manure when it is applied in the fall and winter. Nitrogen pollution is increasing, and fall and winter manure application is part of the problem. The Minnesota Department of Agriculture's rules prohibit fall application of commercial nitrogen fertilizer in many areas. The MPCA general feedlot permit does not prohibit fall application of manure, but instead gives producers four options: (1) wait until the ground is cold; (2) add a nitrification inhibitor product; (3) plant a cover crop; (4) apply a portion of the allowed application in the spring. Sections 86 and 113 unreasonably restrict these best management practices, which many agricultural producers have already adopted.

MCEA opposes confusing and counterproductive "unadopted rules" language that would limit the ability of agencies to clarify Minnesota rules and statutes.

Section 17: Unadopted rules must not be enforced by DNR

Section 121: MPCA prohibited from enforcing "unadopted rules"

These provisions are anti-public information, unnecessary and overbroad. First, the provisions define all guidance as unadopted rules, effectively "gagging" agencies by preventing publication of any documents that would help regulated parties understand and comply with complicated statutes and rules. Second, these provisions are unnecessary. Under existing section 14.381, agencies are not allowed to enforce "unpromulgated rules." Similarly, existing section 14.07 prohibits agencies from incorporating documents into rules unless standards are met. These provisions do not help regulated parties or the public and will result in a reduction of public information or massively expensive and unnecessary rulemaking.

MCEA opposes limits on which Minnesotans can petition for environmental review of a proposal.

Section 124: Limits environmental assessment worksheet petitions to 100 signatures in county where proposal is located and adjoining counties as opposed to statewide

Air and water pollution do not respect county boundaries. Projects undertaken in one county can significantly impact downstream or downwind communities across the state, as when an

important fish spawning area is located miles upstream from where anglers seek to fish. This provision would limit the rights of affected persons to petition for environmental review.

MCEA opposes expensive efforts to legislatively modify technical measurements of pollution that would result in dirtier water for downstream users.

Section 155: Whole Effluent Toxicity (WET) rulemaking provisions
Section 156: WET rulemaking does not apply in Lake Superior watershed, establishes technical definitions of mixing zones
Over $700,000 is appropriated in Section 1 of this bill for this rulemaking, which MPCA has testified would impact dozens of permits. The highly technical language of this bill which modifies how MPCA would calculate and enforce concepts like “acute toxic units” and modifying “mixing zone” calculations and boundaries makes it clear that this section goes far beyond the proper role of the Legislature. At a minimum, the impact of this provision on Minnesota’s water needs to be made very clear before any legislative changes to this highly technical area are considered.

MCEA opposes legally dubious and unnecessary changes to Minnesota’s Clean Air Act State Implementation Plan.
Section 158: Clean Air Act State Implementation Plan changes request required that prohibits applying a national or state ambient air quality standard in a permit with unmodified emissions levels
Legislatively directing the MPCA to seek a change in our State Implementation Plan for the Clean Air Act is legally dubious. The U.S. Environmental Protection Agency would need to approve it and it’s likely to be challenged in court, which would create additional uncertainty for regulated parties. Ambient quality standards are critical to protecting public health, and must be applied uniformly for all facilities to be effective.

MCEA opposes setting bad precedent for energy and utility companies to not follow current law on permitting.

Section 159: Exemption from Minnesota environmental laws for potential oriented strand board facility
Language added to SF 959 by amendment would exempt a potential oriented strand board (OSB) on Minnesota Power property near the Boswell Energy Center from “any law” that prevents clearing the land and preparing the site and requires issuance of several permits. This amendment has not been subject to public testimony, the project proposer is not yet known, and no details of the proposal are public at this time. In addition, this section is unnecessary, since provisions exist in state rules (Minnesota Rules 4410.3100 subparts 4-8) that allow a variance to the environmental review process for construction under certain conditions. MCEA supports a just transition for all fossil fuel workers, including those at Boswell, and has testified in favor of just transition planning this session (HF1750). But this overbroad provision would set a dangerous precedent of creating a blanket exemption from Minnesota’s environmental laws for a proposal that is currently shrouded in secrecy.

CONCLUSION

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Senators, thank you again for your service to the people of Minnesota. We appreciate that the challenge of legislating using remote work has added to the burden of addressing policy provisions that were not completed in 2020. But in addition to our concern about specific sections, the number and variety of policy provisions in a budget bill is a concern for MCEA. Policy provisions, particularly those with sweeping application, would be far better addressed in individual policy bills. Indeed, many of the provisions of concern in this bill originally traveled as stand-alone legislation.

The Minnesota Center for Environmental Advocacy's policy and legal experts are happy to discuss any of the above testimony with you and your staff as you continue your work to assemble the budget for FY 2022-2023.

Sincerely,

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