

TESTIMONY OF

David Glatt, Director of North Dakota Department of Environmental Quality

Good morning Chairman Schauer and members of the House Government and Veterans Affairs Committee. My name is David Glatt, and I am the Director of the North Dakota Department of Environmental Quality. I am here to testify in opposition to SB 2296.

The DEQ is the state's primary environmental agency, ensuring North Dakotans have clean air, drinkable water, and livable land. DEQ implements state programs and, through Primacy Agreements with the US EPA, is responsible for implementing many federal environmental protection programs. This federal-state partnership, known as "cooperative federalism," was adopted by the US Congress because it recognized that states were in a better position to implement federal regulations at the state level due to their in-depth knowledge of their unique environmental, cultural, and economic circumstances.

Environmental laws are often complex, especially federal laws, which can be over 1,000 pages, covering highly technical engineering and scientific concepts. DEQ staff, including engineers, hydrologists, chemists, biologists, and other scientists – are experienced in interpreting and applying these laws in a scientifically sound and common-sense way. It is critical that judges are able to give DEQ deference, when appropriate, if these laws become an issue in a court case. This does not mean that judges should indiscriminately accept whatever DEQ says. But if DEQ is able to show a judge that it is reasonably applying a law with a sound scientific basis, the judge should be able to rely on DEQ's technical expertise.

Prohibiting judges from deferring to DEQ experts would harm the state's environment and economy. Because judges wouldn't be able to look to DEQ – which seeks to act in the best interests of the state – judges would instead have to be guided by polluters, special interest groups, and the US EPA. Although this bill could impact nearly every decision DEQ makes, I will focus on four areas of concern.

First, this bill would hamstring DEQ's ability to enforce environmental laws. Judges would not be able to defer to DEQ's interpretation and could look to the polluters' interpretations for compliance requirements, appropriate penalties, and cleanup. This would harm our citizens and put reputable companies who seek to comply with environmental laws at a competitive disadvantage. If DEQ is unable to enforce these laws effectively, the US EPA may decide to take over environmental enforcement in the state.

Second, this bill would lead to an increase in citizen suits. Citizen suits are where an individual or special interest group can step into the shoes of DEQ and enforce the states' environmental laws. DEQ can intervene in these suits. But, with this bill, all the deference would go to the individual or special interest groups and not DEQ. As a result, North Dakota would become an attractive location for environmental litigation by these groups.

Third, this bill would cripple DEQ's ability to issue permits. There have been several instances of environmental permits being challenged by neighbors or special interest groups, but the permitting decision has been affirmed by the courts, relying on DEQ's technical expertise. These include the Devil's Lake Outlet, a large hog operation, and a refinery. DEQ staff spend thousands of hours reviewing and drafting complex permits and it makes sense to allow a judge to defer to DEQ where DEQ can justify its interpretation and application of the law. In some cases, permit opponents have retained their own experts – often from outside the state with no knowledge of the unique circumstances that exist in North Dakota. Under this bill, these hired, out-of-state experts could be relied on by a judge but DEQ's experts could not. This would result in poor decision-making and uncertainty, making North Dakota a less attractive option for new projects.

Fourth, this bill would tip the scales in favor of the US EPA on issues where it disagrees with a state decision. Sometimes, the US EPA and DEQ have different interpretations of environmental laws. If these differences can't be resolved, the issue ends up in federal court. A federal judge then must decide if they should defer to the US EPA or DEQ. It will be difficult – if not impossible – to convince a federal judge to defer to DEQ when our state courts aren't even allowed to do so. Examples of situations where this could arise are state air quality plans, such as Regional Haze and the Clean Power Plan; state environmental program delegations; complex permitting decisions; and federal enforcement cases.

There are many more examples of program interpretation, permit decisions, and implementation expertise I could provide that highlight the importance of courts giving deference to state experience and knowledge. The Legislature should want judges to defer to DEQ where DEQ has provided justification for doing so. The alternative is that judges – who generally do not have technical backgrounds – will have to rely on parties seeking to advance their own agendas, and not North Dakota's.

I am aware of possible amendments to this bill. None of the amendments I have reviewed would address these concerns.

I request that this committee vote to reject SB 2296. The unintended consequences of this legislation could be extremely detrimental to the State of North Dakota. This concludes my testimony, and I will stand for questions.