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State of Minnesota

HOUSE OF REPRESENTATIVES

NINETIETH SESSION

H. F. No. 702

02/01/2017 Authored by O'Driscoll, Urdahl, Pelowski, Poston, Marquart and others
The bill was read for the first time and referred to the Committee on Environment and Natural Resources Policy and Finance

1.1 A bill for an act
1.2 relating to environment; providing for review of agency actions; prohibiting use
1.3 of unadopted rules; amending Minnesota Statutes 2016, sections 115.05; 116.07,
1.4 by adding a subdivision.

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

1.6 Section 1. Minnesota Statutes 2016, section 115.05, is amended to read:

1.7 115.05 JUDICIAL REVIEW REVIEWING AGENCY ACTIONS.

1.8 Subd. 11. Judicial review. Any person aggrieved by any final decision of the agency
1.9 or of the commissioner of the Pollution Control Agency may obtain judicial review thereof
1.10 pursuant to sections 14.63 to 14.69 if the final decision is made pursuant to the agency's or
1.11 the commissioner's authority under section 115A.914, this chapter, chapter 114D or 116,
1.12 or the rules adopted thereunder, and if the decision is a final decision pertaining to:

1.13 (1) issuance, amendment, or denial of issuing, amending, or denying a total maximum
1.14 daily load (TMDL) allocation, watershed restoration and protection strategy (WRAPS),
1.15 permit, license, or certification;

1.16 (2) issuing, amending, or modifying a water-quality standard according to section 115.44;

1.17 (3) identifying or listing impaired waters according to section 114D.25;

1.18 (2) (4) granting or denial of denying a variance or a site-specific water-quality standard;

1.19 (3) issuance of (5) issuing an administrative order, except for an administrative penalty
1.20 order issued pursuant according to section 116.072; or

1.21 (4) denial of (6) denying a contested case hearing on any of the matters listed in clauses

1.22 (1) to (3) (5); or

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

2.2 Subd. 12. **Review of actions concerning water quality.** (a) This subdivision applies to
2.3 final decisions of the commissioner of the Pollution Control Agency that are related to water
2.4 quality.

2.5 (b) In any proceeding to review a final decision of the commissioner under subdivision
2.6 11 or in any proceeding under chapter 14, the reviewing authority must examine the
2.7 administrative record and, without deference to the commissioner, must independently
2.8 determine from the record whether:

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

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

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

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

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

2.24 (c) Upon determining that a challenged action does not meet one or more of the
2.25 requirements of this subdivision, the reviewing authority must invalidate the action and, if
2.26 appropriate, remand the matter to the commissioner for further proceedings consistent with
2.27 this section.

2.28 Subd. 13. **Expert review.** (a) In a review required under subdivision 12, whenever the
2.29 reviewing authority finds that there is expert opinion, expressed through testimony or written
2.30 submission, that specifically contradicts the scientific validity of the commissioner's approach,
2.31 including cases in which an external peer review was conducted according to section 115.035,
2.32 the scientific evidence and the adequacy of the commissioner's response to the evidence

3.1 must be reviewed with the assistance of qualified independent experts according to this
3.2 subdivision.

3.3 (b) The reviewing authority must establish by order an expert review panel of three
3.4 independent experts with qualifications in the subject matter of the scientific dispute who
3.5 are employed neither by the agency nor by any adverse parties to the proceeding and who
3.6 are not directly or indirectly involved with the work conducted or contracted by the agency.
3.7 The composition of the panel is determined as follows:

3.8 (1) the commissioner must select one expert satisfying the requirements of this paragraph;

3.9 (2) the adverse party or parties to the proceeding must select one expert satisfying the
3.10 requirements of this paragraph;

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

3.13 (4) if the two experts selected under clauses (1) and (2) are unable to mutually agree on
3.14 a third expert, the reviewing authority must make the appointment.

3.15 (c) In the order establishing the expert review panel, the reviewing authority must include
3.16 a statement of the specific scientific issues or questions in dispute to be submitted for review.
3.17 The parties must mutually agree to the issues or questions, except that if the parties cannot
3.18 agree on one or more issues or questions, the reviewing authority must determine the issue
3.19 or question to be submitted.

3.20 (d) The expert review panel established by the reviewing authority must review the
3.21 scientific evidence relevant to the issues or questions listed in the reviewing authority's
3.22 order, including the results of any external peer review conducted according to section
3.23 115.035, in general accordance with the guidance in the United States Environmental
3.24 Protection Agency's Peer Review Handbook and must make written findings supported by
3.25 at least two of the panel members. For each issue or question submitted, the panel must
3.26 make a finding that:

3.27 (1) the commissioner's approach with respect to the issue or question submitted is
3.28 scientifically defensible;

3.29 (2) the commissioner's approach with respect to the issue or question submitted is not
3.30 scientifically defensible; or

3.31 (3) the commissioner's approach with respect to the issue or question submitted is
3.32 scientifically defensible with conditions developed by the expert review panel.

4.1 (e) For each scientific issue or question submitted to the expert review panel, the
4.2 reviewing authority must consider the panel's written findings together with the record
4.3 evidence and arguments of the parties and finally determine the scientific issues or questions
4.4 submitted by applying a preponderance of the evidence standard.

4.5 (f) The reviewing authority must assess the cost of the expert review panel against the
4.6 parties to the proceeding on an equitable basis, except that no costs may be assessed against
4.7 a party that is a local government.

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

4.10 Subd. 13. **Unadopted rules.** (a) The commissioner of the Pollution Control Agency
4.11 must not enforce or attempt to enforce an unadopted rule. For the purposes of this subdivision,
4.12 "unadopted rule" means a guideline, bulletin, criterion, manual standard, interpretive
4.13 statement, or similar pronouncement, if the guideline, bulletin, criterion, manual standard,
4.14 interpretive statement, or similar pronouncement meets the definition of a rule as defined
4.15 under section 14.02, subdivision 4, but has not been adopted according to the rulemaking
4.16 process provided under chapter 14. If an unadopted rule is challenged under section 14.381,
4.17 the commissioner must demonstrate the following to overcome a presumption against the
4.18 unadopted rule:

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

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

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