
Considerations for a Multi-Agency Funding Strategy to Address Significant Litigation Costs

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Table of Contents

Executive Summary	1
Background.....	2
Litigation Costs at the DNR and MPCA.....	3
Drivers of Major Litigation Costs	3
Impact on Operations and Budget	3
Looking at Funding Options Across Agencies.....	4
Options for an Enterprise Solution	4
Agencies' Different Circumstances.....	5
Conclusion	5

Executive Summary

Major litigation has imposed significant and continuing costs on the Minnesota Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA) over the last several years. Seeing the persistent need for appropriations to cover these costs, the 2024 Senate Environment, Climate, and Legacy Committee and the House Environment and Natural Resources Finance and Policy Committee directed the DNR work with the MPCA, Minnesota Management and Budget (MMB) and other Minnesota cabinet departments to develop recommendations for a statewide funding strategy to address escalating litigation-related costs. This report is submitted in fulfillment of that request.

Through discussion with the agencies that opted to participate in the drafting of this report, it was clear that cabinet agencies are very differently situated with regards to their legal costs and experiences with litigation, and there is no “one size fits all” solution to addressing these costs. Additionally, the agencies consulted for this report expressed concern that an enterprise solution to funding legal costs would be less effective than the current model whereby legislative committees most knowledgeable about each agencies’ needs play a critical role in considering litigation-related funding requests in the broader context of the agency’s budget. Informed by these interagency discussions, this report focuses on the experiences of the DNR and MPCA, for which persistent and significant litigation impacts the delivery of statutorily required programs and presents a considerable budget risk.

The DNR developed this report in consultation with MMB and MPCA, with contributions from the Minnesota Departments of Agriculture, Education, Public Safety, and Veterans Affairs. In addition, the Office of Higher Education contributed data. The Minnesota Attorney General’s Office (AGO) was also consulted in the development of this report.

Background

Major litigation has imposed significant and continuing costs on the Minnesota Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA) over the last several years. These cases are beyond the agencies' control as the agencies do not determine whether their environmental regulatory, leasing, public land and resource management, and other related decisions and actions are legally challenged. Nonetheless, the two agencies are legally bound to defend these decisions and actions when challenged. In some instances, agency decisions made years prior are now being challenged or relitigated decades after the original court cases, resulting in prolonged disputes of immense complexity, duration, and scope. The DNR's and MPCA's current operating budgets do not include ongoing funding for these large legal expenses. Without sufficient resources for major litigation, the money and time dedicated to these cases will take away resources from core agency programs and services. Therefore, the general public, which relies on those core programs and services, has a clear interest in the agencies being adequately resourced to handle the demands of major litigation.

The Minnesota Legislature has appropriated over \$20 million from FY15-FY24 to pay for major litigation costs experienced by the DNR and MPCA. Seeing the persistent need for appropriations to cover these costs, the 2024 Senate Environment, Climate, and Legacy Committee and the House Environment and Natural Resources Finance and Policy Committee directed the DNR work with the MPCA, Minnesota Management and Budget (MMB) and other Minnesota cabinet departments to develop recommendations for a statewide funding strategy to address escalating litigation-related costs.

This report fulfills the direction of the Laws of Minnesota 2024, Chapter 116, Article 1, Section 3, Subd 2, which directs that:

The commissioner of natural resources must work with the commissioners of management and budget, the Pollution Control Agency, and other cabinet departments that incur significant litigation-related costs to develop recommendations for a statewide funding strategy to address escalating litigation-related costs across cabinet agencies. That strategy should consider the unpredictable and outsized effects that major litigation can have on an individual agency's budget. The commissioners must submit a report of the recommendation to the relevant committee chairs by December 15, 2024.

The DNR developed this report in consultation with MMB and MPCA. The DNR also reached out to all cabinet agencies to invite other interested agencies to contribute to this report. Other cabinet departments that opted to participate in discussions that led to development of this report include the Minnesota Departments of Agriculture, Education, Public Safety, and Veterans Affairs. In addition, the Office of Higher Education contributed data. The Minnesota Attorney General's Office (AGO) was also consulted in the development of this report.

Through discussion with these agencies, it was clear that cabinet agencies are very differently situated with regards to their legal costs and experiences with litigation. There are multiple factors that vary widely across agencies, including the magnitude, frequency, and nature of the legal costs they experience, the resources agencies have available to address these costs, and the legislative committees that oversee their funding. The agencies consulted for this report expressed concern that an enterprise solution to funding legal costs would be less effective than the current model. Under the current model the legislature provides direct appropriations to individual agencies, giving the legislative committees most knowledgeable about each agency's needs a critical role in considering litigation-related needs in the broader context of the agency's overall budget. Informed by these interagency discussions, this report focuses on the experiences of the DNR and MPCA.

Litigation Costs at the DNR and MPCA

Drivers of Major Litigation Costs

There are several cost drivers that contribute to litigation costs for the DNR and the MPCA. Increasingly, aggrieved parties are using the appeals process to relitigate the same issue multiple times. For example, the Minnesota Supreme Court resolved the Mile Post 7 (Northshore Mine) tailings basin siting and design issues in 1977, after a nearly a decade of litigation; and yet, in 2024, the DNR once again received a legal challenge to the Mile Post 7 site and design. State and federal laws also provide multiple legal pathways for parties to pursue grievances, resulting in the same case or issue being brought to court in a variety of different ways. For example, the DNR has been sued six times since 2017 by either Cleveland Cliffs or Essar Global over the DNR's and the Executive Council's decisions related to the Nashwauk iron ore deposits. Cumulatively, these factors contribute significantly to litigation cost growth for the agency.

Impact on Operations and Budget

Major litigation has a considerable impact on DNR and MPCA operations because of the amount of staff time that it pulls away from programmatic work. Litigation requires significant agency efforts to prepare for and defend agency decisions or practices. These efforts can include briefing the litigation attorneys assigned to the case; staff acting as expert witnesses (as applicable); producing documents and compiling administrative records; making staff available for and preparing them for depositions and trial; and reviewing written filings to assure technical and policy accuracy. Finally, after the initial legal challenge is decided, it is common for parties to seek the opinion of a higher court and these appeals can last years, with significant agency resources needed to support the appeals phase.

The extensive resources needed to respond to litigation result in less staff time available to carry out the work and mission of the two agencies. At the Minnesota Department of Natural Resources, major litigation draws away permitting experts, technical staff and management resources needed to defend its decisions in court. For example, the DNR estimates that litigation activities have consumed as much as 10-15% of mining permitting

staff time in recent years. Similarly, the MPCA estimates that litigation activities have consumed as much as 10-15% of its permitting staff's time. In addition, the MPCA estimates that litigation activities have also consumed as much as 100% of an enforcement case lead's time for extended periods and regularly consumes over 50% of an enforcement case lead's time. This diversion of staff experts increases the timelines for acting on permit applications, conducting inspections, and related work. The use of agency resources in litigation can also affect the ability to complete natural resource management activities.

In addition to operational impacts, direct costs for major litigation present a significant budget risk to the DNR and the MPCA. Without the direct appropriations that the two agencies have received since FY16, there would have been considerable funding deficits. Major litigation costs fluctuate depending on what is occurring within each case. Given the nature of litigation, the timing of costs is quite unpredictable. From FY16-FY24, the DNR spent an average of \$813,000 annually on major litigation, ranging from \$347,000 in FY16 to \$1.76 million in FY19. In the absence of the General Fund appropriations over this period, the DNR would not have been able to absorb these costs. For example, the \$1.76 million spent in FY19 was equivalent to 18% of the two relevant divisions' General Fund budgets in that year. While the DNR's budget is large, it is also highly restricted by law and statute, spanning across multiple funds, including the Legacy Funds, Environmental Trust Fund, and Federal funds. Even the DNR's General Fund appropriations are designated to meet the DNR's water and mining permitting and regulatory obligations and using these sources to cover major litigation costs would functionally halt DNR's regulatory work, exposing the DNR to further litigation and imposing significant adverse consequences on regulated parties.

Looking at Funding Options Across Agencies

Options for an Enterprise Solution

The legislative direction for this report calls on the DNR, in consultation with other agencies, to develop recommendations for a statewide funding strategy to address escalating litigation costs across cabinet agencies. Under the state's current funding model, in circumstances where an agency's legal costs exceed their capacity to absorb them, they typically bring forward funding requests for consideration by legislative committees with jurisdiction over the agency's finances. One option is to continue this model, with each agency seeking funding from its respective legislative committee according to its needs. A second option would be to create a shared legal cost pool from which covered agencies could request funded as needed. A cost pool would require careful consideration of several factors, including agency accountability, transparency to the public, agency incentive to control costs, reliability, efficiency, and ease of administration. A third conceivable option would be to increase funding to the AGO, reducing the AGO's need to direct bill agencies for services. This potential option would, of course, not address agencies' legal costs outside of AGO services, such as the costs associated with outside counsel, data management, or settlement costs. In the course of preparing this report, the DNR consulted with MMB, MPCA, other executive agencies, and the AGO. Given how differently situated individual state agencies are, no enterprise alternative to the current funding model emerged with broad support.

Agencies' Different Circumstances

In discussion with contributing agencies, it became clear that cabinet agencies are very differently situated when it comes to litigation and other legal costs. Some agencies, like DNR and MPCA, experience considerable, ongoing litigation and other legal costs while other experience considerably less. For example, over the last eight fiscal years, the Departments of Veterans Affairs, Higher Education, and Agriculture have paid an average of \$133,000 to the AGO annually for legal services, using individual agency General Fund operating dollars and other dedicated funds (if applicable). The same agencies have also incurred annual average costs of approximately \$48,000 for such expenses as outside counsel. By contrast the DNR has paid an average of \$574,000 annually for AGO services since FY16, with additional costs for outside counsel, records management, and other litigation-related costs. The DNR's total annual legal costs averaged \$1.71 million from FY16 to FY24, ranging from \$1.12 million in FY21 to \$2.36 million in FY19.

In addition to the size of litigation and other legal costs varying considerably across agencies, the nature of those costs also vary. While the DNR and MPCA are primarily concerned with major litigation costs stemming from regulatory decisions, many other agencies do not routinely experience this type of litigation. Given the diversity of agencies' needs and circumstances, an enterprise solution to addressing escalating litigation costs is not readily apparent.

Furthermore, agencies expressed concerns that any attempt to address litigation or other legal costs at a statewide level would be less effective than the existing model of handling agencies' budgetary requests within the appropriate committee of jurisdiction. The main concern here is that legislative committees are best positioned to understand the circumstances and budgetary constraints of agencies in their jurisdiction, and therefore that removing the funding of litigation costs from the legislative committee structure would both result in less nuanced decision-making and lessen agency accountability to the legislature overall. Additionally, as budgets are set within a legislative committee structure, moving away from that structure is challenging. Any enterprise funding model would require additional governance and oversight to maintain. Careful and in-depth assessment would be needed to vet any potential enterprise funding options given these considerations.

Conclusion

Through discussions with agencies while compiling this report, the DNR in consultation with the MPCA, MMB, and other agencies determined that an enterprise approach to addressing litigation and other legal costs is not readily apparent. Cabinet agencies have profoundly different experiences regarding litigation and other legal costs and there is no "one size fits all" solution. There are also important considerations regarding moving away from the existing model of budgeting for litigation costs through the existing legislative committee structure. Development of any enterprise strategy would require in-depth exploration and research that was not possible within the timeline for this report, but the legislature could elect to pursue in the future.

The legislature could also consider statutory changes to reduce repeat or duplicative legal actions, such as limiting the number of appeals that can be brought on the same case or imposing time bounds on the opportunity to challenge agency decisions under statutes that do not currently include such limitations. Such actions could help to curb litigation costs to the state.