State of Wisconsin

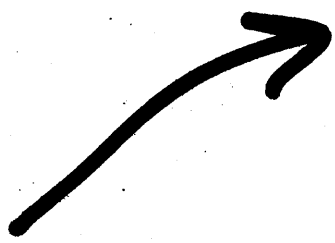
LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Added To File: 11/05/2003 (Per: GMM)

☞ The 2003 drafting file for the following compile drafts



LRB 03–3380

LRB 03–3426

LRB 03–3455

LRB 03–3599

have been transferred to the drafting file for

2003 LRB 03–3629

LRB-3380

2003 DRAFTING REQUEST

Bill

Received: **09/25/2003**

Received By: **gmalaise**

Wanted: **Soon**

Identical to LRB:

For: **Cathy Stepp (608) 266-1832**

By/Representing: **Scott Manley**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact:

Addl. Drafters: **btradewe**
mglass
mkunkel
mshovers
rmarchan
rnelson2

Subject: **Administrative Law**
Public Util. - electric
Nat. Res. - nav. waters
Munis - zoning
Fin. Inst. - banking inst.
Environment - mining
Environment - air quality
Employ Priv - job training

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Stepp@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Omnibus regulatory reform

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	gmalaise 09/26/2003 mkunkel 09/30/2003 mshovers 10/03/2003 btradewe 10/09/2003 gmalaise 10/13/2003	kfollett 10/09/2003 kfollett 10/15/2003					S&L
/P1	rmarchan 10/22/2003	kfollett 10/22/2003	jfrantze 10/16/2003		mbarman 10/17/2003		S&L
/P2			pgreensl 10/23/2003		mbarman 10/23/2003		S&L Tax
/P3	gmalaise 10/23/2003 rmarchan 10/30/2003	kfollett 10/23/2003 kgilfoy 10/31/2003	pgreensl 10/24/2003		sbasford 10/24/2003		S&L Tax
/P4			rschluet 10/31/2003		lnorthro 10/31/2003		S&L Tax
/P5	mkunkel 11/03/2003	kgilfoy 11/03/2003	chaugen 11/04/2003		mbarman 11/04/2003		

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CH 11-4

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CH SF 11-4

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/P4 – 10/31
KMG

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10313

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Addl. Drafters: **btradewe**, **mglass**, **mkunkel** ✓, **mshovers** ✓, **rmarchan** ✓, **rnelson2**

Check name when done & pass on

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Munis - zoning
Fin. Inst. - banking inst.
Environment - mining
Environment - air quality
Employ Priv - job training

Extra Copies:

bryon.wilcoxson@legis.state.wi.us
(Speaker Gard's office)

Submit via email: **YES**

Requester's email: **Sen.Stepp@legis.state.wi.us**

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No specific pre topic given

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/?	gmalaise	1 PI KJ 10/15	10/16	10/16			

FE Sent For:

<END>

Malaise, Gordon

From: Malaise, Gordon
Sent: Thursday, September 25, 2003 5:21 PM
To: Nelson, Robert P.; Gibson-Glass, Mary; Kunkel, Mark; Shovers, Marc; Marchant, Robert
Cc: Tradewell, Becky
Subject: FW: Omnibus Regulatory Reform Draft

Attorneys:

This is just a heads up to let you know about the attached drafting request, which I have entered is LRB-3380, that will involve all of you to a greater or lesser extent.

As you will see, the request will involve substantial changes to chs. 227 (RPN) and 285 (RCT) and relatively smaller changes to chs. 66 (MES), 106 (GMM), 196 (MDK), 221 (RJM), 241 (RJM), and 295 (RCT). The request will also involve substantial changes to ch. 30 (MGG), but it appears that Mary has already begun drafting those changes.

I have been requested to coordinate this effort. To that end, I will advise Scott Manley of Senator Step's office as to who will be working on what, draft my small bit, and pass the draft on to the next person. The last person can then turn the draft into editing.

Because the Speaker will be requesting a companion bill, it appears that the draft is a high priority. Therefore, we need to get our pieces drafted as soon as possible. Indeed, we should probably begin work on our pieces as inserts rather than wait for the draft to come around.

If you have any questions, please do not hesitate to contact me directly.

Gordon

-----Original Message-----
From: Tradewell, Becky
Sent: Thursday, September 25, 2003 2:28 PM
To: Malaise, Gordon
Subject: FW: Omnibus Regulatory Reform Draft

-----Original Message-----
From: Miller, Steve
Sent: Thursday, September 25, 2003 12:14 PM
To: Tradewell, Becky
Subject: FW: Omnibus Regulatory Reform Draft

-----Original Message-----
From: Manley, Scott
Sent: Thursday, September 25, 2003 11:42 AM
To: Miller, Steve
Subject: Omnibus Regulatory Reform Draft

Steve,

Thank you for your willingness to help draft the attached proposal as expeditiously as possible. Per your request, I have included the document describing the omnibus draft. Please let me know when you have had the chance to review and assign someone to coordinate this undertaking as we would like to authorize a couple people to work with your staff to answer questions as they arise. Also, it is our understanding that Rep. Gard will be making an identical drafting request for a companion bill in the Assembly. Finally, I would note that the portion of the draft below relating to Chapter 30 permit reform has already been drafted by Mary Gibson-Glass.

Thank you again Steve, and please let me know if we can provide you with additional information.

Scott Manley
Chief of Staff
Senator Cathy Stepp
State Capitol, Room 7 South
(608) 266-1832

RegReformConsens
us Stepp Edit....

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State Capitol, Room 7 South
(608) 266-1832

RegReformConsens
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From: Malaise, Gordon
Sent: Thursday, September 25, 2003 5:37 PM
To: Manley, Scott
Cc: Nelson, Robert P.; Gibson-Glass, Mary; Kunkel, Mark; Shovers, Marc; Marchant, Robert; Tradewell, Becky
Subject: FW: Omnibus Regulatory Reform Draft

Scott:

I have been requested to coordinate the drafting of the Omnibus Regulatory Reform Draft, which has been assigned LRB#-3380.

Although I will be doing the coordinating, the actual piece that I will be drafting will be rather small. Accordingly, it would probably be more efficient for you to direct any questons or follow-up instructions that you might have directly to the attorney who will be drafting the respective piece as follows:

- Chapter 227 Rule-Making Process Robert Nelson 7-7511
- Chapters 285 and 295 Air Pollution and Nonmetallic Mining
  Becky Tradewell 6-7290
- Chapter 30 Navigable Waters Mary Gibson-Glass 7-3215
- Chapter 196 Public Utilities Mark Kunkel 6-0131
- Chapter 66 Smart Growth Marc Shovers 6-0129
- Chapter 106 Apprenticeships Gordon Malaise 6-9738
- Chapters 221 and 241 State Banks and Fraudulent Conveyances
  Robert Marchant 1-4454

I hope this information is helpful to you. If you have any questions, please do not hesitate to contact me at 6-9738.

Gordon M. Malaise
Senior Legislative Attorney
Legislative Reference Bureau

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State Capitol, Room 7 South
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RegReformConsens
us Stepp Edit....

Chapter 227

Rulemaking Authority & Process

1. **Issue: Assessing Impacts of Agency Proposals on Businesses and Economic Development.**

   Creating the right for affected parties to petition agencies to prepare an Economic Impact Report on their regulatory proposals.

   Background: In general, Wisconsin agencies have no requirement to evaluate costs, either business-specific costs, or to the economy as a whole. Nor is there a requirement that agencies quantify the problem/risks they are attempting to address by their proposals and to what extent those problems/risks are mitigated or what other benefits are achieved from the proposal. Thus, costly rules are often advanced without any articulation of the problem/risks being addressed, and without any evaluation whether the rules produces meaningful benefits that justify its costs.

   While existing Chapter 227 provisions require a "small business analysis," these provisions are woefully inadequate in practice. An exception to the general practice under Chapter 227 was the "Business Impact Analysis" undertaken as part of the NR 445 (air toxics) rule-making process. DNR participated in a WMC-funded effort to evaluate the costs of the rule on businesses regardless of size. This effort first broke the rule down into a compliance flow chart, identifying in detail the steps and decision points needed to comply with the rule. In addition to identifying total costs, costs were pegged for each administrative step in the compliance process, which led to important streamlining changes that resulted in over $150 million cost savings, as well as significantly improving compliance prospects. Despite the streamlining measures, however, the revised rule would still cost business close to $100 million in administrative/paperwork costs the first year without any showing there was an actual problem being addressed.

   A related issue, and a major concern of industry over having both a state and federal program attempting to address the same problem, is the likelihood of inconsistencies and redundancies between the two programs, even if the ultimate standard is similar. Even if agencies reconcile standards or regulatory "end-points," inconsistency or redundant administrative requirements such as monitoring, reporting, and compliance demonstrations often create substantial and unnecessary costs.

   An additional concern by businesses is the use of guidance by an agency that does not undergo Chapter 227 notice and hearing procedures, but nevertheless, impose substantial regulatory burdens on the business community. In addition, agencies have the unfettered ability to take positions on federal programs that often advocate the imposition of onerous federal mandates, leading to mandatory state regulatory requirements.

   Purpose: The purpose of an economic impact report is to provide information on the problems/risks that are the subject of the agency proposal, its anticipated costs, and whether material benefits will result from the regulatory effort. With that information,

agencies and business representatives, as well as elected officials, can evaluate whether certain requirements make sense or if they could be streamlined or eliminated without compromising outcomes, or whether a rule is justified at all.

Given the effort required for a meaningful economic impact report, which should be akin to that report noted above prepared for the air toxics proposal, only those parties potentially economically affected could request its development. This petition process is similar to the existing right of parties to petition for rules. Beyond providing for agency accountability, it's a fairness issue; if an environmental group or a handful of individuals can request and get rules imposing significant regulatory burdens on businesses, those business affected should have a right to petition agencies for a thorough accounting of its costs and expected benefits. Under this proposed petition process it is anticipated that only a few rules, if any, would undergo such an analysis in any given year.

In addition, affected parities need an opportunity, through an economic impact report, to require an agencies assess the costs and expected benefits associated with unpromulgated guidance and policies, including agency comments and positions relating to federal regulatory programs.

Proposal: Create a new subsection in Chapter 227 (s. 227.117) – Review of Rules affecting Business and Economic Development. Key provisions would include the following:

227.117 Review of rules and policies affecting business and economic development.

(1) Economic Impact Reports. At any time after the publication of a statement of scope of a proposed rule under s. 227.135, a municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in the proposed rule may petition an agency requesting it prepare an economic impact report of the proposed rule. Upon a finding that individual petitioners or members of association petitioners may reasonably be economically affected by the proposed rule, the agency shall prepare an economic impact report. The report shall contain information on the effect of the proposed rule on individual businesses, business sectors, and the state's economy, including all of the following:

(a) An analysis and quantification of the problem, including any risks to human health or the environment, the proposed rule is intending to address;

(b) In cooperation with the Department of Commerce, affected businesses, organizations, and petitioners, an analysis and quantification of the economic impacts of the proposed rule, including direct, indirect, and consequential costs reasonably expected to be incurred by local and state government, businesses, and petitioners, and the overall impact on the

state's economy, including whether the proposed rule furthers or hinders the state's economic development policies;

(c) An analysis of the benefits expected to arise from the proposed rule, including how the proposed rule reduces the risks or otherwise addresses the problems intending to be addressed, and a related finding that such benefits exceed the overall cost of the rule;

(d) An analysis of existing or anticipated federal programs that are intended to address the identified problem and risks the agency is intending to address under the state rule and a finding the proposed rule, including administrative requirements, is consistent with and not duplicative of the relevant federal programs; and,

(e) An analysis of regulatory alternatives, including the alternative of not regulating, and a finding that the preferred regulatory alternative reduces the identified problem and risks in the most cost-efficient manner.

(2) Guidance and Policies. A municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in the proposed rule may petition an agency to prepare an economic impact report consistent with sub. (1) for any existing or proposed agency guidance or policies, including agency comments and positions relating to federal regulatory programs. Upon a finding that individual petitioners or members of association petitioners may reasonably be economically affected by the existing or proposed agency guidance or policies, the agency shall prepare an economic impact report.

(3) Report Submittal. The economic impact report shall be submitted to legislative council staff for review under s. 227.15(1), the department of administration for review under s. 227.118, and concurrently, to any petitioners requesting the report.

(4) Information Requests. The agency may request any information from other state agencies, local governments, individuals or organizations that is reasonably necessary for the agency to prepare the report. This provision creates no obligation that such agencies, local governments, individuals or organizations respond to such requests.

(5) Applicability. This section does not apply to emergency rules promulgated under s. 227.24.

(6) Rule-making Authority. The agency may promulgate any rules necessary for the administration of this section.

2. **Issue: Governor Approval of Agency Proposals**

Assuring agency accountability by providing for Governor approval of all agency rulemaking prior to submittal to the Legislature for review.

Background: Exiting law (Chapter 227) provides for review by the Legislature of agency rulemaking to assure checks and balances between the executive and legislative branches of government. Objections are allowed if the agency lacks statutory authority and it the proposed rule does not comply with legislative intent or conflicts with state law, among other reasons. However, there are no statutory procedures for gubernatorial review and approval of agency proposals to assure agencies are acting consistent with the Governor's positions and priorities.

While it is certainly the Governor's prerogative to review and direct the outcome of agency actions, the voluminous number of agency actions allows significant rule-making to proceed without any gubernatorial scrutiny. Agencies are simply not inclined to "flag" initiatives that may not be aligned with a Governor's positions or priorities. For example, Governor Doyle recently reversed Department of Revenue's efforts to strong-arm a few Green Bay Packer fans for back taxes who live near the stadium and park cars on their lawns. In his Sept. 15 press release the Governor noted he responded as soon as he learned of this effort by what he called "overzealous bureaucrats acting on their own." Undoubtedly, he learned of this effort not from the agency, but by disgruntled constituents. Anyone working in the regulatory arena could cite numerous occasions on which agency rules or policies were advanced by "an overzealous bureaucrat acting on their own," often inconsistent with gubernatorial positions and priorities.

Purpose: To assure agency actions are formally reviewed and approved by the Governor, there must be administrative procedure and review provisions in Chapter 227 that specifically require such review and approval. To effectuate this objective, provisions in Chapter 227 relating to an agency's obligations to submit rulemaking notices and reports directly to the Legislature for review should correspondingly be modified to have the proposals be submitted by the Governor. This assures the Legislature that such agency proposals are Executive Branch proposals from an elected official, the Governor, rather than unelected and civil service protected bureaucrats.

Proposal: Create s. 227.14(4a), relating to Governor Approval of Proposed Rule, as noted below, and make related changes to effectuate this provision.

227.14 (4a) Governor Approvals of Proposed Rules. The Governor shall approve all proposed rules prior to submittal of the notice to the Legislature required in s. 227.19(2).

Amend s. 227.19(2) (Notification of Legislature), and related Chapter 227 provisions, to substitute the term "the Governor" for the term "agency." See issue 4 relating to legislative review for specific language changes to s. 227.19(3) (Form of Report).

3. **Issue: Create Independent Regulatory Review within the Department of Administration.**

Providing an independent review of agency proposals and policies, including sufficiency of Economic Impact Reports, sufficiency of statutory authorities, compliance with limitations on such authority, and consistency with related state and federal programs.

Background. Existing law, s. 227.02, Wis. Stats., states compliance with administrative rules procedures "does not eliminate the necessity of complying with a procedure required by another statute." While this directive should be obvious, it is not always clear what are the "other" statutory procedures an agency must follow. A closely related issue is determining the relevant statutory authorities and limitations.

There is often little recourse if an agency takes a strained reading of its authorities. For example, the Legislature has adopted numerous policies that would appear to make clear that an agency can not adopt rules that exceed federal requirements, yet agencies continue to advance initiatives the exceed federal requirements. In other areas, the Legislature set forth a general policy that exceeding federal requirements are allowed, but only upon a finding of need by the agency. There can be similar legislative directives to promulgate state rules that track (e.g., be "similar" to, or "consistent" with) federal programs. In practice, these requirements for a finding of need or consistency can and are disregarded by agencies intent on pushing their agenda.

As noted above, a related issue is more stringent state requirements, as well as inconsistencies and duplications between state programs and federal programs attempting to address the same problem. Additional concern relate to the use of guidance by an agency that does not undergo Chapter 227 notice and hearing procedures, and the ability of agencies to expand state programs in a manner inconsistent with legislative or gubernatorial policies and priorities through positions and comments on federal regulatory proposals.

Regardless of the limitations or other statutory directives, agencies, the proponents of the regulatory proposal, are usually the final arbitrators on whether such criteria are met. While the regulatory community could take its case to court, an objective, administrative review of authority and federal consistency issues would be a more cost-effective route, while assuring meaningful agency accountability. The federal Office of Management and Budget is a potential model. Some states have specific agencies for such reviews.

Purpose: To provide for administrative review of agencies statutory authorities, economic impact reports, when applicable, and assurance proposed rules, guidance or policies are consistent with federal programs and gubernatorial positions and priorities, require the Department of Administration (DOA) conduct a review and prepare a corresponding report on certain proposed rules. The duties and responsibilities of DOA would generally be consistent with the federal Office of Management and Budget (OMB), as set forth in E.O. 12866 (58 Fed. Reg. 51735, Oct. 4, 1993)

To the scope of this requirement, have such review limited to only those rules on which an agency must prepare an economic impact report, as required under proposed s. 227.117 (above) or upon a petition by interested parties. It is anticipated that such review would be limited to only a few rules in any given year.

Proposal: Create s. 227.118 - Review of Proposed Rules by the Department of Administration. Key provisions would include the following:

227.118 Review of Proposed Rules by the Department of Administration.

(1) Definitions. In this section:

(a) "Department" means the department of administration.

(b) "Economic impact report" means the report developed under s. 227.117

(2) Report on Proposed Rules. For any proposed rule that is required to have an economic impact report or upon a petition to the department by a municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in the proposed rule, the department shall prepare a report on the proposed rule before it is submitted to the legislative council staff under s. 227.15. The department may request any information from other state agencies that is reasonably necessary for the department to prepare the report.

(3) Findings by the Department to be contained in the Report. Within 60 days of receipt of an economic impact report or a petition for review, whichever is first received by the department, the department shall prepare the report that include findings on all of the following:

(a) That the economic impact report is prepared consistent with s. 227.117, including a finding that agency's findings required under s. 227.117(1) are substantially supported by the promulgating agency's analysis and related documentation contained in the economic impact report.

(b) That the agency has clear statutory authority to promulgate the proposed rule.

(c) That the proposed rule, including administrative requirements, is consistent with and not duplicative of other state or federal regulatory programs, and is consistent with the Governor's positions and priorities, including those relating to economic development.

(d) That the data used by the agency in developing its proposed rule is complete, accurate and derived from accepted scientific methodologies.

(4) Return of Rules to Promulgating Agency. The department may return a rule to the promulgating agency for further consideration based upon its review, and shall provide written explanation for such return. If the agency head disagrees with some or the entire basis for the return, the agency head shall so inform the department secretary in writing. Once the department secretary determines the issues raised in its return of the rule have been adequately addressed by the agency, the department shall forward the rule for approval under s. 227.14(4a), along with its report and related correspondence between the department and the promulgating agency and explanation of what changes, if any, that were made in the proposed rule in response to that report.

(5) Guidance and Policies. A municipality, an association which is representative of a farm, labor, business or professional group, or any 5 or more persons having an interest in the proposed rule may petition the department for a review of any existing or proposed agency guidance or policies, including agency comments and positions relating to federal regulatory programs. Upon a finding that individual petitioners or members of association petitioners may reasonably be economically affected by the existing or proposed agency guidance or policies, the agency shall prepare a report consistent with sub. (2), including findings relating to all of the following:

(a) That the economic impact report prepared under s. 227.117 (2), is consistent with such requirements, including that the related promulgating agency findings are substantially supported by the agency's analysis and related documentation contained in the economic impact report.

(b) The guidance and policies are consistent with and to not exceed the agency's statutory authorities and are consistent with the Governor's positions and priorities, including those relating to economic development.

(c) The guidance and policies are to of the type that are note required to be promulgated as rules.

An agency may not implement guidance or policies that are the subject of the report until such time the department secretary determines the issues raised in the report have been adequately addressed by the agency,

(6) Rule-making Authority. The department may promulgate any rules necessary for the administration of this section, and when appropriate, publish policies to effectuate these provisions.

4. Issue: Legislative Review of Agency Proposals

Assure reports submitted on proposed rule for legislative review include economic impact reports and Department of Administration reports required on proposals noted above.

Background. Existing law (Chapter 227) provides for review by the Legislature of agency rulemaking to assure checks and balances between the executive and legislative branches of government. Objections are allowed if the agency lacks statutory authority; the proposed rule does not comply with legislative intent or conflicts with state law, among other reasons. Existing legislative review processes require certain reports be prepare to assist the legislature in reviewing proposed rules.

Purpose: The purpose of these changes is to assure relevant documents prepared by agencies, including economic impact reports and Department of Administration reports, are part of existing reports due the Legislature.

Amend s. 227.19 (3) (intro) to read:

(3) Form of report. The report required under sub. (2) shall be in writing and shall include the proposed rule in the form specified in s. 227.14 (1), the material specified in s. 227.14 (2) to (4), a copy of any economic impact report received by any agency under s. 227.117 (3), a copy of any report by the department of administration prepared under s. 227.118, written approval by the Governor required under s. 227.14(4a) and a copy of any recommendations of the legislative council staff and an analysis. The analysis shall include:

5. Issue: Consistency with Federal Programs.

Require scoping statement include an assessment of consistency with related federal programs.

Background. As noted above, a major concern of industry is having both a state and federal program attempting to address the same problem. Existing s. 227.135 (Statements of scope of proposed rules) requires agencies to prepare a statement of scope of any rule that it plans to promulgate. The statement must include specific information, but nothing relating to consistency with and duplication between federal programs.

Proposal. Amend s. 227.135 (1) to include the following the following provisions:

(f) A summary of existing or anticipated federal programs that are intended to address those activities to be regulated under the state rule, and an analysis on the need for the rule if such a federal program exists.

(g) An assessment on whether a proposed rule could be inconsistent, duplicative or more stringent than required under those federal programs noted under sub. (f).

6. Issue: Miscellaneous Administrative Review Provisions

Background: Various organizations and administrative law experts commented on possible changes to Chapter 227. Generally, they looked for changes to better address how the many administrative decisions that impact Wisconsin businesses, and how to provide

Wisconsin businesses the ability to challenge those decisions through a fair administrative hearing process.

Proposals:

- Amend the Chapter 227 administrative hearing process to ensure that persons and organizations challenging an agency's action are provided due process:

  The decision of the Administrative Law Judge should be the final administrative decision, subject to judicial review. Under current law, many ALJ decisions are issued as "proposed decisions" and with the agency that made the original decision issuing the "final decision," which may or may not be consistent with the ALJ's decision. One could argue that the administrative review process is not impartial when the agency against which the action was filed issues the final decision. This policy may needlessly force Wisconsin businesses into the more costly judicial system in order to obtain an impartial review of an agency's action. (Aggrieved parties cannot seek judicial review of agency actions until they have exhausted all administrative reviews.) By providing for an impartial review early in the process, costly litigation may be avoided.

  Agencies should be subject to discovery during an administrative hearing process in circumstances when the aggrieved party has a significant financial interest in the outcome of the administrative decision. Under current law, aggrieved parties preparing for their administrative hearing do not always have the right to question agency staff to determine the rationale for the agency decision. The aggrieved party is at a significant disadvantage when they do not know the arguments an agency will make until the administrative hearing is underway.

- Amend sec. 227.53(1)(g) to allow petitions for review filed by nonresidents of Wisconsin to be brought in the county where the property is located or the dispute arose, rather than forcing non-residents to go to Dane County.

- Specifically authorize administrative law judges to award frivolous action costs and fees (814.025) in administrative proceedings against parties who bring legally or factually frivolous claims. This is aimed at "public objectors" who can force an applicant to hearing even when the agency is willing to issue the permit. Right now this can be done with no consequences, no matter how meritless the objection is. DNR, at least in water regulation cases, treats all objections as sacred and forces the applicant to hearing.

- Amend 227.57 to say that a reviewing court in a judicial review proceeding should give no deference to the decision of the ALJ where the decision departs from the position of the agency at the hearing, but the agency has nevertheless "adopted" the ALJ position as its own under sec. 227.46(3)(a). This is a fairly significant problem. Deference is due to agency expertise, but the agency, if it gets more than what it advocated for at the hearing from the ALJ, can simply adopt the ALJ decision as its own and the courts then give deference to the ALJ. This is an unethical result and this simple change would help applicants who have

compromised with the agency, the agency supports them in the hearing, and the ALJ then overrules them both. On review, the ALJ's decision is treated as though it is the result of agency expertise even though it is not.

- Permit a person who challenges an agency's failure to promulgate rules pursuant to ch. 227, Stats., to recover from the agency budget his/her costs and attorneys fees of making the challenge if it is successful, except that petitioners for rulemaking is considered a "challenge" under this provision.

- Amend sec. 227.43, Stats., to allow an applicant one crack at substitution of an ALJ in a manner similar to the rights of a litigant in the circuit courts. Right now the same ALJ's decide the same issues over and over again but there is really no means to try to get a more fair hearing.

- Statutorily prohibit ALJ's from deciding constitutional issues in 227.44. This would relieve applicants from having to raise such issues before ALJ's and inconsistency in the ALJ's regarding their ability to hear and decide issues of constitutional law. ALJ's are civil service employees, not elected common law judges, and should not have this authority.

- Require random assignment of cases to ALJ's by the Division of Hearings and Appeals in sec. 227.43. This is done in the circuit courts. The Legislature never intended to create an "expert" forum in the Division of Hearings and Appeals, just a fair forum. See sec. 227.46(6). This would go a long way to making that forum more fair. Rotation of subject areas among the ALJs might be helpful if random assignment won't work.

- Apply in sec. 30.02, the "person aggrieved" standard of sec. 227.53(1). This would eliminate the practice of ALJ's giving anyone party status in administrative hearings under ch. 30, Stats., despite their lack of standing. The harm here is that party status for a person without legal standing can really gum up the works, lengthen a hearing, and cause significant delay. Parties get to take discovery, make motions, cross examine, etc.

Chapter 285
(Air Program)

[**Note**: These proposals relating to Chapter 285 require additional refinement prior to submittal to LRB for drafting.]

1. **Issue: Adoption of EPA New Source Review Reforms**

   Incorporation into Wisconsin's air permitting program federal New Source Review reforms.

   Background: EPA promulgated rules to reform the new source review (NSR) program. The reforms would be administered by the EPA under the Clean Air Act and would "remove the obstacles to environmentally beneficial projects, clarify NSR requirements, encourage emissions reductions, promote pollution prevention, provide incentives for energy efficiency improvements, and help assure worker and plant safety." For more than two decades, states, industry and the EPA have recognized that the NSR program needs serious repair. The final and proposed NSR rules will help promote safer, cleaner and more efficient factories, refineries and power plants.

   Adopting the federal NSR reforms in Wisconsin is a high priority for Wisconsin's business community. While it is encouraging DNR has recently made NSR modifications a priority, it remains unclear whether meaningful changes can be accomplished through a DNR-led advisory committee. In addition, there is an argument the Legislature should formally be a part of these deliberations.

   Proposal: Add s. 285.11 (19) to require DNR do the following:

   > (19) Promulgate rules by [date specific, or within set period from the EPA rules' effective date] that incorporate changes promulgated by the U.S. environmental protection agency to the federal clean air act new source review program and without any state-only requirements that are inconsistent or more stringent than the federal program.

2. **Issue: Criteria for Listing Hazardous Air Contaminants not regulated by EPA**

   Establish criteria and related findings necessary before DNR can regulate hazardous air contaminants not regulated by EPA.

   Background: The Legislature, under s. 285.27 (2), set forth a general policy that regulating hazardous substance not regulated by EPA are allowed, but only upon a finding such regulation is necessary. The existing provision provides that "If an emission standard for a hazardous air contaminant is not promulgated under section 112 of the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant **if the department finds the standard is needed to provide adequate protection for public health and welfare**."

DNR recently promulgated significant revisions to the existing air toxics rules (NR 445). In some ways the rule was improved during the 3-year advisory committee process. But despite these changes, expanding the program by adding 144 new substances (bringing the total to 577) and lowering many thresholds substantially increases the reach of the rule and creates new burdens for sources already regulated under NR 445. The federal program regulates 188 substances. Although DNR made the requisite "finding" that the regulation of these additional substances was need, they did not undertake any analysis that the substances posed any actual environmental or health risks. Thus, the benefits were never quantified, much less shown to be sufficient to justify the $100 million price tag industry must cover in the first year.

DNR's mercury initiative, also recently promulgated after year of advisory committee deliberation, had similar policy defects. Proceeding with a state-only mercury rule at this time would impose substantial burdens on utilities targeted by rule, and substantially increase the cost of doing business in Wisconsin through higher electric rates. The proposal would have little impact on Wisconsin water quality, and the effort will be proved meaningless because state law requires such standards to be superceded by pending federal mercury standards.

The primary policy defect that needs to be addressed is the lack of any legislative direction on what factors or other considerations should be part of the finding of need. The result is that DNR has a blank check to add any substances not regulated by EPA.

A related issue is the inherent inconsistencies and duplication resulting from both a comprehensive federal and state program to regulate hazardous air contaminants. For example, the 1990 amendments to the federal program restructured prior law with an objective to regulate area source and industrial categories rather than concentrating on individual pollutants. In contrast, the state program continues to target individual pollutants, create inconsistencies and complexities. In addition, separate administrative components relating to permitting, monitoring and compliance requirements create additional inconsistencies and unnecessary redundancies.

Proposal: Revised s. 285.27(2) and (4) as follows:

285.27 Performance and emission standards.

(1) Standards of performance for new stationary sources.

Note: Modify same as sub (2)

(a) *Similar to federal standard.* If a standard of performance for new stationary sources is promulgated under section 111 of the federal clean air act, the department shall promulgate by rule a similar emission standard but this standard may not be more restrictive in terms of emission limitations than the federal standard except as provided under sub. (4).

(b) *Standard to protect public health or welfare.* If a standard of performance for any air contaminant for new stationary sources is not promulgated under section 111 of the federal clean air act, the department may promulgate an emission standard of performance for new stationary sources if the department finds the standard is needed to provide adequate protection for public health or welfare.

(c) *Restrictive standard.* The department may impose a more restrictive emission standard of performance for a new stationary source than the standard promulgated under par. (a) or (b) on a case-by-case basis if a more restrictive emission standard is needed to meet the applicable lowest achievable emission rate under s. 285.63 (2) (b) or to install the best available control technology under s. 285.63 (3) (a).

(2) Emission standards for hazardous air contaminants.

(a) *Similar to federal standard.* If an emission standard for a hazardous air contaminant is promulgated under ~~section 112 of~~ the federal clean air act, the department shall promulgate ~~by~~ a rule that incorporates ~~a similar~~ such standard and related administrative requirements. ~~but t~~This ~~standard~~ rule may not be more restrictive in terms of emission limitations or otherwise more burdensome to affected sources than the comparable federal ~~standard~~ requirements except as provided under sub. (4).

(b) *Standard to protect public health or welfare.* If an emission standard for a hazardous air contaminant is not promulgated under ~~section 112 of~~ the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant if the department finds the standard is needed to provide adequate protection for public health or welfare. The department's finding shall be supported with written documentation relating to each hazardous air contaminant that includes all of the following:

1. A human health and ecological risk assessment that characterizes the Wisconsin sources known to release the hazardous air contaminant and the receptors that are potentially at risk from the release.

2. An analysis and related finding that identified receptors are subjected to inhalation levels of the hazardous air contaminant above recognized environmental health standards.

3. An evaluation of risk management options considering risks, costs, economic impacts, feasibility, energy, safety and other relevant factors, and a finding that the preferred risk management option reduces risks in the most cost-effective manner practicable.

(c) *Restrictive standard.* The department may impose a more restrictive emission standard for a hazardous air contaminant than the standard promulgated under par. (a) or (b) on a case-by-case basis if a more restrictive standard is needed to meet the applicable lowest achievable emission rate under s. 285.63 (2) (b) or to install the best available control technology under s. 285.63 (3) (a).

(4) Impact of change in federal standards. If the standards of performance for new stationary sources or the emission standards for hazardous air contaminants under the federal clean air act are relaxed, the department shall alter the corresponding state

standards unless it finds that the relaxed standards would not provide adequate protection for public health and welfare. The department's finding shall be supported with that written documentation required under subsection (b). This subsection applies to state standards of performance for new stationary sources and emission standards for hazardous air contaminants in effect on April 30, 1980, if the relaxation in the corresponding federal standards occurs after April 30, 1980.

Chapter 30
Navigable Waters

1. Issue: Chapter 30 Permit Reform [LRB drafting already proceeding]

Reducing the time involved in obtaining a Chapter 30 permit for development projects.

Background: Virtually any human activity that takes place in the vicinity of a "navigable" water is subject to jurisdiction of the Wisconsin DNR under the Chapter 30 program. This program is notorious for slow decisions, inconsistent decisions, vague or non-existent standards, et al. Because key terms such as navigable and "the bank" of a navigable waterway have been defined to the broadest extent possible, thousands of projects each year are subject to this program.

All construction projects, from the largest to the smallest, new or redevelopment, are affected. The five most common Chapter 30 permits include:

- Grading and pond creation
- Placing bridges and culverts
- Dredging
- Placing a structure or other material in a waterway
- Redirecting a stream.

In addition to a significant impediment to economic growth, Chapter 30 poses a huge and growing burden on DNR staff time. DNR field staff are frequently called upon to settle Chapter 30 neighbor disputes over shorelines or piers while major projects languish. A DNR Administrator recently called the program, "indefensible."

Proposal: Amend Chapter 30 permits to sort permits into three categories:

1. De minimus exemptions for those projects already exempt under law or subject to other regulatory oversight
2. General permits for routine projects that typically have been approved
3. Individual permits for significant projects

Individual permits would be further modified as follows:

- DNR review would be subject to completeness deadlines
- DNR review would be subject to decision deadlines
- Public input would be gained via a "public hearing," as opposed to the current "contested case hearing," which is more time-consuming and adversarial.
- Decisions would be reviewable by an Administrative Law Judge, *OR* Circuit Court

2. **Issue: Nonmetallic Mining Reclamation (NR 340 Permits) – Financial Assurance Flexibility [LRB drafting already proceeding]**

Provide nonmetallic mine operators with more flexibility in the type of financial assurance that can be posted in connection with operations in waterways.

Background: Nonmetallic mining operations in waterways are regulated under Chapter 30 stats. and NR 340 Administrative Code. The applicable provisions in Chapter 30 [s. 30.19, 30.195 and 30.20] grant DNR broad authority to condition permits and contracts as necessary for the protection of the public and of the state. While the statutes do not specifically provide for financial assurance requirements, the department has used its broad authority to impose strict financial security requirements under accompanying administrative code in NR 340.055. Under NR 340.055, operators are required to post bonds and bonding is the only option an operator has in meeting the financial assurance requirement. The code [NR 340.055 (3)] does provide for limited alternatives to bonding (specifically, cash deposit, certificate of deposit or government security) but only upon written approval of the department.

Since the promulgation of NR 340, state law has been enacted establishing uniform requirements associated with reclamation of nonmetallic mining sites. [Reference Chapter 295 and NR 135]. Under the new law, reclamation standards are applicable to mining sites in or near navigable waterways, but the permitting and other requirements are subject to NR 340 rather than NR 135.

Under the more recently adopted code in NR 135.40 (4), an operator may provide financial assurance by a bond or an alternative form of financial assurance, including cash, certificates of deposits, irrevocable letters of credit, irrevocable trusts, established escrow accounts, demonstration of financial responsibility by meeting net worth requirements, or government securities. This relatively positive aspect of the NR 135 financial assurance provisions is not similarly available to operators dealing with nonmetallic mining in or around navigable waters under an NR 340 permit.

Proposal: Amend s.30.20 of the statutes to enable an operator to satisfy financial assurance requirements through a variety of financial security instruments, consistent with the options provided under s. 295.12 (3) (g) and NR 135.40 (4). Under this proposal, an operator regulated under an NR 340 permit could meet their finanacial assurance requirement through a bond, deposit of funds, established escrow account, letter of credit, demonstration of financial responsibility by meeting net worth requirments or other form of financial assurance, as opposed to being limited only to a bond.

3. **Issue: Regulation of On-Water Storage in Great Lake Harbors (Chapter 30.12) [LRB drafting already proceeding]**

Clarify and codify the limits of DNR authority to regulate the use of vessels for commercial storage in Wisconsin harbors on the Great Lakes.

Background: Current law does not specifically address the use of vessels for commercial storage in Great Lakes harbors. DNR is granted general authority to regulate activities in navigable waters under Chapter 30, WI stats. The department, while maintaining regulatory jurisdiction over storage vessels under Chapter 30, has yet to develop administrative rules or specific policy guidance with respect to this issue. (DNR has indicated they are in the process of developing departmental guidance.). In fact, internal policy has been erratic in recent years. At one point DNR regulators maintained that storage vessels were akin to "fixed houseboats" and therefore prohibited. More recent internal policy reflects that storage vessels could be permitted under s. 30.12 (2) but only under very limited circumstances, only on a temporary basis, and only for a limited duration with no or limited opportunity for permit renewal.

Proposal: Explicitly authorize DNR to issue permits and prescribe permit timeline.

Create s 30.12 (3) 10 to explicitly authorize DNR to issue permits for "Temporary Commercial Storage Vessels." A new provision would also be created to require that permits issued for temporary commercial storage vessels be issued for no less than 5 years and no more than 10 years, with a right to renew for succeeding periods up to 10 years.

Permit procedure, conditions and standards shall be developed by DNR, by rule, with reference to utilizing applicable provisions of NR 327 as a guideline for developing rules. Provisions would allow existing vessels to continue to be used for on-water storage without a permit until the final permitting decision is made. [Ref. NR 327.04 (1)]

Chapter 196

Regulation of Public Utilities

1. Issue: Timing of CPCN approval for interstate transmission lines

Eliminate the statutory provisions, excluding interstate transmission projects from the 180-day period the Commission has to issue a CPCN.

Background: Under current law, the Public Service Commission has 180 days after an application is complete to issue a certificate of public convenience and necessity on the application. If the Commission does not act within the 180-day period, it is considered to have issued the CPCN with respect to the application. Under Wis. Stat. § 196.491(3)(g)1m, applications for an interstate transmission line project are excluded from the 180-day approval period.

Currently, there are only four major extra high-voltage transmission lines crossing the borders into the State of Wisconsin. Given the very clear need for additional transmission line infrastructure into Wisconsin, it is likely that there will be significant increases in construction of these projects over the next several years. Historically, projects that need approval in multiple states have not required or resulted in significant cooperation by the regulatory agencies in each state. Normally, each state runs through its own regulatory process for construction certification. Wisconsin interstate projects which do not have the 180-day approval period historically take substantially longer time periods to permit at greater cost to consumers.

Proposal: Eliminate Wis. Stat. § 196.491(3)(g)(1m). RP 196.491(3)(g)1m. ✓

RN 196.491(3)(g)1. ✓ → (g)

2. Issue: Strategic energy assessment

Expand the planning horizon in the strategic energy assessment for large electric generation facilities and high-voltage transmission lines from the current three years to 7 years.

Background: Under Wis. Stat. § 196.491(2), the Public Service Commission is tasked with producing a biennial strategic energy assessment, which evaluates the adequacy and reliability of the State's current and future electrical supply. Under the terms of the statute, the strategic energy assessment must identify and describe large electric generating facilities and high-voltage transmission lines on which an electric utility plans to commence construction within three years. The lead-time for permitting and licensing and constructing large electric generating facilities and high-voltage transmission lines in almost all cases exceeds the three-year planning horizon required in the strategic energy assessment. This makes it difficult to adequately plan for a cost-efficient adequate and reliable electric system in the state.

Proposal: Amend Wis. Stat. §§ 196.491(2)(3) and (3m) to provide a 7-year planning horizon. ✓

AM 196.491(1)(d) (2)(a) 3. ~~3m.~~ (g)

3. **Issue: Engineering plan for high voltage transmission line.**

Clarify statute so that an engineering plan is not required for high voltage transmission lines.

Background: Under Wis. Stat. § 196.491(3)(a)(3), a person is required to file with the DNR an engineering plan showing the location of the facility, a description of the facility and a description of the anticipated effects of the facility on air and water quality. The Department then provides a list of all necessary permits or approvals. Statutory revisions to Section 196.491 in Act 204 were intended to apply this provision to large electric generating facilities.

The provision of an engineering plan for high-voltage transmission lines which may cover significant miles was not considered in those revisions. While the provision of an engineering plan for a large electric generating facility makes sense from a Department of Natural Resources permitting perspective, it does not make logical sense for high-voltage transmission lines. Elimination of the required filing of an engineering plan sixty (60) days before an application for a CPCN will not impact the requirement that a utility obtain the necessary permits to construct the line.

Proposal: Amend Wis. Stat. § 196.491(3a3) to read as follows: Am 196.491(3)(a)3.a (e)

At least sixty (60) days before a person files an application under Subd. 1., the person shall provide the Department with an engineering plan showing the location of the facility large electric generating facility, a description of the facility large electric generating facility, including the major components of the facility large electric generating facility that have a significant air, water or solid waste pollution potential and a description of the anticipated effects of the facility large electric generating facility on air and water quality. Within thirty (30) days after a person provides an engineering plan, the Department shall provide the person with a listing of each department permit or approval which, on the basis of the information contained in the engineering plan, appears to be required for the construction or operating of the large electric generating facility.

4. **Issue: Require a PSC Deadline or Limitation Period for Rulings on Deregulation Petitions.**

Background: Under s. 196.195, Stats., the PSC, upon receipt of an applicable petition, or upon its own motion, may elect to partially deregulate certain telecommunications services where the Commission determines, among several other factors, that the level of competition existing in the petition subject areas are sufficient to justify a lesser degree of regulation for relevant telecommunications providers. Currently there is no limitation period within which the Commission must conclude its review of partial deregulation requests filed with the Commission for its consideration. Accordingly, petitioners and intervening parties have no certainty as to the time frame they may expect for the Commission's disposition of deregulation requests.

Proposal: Amend Wis. Stat. §§ 196.195(5m) to provide for a ~~180~~ day limitation period for Commission action on partial deregulation requests, with presumptive approval for ~~cases in~~ which the Commission fails to dispose of such requests within the 120 day ~~time~~ frame.

Miscellaneous Chapters

Chapter 66 (Municipal Law)

1. Issue: Comprehensive Planning (Smart Growth - Chapter 66.1001)

Expand the notification requirements associated with adoption of a comprehensive plan under s. 66.1001 (4) to specifically include notice of affected property owners.

Background: Under Wisconsin's comprehensive planning law (known as Smart Growth) local governments are currently developing comprehensive plans. Beginning January 1, 2010 any program or action of a local government that affects land use is required to be consistent with that plan.

Current law requires a local unit of government to adopt written procedures to foster public participation in every stage of the preparation of a comprehensive plan. [Ref. s. 66.1001 (4) (a)] It also requires that at least one public hearing be held on the adoption or amendment of the comprehensive plan, which must be preceded by a class 1 notice that is published at least 30 days before the hearing is held. [Ref. S 66.1001 (4) (d)]

It is critical that local governments consider input from and provide adequate notification to potentially affected property owners in developing and adopting comprehensive plans. Accordingly current law needs to be strengthened in this regard.

Proposal:

1. Amend s 66.1001 (4) (a) by adding the following:

   The written procedures shall include a description of the methods the local government unit will employ to distribute proposed, alternative or amended elements of a comprehensive plan to owners of property in which the allowable use(s) or intensity of use(s) is changed by the comprehensive plan, including individuals with a property interest in nonmetallic mineral resources.

2. Amend s 66.1001 (4) (d) by adding the following:

   The local government unit must provide notice in writing, at least 30 days before the hearing is held, to all owners of property in which the allowable use(s) or intensity of use(s) is changed by the comprehensive plan, including the following:

   (1) An operator who has obtained or made application for a permit under s. 295.(3) (d);

   (2) An individual who has registered a marketable nonmetallic mineral deposit under s. 295.20; or,

   (3) Other persons known to have a property interest in nonmetallic mineral resources in the jurisdiction.

3. Amend s 66.1001 (2) (e) as follows:

(e) *Agricultural, natural and cultural resources element.* A compilation of objectives, policies, goals, maps and programs for the conservation, and promotion of the effective management, of natural resources such as groundwater, forests, productive agricultural areas, environmentally sensitive areas, threatened and endangered species, stream corridors, surface water, floodplains, wetlands, wildlife habitat, metallic and nonmetallic mineral resources consistent with zoning limitations under s. 295.20(2), parks, open spaces, historical and cultural resources, community design, recreational resources and other natural resources.

Chapter 106 (Apprentice, Employment and Equal Rights Programs)

2. Issue: Apprentice to Journeyman Jobsite Ratios

Restrict the Department of Workforce Development ability to require apprentice to journeyman jobsite ratios.

Background: The Bureau of Apprenticeship Standards has issued a directive to change the journeyman: apprentice ratio for the electrical trade. The change includes a 1:1 job site ratio and a new company ratio essentially requiring 3 journeymen for each apprentice for companies with 10 or more apprentices. Issues arising out of this directive include:

- **The more restrictive company ratio will have a negative impact on future training opportunities.**

  Some employers will have applicants who have been promised apprenticeship opportunities as part of their employment, who will be denied the opportunity for an electrical apprenticeship this fall.

  An electrical apprentice will receive an average base salary (not including benefits) of $47,000 per year over the term of his or her apprenticeship. These are exactly the type of highly skilled and high paying jobs the state is attempting to attract and retain.

- **The new ratio will have a real and significant impact on the cost of public and private construction.**

- **A 1:1 job site ratio does not ensure proper supervision.**

  The only empirical data relating to apprenticeship in Wisconsin comes from a 1992 Legislative Audit Bureau report that looked specifically at the job site supervision of apprentices in both the JAC and ABC program.

  The auditors asked apprentices "how often they experience difficulty in locating a Journey worker?" The vast majority of apprentices responded in the "never or a few times" category (88.4% for the JAC program and 86.5% in the ABC program). This despite the two (ABC and JAC) programs having vastly different company ratios and in many cases no job site ratio.

- **A 1:1 job site ratio does not ensure proper training.**