

STATE OF MINNESOTA  
IN COURT OF APPEALS  
Appellate Court Case No. A09-1175

5

City of Woodbury,

Petitioner/Relator

v.

Minnesota Board of Water & Soil Resources,

Respondent,

Washington County, Valley Branch Watershed District,  
South Washington Watershed District,

Respondents.

---

**RELATOR CITY OF WOODBURY'S BRIEF**

---

Mark J. Vierling (#112823)  
Kevin S. Sandstrom (#0348958)  
Eckberg, Lammers, Briggs, Wolff & Vierling, P.L.L.P.  
1809 Northwestern Avenue  
Stillwater, Minnesota 55082  
(651) 439-2878

*Attorneys for Relator City of Woodbury*

Lori Swanson, Attorney General (#0254812)  
Office of the Minnesota Attorney General  
1440 Bremer Tower  
445 Minnesota Street  
St. Paul, MN 55101  
(651) 296-3353

*Attorney for Respondent Minnesota Board of  
Water & Soil Resources*

Doug Johnson (#0050957)  
Washington County Attorney  
14949 - 62<sup>nd</sup> Street North  
P.O. Box 6  
Stillwater, MN 55082  
(651) 430-6115

*Attorney for Respondent Washington  
County*

Ray Marshall (#0067891)  
Lawson, Marshall, McDonald, Galowitz and Wolle  
10390 - 39<sup>th</sup> Street North  
Lake Elmo, MN 55042  
(651) 777-6960

*Attorneys for Respondent Valley Branch  
Watershed District*

Jack Clinton (#0017413)  
Jack Clinton, P.A.  
7616 Currell Boulevard, Suite 200  
Woodbury, MN 55125  
(651) 264-3077

*Attorney for Respondent South Washington  
Watershed District*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iii

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 4

LEGAL ARGUMENT ..... 9

    I.    STANDARD OF REVIEW ..... 9

        A.    Unlawful Procedure..... 9

        B.    Errors of Law ..... 10

        C.    Unsupported by Substantial Evidence ..... 10

        D.    Arbitrary & Capricious..... 12

    II.   BACKGROUND OF WATERSHED DISTRICT..... 12

    III.  BWSR’S DECISION WAS RENDERED UPON UNLAWFUL  
PROCEDURE AND/OR UPON AN ERROR OF LAW BECAUSE  
THE LSCWMO’S VOLUNTARY DISSOLUTION WAS  
IMPROPERLY CONDITIONED UPON BWSR’S APPROVAL OF  
WASHINGTON COUNTY PETITIONS AS SUBMITTED, THEREBY  
ARTIFICIALLY LIMITING BWSR’S DISCRETION AND  
JURISDICTION TO RENDER A DECISION BASED UPON THE  
SOUND POLICIES AND PRINCIPLES OF THE MINNESOTA  
WATER LAW..... 14

    IV.  BWSR’S DECISION WAS ARBITRARY, CAPRICIOUS AND  
UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD  
WHEN IT REASSIGNED THE LANDS OF THE LSCWMO  
IGNORING A MAJOR HYDROLOGICAL BOUNDARY TO VBWD  
AND SWWD..... 23

V. BWSR'S DECISION TO ENLARGE THE NUMBER OF MANAGERS OF SWWD WAS ARBITRARY, CAPRICIOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN VIEW OF THE RECORD AS A WHOLE AND SHOULD BE REVERSED .....27

CONCLUSION .....29

## TABLE OF AUTHORITIES

### Minnesota Statutes

| <b>Statute</b>               | <b>Page</b>                     |
|------------------------------|---------------------------------|
| Minn. Chpt. 103B .....       | 15, 17, 19, 24                  |
| Minn. Chpt. 103D .....       | 3, 4, 5, 15, 17, 18, 19, 24, 31 |
| Minn. Stat. § 14.69 .....    | 3, 4, 10, 11, 12, 25            |
| Minn. Stat. § 103B.215 ..... | 15                              |
| Minn. Stat. § 103D.001 ..... | 14                              |
| Minn. Stat. § 103D.201 ..... | 2, 3, 4, 14, 15, 26             |
| Minn. Stat. § 103D.225 ..... | 18                              |
| Minn. Stat. § 103D.251 ..... | 15, 18, 19                      |
| Minn. Stat. § 103D.261 ..... | 5, 15, 16, 17, 18, 19           |
| Minn. Stat. § 103D.305 ..... | 4, 5, 29                        |
| Minn. Stat. § 473.121 .....  | 15                              |

### Minnesota Cases

| <b>Case Name</b>   | <b>Page</b> |
|--|-------------|
| <i>Appeal of Signal Delivery Serv., Inc.</i> , 288 N.W.2d 707 (Minn.1980) .....                                      | 12          |
| <i>Cable Communications Bd. v. Nor-West Cable Communications P'ship</i> , 356 N.W.2d 658 (Minn. 1984) .....          | 13          |
| <i>Citizens Advocating Responsible Devel. v. Kandiyohi County Bd. of Comm'rs</i> , 713 N.W.2d 817 (Minn. 2006) ..... | 4, 13, 26   |
| <i>City of North St. Paul v. Minnesota Water Resources Bd.</i> , 260 N.W.2d 584 (Minn. 1977) .....                   | 3, 4, 26    |
| <i>Deli v. Univ. of Minnesota</i> , 511 N.W.2d 46 (Minn. App. 1994) .....  | 11, 17      |

|   |               |
|---|---------------|
| <i>Dozier v. Comm’r of Human Services</i> , 547 N.W.2d 393 (Minn. App. 1996).....   | 12            |
| <i>Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health</i> , 375 N.W.2d 496 (Minn. App. 1985).....                    | 3, 11, 17     |
| <i>In re Claim for Benefits by Meuleners</i> , 725 N.W.2d 12 (Minn. App. 2006) .....  | 12, 17        |
| <i>In re Eller Media Company's Applications for Outdoor Advertising Device Permits</i> , 642 N.W.2d 492 (Minn. App. 2002) ..... | 11, 17        |
| <i>In re Excess Surplus Status of Blue Cross &amp; Blue Shield of Minn.</i> , 624 N.W.2d 264 (Minn.2001).....                   | 13, 25        |
| <i>In re Financial Responsibility for Mental Health Services Provided to D.F.</i> , 656 N.W.2d 576 (Minn. App. 2003) .....      | 12, 17        |
| <i>In re Grand Rapids Public Utilities Com’n</i> , 731 N.W.2d 866 (Minn. App. 2007) .....                                       | 13, 14        |
| <i>In re Matter of Brown’s Creek Watershed District in Wash. Co.</i> , 633 N.W.2d 76 (Minn. App. 2001).....                     | 3, 10, 17     |
| <i>In re Max Schwartzman &amp; Sons, Inc.</i> , 670 N.W.2d 746 (Minn. App. 2003).....   | 14            |
| <i>In re Petition of N. States Power Co.</i> , 416 N.W.2d 719 (Minn.1987) .....   | 12            |
| <i>Indep. Sch. Dist. No. 281 v. Minnesota Dept. of Educ.</i> , 743 N.W.2d 315 (Minn. App. 2008).....                            | 25            |
| <i>Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency</i> , 644 N.W.2d 457 (Minn. 2002).....                      | 4, 12, 13, 25 |
| <i>Northern Messenger, Inc. v. Airport Couriers, Inc.</i> , 359 N.W.2d 302 (Minn. App. 1984).....                               | 3, 11         |
| <i>Saif Food Market v. Comm’r, State, Dep’t of Health</i> , 664 N.W.2d 428 (Minn.App.2003).....                                 | 13            |
| <i>Watab Tp. Citizen Alliance v. Benton County Bd. of Com’rs</i> , 728 N.W.2d 82 (Minn. App. 2007).....                         | 13            |
| <i>Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758</i> , 594 N.W.2d 216 (Minn.App.1999).....                                 | 11            |

## INTRODUCTION

On May 27, 2009, the Minnesota Board of Water & Soil Resources (“BWSR”) rendered a decision approving two petitions by Washington County to enlarge the South Washington Watershed District (“SWWD”) and the Valley Branch Watershed District (“VBWD”). The SWWD and VBWD were enlarged to subsume the land that was previously within the Lower St. Croix Water Management Organization (“LSCWMO”). However, the dissolution of the LSCWMO was conditioned upon BWSR approving the distribution of land as set forth in Washington County’s petitions. Likewise, the cities within the LSCWMO sent resolutions of support for the petitions, but only so long as BWSR approved them as submitted.

Unfortunately, Washington County’s petitions to enlarge SWWD and VBWD did not make sense. SWWD has always drained entirely into the Mississippi River. VBWD has always drained entirely into the St. Croix River. The LSCWMO contained land that drained into both rivers, and contained the major hydrological divide between the two rivers. Rather than apportioning the LSCWMO’s land pursuant to the major hydrological boundary between the two rivers, the petitions apportioned the bulk of the LSCWMO to SWWD, which included adding land to SWWD that flows into the St. Croix River. Thus the petitions contained a ‘poison pill’ whereby BWSR was forced to either accept the illogical boundaries as proposed, or reject the petitions and have the LSCWMO remain in place. BWSR improvidently chose to accept the petitions as submitted.

Because the petitions contained a poison pill, and thereby limited BWSR’s ability to render a decision based upon the sound scientific principles of the Minnesota Watershed

Law, its decision was rendered upon an error of law, and upon unlawful procedure. Moreover, BWSR's decision was rendered for the express purpose of eliminating the LSCWMO, rather than upon one of the enumerated principles set forth in Minn. Stat. 103D.201, subd. 2, and BWSR wholly failed to consider or opine upon the objections of the City of Woodbury or VBWD that the boundaries as proffered did not make sense. As such, BWSR's decision was arbitrary, capricious, and unsupported by substantial evidence.

Finally, the SWWD petition also contained a request to increase its number of managers from five to seven. BWSR granted this request without an adequate rationale as to why additional managers were needed, and against the advice of BWSR staff. BWSR's decision to increase the number of managers was arbitrary, capricious, and unsupported by substantial evidence. For all of the foregoing reasons, BWSR's decision should be reversed, and BWSR should be directed to dismiss Washington County's petitions as improper.

### **STATEMENT OF LEGAL ISSUES**

1. **ISSUE:** Was BWSR's decision rendered upon unlawful procedure and an error of law when the LSCWMO, Cottage Grove, Afton, and Denmark Township conditioned the dissolution of LSCWMO upon BWSR's approval of Washington County's petitions as submitted, thereby limiting BWSR's discretion and jurisdiction to render a decision based upon the sound scientific principles and policies of the Minnesota Watershed Law?
  - a. **RULING:** BWSR acting on staff advisory that their jurisdiction was limited approved the petitions to enlarge the SWWD and VBWD such that land that

hydrologically should have been included within VBWD was instead assigned to the SWWD for political reasons, with the LSCWMO, Cottage Grove, Afton, and Denmark Township effectively restricting BWSR's ability to exercise its discretion to determine the logical boundaries.

- b. **Authority:** Minn. Stat. § 14.69(c) (2008); Minn. Stat. Chap. 103D (2008); *In re Matter of Brown's Creek Watershed District in Wash. Co.*, 633 N.W.2d 76, 78 (Minn. App. 2001); *City of North St. Paul v. Minnesota Water Resources Bd.*, 260 N.W.2d 584, 587 (Minn. 1977); *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health*, 375 N.W.2d 496, 502 (Minn. App. 1985); *Northern Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 305 (Minn. App. 1984);

2. **ISSUE:** Was BWSR's decision arbitrary, capricious, and unsupported by substantial evidence in view of the entire record as submitted when it approved the enlargement of the SWWD and VBWD without adequate findings of fact supported by evidence within the record and for reasons outside the policies enumerated by the legislature, and where BWSR failed to address the concerns raised by the City of Woodbury in opposition to the Petitions?

- a. **RULING** BWSR adopted its Order claiming Findings in support of its decision and approved the Petitions for the primary purpose of eliminating LSCWMO, a joint powers watershed management organization, in favor of expanding the SWWD and VBWD watershed districts, which is not one of the specific purposes enumerated in Minn. Stat. § 103D.201, subd. 2

b. **Authority:** Minn. Stat. § 14.69(c) (2008); Minn. Stat. Chap. 103D (2008); *City of North St. Paul v. Minnesota Water Resources Bd.*, 260 N.W.2d 584, 587 (Minn. 1977); *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002); *Citizens Advocating Responsible Devel. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

3. **ISSUE:** Was BWSR's decision to increase the number of managers of the SWWD arbitrary, capricious, and unsupported by substantial evidence in view of the entire record as submitted when it did so without adopting findings of fact and providing, a rational explanation or basis as to why additional managers were necessary in conjunction with an increase in size of the watershed district?

a. **RULING:** BWSR increased the number of managers of SWWD from five to seven as petitioned by Washington County but did so against the advice of BWSR staff based upon a perceived but unsupported rationale that the newly included areas would be better served by increasing the board to seven managers from the existing five.

b. **Authority:** Minn. Stat. § 14.69(c) (2008); Minn. Stat. § 103D.201 & § 103D.305 (2008); *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002); *Citizens Advocating Responsible Devel. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

## STATEMENT OF THE CASE

On March 24, 2009, Washington County filed two petitions to the Board of Water and Soil Resources (“BWSR”) requesting that: (1) BWSR enlarge the South Washington Watershed District (“SWWD”) and increase its number of managers from five to seven, and (2) BWSR enlarge the Valley Branch Watershed District (“VBWD”). The petitions were submitted pursuant to Minn. Stat. §§ 103D.261 (enlargement) & 103D.305 (increasing managers). At its regular meeting on March 25, 2009, BWSR determined that the petitions met the statutory requirements of Chapter 103D, and ordered a public hearing. Several governmental subdivisions sent letters and/or resolutions to BWSR supporting the petitions. The City of Woodbury sent letters and a resolution to BWSR objecting to the petitions.

On April 22, 2009, BWSR held a public hearing on the petitions. At the hearing, the City of Woodbury’s representatives objected to and provided argument against the petitions. Following the hearing, BWSR left the record open for one week, and additional letters supporting or objecting to the petitions were received by BWSR. On May 27, 2009, BWSR issued an Order for Enlargement of Watershed Districts approving the petitions and enlarging the SWWD and VBWD.

The City of Woodbury received a mailed copy of BWSR’s decision and order on June 9, 2009. On June 29, 2009, Woodbury petitioned the Court of Appeals for a Writ of Certiorari to review BWSR’s decision.

## STATEMENT OF FACTS

The SWWD and VBWD are located near the confluence of the St. Croix and Mississippi rivers in southern Washington County.<sup>1</sup> (Appx. A.000038). Also previously located exactly at the confluence of the St. Croix and Mississippi rivers was the Lower St. Croix Watershed Management Organization (LSCWMO), a joint powers organization formed by the cities of Cottage Grove, Afton, Hastings, and Denmark Township. (Appx. A.000003). Washington County, LSCWMO, and the aforesaid cities came to an agreement whereby the LSCWMO conditionally agreed to dissolve, and Washington County simultaneously petitioned to have the areas served by the LSCWMO incorporated within the neighboring SWWD and VBWD. (Appx. A.000001-000019). Washington County did so by petitioning to the BWSR for enlargement of the SWWD and VBWD pursuant to Minn. Stat. § 103D.261 (2008). (*Id.*)

Prior to the enlargement, the hydrological characteristics were such that the SWWD watershed ultimately flowed to the Mississippi River, and the VBWD watershed ultimately flowed to the St. Croix River. (Appx. A.000038). In fact, SWWD and VBWD abutted against each other for a significant portion of their boundaries, and that shared boundary consisted of the major hydrological divide between the Mississippi and St. Croix River watersheds. (Appx. A.000010). The LSCWMO was hydrologically divided, in that portions of LSCWMO flowed to the Mississippi river, and the remainder flowed to the St. Croix river. (Appx. A.000063). However, Washington County's petition to apportion the area of

---

<sup>1</sup> A small portion of the VBWD is located in Ramsey County, but a vast majority of the watershed is within Washington County.

the LSCWMO into SWWD and VBWD did not opt to follow the major hydrological boundary, rather, it followed an artificial and political boundary such that SWWD would be enlarged to include a majority of the former LSCWMO, including large portions thereof that drain to the St. Croix River rather than the Mississippi. (Appx. A.000001-000019). This proposed division of the area within the LSCWMO was apparently created by a joint agreement of LSCWMO, Washington County, and the communities within the LSCWMO. (Appx. A.000021-000024). The proposed division was then incorporated into Washington County's petitions. (Appx. A .000001-000019). LSCWMO's resolution of voluntary dissolution was made expressly contingent upon BWSR's approval of Washington County's petition and the proposed apportionment of the LSCWMO area as submitted. (Appx. A.000024).

Washington County sought approval of its petitions from the affected local governments. (Appx. A.000020). The cities of Cottage Grove, Afton, Hastings, and Denmark Township passed resolutions in support of the dissolution of LSCWMO and Washington County's petitions for enlargement of SWWD and VBWD. (Appx. A.000025-000034). However, the cities' resolutions of approval were expressly contingent upon BWSR's approval of the apportionment of the LSCWMO area as set forth in Washington County's petitions.<sup>2</sup> (Appx. A.000026; 000030; & 000032). For example, the City of Afton's, City of Cottage Grove's, and Denmark Township's resolutions all include the following 'poison pill' provision:

---

<sup>2</sup> The City of Hastings passed a resolution supporting Washington County's resolutions, but its resolution did not condition its support upon BWSR accepting the boundaries as submitted.

BE IT FURTHER RESOLVED, if the Dissolution Resolution is not supported by a sufficient number of the Parties to the Agreement to achieve the dissolution, or if BWSR does not approve the enlargement petitions with the division of land as proposed in the dissolution plan and Exhibit A, the LSCWMO shall not be dissolved and will continue to perform its duties and obligations consistent with the Agreement;

*(Id.)*. (emphasis added).

VBWD passed a resolution in support of the dissolution of LSCWMO and incorporation into the SWWD and VBWD, but it suggested that the more appropriate apportionment of area would have been to divide the LSCWMO upon the major hydrological boundary. (Appx. A.000035-000036).

Woodbury supported the dissolution of LSCWMO and incorporation thereof into SWWD and VBWD, but it strongly objected to Washington County's proposed apportionment of the LSCWMO. (Appx. A.000038). Woodbury argued that the appropriate division of LSCWMO was for the new boundary between SWWD and VBWD to continue to follow the major hydrological divide between the Mississippi and St. Croix River watersheds, just as their common boundary previously did. *(Id.)* On April 13, 2009, Woodbury sent a resolution and letter stating its objections to the proposed apportionment of the LSCWMO land. (Appx. A.000038-000042). On April 22, 2009, Woodbury's Mayor sent another letter stating additional arguments and objections against Washington County's petitions. (Appx. A.000043-000045). If the City of Woodbury's arguments were accepted, then a majority of LSCWMO would go to VBWD, whereas Washington County's petition proposed that a majority of LSCWMO's area go to SWWD. (Appx. A.000038).

At the public hearing before BWSR on April 22, 2009, representatives of Woodbury again reiterated that the appropriate division of LSCWMO was for SWWD to be assigned those portions draining to the Mississippi River, and for VBWD to be assigned those portions draining to the St. Croix River, thus following the major hydrological boundary in that area. (Appx. A.000053-000054).

Following the public hearing, BWSR held the record open for one week for additional submissions. (Appx. A.000057). Denmark Township sent an additional letter restating its support for Washington County's petition as submitted, and noting:

If the merger were to occur along hydrologic lines as has been suggested, over half of Denmark Township residents would be funding projects throughout the entire Valley Branch Watershed District. The Township would incur significant additional on-going costs for our consultant staff to learn and stay current on rules/requirements in two Watershed Districts. Due to the fact that we are primarily rural in nature with many large parcels of land, it is highly likely that many proposed developments/projects would cross the hydrologic line. We do not support residents in the township having to go through yet another duplicative administrative process, submitting applications to both SWWD and VBWD. We would like to see the same rules/standards apply to all properties within the township.

(Appx. A.000058-000059). Thus, it appears the petitions and proposed apportionment of LSCWMO may have been proposed simply to satisfy Denmark Township's political desire to be entirely within a single watershed district. (*Id.*)

BWSR staff issued a Staff Advisory Report which instructed the BWSR board that it had to approve or deny the petition on a take-it-or-leave-it basis given the contingencies put in place by the resolutions of Afton, Cottage Grove, and Denmark Township. (Appx. A.000060 - 000064). BWSR staff felt this was so because the resolutions conditioned the

dissolution of the LSCWMO upon BWSR's approval of the petition as submitted, thus any change by BWSR to the boundary line would cause the LSCWMO to not be dissolved, and as noted by BWSR staff, "Minnesota case law precludes the enlargement of a watershed district over area already under the jurisdiction of a watershed management organization." (Appx. A.000060). BWSR staff therefore concluded: "The Board has no option to establish a different boundary from that proposed in the plan of division contained in the petitions." (*Id.*) BWSR staff did advise against increasing SWWD's number of managers from five to seven as petitioned. (Appx. A.000064).

On May 27, 2009, BWSR issued its Order For Enlargement of Watershed Districts, which approved Washington County's petitions as submitted. (Appx. A.000065-000077).

## ARGUMENT

### **I. Standard of Review.**

The standard and scope of review by the Court of Appeals of a state agency's decision is governed by Minn. Stat. § 14.69 (2008), In particular, judicial review of a Board of Water and Soil Resources (BWSR) decision enlarging a watershed district is governed by the general statute that governs judicial review of agency decisions. *In re Matter of Brown's Creek Watershed District in Wash. Co.*, 633 N.W.2d 76, 78 (Minn. App. 2001). Minn. Stat. § 14.69 provides that:

[T]he court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Woodbury contends that BWSR's decision was made in contravention of provisions (c) through (f). These standards are more fully explained as set forth below.

A. Unlawful Procedure

The Court of Appeals may reverse an agency's decision that is made upon unlawful procedure. Minn. Stat. § 14.69(c) (2008). An agency's decision rendered after failing to consider evidence in the record is upon unlawful procedure. *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health*, 375 N.W.2d 496, 502 (Minn. App. 1985). An agency's refusal to allow testimony by an interested party on essential issues renders its actions to be upon unlawful procedure. *Northern Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 305 (Minn. App. 1984). An agency's decision which is made upon unlawful procedure mandates reversal if a party's substantial rights have been prejudiced. *Id.* at 305; *Deli v. Univ. of Minnesota*, 511 N.W.2d 46, 49 (Minn. App. 1994). The Court of Appeals reviews de novo the procedural due process afforded a party in an administrative process. *In re Eller Media Company's Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492, 503 (Minn. App. 2002); *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn.App.1999).

B. Errors of Law

The Court of Appeals will reverse an agency's decision that is affected by an error of law. Minn. Stat. § 14.69(d) (2008). Appellate courts retain the authority to review *de novo* errors of law which arise when an agency decision is based upon the meaning of words in a statute. *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). When reviewing an agency's determination of a question of law, a court is not bound by the decision of the agency and need not defer to agency expertise. *In re Financial Responsibility for Mental Health Services Provided to D.F.*, 656 N.W.2d 576, 578 (Minn. App. 2003); *Dozier v. Comm'r of Human Services*, 547 N.W.2d 393, 395 (Minn. App. 1996)

C. Unsupported by Substantial Evidence

The Court of Appeals may reverse an agency's decision that is not supported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 14.69(e) (2008). An agency acts in a quasi-judicial manner when it hears the view of opposing sides presented in the form of written and oral testimony, examines the record and makes findings of fact. *Appeal of Signal Delivery Serv., Inc.*, 288 N.W.2d 707, 710 (Minn.1980). When an agency acts in a quasi-judicial capacity, an appellate court applies the substantial evidence test on review. *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 723 (Minn.1987). Substantial evidence is defined as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Env'tl. Advocacy v. Minn.*

*Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). An agency's decision is not supported by substantial evidence if there is a “combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.” *Cable Communications Bd. v. Northwest Cable Communications P'ship*, 356 N.W.2d 658, 668-69 (Minn. 1984).

When applying the substantial-evidence test, the reviewing court determines whether the agency adequately explained how it derived its conclusion and whether that conclusion was reasonable. *In re Grand Rapids Public Utilities Com'n*, 731 N.W.2d 866, 871 (Minn. App. 2007). The court will reverse an agency's decision if its findings are unsupported by substantial evidence. *Watab Tp. Citizen Alliance v. Benton County Bd. of Com'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007). The substantial-evidence standard of review is generally applied to an administrative agency's findings of fact. *See, e.g., Saif Food Market v. Comm'r, State, Dep't of Health*, 664 N.W.2d 428, 430 (Minn.App.2003).

*D.     Arbitrary & Capricious*

An agency acts arbitrarily if it fails to articulate a rational connection between facts found and the decision made. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn.2001). An agency's ruling is arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise. *Citizens Advocating Responsible Devel v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn.

2006). An agency's decision is arbitrary and capricious if it reflects the agency's will and not its judgment. *In re Grand Rapids Public Utilities Com'n*, 731 N.W.2d 866, 871 (Minn. App. 2007). An agency's legal conclusions are reviewed under the arbitrary and capricious standard. *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 753 (Minn. App. 2003).

## **II. Background of Watershed Districts:**

Watershed districts are local units of government that work to solve and prevent water-related problems. See BWSR website: <http://www.bwsr.state.mn.us/relatedlinks/watersheddistricts.html>. The boundaries of the watershed districts follow those of a natural watershed (an area in which all water drains to one point). *Id.* The Minnesota Legislature authorized the creation of watershed districts in 1955, through the Watershed Act, with the idea that managing water on a watershed basis, rather than on the basis of political boundaries, made sense, since water does not stop flowing at city or county boundaries. *Id.*; see also Minn. Stat. § 103D.001 et seq. The general purpose of watershed districts is to “conserve the natural resources of the state by land use planning, flood control, and other conservation projects by using sound scientific principles for the protection of the public health and welfare and the provident use of the natural resources....” Minn. Stat. § 103D.201, subd. 1 (2008). The statutes provide the following specific purposes for which a watershed district may be established:

- (1) to control or alleviate damage from flood waters;
- (2) to improve stream channels for drainage, navigation, and any other public purpose;

- (3) to reclaim or fill wet and overflowed land;
- (4) to provide a water supply for irrigation;
- (5) to regulate the flow of streams and conserve the streams' water;
- (6) to divert or change all or part of watercourses;
- (7) to provide or conserve water supply for domestic, industrial, recreational, agricultural, or other public use;
- (8) to provide for sanitation and public health, and regulate the use of streams, ditches, or watercourses to dispose of waste;
- (9) to repair, improve, relocate, modify, consolidate, and abandon all or part of drainage systems within a watershed district;
- (10) to control or alleviate soil erosion and siltation of watercourses or water basins;
- (11) to regulate improvements by riparian property owners of the beds, banks, and shores of lakes, streams, and wetlands for preservation and beneficial public use;
- (12) to provide for hydroelectric power generation;
- (13) to protect or enhance the water quality in watercourses or water basins; and
- (14) to provide for the protection of groundwater and regulate its use to preserve it for beneficial purposes.

Minn. Stat. § 103D.201, subd. 2 (2008).

The SWWD and VBWD are included within the metropolitan area. *See* Minn. Stat. § 473.121, subd. 4 (2008). Watershed districts within the Twin Cities metropolitan area come under the guidance of both the Watershed Act (Minnesota Statutes chapter 103D) and the Metropolitan Surface Water Management Act (Minnesota Statutes chapter 103B). More specifically, the authority regarding boundary changes is outlined in Minn. Stat. § 103D.261 (relating to boundary enlargements for all watersheds), Minn. Stat. § 103D.251 (relating to boundary changes for all watersheds), and § 103B.215 (relating to boundary changes for metropolitan area watersheds). The procedure to initiate a change under the statutes requires a petition to the BWSR requesting boundary change.

Washington County chose to petition for the enlargement of SWWD and VBWD pursuant to § 103D.261.

In terms of the purpose and policy behind watershed districts as outlined above, it would have been most logical for the area within the LSCWMO that flowed to the Mississippi River to be apportioned to the SWWD, and for the LSCWMO area that flowed to the St. Croix River to be apportioned to the VBWD. BWSR did not do so, and its decision should be reversed for the reasons set forth below.

**III. BWSR's decision was rendered upon unlawful procedure and/or upon an error of law because the LSCWMO's voluntary dissolution was improperly conditioned upon BWSR's approval of Washington County petitions as submitted, thereby artificially limiting BWSR's discretion and jurisdiction to render a decision based upon the sound policies and principles of the Minnesota Watershed Law.**

LSCWMO, Cottage Grove, Afton, and Denmark Township all conditionally supported the enlargement of the SWWD and VBWD only so long as BWSR approved the new boundaries as petitioned. Thus the petitions as proffered by Washington County, and the conditional support by LSCWMO, Cottage Grove, Afton, and Denmark, all contained a 'poison pill' that required the BWSR to accept the Petitions on a take-it-or-leave-it basis. Yet BWSR's decision does not address this issue, nor address the fact that its decision was in direct contravention of the City of Woodbury's position that the SWWD's boundary should not be expanded to traverse a major hydrological boundary. This rendered BWSR's decision upon unlawful procedure and based upon an error of law.

An agency's decision rendered after failing to consider evidence in the record is upon unlawful procedure. *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health*, 375 N.W.2d 496, 502 (Minn. App. 1985). An agency's decision which is made upon unlawful procedure mandates reversal if a party's substantial rights have been prejudiced. *Deli v. Univ. of Minnesota*, 511 N.W.2d 46, 49 (Minn. App. 1994). The Court of Appeals reviews *de novo* the procedural due process afforded a party in an administrative process. *In re Eller Media Company's Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492, 503 (Minn. App. 2002). Errors of law by an agency are also subject to *de novo* review, and the court need not defer to the agency on questions of interpretation of the law. *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006); *In re Financial Responsibility for Mental Health Services Provided to D.F.*, 656 N.W.2d 576, 578 (Minn. App. 2003).

An agency's interpretation of statutory construction is a question of law subject to *de novo* review. *In re Matter of Brown's Creek Watershed District in Wash. Co.*, 633 N.W.2d 76, 78 (Minn. App. 2001). When a statute is ambiguous, the court must determine the probable legislative intent and construe the statute in a manner consistent with that intent. *Id.* The courts are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations. *Id.* at 78-79. In the case of interpreting the watershed enlargement statute, § 103D.261, the Court of Appeals has specifically looked to all of the surrounding provisions of both Chapter 103D and 103B to determine its meaning. *Id.* at 79. The courts must construe a statute to avoid absurd results and unjust consequences. *Id.* at 78-79.

Here, the reasonable interpretation of Minnesota Statutes § 103D.261 is that BWSR has the power and authority to determine and modify the appropriate boundaries of a watershed district when a petitioner's proposed boundaries fail to conform to the sound scientific principles and policies of Chapter 103D. Regardless of "conditions" placed in petitions and resolutions in support of petitions, the agency must analyze each matter upon its own merits. Jurisdiction of the agency cannot be arbitrarily limited by the petitioning parties to place the agency in a "yes or no" position that limits its deliberations and its fundamental statutory mandate.

The surrounding statutes of Chapter 103D suggest that § 103D.261 should be interpreted to allow BWSR to modify inappropriate boundaries in petitions for enlargement. *See* Minn. Stat. § 103D.225, subd. 3 (2008) ("The order of the board establishing a watershed district must include: (1) the findings of the board supporting its determination to establish the watershed district; (2) the official name of the watershed district; (3) the location of the principal place of business of the watershed district; (4) the boundaries of the watershed district; and (5) the names of the managers for the first board of managers selected under subdivision 4."); *see also* Minn. Stat. § 103D.251, subd. 7(b) (regarding changes of watershed district boundaries, provides that "In the order establishing the boundary change, the board must include: (1) the findings of the board supporting its determination to establish the boundary change; and (2) the boundaries of watershed districts affected by the boundary change." (emphasis added)).

The watershed district boundary change statute states: "If the board determines that a watershed district boundary change would not benefit the public welfare and public interest

or would not serve the purposes of this chapter, the board must, by order, dismiss proceedings to change a watershed district boundary.” Minn. Stat. § 103D.251, subd. 8. Based upon the establishment and boundary change statutes, BWSR has the authority, duty and power to determine the appropriate boundaries of a proposed watershed district, and should be granted the discretion to modify those boundaries as it sees fit.

In this case, Washington County petitioned to enlarge the SWWD and VBWD pursuant to Minn. Stat. § 103D.261. The standards to be applied under § 103D.261 are noticeably lacking, in that the statute provides: “After the hearing, if the board determines that the enlargement of the watershed district as asked for in the petition would be for the public welfare and public interest and the purpose of this chapter would be served, the board shall, by making findings and an order, enlarge the watershed district and file a certified copy of the findings and order with the secretary of state.” However, when the provisions of Chapter 103D & 103B are read together as a whole as required under the holding of *In the Matter of Brown’s Creek Watershed District*, it is evident that BWSR has the authority to determine the appropriate boundaries of a newly enlarged watershed district.

BWSR’s decision in this case was rendered upon unlawful procedure where LSCWMO, Cottage Grove, Afton, and Denmark Township attempted to artificially limit BWSR’s jurisdiction by conditioning the dissolution of LSCWMO upon approval of the boundaries as proposed in the Petitions. Even BWSR’s staff advised its Board that it was required to accept or reject the Petitions as-is, and without change. This conditional action caused BWSR board to assume that they were required to render its decision without the requisite discretion and decision-making authority that is granted to the agency. Acting

under this errant assumption as a result of the conditional dissolution of LSCWMO, BWSR was unable to effectively utilize its sound scientific principles and was unable to promote the purposes and policies of the Minnesota Watershed Laws.

Woodbury duly noted this deficiency to BWSR in its objections to the Petitions. However, BWSR's decision does not even address Woodbury's concerns. BWSR's Findings of Fact are cursory and superficial. They can be summarized as follows:

1. Finding of Fact #1 describes the petitions for enlargement.
2. Finding of Fact #2 describes the amount of area to be added to each watershed district from the LSCWMO, but does not address the hydrological boundaries involved.
3. Finding of Fact #3 states that the SWWD petition includes a request for an increase in the number of managers.
4. Finding of Fact #4 states that the petitions were properly served.
5. Finding of Fact #5 notes that LSCWMO's dissolution is contingent upon BWSR's approval of the boundary changes as petitioned, and further notes that a watershed district may not be enlarged over an existing WMO, but this finding of fact fails to make any further findings regarding the propriety or effect of such a contingency.
6. Finding of Fact #6 essentially states that Washington County has determined that watershed districts are preferable to joint powers watershed management organizations, and states that Washington county's petitions believe the enlargements will be conducive to the public health and public welfare, yet

BWSR's finding of fact does not state that it finds these contentions of Washington County to be true, or otherwise elaborate upon the validity or support for such contentions.

7. Finding of Fact # 7 notes that the Petitions meet the minimum statutory requirements and were appropriate for a public hearing.
8. Finding of Fact #8 states that the public hearings were properly noticed.
9. Finding of Fact # 9 notes that a public hearing was held, and briefly describes each exhibit in the record, but does not make any findings regarding the validity or weight of any such information obtained.
10. Finding of Fact # 10 notes that the Metro Water Planning Committee met following the public hearing and made the following findings and recommendations:
  - i. Recommended that the SWWD and VBWD be enlarged and the number of managers of SWWD increased, as petitioned;
  - ii. Found that SWWD and VBWD will "accomplish more" in the area of watershed management than the LSCWMO has;
  - iii. Found the enlargement would benefit the public welfare and public interest (but does not explain why);
  - iv. Found that SWWD and VBWD more proactively manage their water resources, while not so in the LSCWMO;

- v. Found that eliminating LSCWMO as a less effective organization will lead to better management and negligible cost increases for SWWD and VBWD;
- vi. Noted the major hydrological boundary currently within the LSCWMO, but absolutely fails to mention the fact that the petitions propose that SWWD's enlarged area crosses over that major divide without scientifically supportable rationale.
- vii. Found that the SWWD and VBWD cannot be enlarged as proposed without the dissolution of LSCWMO first; and
- viii. Found that the increase of the number of managers of SWWD is "necessary to provide for better representation of the various hydrological units" but fails to cite any supporting findings therefore.

*(See Appx. A.000065-72.)*

Notably, none of BWSR's "Findings of Fact" address the concerns of Woodbury and VBWD, that the proposed enlargement of SWWD would cross a major hydrological boundary, and that it makes more sense, within the purposes and principles of the Minnesota Watershed Law, that all of the area within the St. Croix River hydrological watershed be apportioned to VBWD rather than SWWD. Moreover, BWSR's Findings of Fact merely report the opinions and findings of other parties, rather than making their own independent findings of fact.

Beyond its Findings of Fact, the BWSR's "Conclusions of Law" are empty and lack meaningful content. The only Conclusion of Law that comes close to mentioning a substantive reason for BWSR's decision is #5, which states:

5. The enlargements of the South Washington Watershed District and the Valley Branch Watershed District as proposed in the Petitions would benefit the public welfare and public interest and the purposes of Minnesota Statutes Chapters 103B and 103D would be served because the South Washington Watershed District and the Valley Branch Watershed District will accomplish more in the area of watershed management than the Lower St. Croix Watershed Management Organization has.

(Appx. A.000073.)

BWSR has failed to render valid and meaningful findings of fact or conclusions of law. Instead, it merely repeats the statements of other parties, and makes the conclusory assumption that enlargement of SWWD and VBWD will be beneficial for the mere reason that the SWWD and VBWD are better managed than LSCWMO was. BWSR's decision absolutely ignores the concerns raised by Woodbury, namely that the area in the St. Croix River watershed that should properly be part of VBWD has been added to SWWD instead for purely political reasons, namely that Denmark Township prefers to be entirely within SWWD rather than partially within SWWD and partially within VBWD.

As a result, BWSR's decision was rendered upon unlawful procedure and error of law, and BWSR had a duty either to summarily reject Washington County's petitions or assert its authority to render its decision on the merits of the issues regardless of the conditions placed on the resolutions. Instead it did neither. By accepting, affirming, and ultimately approving the Petitions, which contained a 'poison pill' limiting its discretion, BWSR acted upon an unlawful procedure and error of law. Woodbury respectfully requests

that the Court reverse BWSR's Order based upon the fact that the Order was rendered upon unlawful procedure and an error of law in that BWSR assumed it had no authority to do otherwise.

If Chapter 103D is interpreted such that petitioners can conditionally limit the jurisdiction of BWSR, or that petitioners can limit the power of BWSR to determine and modify the appropriate boundaries of a proposed watershed district, then the ability of BWSR to use its expertise to further the Minnesota Watershed Law will be thwarted. To hold otherwise leaves BWSR at the mercy of the petitioners, in that BWSR would not be able to adjust the boundaries to appropriately conform to the purposes, policies, and principles espoused in Minn. Stat. Chapter 103B and 103D, and BWSR would be left in a take-it-or-leave-it scenario as was created in this situation. If BWSR is forced to accept petitions with proposed boundaries as submitted so long as some minimal benefit would accrue, then BWSR is essentially left without function as a rubber stamp of the petitioners, securing boundaries based on political expedience as opposed to those that correspond with the scientific principles and policies that BWSR is bound to uphold. If BWSR is not granted the discretion under the statutes to adjust the watershed district boundaries as proposed, BWSR will be left, as it was in this case, to choose between the 'lesser of two evils' when a petitioner proposes a watershed district with inappropriate boundaries.

In this case, BWSR's staff in error advised its board in direct contravention of this statutory interpretation, and the LSCWMO, Cottage Grove, Afton, and Denmark Township artificially evaded this statutory interpretation. As a result, BWSR's decision was rendered upon unlawful procedure and an error of law, and should be reversed.

**IV. BWSR's decision was arbitrary, capricious, and unsupported by substantial evidence in the record when it reassigned the lands of the LSCWMO ignoring a major hydrological boundary to VBWD and SWWD**

When an agency performs the quasi-judicial function of receiving and weighing evidence, making factual findings, and applying a prescribed standard to reach a conclusion, a reviewing court applies the substantial evidence test. *Indep. Sch. Dist. No. 281 v. Minnesota Dept. of Educ.*, 743 N.W.2d 315, 327 (Minn. App. 2008); *see also* Minn. Stat. § 14.69(e) (court will reverse or modify agency's decision if substantial rights of the petitioner's may have been prejudiced because the agency's findings are "unsupported by substantial evidence in view of the entire record as submitted"). Under the substantial evidence test, substantial evidence is defined as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Id.* at 327 (*citing Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002)).

An agency acts arbitrarily if it fails to articulate a rational connection between facts found and the decision made. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn.2001). An agency's ruling is arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained

as a difference in view or the result of the agency's expertise. *Citizens Advocating Responsible Devel. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006).

BWSR's own website notes that watershed districts generally follow natural hydrological boundaries rather than political boundaries. Moreover, in *City of North St. Paul v. Minnesota Water Resources Bd.*, 260 N.W.2d 584, 587 (Minn. 1977), the court duly noted:

“When the legislature, in the Watershed Act, stated that water resources are to be managed in accordance with scientific principles, it did not intend to confine the Water Resources Board to a consideration of scientific data only; rather, the statutory language serves to underscore the legislature's desire to have resource-related decisions grounded in scientific or technological rather than political or other considerations. This desire conforms to the fact that natural resource problems do not observe artificial political boundaries and do not respond to traditional political solutions.”

The *North St. Paul* case illustrates the purpose and function of the Water Resources Board and directs that BWSR should focus on scientific data rather than political considerations, although BWSR's decision need only be based upon a single rationale that falls within the purposes enumerated in the statutes. *See id.*

In this case, BWSR's decision was not supported by any of the purposes enumerated in Minn. Stat. § 103D.201. Rather, it was motivated by a clearly articulated preference for watershed districts over joint powers watershed management organizations. Thus BWSR chose to accept a poorly executed enlargement of SWWD and VBWD merely to further a political desire to eliminate the LSCWMO as an inefficient organization. This is not a purpose articulated by the statute that BWSR is bound to apply.

Washington County, LSCWMO, Cottage Grove, Afton, Hastings, and Denmark Township planned to enlarge the SWWD to include area in a different major hydrological area that would have been better suited in the VBWD. It appears they did so to accommodate political desires including that of Denmark Township's to be located entirely within a single watershed district, despite the fact that a major hydrological divide runs through the middle of Denmark Township. Even the VBWD acknowledged that the hydrological boundary was not being observed and suggested that BWSR adjust the assignment of lands.

The only rationale provided by BWSR for the decision can be found in its Findings of Fact #10 and Conclusions of Law #5, namely that LSCWMO was less well managed than SWWD and VBWD. BWSR vaguely cites to findings of its committee that SWWD and VBWD will "accomplish more" than LSCWMO has in the past, and that SWWD and VBWD more "proactively manage" their watershed resources. However, BWSR's rationale does not explain in any fashion why it would be appropriate to apportion land within the St. Croix River hydrological watershed to the SWWD, when SWWD has always been entirely within the Mississippi River watershed, whereas the neighboring VBWD has always been entirely within the St. Croix River watershed. BWSR's decision to allow that apportionment of land as set forth in the petitions merely to further the elimination of the LSCWMO and follow the political desire of a local government unit is entirely arbitrary, capricious, and unsupported by substantial evidence.

Denmark Township's own submissions to BWSR indicate that it strongly desired to be entirely within SWWD because it preferred the operating and financing procedures of

SWWD over VBWD, and it did not want its citizens or township staff to be subject to the watershed rules of two different districts. Few municipalities or townships in reality experience the privilege to demand such a result. Denmark's Township's political reasons for desiring to be entirely within SWWD are understood but also are in stark dereliction of the policies and scientific principles to be promoted by BWSR and the Minnesota Watershed Law.

BWSR's decision on its face is arbitrary and capricious, as BWSR has failed to evaluate and implement the policies and purposes as articulated by the legislature in § 103D.201, subd. 2. Instead, BWSR has "relied on factors not intended by the legislature," namely a desire to eliminate LSCWMO in favor of watershed districts, without regard to whether the apportionment of land as suggested by the Petitions was appropriate. Moreover, BWSR has "entirely failed to consider an important aspect of the problem," the fact that Woodbury and VBWD have objected to the proposed apportionment of LSCWMO's land to SWWD and VBWD. BWSR's failure to address the objections of the City of Woodbury and VBWD renders its decision arbitrary and capricious.

Because BWSR's decision was rendered on a basis outside the purposes and policies enumerated by the legislature, and BWSR has failed to consider an important aspect of the problem, its decision is unsupported by substantial evidence and is arbitrary and capricious, and should be reversed.

V. **BWSR's decision to enlarge the number of managers of SWWD was arbitrary, capricious, and unsupported by substantial evidence in view of the record as a whole, and should be reversed.**

Minnesota Statutes § 103D.305 lays out the requirements for an increase in the number of managers of a watershed district. The statute provides: "If the board determines at the hearing that an increase in the number of managers would benefit the public welfare, public interest, and the purpose of this chapter, the board must increase the number of managers." Minn. Stat. § 103D.305, Subd. 5(a) (2008). BWSR's Findings of Fact and Conclusions of Law regarding increasing SWWD's number of managers from five to seven are limited and vague. They can be summarized as follows:

1. Finding of Fact #3 states that the SWWD petition includes an increase in the number of managers from five to seven.
2. Finding of Fact # 6 states in part that: "The Petition for SWWD states the increase in number of managers is necessary due to the complex nature of managing water resources in the southern portion of the county and to provide representation from the sub-watershed areas, and that the county will establish a plan to shift representation throughout the entire enlarged watershed district through the appointment of new managers."
3. Finding of Fact # 10 notes that the Metro Water Planning Committee met following the public hearing and found that the increase of the number of managers of SWWD is "necessary to provide for better representation of the various hydrological units."

4. Conclusion of Law #10 states: “The increase in the number of managers as proposed in the Petition for the South Washington Watershed District should be approved because the various hydrological units will have better representation and there will be more continuity with veteran managers and newly appointed managers.”

(See Appx. A.000066-74.)

BWSR’s decision to increase the number of managers in SWWD is flawed, unsupported by substantial evidence, arbitrary, and capricious. Before the decision to increase the number of managers and enlarge SWWD, the five existing managers operated the SWWD in an efficient and effective manner. Moreover, the five existing managers served in positions appointed at large, thereby each manager represented the entire watershed district, rather than any type of sub-watershed area, precinct, or ward. Because each existing manager represents the SWWD as a whole, there was no need to add additional managers to represent the newly added “hydrological units” upon the expansion of the SWWD. Indeed no mechanism is in place that would allow board representation by these two new members to be dedicated to the newly added subwatersheds. BWSR’s decision simply does not make sense and is unsupported by substantial evidence as required for an agency’s decision.

As noted by BWSR’s own staff advisory report, “Other than the request in the petition, the hearing record is silent on the issue of the number of managers.” (Appx. A.000064.) The staff advisory report further notes: “The vast majority of watershed

districts in Minnesota have five managers. Several of those districts cover large geographic areas and deal with varied and complex water resource issues. A smaller board of five appears to work together well.” (*Id.*) The BWSR staff report advised against increasing the number of managers. (*Id.*)

Notwithstanding the staff’s recommendation, and the lack of other evidence to support increasing the number of managers, BWSR approved the request. Curiously, it did not do the same for VBWD. Its decision was arbitrary and capricious, in that the only potential supporting reason provided was that the new managers might be selected from the newly added area. However, BWSR’s order also fails to explicitly require that the two newly added managers be selected from the newly added area and indeed statutorily cannot. Given that a vast majority of watershed districts have five managers, and that the five existing managers of SWWD were operating successfully, the decision to increase the number of managers did not serve to benefit the public welfare, public interest, or the purpose of chapter 103D as required by the statute. Thus there is no valid factual basis for BWSR’s decision and it should be reversed.

### CONCLUSION

Washington County’s petitions to enlarge the SWWD and VBWD were flawed from the start due to the fact that they contained a ‘poison pill’ whereby BWSR’s decision was limited to a take-it-or-leave-it basis. The petitions were further rendered improper by the fact that SWWD was proposed to be enlarged across a major hydrological boundary, in dereliction of the scientific principles and purposes by which a watershed district is bound.

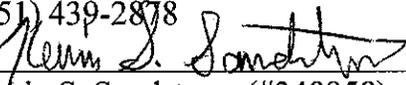
The City of Woodbury respectfully suggests that BWSR should have rejected the petitions outright, and its decision to approve the petitions as submitted should be reversed, with a directive to BWSR to reject the petitions.

Likewise, BWSR's decision to increase the number of managers of SWWD was arbitrary, capricious, and unsupported by substantial evidence. The only rationale given for the increase was to provide better representation to the newly added land, whereas the existing managers of the SWWD are appointed at large and already represent the entire watershed district, rather than a particular precinct or ward. The City of Woodbury respectfully suggests that BWSR's decision to increase the number of managers of SWWD should be reversed, with a directive to BWSR to reject the petition to increase the number of managers.

**ECKBERG, LAMMERS, BRIGGS,  
WOLFF & VIERLING, P.L.L.P.**

By: 

Mark J. Vierling (#112823)  
1809 Northwestern Avenue  
Stillwater, MN 55082  
(651) 439-2878

By: 

Kevin S. Sandstrom (#348958)  
1809 Northwestern Avenue  
Stillwater, MN 55082  
(651) 439-2878

*Attorneys for Relator City of Woodbury*

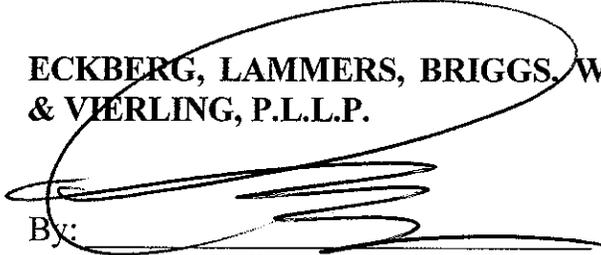
**FORMAT CERTIFICATION**

The undersigned hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the foregoing brief of Relator City of Woodbury, including footnotes, but exclusive of pages containing the Table of Contents and the Table of Authorities, is **8,312 words**. The Brief complies with the typeface requirements of the rules and was prepared, and the word count was made, using Microsoft Word.

**ECKBERG, LAMMERS, BRIGGS, WOLFF  
& VIERLING, P.L.L.P.**

Dated: \_\_\_\_\_

9/2/09

By: 

Mark J. Vierling (#112823)