10/23 soon

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–3426/P1 3
RPN:wlj:jf

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

regen

AN ACT ***to repeal*** 19.52 (4), 227.45 (7) (a) to (d), 227.46 (2), 227.46 (2m), 227.46 (3) and 227.46 (4); ***to renumber and amend*** 227.45 (7) (intro.); ***to amend*** 19.52 (3), 30.02 (3), 196.24 (3), 227.19 (2), 227.19 (3) (intro.), 227.46 (1) (h), 227.46 (6), 227.47 (1), 227.485 (5), 227.53 (1) (a) 3., 289.27 (5), 448.02 (3) (b) and 448.675 (1) (b); and ***to create*** 227.12 (4), 227.135 (1) (e) and (f), 227.137, 227.138, 227.185, 227.43 (1g), 227.44 (2) (d), 227.445, 227.47 (3), 227.483 and 227.57 (11) of the statutes; **relating to:** administrative rules, guidelines, policies, and hearings.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 19.52 (3) of the statutes is amended to read:

19.52 **(3)** Chapters 901 to 911 apply to the admission of evidence at the hearing. The ~~board~~ hearing examiner shall not find a violation of this subchapter or subch. III of ch. 13 except upon clear and convincing evidence admitted at the hearing.

SECTION 2. 19.52 (4) of the statutes is repealed.

SECTION 3. 30.02 (3) of the statutes is amended to read:

30.02 **(3)** Upon receipt of a complete permit application or a request for a determination under s. 236.16 (3) (d), the department shall either schedule a public hearing to be held within 60 days after receipt of the application or request or provide notice stating that it will proceed on the application or request without a public hearing if, within 30 days after the publication of the notice, no substantive written objection to issuance of the permit is received or no request for a hearing concerning the determination under s. 236.16 (3) (d) is received from a person who may be aggrieved by issuance of the permit or determination. The notice shall be provided to the clerk of each municipality in which the project is located and to any other person required by law to receive notice. The department may provide notice to other persons ~~as it deems appropriate~~ who may be aggrieved by the issuance of the permit or determination. The department shall provide a copy of the notice to the applicant, who shall publish it as a class 1 notice under ch. 985 in a newspaper designated by the department that is likely to give notice in the area affected. The applicant shall file proof of publication with the department.

SECTION 4. 196.24 (3) of the statutes is amended to read:

196.24 **(3)** The commission may conduct any number of investigations contemporaneously through different agents, and may delegate to any agent the authority to take testimony bearing upon any investigation or at any hearing. The decision of the commission shall comply with s. 227.46 and shall be based upon its

records and upon the evidence before it, except that~~, notwithstanding s. 227.46 (4),~~ a decision maker may hear a case or read or review the record of a case if the record includes a synopsis or summary of the testimony and other evidence presented at the hearing that is prepared by the commission staff. Parties shall have an opportunity to demonstrate to a decision maker that a synopsis or summary prepared under this subsection is not sufficiently complete or accurate to fairly reflect the relevant and material testimony or other evidence presented at a hearing.

SECTION 5. 227.12 (4) of the statutes is created to read:

227.12 **(4)** If the agency proceeds with the requested rule making, the agency shall reimburse the person who petitioned for the rule for his or her costs related to the petition for rule making, including reasonable attorney fees.

SECTION 6. 227.135 (1) (e) and (f) of the statutes are created to read:

227.135 **(1)** (e) A summary of any existing or anticipated federal program that is intended to address the activities to be regulated by the rule and an analysis of the need for the rule if a federal program exists.

(f) An assessment of whether the rule is inconsistent, duplicative, or more stringent than the regulations under any federal program summarized in par. (e).

SECTION 7. 227.137 of the statutes is created to read:

227.137 Economic impact reports of guidelines, policies, and rules. (1) After an agency publishes a statement of the scope of a proposed rule under s. 227.135, and before the agency submits the proposed rule to the legislative council for review under s. 227.15, a municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons having an interest in the proposed rule may petition the agency to prepare an economic impact report of the proposed rule. If the agency determines that the petitioner may be economically

affected by the proposed rule, the agency shall prepare an economic impact report before submitting the proposed rule to the legislative council under s. 227.15.

(2) A municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons affected by an existing or proposed agency guideline or policy, including agency comments and policies in response to federal regulations, may petition the agency to prepare an economic impact report for that existing or proposed agency guideline or policy. If the agency determines that the petitioner may be economically affected by the proposed or existing guideline or policy, the agency shall prepare an economic impact report.

(3) An economic impact report shall contain information on the effect of the proposed rule or existing or proposed guideline or policy on specific businesses, business sectors, and the state's economy. When preparing the report, the agency shall solicit information and advice from the department of commerce and governmental units, associations, businesses, and individuals that may be affected by the proposed rule or existing or proposed guideline or policy. The agency may request information that is reasonably necessary for the preparation of an economic impact report from other state agencies, governmental units, associations, businesses, and individuals, but no one is required to respond to that request. The economic impact report shall include all of the following:

(a) An analysis and quantification of the problem, including any risks to public health or the environment, that the guideline, policy, or rule is intending to address.

(b) An analysis and quantification of the economic impact of the guideline, policy, or rule, including direct, indirect, and consequential costs reasonably expected to be incurred by the state, governmental units, associations, businesses, and affected individuals.

(c) An analysis of the guideline's, policy's, or rule's impact on the state's economy, including how the guideline, policy, or rule affects the state's economic development policies.

(d) An analysis of benefits of the guideline, policy, or rule, including how the guideline, policy, or rule reduces the risks and addresses the problems that the guideline, policy, or rule is intended to address.

(e) An analysis that compares the benefits to the costs of the guideline, policy, or rule.

(f) An analysis of existing or anticipated federal programs that are intended to address the risks and problems the agency is intending to address with the guideline, policy, or rule, including a determination of whether the guideline, policy, or rule and related administrative requirements are consistent with and not duplicative of those existing or anticipated federal programs.

(g) An analysis of regulatory alternatives to the guideline, policy, or rule, including the alternative of no regulation, and a determination of whether the guideline, policy, or rule addresses the identified risks and problems the agency is intending to address in the most cost–efficient manner.

Insert 5-17

(4) ~~No later than 60 days after the date that an agency receives a petition requesting an economic impact report from a petitioner who may be economically affected by the existing or proposed guideline, policy, or rule,~~ the agency shall submit the economic impact report to the legislative council staff, to the department of administration, and to the petitioner.

~~****NOTE: There was no time frame for issuing the report, so I created a 60–day time limit. I used the same number as in the DOA review. Is it too short, too long, or OK?~~

~~****NOTE: What does the legislative council do with economic impact reports?~~

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

SECTION 8. 227.138 of the statutes is created to read:

227.138 Department of administration review of proposed rules. (1) In this section:

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

(b) "Economic impact report" means a report prepared under s. 227.137.

(c) "Guideline or policy" includes any agency comments or policies in response to federal regulations.

(2) If the department receives an economic impact report under s. 227.137 (4) regarding a proposed rule, the department shall review the proposed rule and issue a report. A municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons having an interest in a proposed rule may petition the department to review the proposed rule. If the department determines that the petitioner may be economically affected by the proposed rule, the department shall review the proposed rule and issue a report. The department shall notify the agency that a report will be prepared and that the agency shall not submit a proposed rule to the legislative council for review under s. 227.15 (1) until the agency receives a copy of the department's report. The report shall include all of the following findings:

(a) If an economic impact report was prepared as required under s. 227.137 (1), that the report and the analysis required under s. 227.137 (3) are supported by 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 any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations.

(d) That the proposed rule is consistent with the governor's positions and priorities, including those related to economic development.

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

(3) Before issuing a report under sub. (2), the department may return a proposed rule to the agency for further consideration and revision with a written explanation of why the proposed rule is returned. If the agency head disagrees with the department's reasons for returning the proposed rule, the agency head shall so notify the department in writing. The department secretary shall approve the proposed rule when the agency has adequately addressed the issues raised during the department's review of the rule. The department shall submit a statement to the governor indicating the department's approval of the proposed rule, the correspondence between the agency and the department related to the proposed rule, and a copy of its report regarding the proposed rule.

(4) If the department receives an economic impact report under s. 227.137 (4) regarding a proposed or existing guideline or policy, the department shall review the guideline or policy and issue a report. A municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons having an interest in a proposed or existing guideline or policy may petition the department to review the guideline or policy. If the department determines that the petitioner may be economically affected by the guideline or policy, the department shall review the guideline or policy and issue a report. The department shall notify the agency that

a report will be prepared. The report shall include findings consistent with those under sub. (2) and include the following findings:

(a) If an economic impact report was prepared as required under s. 227.137 (4), that the report and the analysis required under s. 227.137 (3) are supported by related documentation contained in the economic impact report.

(b) That the guideline or policy is consistent with and does not exceed the agency's statutory authority.

(c) That the guideline or policy is consistent with the governor's positions and priorities, including those related to economic development.

(d) That the guideline or policy is of the type that is not required to be promulgated as a rule.

(5) Before issuing a report under sub. (4), the department may prohibit an agency from implementing a proposed guideline or policy until the department secretary determines that the proposed guideline or policy meets the criteria under sub. (4) (a) to (d).

Insert 8-15

SECTION 9. 227.185 of the statutes is created to read:

227.185 Approval by governor. After a proposed rule is in final draft form and approved by the department of administration under s. 227.138 (3), the agency shall submit the rule to the governor. The governor may approve, modify, or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19 (2) or filed with the office of secretary of state or revisor unless the governor has approved the proposed rule in writing. This section does not apply to emergency rules promulgated under s. 227.24.

SECTION 10. 227.19 (2) of the statutes is amended to read:

227.19 **(2)** NOTIFICATION OF LEGISLATURE. An agency shall submit a notice to the presiding officer of each house of the legislature when a proposed rule is in final draft form and approved by the governor. The notice shall be submitted in triplicate and shall be accompanied by a report in the form specified under sub. (3). A notice received under this subsection on or after September 1 of an even–numbered year shall be considered received on the first day of the next regular session of the legislature. Each presiding officer shall, within 7 working days following the day on which the notice and report are received, refer them to one committee, which may be either a standing committee or a joint legislative committee created by law, except the joint committee for review of administrative rules. The agency shall submit to the revisor for publication in the register a statement that a proposed rule has been submitted to the presiding officer of each house of the legislature. Each presiding officer shall enter a similar statement in the journal of his or her house.

SECTION 11. 227.19 (3) (intro.) of the statutes is amended to read:

227.19 **(3)** FORM OF REPORT. (intro.) 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 prepared by the agency under s. 227.137, a copy of the report prepared by the department of administration under s. 227.138, a copy of the written approval of the governor under s. 227.185, a copy of any recommendations of the legislative council staff, and an analysis. The analysis shall include:

Insert 9-21

SECTION 12. 227.43 (1g) of the statutes is created to read:

227.43 **(1g)** The administrator of the division of hearings and appeals shall randomly assign hearing examiners to preside over any hearing under this section.

SECTION 13. 227.44 (2) (d) of the statutes is created to read:

227.44 **(2)** (d) The name and title of the person who will conduct the hearing.

SECTION 14. 227.445 of the statutes is created to read:

227.445 Substitution of hearing examiner. (1) A person requesting a hearing before a hearing examiner may file a written request for a substitution of a new hearing examiner for the hearing examiner assigned to the matter. The written request shall be filed not later than 10 days after receipt of the notice under s. 227.44.

(2) No person may file more than one such written request in any one hearing.

(3) Upon receipt of the written request, the original hearing examiner shall have no further jurisdiction in the matter except to determine if the request was made timely and in proper form. If the hearing examiner fails to make a determination as to allowing the substitution within 7 days, the hearing examiner shall refer the matter to the administrator of the division of hearings and appeals for the determination and reassignment of the hearing as necessary. If the written request is determined to be proper, the matter shall be transferred to another hearing examiner. Upon transfer, the hearing examiner shall transmit to the new hearing examiner all the papers in the matter.

SECTION 15. 227.45 (7) (intro.) of the statutes is renumbered 227.45 (7) and amended to read:

plain text

227.45 **(7)** In any ~~class 2~~ proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon motion by a party or by the person from whom discovery is sought in any ~~class 2~~ plain text proceeding, and for good cause shown, the hearing examiner may make any order in accordance with s. 804.01 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. ~~In any class 1 or class 3 proceeding, an agency may by rule permit the taking and preservation~~

~~of evidence, but in every such proceeding the taking and preservation of evidence shall be permitted with respect to a witness:~~

Insert 11-3 ✓

SECTION 16. 227.45 (7) (a) to (d) of the statutes are repealed.

SECTION 17. 227.46 (1) (h) of the statutes is amended to read:

227.46 **(1)** (h) Make ~~or recommend~~ findings of fact, conclusions of law, and decisions to the extent permitted by law.

SECTION 18. 227.46 (2) of the statutes is repealed.

SECTION 19. 227.46 (2m) of the statutes is repealed.

SECTION 20. 227.46 (3) of the statutes is repealed.

SECTION 21. 227.46 (4) of the statutes is repealed.

SECTION 22. 227.46 (6) of the statutes is amended to read:

227.46 **(6)** The functions of persons presiding at a hearing or participating in ~~proposed or~~ final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

SECTION 23. 227.47 (1) of the statutes is amended to read:

227.47 **(1)** Except as provided in sub. (2), every ~~proposed or~~ final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every ~~proposed or~~ final decision shall include a list of the names and addresses of all

persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53. The agency shall by rule establish a procedure for determination of parties.

SECTION 24. 227.47 (3) of the statutes is created to read:

227.47 **(3)** A decision of an agency or hearing examiner may not be based in whole or in part on a conclusion of law that a statute, rule, policy, procedure, or practice is unconstitutional.

SECTION 25. 227.483 of the statutes is created to read:

227.483 Costs upon frivolous claims. (1) If a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party his or her costs, as determined under s. 814.04, and reasonable attorney fees.

(2) If the costs and fees awarded under sub. (1) are awarded against the party other than a public agency, those costs may be assessed fully against either the party or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

SECTION 26. 227.485 (5) of the statutes is amended to read:

227.485 **(5)** If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). The decision on the merits of the case shall be placed in a ~~proposed~~ decision and submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within 30 days after service of the ~~proposed~~ decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.

SECTION 27. 227.53 (1) (a) 3. of the statutes is amended to read:

227.53 **(1)** (a) 3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 73.0301 (2) (b) 2., 77.59 (6) (b), 182.70 (6), and 182.71 (5) (g). ~~The proceedings shall be in the circuit court for Dane County if~~ If the petitioner is a nonresident, the proceedings shall be held in the county where the property affected by the decision is located or, if no property is affected, in the county where the dispute arose. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of

the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

SECTION 28. 227.57 (11) of the statutes is created to read:

227.57 **(11)** If the decision of the hearing examiner is inconsistent with the position taken at the hearing by the agency ~~involved in the hearing~~, the court shall give no deference to the examiner's decision when conducting its review.

SECTION 29. 289.27 (5) of the statutes is amended to read:

289.27 **(5)** DETERMINATION OF NEED; DECISION BY HEARING EXAMINER. If a contested case hearing is conducted under this section, the secretary shall issue any decision concerning determination of need~~, notwithstanding s. 227.46 (2) to (4)~~. The secretary shall direct the hearing examiner to certify the record of the contested case hearing to him or her without an intervening proposed decision. The secretary may assign responsibility for reviewing this record and making recommendations concerning the decision to any employee of the department.

SECTION 30. 448.02 (3) (b) of the statutes is amended to read:

448.02 **(3)** (b) After an investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct or negligence in treatment, the board shall hold a hearing on such conduct. The board may use any information obtained by the board or the department under s. 655.17 (7) (b), as created by 1985 Wisconsin Act 29, in an investigation or a disciplinary proceeding, including a public disciplinary proceeding, conducted under this subsection and the board may require a person holding a license, certificate or limited permit to undergo and may consider the results of one or more physical, mental or professional

competency examinations if the board believes that the results of any such examinations may be useful to the board in conducting its hearing. A unanimous finding by a panel established under s. 655.02, 1983 stats., or a finding by a court that a physician has acted negligently in treating a patient is conclusive evidence that the physician is guilty of negligence in treatment. A finding that is not a unanimous finding by a panel established under s. 655.02, 1983 stats., that a physician has acted negligently in treating a patient is presumptive evidence that the physician is guilty of negligence in treatment. A certified copy of the findings of fact, conclusions of law and order of the panel or the order of a court is presumptive evidence that the finding of negligence in treatment was made. The board shall render a decision within 90 days after the date on which the hearing is held ~~or, if subsequent proceedings are conducted under s. 227.46 (2), within 90 days after the date on which those proceedings are completed~~.

SECTION 31. 448.675 (1) (b) of the statutes is amended to read:

448.675 **(1)** (b) After an investigation, if the affiliated credentialing board finds that there is probable cause to believe that the person is guilty of unprofessional conduct or negligence in treatment, the affiliated credentialing board shall hold a hearing on such conduct. The affiliated credentialing board may require a licensee to undergo and may consider the results of a physical, mental or professional competency examination if the affiliated credentialing board believes that the results of the examination may be useful to the affiliated credentialing board in conducting its hearing. A finding by a court that a podiatrist has acted negligently in treating a patient is conclusive evidence that the podiatrist is guilty of negligence in treatment. A certified copy of the order of a court is presumptive evidence that the finding of negligence in treatment was made. The affiliated credentialing board

shall render a decision within 90 days after the date on which the hearing is held ~~or, if subsequent proceedings are conducted under s. 227.46 (2), within 90 days after the date on which those proceedings are completed~~.

(END)

insert 5–17:

(h) A comparison of the costs on Wisconsin businesses to costs born by similar businesses located in Indiana, Missouri, and adjacent states.

****NOTE: This addition to the list of what the economic impact report should contain does not relate back to the guideline, policy, or rule that is being reviewed in the economic impact report. OK?

insert 8–15:

SECTION 1. 227.14 (2) (a) of the statutes is amended to read:

227.14 **(2)** (a) An agency shall prepare in plain language an analysis of each proposed rule, which shall be printed with the proposed rule when it is published or distributed. The analysis shall include ~~a~~ all of the following:

1. A reference to each statute that the proposed rule interprets, each statute that authorizes its promulgation, each related statute or related rule ~~and a.~~

2. A brief summary of the proposed rule.

History: 1985 a. 182; 1987 a. 22, 283; 1993 a. 399; 1995 a. 106; 1999 a. 9.

SECTION 2. 227.14 (2) (a) 3. of the statutes is created to read:

227.14 **(2)** (a) 3. A summary of the relevant legal interpretations and policy considerations underlying the proposed rule.

SECTION 3. 227.14 (2) (a) 4. of the statutes is created to read:

227.14 **(2)** (a) 4. A summary of existing and anticipated federal regulatory programs intended to address similar matters.

SECTION 4. 227.14 (2) (a) 5. of the statutes is created to read:

227.14 **(2)** (a) 5. A summary of the factual data on which the proposed rule is based, the methodology used to obtain and analyze the data, how the data supports the regulatory approach chosen for the rule and how the data supports any required agency's findings.

SECTION #. 227.14 (4) (b) 3. of the statutes is created to read:

227.14 **(4)** (b) 3. For rules that the agency determines may have a significant fiscal effect on the private sector, the anticipated costs that will be incurred by the private sector in complying with the rule.

insert 9–21:

SECTION #. 227.19 (3) (a) of the statutes is amended to read:

227.19 **(3)** (a) A detailed statement explaining the ~~need for~~ basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purposes.

History: 1985 a. 182; 1987 a. 253; 1987 a. 403 s. 256; 1989 a. 175; 2001 a. 87.

SECTION 7. 227.19 (3) (am) of the statutes is created to read:

227.19 **(3)** (am) An analysis of policy alternatives to the proposed rule, including reliance on federal regulatory programs, and an explanation for the rejection of those alternatives.

SECTION #. 227.19 (3) (b) of the statutes is amended to read:

227.19 **(3)** (b) ~~An~~ A summary of public comments to the proposed rule and the agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at a public hearing.

History: 1985 a. 182; 1987 a. 253; 1987 a. 403 s. 256; 1989 a. 175; 2001 a. 87.

SECTION 9. 227.19 (3) (cm) of the statutes is created to read:

227.19 **(3)** (cm) Any changes to the analysis prepared under s. 227.14 (2) or the fiscal estimate prepared under s. 227.14 (4).

SECTION 10. 227.40 (4) (am) of the statutes is created to read:

227.40 **(4)** (am) The court shall review the record and evaluate the reasons underlying a rule when determining the validity of the rule. The agency's record submitted to the court shall include the analysis and documentation required under ss. 227.137 (3), 227.14 (2) and 227.19 (3) and public comments and on the proposed rule. The trial court may accept other relevant evidence to supplement the agency record when determining the validity of the rule. The court shall find a rule invalid for failure to comply with the rule making procedures if the agency's analysis under ss. 227.137 (3), 227.14 (2), and 227.19 (3) is not supported by substantial evidence. If an agency acts under a statute that allows the agency to exceed federal law, the court shall find that the agency exceeded its statutory authority if the agency's actions are not supported by clear and convincing evidence.

insert 11–3:

SECTION #. 227.46 (1) (intro.) of the statutes is amended to read:

227.46 **(1)** (intro.) Except as provided under s. 227.43 (1), an agency may designate an official of the agency or an employee on its staff or borrowed from another agency under s. 20.901 or 230.047 as a hearing examiner to preside over any contested case. In hearings under s. 19.52, a reserve judge shall be appointed. A hearing examiner does not have authority to address or make decisions regarding

possible constitutional issues. Subject to rules of the agency, examiners presiding at hearings may:

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 196 s. 131; 1977 c. 277, 418, 447; 1979 c. 208; 1983 a. 189 s. 329 (2); 1985 a. 29; 1985 a. 182 ss. 33g, 57; 1985 a. 236; Stats. 1985 s. 227.46; 1987 a. 365; 1993 a. 16.

Nelson, Robert P.

From: Robert Fassbender [fassbender@hamilton-consulting.com]

Sent: Sunday, November 02, 2003 9:46 AM

To: 'Nelson, Robert P.'

Subject: RE: Chap. 227

Bob,

Attached is a memo that outlines those revisions to Chap. 227 we discussed. It includes a discussion on the relevant existing statutory provisions, related case law and how the revisions affect existing law. Hopefully, this makes your preparation of the analysis easier. While the key provisions are discussed, I ran out of time to finish this discussion on several provisions such as the chosen standard of review. Please proceed with these changes, and let me know if you have any questions or need additional information. I will get back in the office later today.

Bob Fassbender
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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: 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 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). every rule before the rule is submitted

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).

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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.

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(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.

Guidelines

(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:

interests

(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.

Nelson, Robert P.

From: Robert Fassbender [fassbender@hamilton-consulting.com]
Sent: Sunday, November 02, 2003 3:01 PM
To: 'Nelson, Robert P.'
Subject: RE: Chap. 227

The way we look at it is that an agency necessarily has to create a record of its analysis required under s. 227.114 (2), or their "consideration" is meaningless (and the law is meaningless). You're correct that the statute does not expressly require such analysis, our reference to such documentation in s. 227.14 (2) (a) 6, however, would make it clear such a record of their analysis is required.

Bob Fassbender
The Hamilton Consulting Group
(608) 258-9506
fassbender@hamilton-consulting.com

-----Original Message-----
From: Nelson, Robert P. [mailto:Robert.Nelson@legis.state.wi.us]
Sent: Sunday, November 02, 2003 2:05 PM
To: Fassbender, Bob
Subject: RE: Chap. 227

I have a problem with the language suggested for s. 227.14 (2) (a) 6., because there is no "analysis and supporting documents" required under s. 227.114 (2). I may change this a little.

-----Original Message-----
From: Robert Fassbender [mailto:fassbender@hamilton-consulting.com]
Sent: Sunday, November 02, 2003 1:25 PM
To: 'Nelson, Robert P.'
Subject: RE: Chap. 227

I'm back in the office. I will spend some additional time on notes relating to the Chap. 227 amendments, but just give me a call if you have any questions.

Bob Fassbender
The Hamilton Consulting Group
(608) 258-9506
fassbender@hamilton-consulting.com

-----Original Message-----
From: Nelson, Robert P. [mailto:Robert.Nelson@legis.state.wi.us]
Sent: Sunday, November 02, 2003 1:02 PM
To: Fassbender, Bob
Subject: RE: Chap. 227

I came in a short time ago. I will work with what you sent. If you have more, let me know.

-----Original Message-----
From: Robert Fassbender [mailto:fassbender@hamilton-consulting.com]
Sent: Sunday, November 02, 2003 8:11 AM
To: 'Nelson, Robert P.'
Subject: RE: Chap. 227

Bob,

Almost done here. Let me know when you get in.

Bob Fassbender
The Hamilton Consulting Group
(608) 258-9506
fassbender@hamilton-consulting.com

-----Original Message-----
From: Nelson, Robert P. [mailto:Robert.Nelson@legis.state.wi.us]
Sent: Saturday, November 01, 2003 1:10 PM
To: Fassbender, Bob
Subject: RE: Chap. 227

I am in my office now, so if you want me to work on it today, send over the changes. If you cannot do that, I could come in tomorrow and work on the draft. The editors will not be in tomorrow night, so I need something to them by tomorrow afternoon.

-----Original Message-----
From: Robert Fassbender [mailto:fassbender@hamilton-consulting.com]
Sent: Saturday, November 01, 2003 9:58 AM
To: robert.nelson@legis.state.wi.us
Subject: Chap. 227

Bob,

I'm working on final suggestions to 227. If I get to you be noon, is it still timely, or must I shut it down and give you what I have now?

Bob Fassbender
The Hamilton Consulting Group
(608) 258-9506
fassbender@hamilton-consulting.com

Nelson, Robert P.

From: Robert Fassbender [fassbender@hamilton-consulting.com]
Sent: Sunday, November 02, 2003 3:05 PM
To: 'Nelson, Robert P.'
Subject: RE: Chap. 227

That was not our intent. If you repeal sub. (4), subsections (a), (b) and (c) would have to be added into the newly created sub. (4), as we did not intend to repeal those sections, particularly sub. (a), which sets forth the general grounds for invalidating are rule.

Bob Fassbender
The Hamilton Consulting Group
(608) 258-9506
fassbender@hamilton-consulting.com

-----Original Message-----
From: Nelson, Robert P. [mailto:Robert.Nelson@legis.state.wi.us]
Sent: Sunday, November 02, 2003 2:14 PM
To: Fassbender, Bob
Subject: RE: Chap. 227

I also wonder if you want the new language of suggested s 227.40 (4a) to replace current s. 227.40 (4)? It appears that you want to repeal current 227.40 (4) and replace it with your language. Is that correct? That is what I will do unless I hear otherwise from you.

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From: Robert Fassbender [mailto:fassbender@hamilton-consulting.com]
Sent: Sunday, November 02, 2003 1:25 PM
To: 'Nelson, Robert P.'
Subject: RE: Chap. 227

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RULEMAKING RECORD & JUDICIAL REVIEW

(Nov. 2, 2003)

RULEMAKING RECORD PROVISIONS

1. Existing LRB SECTION 11. Amend proposed 227.14 (2) (a) 5 to read:

227.14 **(2)** (a) 5. A summary of the factual data, studies and other sources of information on which the proposed rule is based, the methodology used to obtain and analyze the data, studies and other sources of information, how the data, studies and other information supports the regulatory approach chosen for the rule, and how the data, studies and other information supports any required agency's findings.

2. Create 227.14 **(2)** (a) 6 to read:

227.14 **(2)** (a) 6. The analysis and supporting documentation relating to the consideration of the rule's effect on small business required under s. 227.114 (2) and the rule's effect on businesses and the state's economy under s. 227.137 (3).

[**Note:** The background on the provisions relating to amendments to the requirements the agency prepare an analysis of the rule were set forth in prior instructions. However, how this agency record relates to judicial review of rules is discussed in more detail below.]

JUDICIAL REVIEW PROVISIONS

Existing LRB SECTION 20. Delete this section and replace with new 227.40 (4a) to read:

227.40 (4a) (a) In any proceeding pursuant to this section for judicial review of a rule, the review shall be conducted by the court without a jury and shall be confined to a substantial inquiry of the agency record, as necessarily and appropriately supplemented by evidence presented to the court. The agency record includes the analysis and documentation required under ss. 227.137 (3), 227.14 (2), and 227.19 (3), and public comments on the rule.

(b) The court shall separately treat disputed issues of agency procedure, interpretations of law, and determinations of fact or policy within the agency's exercise of delegated discretion.

(c) When reviewing whether a rule is invalid as promulgated without compliance with statutory rulemaking procedures set forth in this chapter, the court shall determine the adequacy of the factual basis to support the rule and the related reasoning employed by the agency to reach its conclusions, with consideration of relevant comments on and alternatives to the rule's approach offered by affected parties during the rulemaking process. Based on this review, the court shall find the rule invalid if the agency's decision-making process was arbitrary and capricious.

(d) The court shall find a rule invalid if it determines the adequacy of the rulemaking process or the validity of the regulatory approach has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(e) When an agency's statutory authority to promulgate a rule is predicated on the rule being comparable to relevant federal programs or standards, including requirements that the rule be similar to, consistent with, or no more restrictive than federal programs or standards, the court shall conduct a de novo review of the agency record to determine if the agency determination that the rule was comparable to the federal program or standards was supported by substantial evidence.

(f) When an agency's statutory authority to promulgate a rule exceeding relevant federal programs or standards is predicated on the agency making a finding of need, including a need to protect human health or the environment, the court shall review agency's record to determine if the agency's findings were supported by substantial evidence.

(g) If a court finds that the agency's analysis and determinations under s. 227.137 (3) are arbitrary and capricious, the court shall consider the rule invalid as without compliance with statutory rulemaking procedures set forth in this chapter.

BACKGROUND ON JUDICIAL REVIEW PROVISIONS

1. **Section 227.40 (4a) (a) – Agency Record & Method of Review.**

a. Agency Record. While existing, s. 227.40 is silent on what is deemed a reviewable record when challenging a rule; the above language is consistent with related statutory provisions and case law. See, for example, s. 227.57 (1) that requires the court to review of record, and *Liberty Homes, Inc. v. DIHLR*, 136 Wis.2d 368, 379 (Sup.Ct. 1987) holding that the "court must be free to accept relevant evidence to supplement the agency record if it appears necessary to perform its judicial review function." The court in *Liberty Homes* used the terms "necessary and appropriate" as a test the court should use when considering what information should supplement the record. *Id.*, at p 379.

Existing Chapter 227 provisions define the record to include the agency analysis to be included in the draft rule that goes to hearing under s. 227.14 (2), and the analysis required analysis for the final rule included in the report to the Legislature under s. 227.19 (3). The court in *Liberty Homes* specifically notes that analysis required under s. 227.19 (3), which incorporates the analysis under s. 227.14 (2), is part of the agency record to be reviewed by the court. *Id.* at pp. 380.

Other provisions in this bill expand the information for an adequate record consistent with state and federal cases. The primary purposes of requiring an agency analysis is to assure meaningful public notice and to give the Legislature and courts sufficient information to assure the agency's decision-making process comports to established rulemaking procedures. On the former, the court in *Connecticut Light and Power Co. v. NRC,* 673 F.2d 525 (D.C.Cir. 1982) noted that:

> The purpose of the comment period is to allow interested member of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making. In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as a mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

On the latter relating to the record required under federal law, a leading administrative law expert notes that:

> No court today would uphold a major agency rule that incorporates only a 'concise general statement of basis and purpose.' To have any reasonable prospect of obtaining judicial affirmation of the a rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its

> method of reasoning from factual predicates to the expected effect of the rule, relates the factual predicate and expected effect of the rule to each of the statutory goals or purposes that agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted. K. Davis, Administrative Law Treatise, sec. 7.4 at 310 ((3d. ed. 1994)

The above amendments, coupled with additional requirements to be included in the agency analysis, recognize that agencies should go beyond a purely formal level of explanation for a rule as currently required under chapter 227, and that the adequacy of this information should be subject to judicial review. As Chapter 227 now stands, the limited scope of the agency analysis allows the agency to "play hunt the peanut" with affected parties, the Legislature and the courts.

b. Method of Review. Chapter 227 is generally ambiguous as to the method of review of rules. But various court decisions have articulated a distinction between the standard of review and the methodology for applying whatever standard should be applied in a given case. Chief Justice Abrahamson's dissent in *Aetna Life Ins. Co. v. Mitchell*, 101 Wis.2d 90 (1981) notes that:

> The legislature has delegated the policy-making function to the administrative agency and has empowered the court [through Wis. Stats. 227.40] to review the agency rules to ensure that they are lawful. A court should not rubber stamp an agency rule; such a review would be a time-consuming, expensive ritual. Judicial review should be a meaningful supervision of the work of the administrative agencies. At pp. 123-124.

Not only does the Chief Justice infer "meaningfulness" of review from the legislature, but also that the review should be of "the work of the administrative agencies." Agency work in promulgating rules involves several steps – from collecting data, reviewing data, incorporating public input, drawing conclusions, deciding among policy alternatives, among other tasks. In *Liberty Homes, Inc. v. DIHLR,* 136 Wis. 2d 368, 386 (1987), the court acknowledged that this review entails a "substantial inquiry into the facts of record supporting the rule, one that is searching and careful."

This provision sets forth that the court must make a "substantial inquiry" of the agency record, which codifies the holding in *Liberty* relating to such review. This is also consistent with "hard look" methodology for reviewing rules under administrative law provisions in other jurisdictions.

In *Liberty Homes*, the Court says that "hard look review" is not a standard of review, but is a methodology of review that may be coupled with a standard of review, such as "arbitrary or capricious." In making this distinction, the court quotes, and supports the conclusions of, a party brief from this case, stating:

> The 'hard look' regimen is not in itself a `standard' of judicial review. 'Hard look' review does not provide the court with a test or threshold limit for the proper quantum of evidence needed to support a rule. The 'hard look' regimen, rather is a judicially evolved methodology of review, which may be used in conjunction with any standard of review, whether the `arbitrary and capricious' test, the `rational basis' test, or the `substantial evidence' test. The methodology of review, however, is critical,

particularly where rules affecting major social, health and technical issues are concerned, because as courts and commentators have recognized, the various `standards' of review tend to converge in actual practice into a general concept of `reasonableness.'" Reply Brief of Cross-Petitioners p. 4 (February 7, 1986).

2. Section 227.40 (4a) (b) – Functional Approach to Judicial Review.

Chief Justice Abrahamson's dissent in *Aetna Life Ins. Co. v. Mitchell*, 101 Wis.2d 90 (1981) includes a helpful discussion on how courts should evaluate a claim under Chapter 227. She recognized "that in reviewing a rule the court might deal separately with the component issues of rulemaking, such as the agency rulemaking procedure, the agency's interpretations of law, the agency's factual determinations, and the agency's decisions on policy within the agency's exercise of delegated discretion." *Id.* at pp. 124. She also found that the Legislature adopted this approach for administrative adjudications:

> In 1975, with the enactment of sec. 227.20, Stats. 1979-80 [now, 227.57], the Wisconsin legislature has adopted this functional approach, albeit in a different context, namely judicial review of administrative decisions [contested cases]." Id. at pp. 124.

Section 227.57 provides, in part:

> The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

Justice Abrahamson also noted, however, that despite the appropriate use of the functional approach in reviewing agency rules, s. 227.40 does not contain parallel provisions to s. 227.57. This amendment embodies the functional approach contained in s. 227.57 for review of rules, consistent with *Aetna* and subsequent decisions.

3. Section 227.40 (4a) (c) – Claims for Violation of Statutory Rulemaking Procedures & Standard of Review.

a. General. Consistent with the functional approach to judicial review in general, s. 227.40 (4a) (c) addresses two aspects of judicial review of rules relating to agency rulemaking procedures: 1) The appropriated claim when challenging the adequacy of the agency's decision-making process; and, 2) The appropriate standard of review. These aspects were discussed in detail by Chief Justice Abrahamson in her dissent in *Aetna*, and subsequently affirmed in *Liberty Homes*. As noted above, however, the courts recognized that s. 227.40 lacked clarity as to these requirements, requiring the courts to look to s. 227.57 and related federal and state case law. This provision is consistent with established case law and procedures found in the federal Administrative Procedure Act (APA), 5 U.S.C. ss. 551-583, 701-706, 801-808, 3105, 334, 6362, 7562.

b. Claims for Violation of Statutory Rulemaking Procedures. Existing Wis. Stats. 227.40(4)(a) provides:

> In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures."

The courts have been somewhat ambiguous as to the appropriate claim for challenging an agency's factual underpinning of a rule. For example, the court in *Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis.2d 688 (Ct. App. 1990) opined that "a factual inadequacy challenge is a due process claim." *Id.* at pp. 708. In addition, the court in *Liberty* noted that "Though neither the circuit court nor the court of appeals explicitly address the issue, it appears they considered the attack on the rule's factual basis a constitutional due process challenge." *Id.* at pp. 373-374. The court went on to acknowledge, however, "that persons asserting that a rule is factually unsupported, could argue that in adoption such a rule the agency exceeded its statutory authority." *Id.* pp. 374, fn. 6.

The confusion by the courts and parties asserting such a claim derives from the ambiguity arising from the s. 227.40(4)(a), which is silent as to how to bring such a claim. The expectation created by the courts that such a claim must be a constitutional due process claim creates several problems. Notably, such a challenge is highly deferential, virtually assuring the validity of a rule no matter how defective.

In addition, most of these types of claims would attack the deficiencies of the agencies decision-making process, as they do under federal law; that is, the record or process does not support the approach taken by the agency. This provision makes it clear that such a claim relating to "the adequacy of the factual basis to support the rule and the related reasoning employed by the agency to reach its conclusions" can be asserted as a violation of rulemaking procedures.