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State of Minnesota  
HOUSE OF REPRESENTATIVES  
NINETIETH SESSION

H. F. No. 2543

03/27/2017 Authored by Torkelson  
The bill was read for the first time and referred to the Committee on Government Operations and Elections Policy

1.1 A bill for an act  
1.2 relating to state government; providing for administrative review of certain agency  
1.3 actions; providing a limitation on interpretive statements; amending Minnesota  
1.4 Statutes 2016, section 116.07, by adding a subdivision; proposing coding for new  
1.5 law in Minnesota Statutes, chapter 115.

1.6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.7 Section 1. [115.051] REVIEWING PROPOSED AGENCY ACTIONS.

1.8 Subdivision 1. Definitions. (a) The definitions in this subdivision apply to this section.

1.9 (b) "Local government unit" means a statutory or home rule charter city, a county, a  
1.10 local public utilities commission, a sanitary district, or an organization formed for the joint  
1.11 exercise of powers under section 471.59.

1.12 (c) "Proposed action" means an action that:

1.13 (1) is being considered by the commissioner of the Pollution Control Agency or has  
1.14 been undertaken by the commissioner but is not yet final; and

1.15 (2) would, once final, constitute:

1.16 (i) issuing, amending, modifying, or denying a water-quality standard under section  
1.17 115.44, a water-related permit, a total maximum daily load (TMDL) study, or a watershed  
1.18 restoration and protection strategy (WRAPS); or

1.19 (ii) another action or decision undertaken according to the commissioner's authority  
1.20 under this chapter or chapter 114D that is or would be eligible for a contested case hearing  
1.21 under chapter 14 or that would constitute rulemaking under chapter 14.

2.1 (d) "Requisite number" means five or more if the proposed action is rulemaking under  
2.2 chapter 14 or one or more if the proposed action is one that is or would be eligible for a  
2.3 contested case hearing under chapter 14.

2.4 (e) "Review petition" means a written petition of a local government unit adopted by  
2.5 resolution of the applicable governing body that describes the need for review by an expert  
2.6 review panel of the scientific basis of a proposed action that potentially affects the petitioner.

2.7 (f) "Review proceeding" means a proceeding under chapter 14 of the Office of  
2.8 Administrative Hearings to review a proposed action.

2.9 Subd. 2. **Review of scientific basis for proposed action.** In any review proceeding, the  
2.10 administrative law judge must examine the administrative record and, without deference to  
2.11 the commissioner of the Pollution Control Agency, independently determine from the record  
2.12 whether:

2.13 (1) the proposed action is based on reliable scientific data and analyses, as confirmed  
2.14 by publicly available peer-reviewed literature;

2.15 (2) every test, measurement, or model the commissioner relied on in support of the  
2.16 proposed action was used by the commissioner for the purpose for which the test,  
2.17 measurement, or model was designed, consistent with generally accepted and peer-reviewed  
2.18 scientific practice;

2.19 (3) the proposed action is consistent with the findings of any applicable external peer  
2.20 review panel the commissioner convened under section 115.035; and

2.21 (4) the proposed action is based on a demonstrated, significant causal relationship between  
2.22 the parameters of concern and the water-quality objective at issue, not the correlation alone.  
2.23 When a causal relationship may be confounded by other factors, the administrative law  
2.24 judge must determine whether the relevance and effect of those factors were assessed to  
2.25 ensure the predicted causal relationship is valid.

2.26 Subd. 3. **Effect of finding inadequate basis for proposed action.** If an administrative  
2.27 law judge determines that any of the conditions under subdivision 2, clauses (1) to (4), are  
2.28 not satisfied, then:

2.29 (1) if the proposed action was a proposed rule, the administrative law judge must find  
2.30 that the need for and reasonableness of the rule has not been established according to section  
2.31 14.14, subdivision 2; and

3.1 (2) if the proposed action was before the Office of Administrative Hearings as part of a  
3.2 contested case hearing, the administrative law judge must include this finding in the report  
3.3 required by sections 14.48 to 14.56, which constitutes the final decision in the case.

3.4 Subd. 4. **Expert review panel; when required; composition.** The Office of  
3.5 Administrative Hearings must convene an expert review panel to review the scientific basis  
3.6 of a proposed action when the office receives the requisite number of review petitions and  
3.7 finds, based on an independent review of the petitions, that the petitions demonstrate the  
3.8 existence of a material scientific dispute regarding the scientific validity of the proposed  
3.9 action. The Office of Administrative Hearings must issue an order granting or denying a  
3.10 petition within 30 days of receiving the petition. A review panel must consist of three  
3.11 independent experts with qualifications in the subject matter of the scientific dispute who  
3.12 are employed neither by the Pollution Control Agency nor by a petitioner to the proceeding  
3.13 and who are not directly or indirectly involved with the work conducted or contracted by  
3.14 the agency. The composition of the panel must be determined as follows:

3.15 (1) the commissioner of the Pollution Control Agency must select one expert satisfying  
3.16 the requirements of this subdivision;

3.17 (2) the petitioners must jointly select one expert satisfying the requirements of this  
3.18 subdivision; and

3.19 (3) the two experts selected under clauses (1) and (2) must mutually agree to a third  
3.20 expert satisfying the requirements of this subdivision. If the two experts cannot agree on a  
3.21 third expert, the Office of Administrative Hearings must make the appointment.

3.22 Subd. 5. **Conduct of expert review panel.** Upon granting a petition for independent  
3.23 expert review, the Office of Administrative Hearings must, as soon as practicable thereafter,  
3.24 issue an order establishing the independent expert review panel and identifying the  
3.25 independent experts selected according to subdivision 4. The order must include a statement  
3.26 of the specific scientific issues or questions in dispute to be submitted for review by the  
3.27 panel. The commissioner of the Pollution Control Agency and all petitioners must agree on  
3.28 the issues or questions in dispute to be submitted for review. If they cannot agree on one or  
3.29 more issues or questions, the Office of Administrative Hearings must determine the issues  
3.30 or questions to be submitted, giving substantial consideration to the questions raised in any  
3.31 petitions the office receives. The panel must review the scientific evidence relevant to those  
3.32 issues or questions as found in the petitions, the administrative record for the proposed  
3.33 action, and the results of any external peer review conducted according to section 115.035,  
3.34 in accordance with the guidance in the United States Environmental Protection Agency's

4.1 Peer Review Handbook. The panel must submit a written opinion on the scientific validity  
4.2 of the commissioner's approach that is in controversy. If the panel finds deficiencies, the  
4.3 panel must recommend how the deficiencies can be corrected. The written opinion becomes  
4.4 part of the administrative record and must be submitted to the Office of Administrative  
4.5 Hearings. The office must send a copy of the opinion to the commissioner of the Pollution  
4.6 Control Agency, all petitioners, and the chairs and ranking minority members of the house  
4.7 of representatives and senate committees having jurisdiction over environment and natural  
4.8 resources policy and finance.

4.9 Subd. 6. **Status of action pending review.** Once the Office of Administrative Hearings  
4.10 receives the requisite number of review petitions:

4.11 (1) the Office of Administrative Hearings must notify the commissioner of the Pollution  
4.12 Control Agency of this fact;

4.13 (2) the commissioner must not grant or deny a contested case petition filed by a local  
4.14 government unit on the proposed action that is the subject of the petition or otherwise  
4.15 proceed toward finalizing the proposed action until the Office of Administrative Hearings  
4.16 denies the petition for independent expert review or, if the petition is granted, the  
4.17 commissioner receives and considers the written opinion required under subdivision 5; and

4.18 (3) the Office of Administrative Hearings must not conduct the review required by  
4.19 subdivision 2 until the office receives the written opinion required under subdivision 5.

4.20 Subd. 7. **Chapter 14 requirements.** Nothing in this section shall be construed to abrogate  
4.21 or otherwise repeal any of the procedural requirements of chapter 14. Upon receiving a  
4.22 written opinion according to subdivision 5, the commissioner of the Pollution Control  
4.23 Agency and the Office of Administrative Hearings must make the opinion available to the  
4.24 public for review and continue to follow all applicable provisions of chapter 14, including  
4.25 public comment and hearing requirements.

4.26 Subd. 8. **Timing of review petition submission.** A review petition submitted to the  
4.27 Office of Administrative Hearings must be submitted within the period for filing a contested  
4.28 case petition or before expiration of the public comment period as noticed in the statement  
4.29 of intent to adopt the rule, as applicable.

4.30 Subd. 9. **Supplementing other law.** The duties and procedures in this section are  
4.31 supplementary and applicable to those set forth in section 14.091.

5.1 Sec. 2. Minnesota Statutes 2016, section 116.07, is amended by adding a subdivision to  
5.2 read:

5.3 Subd. 13. **Limitation regarding certain policies, guidelines, and other interpretive**  
5.4 **statements.** (a) The commissioner of the Pollution Control Agency must not seek to  
5.5 implement or enforce against any person a policy, guideline, or other interpretive statement  
5.6 that meets the definition of a rule under section 14.02, subdivision 4, if the policy, guideline,  
5.7 or other interpretive statement has not been adopted as a rule according to chapter 14. In  
5.8 any proceeding under chapter 14 challenging agency action prohibited by this subdivision,  
5.9 the reviewing authority must independently and without deference to the agency determine  
5.10 whether the agency violated this subdivision. The agency must overcome the presumption  
5.11 that the agency action may not be enforced as a rule.

5.12 (b) If the commissioner incorporates by reference an internal guideline, bulletin, criterion,  
5.13 manual standard, interpretive statement, or similar pronouncement into a statute, rule, or  
5.14 standard, the commissioner must follow the rulemaking process provided under chapter 14  
5.15 to amend or revise the guideline, bulletin, criterion, manual standard, interpretive statement,  
5.16 or similar pronouncement.