

REJECT HF 702 & SF 695: JUDICIAL RULEMAKING IS BAD POLICY

PROBLEM

The federal Clean Water Act requires Minnesota to develop water quality standards to protect Minnesota's waters from pollution. Standards are technical and require input from the state's most expert water quality scientists. Under existing law this is done by scientists employed by the MPCA, along with outside experts they consult, following Minnesota's rulemaking procedures.

The proposed legislation gives powerful interests that oppose water quality standards the ability to force Administrative Law Judges and the Court of Appeals to conduct an independent "do over" of rulemaking based on their own determinations about which scientific issues and data matter. These bills

- ask judges with no subject matter expertise to do the complex work of expert career agency scientists,
- duplicate the rulemaking process and increase the cost, delay, and uncertainty, of developing water quality standards, and
- significantly undermine public input into rulemaking and agency transparency to the public.

SOLUTION

Reject rulemaking by judges. Support water quality standards based on expert science and public input.
Oppose HF 702 and SF 695.

BACKGROUND

The Clean Water Act requires states to develop water quality standards to protect rivers, lakes, and streams. The standards must reflect what the science shows is necessary to protect uses like swimming and fishing. Before a standard goes into effect, EPA must review and approve the underlying science. Any changes to the standard must be reviewed and approved by EPA.

Rulemaking for water quality standards must comply with the requirements of the Administrative Procedure Act (APA) which include:

- consider economic costs, including whether less expensive alternatives are available;
- demonstrate the standard is needed and reasonable;
- collect and evaluate the supporting data, including evaluation by outside scientists;
- consider input and opposing viewpoints from the public including cities, industry, other regulated parties, and outside scientists;
- consider recommendations of an Administrative Law Judge who reviews the proposed standard.

Agency decisions to issue permits, variances, administrative orders, limits, impaired water designations, and restoration and protection strategies are all currently reviewable in court. To ensure that MPCA's actions are consistent with the will and intent of the legislature, the APA also requires that reviewing ALJs and courts invalidate any agency decisions that:

- violate the constitution;
- exceed the authority of the agency;
- are made in violation of procedures and standards set by the legislature;
- aren't supported by substantial evidence; or
- are arbitrary or capricious.

THE PROPOSED BILLS WOULD:

- **Increase the costs and delay of rulemaking** by agencies to produce data and records beyond what's required by the legislature;
- **Require an expensive and unnecessary "do-over" of rulemaking** whenever a regulated entity challenges one of MPCA's decisions;
- **Allow judges to engage in "rulemaking from the bench"** by giving them authority to independently decide what scientific issues and data are needed to uphold or invalidate a rule;
- **Require judges with no subject matter expertise** to engage in highly technical scientific analysis;
- **Reduce public input and agency transparency** in rule- and decision-making; and
- **Reduce MPCA's accountability** to the legislature and the public.

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