

SENATE
STATE OF MINNESOTA
NINETIETH SESSION

S.F. No. 695

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DATE	D-PG	OFFICIAL STATUS
02/06/2017	524	Introduction and first reading Referred to Environment and Natural Resources Policy and Legacy Finance
02/15/2017	598	Comm report: To pass and re-referred to State Government Finance and Policy and Elections
03/07/2017	1131a	Comm report: To pass as amended and re-refer to Environment and Natural Resources Finance

- 1.1 A bill for an act
- 1.2 relating to environment; changing the review process for certain water quality
- 1.3 decisions of the Pollution Control Agency; requiring an independent scientific
- 1.4 review of certain proposed rulemakings of the Pollution Control Agency and
- 1.5 contested cases before the agency; prohibiting the Pollution Control Agency from
- 1.6 enforcing unadopted rules; suspending enforcement of certain water quality rules;
- 1.7 appropriating money to cover costs of independent scientific reviews; amending
- 1.8 Minnesota Statutes 2016, sections 115.05, by adding subdivisions; 116.07, by
- 1.9 adding a subdivision.
- 1.10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:
- 1.11 Section 1. Minnesota Statutes 2016, section 115.05, is amended by adding a subdivision
- 1.12 to read:
- 1.13 Subd. 12. **Review of actions concerning water quality.** (a) This subdivision applies to
- 1.14 final decisions of the commissioner of the Pollution Control Agency that pertain to:
- 1.15 (1) issuing, amending, or denying a total maximum daily load (TMDL) allocation,
- 1.16 watershed restoration and protection strategy (WRAPS), permit, license, or certification;
- 1.17 (2) issuing, amending, or modifying a water-quality standard according to section 115.44;
- 1.18 (3) identifying or listing impaired waters according to section 114D.25;
- 1.19 (4) granting or denying a variance or a site-specific water-quality standard;
- 1.20 (5) issuing an administrative order, except for an administrative penalty order issued
- 1.21 according to section 116.072;
- 1.22 (6) denying a contested case hearing on any of the matters listed in clauses (1) to (5);
- 1.23 or

2.1 (7) denying a request for reconsideration in any action identified in clauses (1) to (6).

2.2 (b) In any proceeding to review a final decision of the commissioner under chapter 14,
2.3 the administrative law judge must examine the administrative record and, without deference
2.4 to the commissioner, must independently determine from the record whether:

2.5 (1) the commissioner's action is based on reliable, scientific data and analyses, as
2.6 confirmed by available peer-reviewed literature that the commissioner made publicly
2.7 available for review before any applicable public comment period;

2.8 (2) the commissioner explained the action and substantively answered relevant and
2.9 significant public comments in writing before taking the action;

2.10 (3) any test, measurement, or model the commissioner relied on in support of the action
2.11 was used by the commissioner for the purpose for which the test, measurement, or model
2.12 was designed, consistent with generally accepted and peer-reviewed scientific practice;

2.13 (4) the action is consistent with the findings of any external peer review panel the
2.14 commissioner convened according to section 115.035; and

2.15 (5) the action is based on a demonstrated, significant causal relationship between the
2.16 parameters of concern and the water-quality objective at issue, not correlation alone. When
2.17 a causal relationship may be confounded by other factors, the reviewing authority must
2.18 determine whether the relevance and effect of those factors were assessed to ensure the
2.19 predicted causal relationship is valid.

2.20 (c) Upon determining that a challenged action does not meet one or more of the
2.21 requirements of this subdivision, the administrative law judge must invalidate the action
2.22 and, if appropriate, remand the matter to the commissioner for further proceedings consistent
2.23 with this section.

2.24 Sec. 2. Minnesota Statutes 2016, section 115.05, is amended by adding a subdivision to
2.25 read:

2.26 **Subd. 13. Independent review of proposed rulemakings concerning water quality.**

2.27 (a) The Office of Administrative Hearings must convene an expert review panel to review
2.28 the scientific basis of a proposed rule of the Pollution Control Agency if it receives petitions
2.29 from five or more local government units within 30 days after the issuance of a notice of
2.30 intention to adopt a proposed rule related to one or more of the following:

2.31 (1) water quality standards under section 115.44;

3.1 (2) impairment designations, total maximum daily load (TMDL) allocations, watershed
3.2 restoration and protection strategies (WRAPS), or water-related permits, licenses, or
3.3 certifications;

3.4 (3) identification or listing of impaired waters under section 114D.25; or

3.5 (4) the granting or denial of site-specific water quality standards or variances to water
3.6 quality standards.

3.7 (b) A petition submitted pursuant to paragraph (a) must be submitted in writing to the
3.8 Office of Administrative Hearings and must describe the need for the independent review.
3.9 The petition may include supporting expert opinion.

3.10 (c) Upon receipt of a petition complying with paragraph (b), the Office of Administrative
3.11 Hearings must convene an expert review panel regardless of whether an external peer review
3.12 was conducted under section 115.035. The office must establish by order an expert review
3.13 panel of three independent experts with qualifications in the subject matter of the scientific
3.14 dispute who are employed neither by the Pollution Control Agency nor by any of the
3.15 petitioners to the proceeding and who are not directly or indirectly involved with the work
3.16 conducted or contracted by the agency. The composition of the panel must be determined
3.17 as follows:

3.18 (1) the commissioner of the Pollution Control Agency must select one expert satisfying
3.19 the requirements of this paragraph;

3.20 (2) the petitioners must jointly select one expert satisfying the requirements of this
3.21 paragraph;

3.22 (3) the two experts selected under clauses (1) and (2) must mutually agree to a third
3.23 expert satisfying the requirements of this paragraph; and

3.24 (4) if the two experts selected under clauses (1) and (2) are unable to mutually agree on
3.25 a third expert, the Office of Administrative Hearings must make the appointment.

3.26 (d) In its order establishing the expert review panel, the Office of Administrative Hearings
3.27 must include a statement of the specific scientific issues or questions in dispute to be
3.28 submitted for review. The commissioner and petitioners must mutually agree to the issues
3.29 or questions, except that if the parties cannot agree on one or more issues or questions, the
3.30 Office of Administrative Hearings must determine the issue or question to be submitted. If
3.31 the Office of Administrative Hearings determines the issue or question to be submitted, the
3.32 office must hold a public hearing on the issue or question.

4.1 (e) The expert review panel established by the Office of Administrative Hearings must
4.2 review the scientific evidence relevant to the issues or questions listed in the order of the
4.3 Administrative Office of the Court, including the results of any external peer review
4.4 conducted according to section 115.035, in general accordance with the guidance in the
4.5 United States Environmental Protection Agency's Peer Review Handbook. The panel must
4.6 submit a written opinion on the scientific validity of the commissioner's approach at issue.
4.7 If the panel finds deficiencies, the panel must recommend how the deficiencies can be
4.8 corrected. The written opinion must be submitted to the Office of Administrative Hearings,
4.9 which shall send a written copy of the opinion to the commissioner of the Pollution Control
4.10 Agency, the petitioners, and the chairs of the house of representatives and senate committees
4.11 having jurisdiction over environment and natural resources policy and finance.

4.12 (f) Once the Office of Administrative Hearings has received petitions from five or more
4.13 local government units pursuant to paragraph (a), it must notify the Pollution Control Agency
4.14 of this fact and the Pollution Control Agency shall not proceed to adopt the proposed rule
4.15 until the agency holds a hearing pursuant to section 14.14 at least 30 days after the agency
4.16 receives the written opinion required to be sent to it under paragraph (e). All of the
4.17 requirements that govern an initial hearing under section 14.14 shall apply to a hearing
4.18 under this paragraph.

4.19 (g) The Office of Administrative Hearings must convene an expert review panel that
4.20 complies with this subdivision if a petitioner in a contested case asserts in a petition to the
4.21 Office of Administrative Hearings that there is a dispute in the contested case as to any of
4.22 the items set forth in paragraph (a), clauses (1) to (4), and the office finds that such a dispute
4.23 exists. The contested case shall not proceed until the written opinion of the expert panel is
4.24 issued and considered by the Pollution Control Agency.

4.25 Sec. 3. Minnesota Statutes 2016, section 115.05, is amended by adding a subdivision to
4.26 read:

4.27 Subd. 14. **Definition of local government unit.** For purposes of subdivision 13, "local
4.28 government unit" includes a statutory or home rule charter city, town, county, local public
4.29 utilities commission, sanitary district, soil and water conservation district, watershed district,
4.30 watershed management organization, an organization formed for the joint exercise of powers
4.31 under section 471.59, or other special purpose district or authority exercising authority in
4.32 water and related land resources management at the local level.

5.1 Sec. 4. Minnesota Statutes 2016, section 116.07, is amended by adding a subdivision to
5.2 read:

5.3 Subd. 13. **Unadopted rules.** (a) The commissioner of the Pollution Control Agency
5.4 must not enforce or attempt to enforce an unadopted rule. For the purposes of this subdivision,
5.5 "unadopted rule" means a guideline, bulletin, criterion, manual standard, interpretive
5.6 statement, or similar pronouncement, if the guideline, bulletin, criterion, manual standard,
5.7 interpretive statement, or similar pronouncement meets the definition of a rule as defined
5.8 under section 14.02, subdivision 4, but has not been adopted according to the rulemaking
5.9 process provided under chapter 14. If an unadopted rule is challenged under section 14.381,
5.10 the commissioner must demonstrate the following to overcome a presumption against the
5.11 unadopted rule:

5.12 (1) the challenged unadopted rule is an agency interpretation of a statute or agency rule
5.13 properly adopted under chapter 14 that is consistent with the plain meaning of the statute
5.14 or rule the agency seeks to interpret; or

5.15 (2) the challenged unadopted rule is a long-standing interpretation of an ambiguous
5.16 statute or agency rule properly adopted under chapter 14.

5.17 (b) If the commissioner incorporates by reference an internal guideline, bulletin, criterion,
5.18 manual standard, interpretive statement, or similar pronouncement into a statute, rule, or
5.19 standard, the commissioner must follow the rulemaking process provided under chapter 14
5.20 to amend or revise any such guideline, bulletin, criterion, manual standard, interpretive
5.21 statement, or similar pronouncement.

5.22 **Sec. 5. SUSPENSION OF CERTAIN WATER QUALITY RULES.**

5.23 Until July 1, 2019, the water quality standards or other water quality rule changes adopted
5.24 on or after July 2, 2014, that require a local unit of government to upgrade or update its
5.25 wastewater treatment facility or to construct a new wastewater treatment facility, are
5.26 suspended. Water quality standards and other water quality rules in effect on July 1, 2014,
5.27 are in effect until July 1, 2019. Any actions brought by the commissioner of the Pollution
5.28 Control Agency before, or contested cases under Minnesota Statutes, chapter 14, that are
5.29 pending on the effective date of this section, to enforce water quality standards or other
5.30 water quality rules adopted on or after July 2, 2014, are suspended until July 1, 2019.

5.31 **EFFECTIVE DATE.** This section is effective the day following final enactment and
5.32 expires July 1, 2019.

6.1 Sec. 6. **APPROPRIATION.**

6.2 \$100,000 in fiscal year 2018 is appropriated from the general fund to the Office of
6.3 Administrative Hearings to convene expert review panels according to Minnesota Statutes,
6.4 section 115.05, subdivision 13. The appropriation is available until expended.