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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

repeal

1 AN ACT ~~to repeal~~ 19.52 (4), 227.45 (7) (a) to (d), 227.46 (2), 227.46 (2m), 227.46  
2 (3) and 227.46 (4); ~~to renumber and amend~~ 227.45 (7) (intro.); ~~to amend~~  
3 19.52 (3), 30.02 (3), 196.24 (3), 227.14 (2) (a), 227.19 (2), 227.19 (3) (intro.),  
4 227.19 (3) (a), 227.19 (3) (b), 227.46 (1) (intro.), 227.46 (1) (h), 227.46 (6), 227.47  
5 (1), 227.485 (5), 227.53 (1) (a) 3., 289.27 (5), 448.02 (3) (b) and 448.675 (1) (b);  
6 and ~~to create~~ 227.135 (1) (e) and (f), 227.137, 227.138, 227.14 (2) (a) 3., 227.14  
7 (2) (a) 4., 227.14 (2) (a) 5., 227.14 (4) (b) 3., 227.185, 227.19 (3) (am), 227.19 (3)  
8 (cm), 227.40 (4) (am), 227.43 (1g), 227.44 (2) (d), 227.445, 227.483 and 227.57  
9 (11) of the statutes; **relating to:** administrative rules, guidelines, policies, and  
10 hearings.

**Analysis by the Legislative Reference Bureau**

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

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

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

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

2           19.52 (3) Chapters 901 to 911 apply to the admission of evidence at the hearing.  
3           The board hearing examiner shall not find a violation of this subchapter or subch.  
4           III of ch. 13 except upon clear and convincing evidence admitted at the hearing.

5           **SECTION 2.** 19.52 (4) of the statutes is repealed.

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

7           30.02 (3) Upon receipt of a complete permit application or a request for a  
8           determination under s. 236.16 (3) (d), the department shall either schedule a public  
9           hearing to be held within 60 days after receipt of the application or request or provide  
10          notice stating that it will proceed on the application or request without a public  
11          hearing if, within 30 days after the publication of the notice, no substantive written  
12          objection to issuance of the permit is received or no request for a hearing concerning  
13          the determination under s. 236.16 (3) (d) is received from a person who may be  
14          aggrieved by issuance of the permit or determination. The notice shall be provided  
15          to the clerk of each municipality in which the project is located and to any other  
16          person required by law to receive notice. The department may provide notice to other  
17          persons ~~as it deems appropriate~~ who may be aggrieved by the issuance of the permit  
18          or determination. The department shall provide a copy of the notice to the applicant,  
19          who shall publish it as a class 1 notice under ch. 985 in a newspaper designated by  
20          the department that is likely to give notice in the area affected. The applicant shall  
21          file proof of publication with the department.

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

2           196.24 (3) The commission may conduct any number of investigations  
3 contemporaneously through different agents, and may delegate to any agent the  
4 authority to take testimony bearing upon any investigation or at any hearing. The  
5 decision of the commission shall comply with s. 227.46 and shall be based upon its  
6 records and upon the evidence before it, except that, ~~notwithstanding s. 227.46 (4),~~  
7 a decision maker may hear a case or read or review the record of a case if the record  
8 includes a synopsis or summary of the testimony and other evidence presented at the  
9 hearing that is prepared by the commission staff. Parties shall have an opportunity  
10 to demonstrate to a decision maker that a synopsis or summary prepared under this  
11 subsection is not sufficiently complete or accurate to fairly reflect the relevant and  
12 material testimony or other evidence presented at a hearing.

13           **SECTION 5.** 227.135 (1) (e) and (f) of the statutes are created to read:

14           227.135 (1) (e) A summary of any existing or anticipated federal program that  
15 is intended to address the activities to be regulated by the rule and an analysis of the  
16 need for the rule if a federal program exists.

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

19           **SECTION 6.** 227.137 of the statutes is created to read:

20           **227.137 Economic impact reports of guidelines, policies, and rules. (1)**

21 After an agency publishes a statement of the scope of a proposed rule under s.  
22 227.135, and before the agency submits the proposed rule to the legislative council  
23 for review under s. 227.15, a municipality, an association that represents a farm,  
24 labor, business, or professional group, or 5 or more persons having an interest in the  
25 proposed rule may petition the agency to prepare an economic impact report of the

1 proposed rule. If the agency determines that the petitioner may be economically  
2 affected by the proposed rule, the agency shall prepare an economic impact report  
3 before submitting the proposed rule to the legislative council under s. 227.15.

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

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

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

23 (b) An analysis and quantification of the economic impact of the guideline,  
24 policy, or rule, including direct, indirect, and consequential costs reasonably

1 expected to be incurred by the state, governmental units, associations, businesses,  
2 and affected individuals.

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

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

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

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

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

20 (h) A comparison of the costs of the guideline, policy, or rule borne by Wisconsin  
21 businesses to costs borne by similar businesses located in Indiana, Missouri, and  
22 adjacent states.

23 (4) The agency shall submit the economic impact report to the legislative  
24 council staff, to the department of administration, and to the petitioner.

1           (5) This section does not apply to emergency rules promulgated under s.  
2           227.24.

3           **SECTION 7.** 227.138 of the statutes is created to read:

4           **227.138 Department of administration review of proposed rules. (1)**

5           In this section:

6           (a) “Department” means the department of administration.

7           (b) “Economic impact report” means a report prepared under s. 227.137.

8           (c) “Guideline or policy” includes any agency comments or policies in response  
9           to federal regulations.

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

21          (a) If an economic impact report was prepared as required under s. 227.137 (1),  
22          that the report and the analysis required under s. 227.137 (3) are supported by  
23          related documentation contained in the economic impact report.

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

*g studies and other sources of information*

1 (c) That the proposed rule, including any administrative requirements, is  
2 consistent with and not duplicative of other state rules or federal regulations.

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

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

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

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

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

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

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

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

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

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

16 **SECTION 8.** 227.14 (2) (a) of the statutes is amended to read:

17 227.14 (2) (a) An agency shall prepare in plain language an analysis of each  
18 proposed rule, which shall be printed with the proposed rule when it is published or  
19 distributed. The analysis shall include a all of the following:

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

22 2. A brief summary of the proposed rule.

23 **SECTION 9.** 227.14 (2) (a) 3. of the statutes is created to read:

24 227.14 (2) (a) 3. A summary of the relevant legal interpretations and policy  
25 considerations underlying the proposed rule.



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**SECTION 10.** 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 11.** 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.

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**SECTION 12.** 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.

**SECTION 13.** 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 14.** 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

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

11 **SECTION 15.** 227.19 (3) (intro.) of the statutes is amended to read:

12 227.19 (3) FORM OF REPORT. (intro.) The report required under sub. (2) shall be  
13 in writing and shall include the proposed rule in the form specified in s. 227.14 (1),  
14 the material specified in s. 227.14 (2) to (4), a copy of any economic impact report  
15 prepared by the agency under s. 227.137, a copy of the report prepared by the  
16 department of administration under s. 227.138, a copy of the written approval of the  
17 governor under s. 227.185, a copy of any recommendations of the legislative council  
18 staff, and an analysis. The analysis shall include:

19 **SECTION 16.** 227.19 (3) (a) of the statutes is amended to read:

20 227.19 (3) (a) A detailed statement explaining the need for basis and purpose  
21 of the proposed rule, including how the proposed rule advances relevant statutory  
22 goals or purposes.

23 **SECTION 17.** 227.19 (3) (am) of the statutes is created to read:

1           227.19 (3) (am) An analysis of policy alternatives to the proposed rule,  
2 including reliance on federal regulatory programs, and an explanation for the  
3 rejection of those alternatives.

4           **SECTION 18.** 227.19 (3) (b) of the statutes is amended to read:

5           227.19 (3) (b) ~~An~~ A summary of public comments to the proposed rule and the  
6 agency's response to those comments, and an explanation of any modification made  
7 in the proposed rule as a result of public comments or testimony received at a public  
8 hearing.

9           **SECTION 19.** 227.19 (3) (cm) of the statutes is created to read:

10          227.19 (3) (cm) Any changes to the analysis prepared under s. 227.14 (2) or the  
11 fiscal estimate prepared under s. 227.14 (4).

12          **SECTION 20.** ~~227.40 (4) (am) of the statutes is created to read:~~

13          227.40 (4) (am) The court shall review the record and evaluate the reasons  
14 underlying a rule when determining the validity of the rule. The agency's record  
15 submitted to the court shall include the analysis and documentation required under  
16 ss. 227.137 (3), 227.14 (2), and 227.19 (3) and public comments on the proposed rule.  
17 The trial court may accept other relevant evidence to supplement the agency record  
18 when determining the validity of the rule. The court shall find a rule invalid for  
19 failure to comply with the rule-making procedures if the agency's analysis under ss.  
20 227.137 (3), 227.14 (2), and 227.19 (3) is not supported by substantial evidence. If  
21 an agency acts under a statute that allows the agency to exceed federal law, the court  
22 shall find that the agency exceeded its statutory authority if the agency's actions are  
23 not supported by clear and convincing evidence.

24          **SECTION 21.** 227.43 (1g) of the statutes is created to read:

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

3           **SECTION 22.** 227.44 (2) (d) of the statutes is created to read:

4           227.44 (2) (d) The name and title of the person who will conduct the hearing.

5           **SECTION 23.** 227.445 of the statutes is created to read:

6           **227.445 Substitution of hearing examiner.** (1) A person requesting a  
7 hearing before a hearing examiner may file a written request for a substitution of a  
8 new hearing examiner for the hearing examiner assigned to the matter. The written  
9 request shall be filed not later than 10 days after receipt of the notice under s. 227.44.

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

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

20           **SECTION 24.** 227.45 (7) (intro.) of the statutes is renumbered 227.45 (7) and  
21 amended to read:

22           227.45 (7) In any class 2 proceeding, each party shall have the right, prior to  
23 the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon  
24 motion by a party or by the person from whom discovery is sought in any class 2  
25 proceeding, and for good cause shown, the hearing examiner may make any order in

1 accordance with s. 804.01 which justice requires to protect a party or person from  
2 annoyance, embarrassment, oppression, or undue burden or expense. ~~In any class~~  
3 ~~1 or class 3 proceeding, an agency may by rule permit the taking and preservation~~  
4 ~~of evidence, but in every such proceeding the taking and preservation of evidence~~  
5 ~~shall be permitted with respect to a witness:~~

6 **SECTION 25.** 227.45 (7) (a) to (d) of the statutes are repealed.

7 **SECTION 26.** 227.46 (1) (intro.) of the statutes is amended to read:

8 227.46 (1) (intro.) Except as provided under s. 227.43 (1), an agency may  
9 designate an official of the agency or an employee on its staff or borrowed from  
10 another agency under s. 20.901 or 230.047 as a hearing examiner to preside over any  
11 contested case. In hearings under s. 19.52, a reserve judge shall be appointed. A  
12 hearing examiner does not have authority to address or make decisions regarding  
13 possible constitutional issues. Subject to rules of the agency, examiners presiding at  
14 hearings may:

15 **SECTION 27.** 227.46 (1) (h) of the statutes is amended to read:

16 227.46 (1) (h) Make ~~or recommend~~ findings of fact, conclusions of law, and  
17 decisions to the extent permitted by law.

18 **SECTION 28.** 227.46 (2) of the statutes is repealed.

19 **SECTION 29.** 227.46 (2m) of the statutes is repealed.

20 **SECTION 30.** 227.46 (3) of the statutes is repealed.

21 **SECTION 31.** 227.46 (4) of the statutes is repealed.

22 **SECTION 32.** 227.46 (6) of the statutes is amended to read:

23 227.46 (6) The functions of persons presiding at a hearing or participating in  
24 ~~proposed or~~ final decisions shall be performed in an impartial manner. A hearing  
25 examiner or agency official may at any time disqualify himself or herself. In class

1 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of  
2 personal bias or other disqualification of a hearing examiner or official, the agency  
3 or hearing examiner shall determine the matter as part of the record and decision  
4 in the case.

5 **SECTION 33.** 227.47 (1) of the statutes is amended to read:

6 227.47 (1) Except as provided in sub. (2), every ~~proposed or~~ final decision of an  
7 agency or hearing examiner following a hearing and every final decision of an agency  
8 shall be in writing accompanied by findings of fact and conclusions of law. The  
9 findings of fact shall consist of a concise and separate statement of the ultimate  
10 conclusions upon each material issue of fact without recital of evidence. Every  
11 ~~proposed or~~ final decision shall include a list of the names and addresses of all  
12 persons who appeared before the agency in the proceeding who are considered  
13 parties for purposes of review under s. 227.53. The agency shall by rule establish a  
14 procedure for determination of parties.

15 **SECTION 34.** 227.483 of the statutes is created to read:

16 **227.483 Costs upon frivolous claims.** (1) If a hearing examiner finds, at  
17 any time during the proceeding, that an administrative hearing commenced or  
18 continued by a petitioner or a claim or defense used by a party is frivolous, the  
19 hearing examiner shall award the successful party his or her costs, as determined  
20 under s. 814.04, and reasonable attorney fees.

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

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

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

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

9           **SECTION 35.** 227.485 (5) of the statutes is amended to read:

10           227.485 (5) If the hearing examiner awards costs under sub. (3), he or she shall  
11 determine the costs under this subsection, except as modified under sub. (4). The  
12 decision on the merits of the case shall be placed in a ~~proposed~~ decision and  
13 submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within  
14 30 days after service of the ~~proposed~~ decision, to the hearing examiner and to the  
15 state agency which is the losing party an itemized application for fees and other  
16 expenses, including an itemized statement from any attorney or expert witness  
17 representing or appearing on behalf of the party stating the actual time expended  
18 and the rate at which fees and other expenses were computed. The state agency  
19 which is the losing party has 15 working days from the date of receipt of the  
20 application to respond in writing to the hearing examiner. The hearing examiner  
21 shall determine the amount of costs using the criteria specified in s. 814.245 (5) and  
22 include an order for payment of costs in the final decision.

23           **SECTION 36.** 227.53 (1) (a) 3. of the statutes is amended to read:

24           227.53 (1) (a) 3. If the petitioner is a resident, the proceedings shall be held in  
25 the circuit court for the county where the petitioner resides, except that if the

1 petitioner is an agency, the proceedings shall be in the circuit court for the county  
2 where the respondent resides and except as provided in ss. 73.0301 (2) (b) 2., 77.59  
3 (6) (b), 182.70 (6), and 182.71 (5) (g). ~~The proceedings shall be in the circuit court for~~  
4 ~~Dane County if~~ If the petitioner is a nonresident, the proceedings shall be held in the  
5 county where the property affected by the decision is located or, if no property is  
6 affected, in the county where the dispute arose. If all parties stipulate and the court  
7 to which the parties desire to transfer the proceedings agrees, the proceedings may  
8 be held in the county designated by the parties. If 2 or more petitions for review of  
9 the same decision are filed in different counties, the circuit judge for the county in  
10 which a petition for review of the decision was first filed shall determine the venue  
11 for judicial review of the decision, and shall order transfer or consolidation where  
12 appropriate.

13 **SECTION 37.** 227.57 (11) of the statutes is created to read:

14 227.57 (11) If the decision of the hearing examiner is inconsistent with the  
15 position taken at the hearing by the agency, the court shall give no deference to the  
16 examiner's decision when conducting its review.

17 **SECTION 38.** 289.27 (5) of the statutes is amended to read:

18 289.27 (5) DETERMINATION OF NEED; DECISION BY HEARING EXAMINER. If a  
19 contested case hearing is conducted under this section, the secretary shall issue any  
20 decision concerning determination of need, ~~notwithstanding s. 227.46 (2) to (4).~~ The  
21 secretary shall direct the hearing examiner to certify the record of the contested case  
22 hearing to him or her without an intervening proposed decision. The secretary may  
23 assign responsibility for reviewing this record and making recommendations  
24 concerning the decision to any employee of the department.

25 **SECTION 39.** 448.02 (3) (b) of the statutes is amended to read:



1           448.02 (3) (b) After an investigation, if the board finds that there is probable  
2 cause to believe that the person is guilty of unprofessional conduct or negligence in  
3 treatment, the board shall hold a hearing on such conduct. The board may use any  
4 information obtained by the board or the department under s. 655.17 (7) (b), as  
5 created by 1985 Wisconsin Act 29, in an investigation or a disciplinary proceeding,  
6 including a public disciplinary proceeding, conducted under this subsection and the  
7 board may require a person holding a license, certificate or limited permit to undergo  
8 and may consider the results of one or more physical, mental or professional  
9 competency examinations if the board believes that the results of any such  
10 examinations may be useful to the board in conducting its hearing. A unanimous  
11 finding by a panel established under s. 655.02, 1983 stats., or a finding by a court that  
12 a physician has acted negligently in treating a patient is conclusive evidence that the  
13 physician is guilty of negligence in treatment. A finding that is not a unanimous  
14 finding by a panel established under s. 655.02, 1983 stats., that a physician has acted  
15 negligently in treating a patient is presumptive evidence that the physician is guilty  
16 of negligence in treatment. A certified copy of the findings of fact, conclusions of law  
17 and order of the panel or the order of a court is presumptive evidence that the finding  
18 of negligence in treatment was made. The board shall render a decision within 90  
19 days after the date on which the hearing is held ~~or, if subsequent proceedings are~~  
20 ~~conducted under s. 227.46 (2), within 90 days after the date on which those~~  
21 ~~proceedings are completed.~~

22           **SECTION 40.** 448.675 (1) (b) of the statutes is amended to read:

23           448.675 (1) (b) After an investigation, if the affiliated credentialing board finds  
24 that there is probable cause to believe that the person is guilty of unprofessional  
25 conduct or negligence in treatment, the affiliated credentialing board shall hold a

1 hearing on such conduct. The affiliated credentialing board may require a licensee  
2 to undergo and may consider the results of a physical, mental or professional  
3 competency examination if the affiliated credentialing board believes that the  
4 results of the examination may be useful to the affiliated credentialing board in  
5 conducting its hearing. A finding by a court that a podiatrist has acted negligently  
6 in treating a patient is conclusive evidence that the podiatrist is guilty of negligence  
7 in treatment. A certified copy of the order of a court is presumptive evidence that the  
8 finding of negligence in treatment was made. The affiliated credentialing board  
9 shall render a decision within 90 days after the date on which the hearing is held ~~or,~~  
10 ~~if subsequent proceedings are conducted under s. 227.46 (2), within 90 days after the~~  
11 ~~date on which those proceedings are completed.~~

12 (END)

2003-2004 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3426/1ins  
RPN:wlj:rs

insert anl:

This bill makes numerous changes to the administrative rulemaking and procedures. The bill:

1. Expands the judicial review of the agency rulemaking process as follows:

a. Requires a court, when determining if a promulgated rule is valid to confine its review to the agency record unless it is necessary to supplement that record with additional evidence.

Expands b. The agency record subject to review is expanded in the bill to include any economic impact report and related analysis that the agency prepares in response to a petition from a group economically affected by the rule, the plain-language analysis of the rule printed at the time the rule is published, and the report submitted to the legislature when the proposed rule is in final draft form.

+ c. Allows a court to find a rule invalid if the agency's decision-making process related to the adequacy of the factual basis to support the rule was arbitrary and capricious, if the agency's required analysis and determinations were arbitrary and capricious, or if the rulemaking process was impaired by a material error in the agency's procedure when promulgating the rule.

Requires that d. If the agency's authority to promulgate a rule requires the rule to be comparable with federal programs or requirements or to exceed federal programs or requirements based on need, the court shall conduct a review of the agency record to determine if the agency determination was supported by substantial evidence.

that represents a 2. Requires an agency to prepare an economic impact report for a proposed rule if a municipality, association, farm, labor, business, or professional group, or five or more persons, who may be economically affected by a proposed rule asks the agency to prepare that report.

3. Requires the department of administration (DOA) to review a proposed rule if petitioned by affected persons or if an economic impact report is prepared and to determine if the agency has statutory authority to promulgate the proposed rule, if the rule is consistent with and not duplicative of other rules or federal regulations, that the proposed rule is consistent with the governor's positions, and that the agency used complete and accurate data when developing the rule. Under the bill, DOA may return the proposed rule to the agency for rewriting.

4. Requires an agency, when preparing the analysis of a proposed rule as required under current law, to include in that analysis, in addition to the currently required summary of the rule and references to the statutes that authorize the rule and that the rule interprets, all of the following:

a. A summary of the legal interpretations and policy considerations underlying the rule.

b. A summary of existing federal regulatory programs that address similar matters.

c. A summary of the data, studies, and other sources of information on which the proposed rule is based.

d. A summary of the methodology used to obtain and analyze the data and how the data supports the regulatory approach and the agency's findings.

5. Requires the agency to submit a proposed rule in final form to the governor for review, modification, or rejection.

6. Requires the administrator of the division of hearing<sup>s</sup> and appeals to randomly assign hearing examiners to preside over administrative hearings.

7. Allows a person to request ~~once~~ the substitution of an administrative hearing examiner and provides a procedure for that substitution to take place.

8. Prohibits a hearing examiner from making any decision regarding constitutional issues. *provision that allowed*

9. Removes the ~~provision~~ certain agencies to have the hearing examiner make a proposed decision and have designated officials of the agency review that proposed decision and issue a final decision. *Instead, the hearing examiner's decision is final*

10. Allows a hearing examiner to award the successful party his or her costs, including attorney fees, if the hearing examiner finds that the other party's claim or defense is frivolous. *the venue of judicial review*

11. Allows ~~in court review~~ of a contested case where the petitioner is a nonresident to be in the county where the property involved is located or if no property involved, in the county where the dispute arose, instead of in Dane County as is ~~the~~ current law.

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

insert 9-8:

~~#~~ SECTION ~~A~~. 227.14 (2) (a) 6. of the statutes is created to read:

227.14 (2) (a) 6. Any analysis and supporting documentation used when the *agency considered* ~~considering~~ the rule's effect on small businesses under s. 227.114 or used when preparing an economic impact report under s. 227.137 (3).

insert 11-23:

~~#~~ SECTION ~~B~~. 227.40 (4m) of the statutes is created to read:

227.40 (4m) (insert 11-23A) *(next page)*

Insert 11-23A

# 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

ⓐ The review

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

227.40 (4) (a) In any proceeding ~~under~~ <sup>under</sup> 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~~ <sup>the analysis and documentation required under ss.</sup> and documentation required under s. 227.137 (3), 227.14 (2) and 227.19 (3), and public comments on the rule.

shall conduct the review

economic impact report

ⓑ 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.

ⓒ When reviewing whether a rule is invalid as promulgated ~~without compliance~~ <sup>under</sup> with statutory rulemaking procedures ~~set forth~~ <sup>for failure to comply</sup> 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. ~~On 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.

ⓓ When determining the adequacy of the factual basis to support the rule, the court shall consider

ⓓ The court shall find a rule invalid if it determines <sup>that</sup> the adequacy of the rulemaking process or the validity of the regulatory approach <sup>has been</sup> impaired by a material error in procedure or a failure <sup>of the agency</sup> 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 <sup>the</sup> 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 <sup>find</sup> ~~consider~~ the rule invalid as without compliance with statutory rulemaking procedures set forth in this chapter. ✓

(end of insert 11-23A)

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3426/1dn  
RPN:wli *6/21*

This draft is based on proposed language and discussions with Bob Fassbender.

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**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3426/1dn  
RPN:wlj:jf

November 3, 2003

This draft is based on proposed language and discussions with Bob Fassbender.

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## 2003 BILL

1     **AN ACT** *to repeal* 19.52 (4), 227.45 (7) (a) to (d), 227.46 (2), 227.46 (2m), 227.46  
2           (3) and 227.46 (4); *to renumber and amend* 227.45 (7) (intro.); *to amend*  
3           19.52 (3), 30.02 (3), 196.24 (3), 227.14 (2) (a), 227.19 (2), 227.19 (3) (intro.),  
4           227.19 (3) (a), 227.19 (3) (b), 227.46 (1) (intro.), 227.46 (1) (h), 227.46 (6), 227.47  
5           (1), 227.485 (5), 227.53 (1) (a) 3., 289.27 (5), 448.02 (3) (b) and 448.675 (1) (b);  
6           and *to create* 227.135 (1) (e) and (f), 227.137, 227.138, 227.14 (2) (a) 3., 227.14  
7           (2) (a) 4., 227.14 (2) (a) 5., 227.14 (2) (a) 6., 227.14 (4) (b) 3., 227.185, 227.19 (3)  
8           (am), 227.19 (3) (cm), 227.40 (4m), 227.43 (1g), 227.44 (2) (d), 227.445, 227.483  
9           and 227.57 (11) of the statutes; **relating to:** administrative rules, guidelines,  
10          policies, and hearings.

---

### *Analysis by the Legislative Reference Bureau*

This bill makes numerous changes to the administrative rule making and procedures. The bill:

1. Expands the judicial review of the agency rule-making process as follows:
  - a. Requires a court, when determining if a promulgated rule is valid, to confine its review to the agency record unless it is necessary to supplement that record with additional evidence.

**BILL**

b. Expands the agency record subject to review to include any economic impact report and related analysis that the agency prepares in response to a petition from a group economically affected by the rule, the plain-language analysis of the rule printed at the time the rule is published, and the report submitted to the legislature when the proposed rule is in final draft form.

c. Allows a court to find a rule invalid if the agency's decision-making process related to the adequacy of the factual basis to support the rule was arbitrary and capricious, if the agency's required analysis and determinations were arbitrary and capricious, or if the rule-making process was impaired by a material error in the agency's procedure when promulgating the rule.

d. Requires that if the agency's authority to promulgate a rule requires the rule to be comparable with federal programs or requirements or to exceed federal programs or requirements based on need, the court shall conduct a review of the agency record to determine if the agency determination was supported by substantial evidence.

2. Requires an agency to prepare an economic impact report for a proposed rule if a municipality, an association that represents a farm, labor, business, or professional group, or five or more persons, who may be economically affected by a proposed rule asks the agency to prepare that report.

3. Requires the Department of Administration (DOA) to review a proposed rule if petitioned by affected persons or if an economic impact report is prepared and to determine if the agency has statutory authority to promulgate the proposed rule, if the rule is consistent with and not duplicative of other rules or federal regulations, that the proposed rule is consistent with the governor's positions, and that the agency used complete and accurate data when developing the rule. Under the bill, DOA may return the proposed rule to the agency for rewriting.

4. Requires an agency, when preparing the analysis of a proposed rule as required under current law, to include all of the following in that analysis, in addition to the currently required summary of the rule and references to the statutes that authorize the rule and that the rule interprets:

a. A summary of the legal interpretations and policy considerations underlying the rule.

b. A summary of existing federal regulatory programs that address similar matters.

c. A summary of the data, studies, and other sources of information on which the proposed rule is based.

d. A summary of the methodology used to obtain and analyze the data and how the data supports the regulatory approach and the agency's findings.

5. Requires the agency to submit a proposed rule in final form to the governor for review, modification, or rejection.

6. Requires the administrator of the division of hearings and appeals to randomly assign hearing examiners to preside over administrative hearings.

7. Allows a person to request the substitution of an administrative hearing examiner and provides a procedure for that substitution.

**BILL**

8. Prohibits a hearing examiner from making any decision regarding constitutional issues.

9. Removes the provision that allowed certain agencies to have the hearing examiner make a proposed decision and have designated officials of the agency review that proposed decision and issue a final decision. Instead, the hearing examiner's decision is final.

10. Allows a hearing examiner to award the successful party his or her costs, including attorney fees, if the hearing examiner finds that the other party's claim or defense is frivolous.

11. Allows the venue of judicial review of a contested case where the petitioner is a nonresident to be in the county where the property involved is located or if no property involved, in the county where the dispute arose, instead of in Dane County as is current law.

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:*

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

2           19.52 (3) Chapters 901 to 911 apply to the admission of evidence at the hearing.

3           The ~~board~~ hearing examiner shall not find a violation of this subchapter or subch.

4           III of ch. 13 except upon clear and convincing evidence admitted at the hearing.

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

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

7           30.02 (3) Upon receipt of a complete permit application or a request for a  
8           determination under s. 236.16 (3) (d), the department shall either schedule a public

9           hearing to be held within 60 days after receipt of the application or request or provide

10          notice stating that it will proceed on the application or request without a public

11          hearing if, within 30 days after the publication of the notice, no substantive written

12          objection to issuance of the permit is received or no request for a hearing concerning

13          the determination under s. 236.16 (3) (d) is received from a person who may be

14          aggrieved by issuance of the permit or determination. The notice shall be provided

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1 to the clerk of each municipality in which the project is located and to any other  
2 person required by law to receive notice. The department may provide notice to other  
3 persons ~~as it deems appropriate~~ who may be aggrieved by the issuance of the permit  
4 or determination. The department shall provide a copy of the notice to the applicant,  
5 who shall publish it as a class 1 notice under ch. 985 in a newspaper designated by  
6 the department that is likely to give notice in the area affected. The applicant shall  
7 file proof of publication with the department.

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

9 196.24 (3) The commission may conduct any number of investigations  
10 contemporaneously through different agents, and may delegate to any agent the  
11 authority to take testimony bearing upon any investigation or at any hearing. The  
12 decision of the commission shall comply with s. 227.46 and shall be based upon its  
13 records and upon the evidence before it, ~~except that, notwithstanding s. 227.46 (4),~~  
14 a decision maker may hear a case or read or review the record of a case if the record  
15 includes a synopsis or summary of the testimony and other evidence presented at the  
16 hearing that is prepared by the commission staff. Parties shall have an opportunity  
17 to demonstrate to a decision maker that a synopsis or summary prepared under this  
18 subsection is not sufficiently complete or accurate to fairly reflect the relevant and  
19 material testimony or other evidence presented at a hearing.

20 **SECTION 5.** 227.135 (1) (e) and (f) of the statutes are created to read:

21 227.135 (1) (e) A summary of any existing or anticipated federal program that  
22 is intended to address the activities to be regulated by the rule and an analysis of the  
23 need for the rule if a federal program exists.

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

**BILL**

1           **SECTION 6.** 227.137 of the statutes is created to read:

2           **227.137 Economic impact reports of guidelines, policies, and rules. (1)**

3           After an agency publishes a statement of the scope of a proposed rule under s.  
4           227.135, and before the agency submits the proposed rule to the legislative council  
5           for review under s. 227.15, a municipality, an association that represents a farm,  
6           labor, business, or professional group, or 5 or more persons having an interest in the  
7           proposed rule may petition the agency to prepare an economic impact report of the  
8           proposed rule. If the agency determines that the petitioner may be economically  
9           affected by the proposed rule, the agency shall prepare an economic impact report  
10          before submitting the proposed rule to the legislative council under s. 227.15.

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

18          **(3)** An economic impact report shall contain information on the effect of the  
19          proposed rule or existing or proposed guideline or policy on specific businesses,  
20          business sectors, and the state's economy. When preparing the report, the agency  
21          shall solicit information and advice from the department of commerce and  
22          governmental units, associations, businesses, and individuals that may be affected  
23          by the proposed rule or existing or proposed guideline or policy. The agency may  
24          request information that is reasonably necessary for the preparation of an economic  
25          impact report from other state agencies, governmental units, associations,

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1 businesses, and individuals, but no one is required to respond to that request. The  
2 economic impact report shall include all of the following:

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

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

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

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

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

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

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

**BILL**

1 (h) A comparison of the costs of the guideline, policy, or rule borne by Wisconsin  
2 businesses to costs borne by similar businesses located in Indiana, Missouri, and  
3 adjacent states.

4 (4) The agency shall submit the economic impact report to the legislative  
5 council staff, to the department of administration, and to the petitioner.

6 (5) This section does not apply to emergency rules promulgated under s.  
7 227.24.

8 **SECTION 7.** 227.138 of the statutes is created to read:

9 **227.138 Department of administration review of proposed rules. (1)**

10 In this section:

11 (a) “Department” means the department of administration.

12 (b) “Economic impact report” means a report prepared under s. 227.137.

13 (c) “Guideline or policy” includes any agency comments or policies in response  
14 to federal regulations.

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

**BILL**

1 (a) If an economic impact report was prepared as required under s. 227.137 (1),  
2 that the report and the analysis required under s. 227.137 (3) are supported by  
3 related documentation contained in the economic impact report.

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

6 (c) That the proposed rule, including any administrative requirements, is  
7 consistent with and not duplicative of other state rules or federal regulations.

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

10 (e) That the agency used data, studies, and other sources of information in  
11 developing the proposed rule that is complete, accurate, and derived from accepted  
12 scientific methodologies.

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

23 (4) If the department receives an economic impact report under s. 227.137 (4)  
24 regarding a proposed or existing guideline or policy, the department shall review the  
25 guideline or policy and issue a report. A municipality, an association that represents



**BILL**

1 a farm, labor, business, or professional group, or 5 or more persons having an interest  
2 in a proposed or existing guideline or policy may petition the department to review  
3 the guideline or policy. If the department determines that the petitioner may be  
4 economically affected by the guideline or policy, the department shall review the  
5 guideline or policy and issue a report. The department shall notify the agency that  
6 a report will be prepared. The report shall include findings consistent with those  
7 under sub. (2) and include the following findings:

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

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

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

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

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

21 **SECTION 8.** 227.14 (2) (a) of the statutes is amended to read:

22 227.14 (2) (a) An agency shall prepare in plain language an analysis of each  
23 proposed rule, which shall be printed with the proposed rule when it is published or  
24 distributed. The analysis shall include a all of the following:

**BILL**

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

3           2. A brief summary of the proposed rule.

4           **SECTION 9.** 227.14 (2) (a) 3. of the statutes is created to read:

5           227.14 (2) (a) 3. A summary of the relevant legal interpretations and policy  
6 considerations underlying the proposed rule.

7           **SECTION 10.** 227.14 (2) (a) 4. of the statutes is created to read:

8           227.14 (2) (a) 4. A summary of existing and anticipated federal regulatory  
9 programs intended to address similar matters.

10          **SECTION 11.** 227.14 (2) (a) 5. of the statutes is created to read:

11          227.14 (2) (a) 5. A summary of the factual data, studies, and other sources of  
12 information on which the proposed rule is based, the methodology used to obtain and  
13 analyze the data, studies, and other sources of information, how the data, studies,  
14 and other sources of information support the regulatory approach chosen for the rule,  
15 and how the data, studies, and other sources of information support any required  
16 agency's findings.

17          **SECTION 12.** 227.14 (2) (a) 6. of the statutes is created to read:

18          227.14 (2) (a) 6. Any analysis and supporting documentation used when the  
19 agency considered the rule's effect on small businesses under s. 227.114 or used when  
20 preparing an economic impact report under s. 227.137 (3).

21          **SECTION 13.** 227.14 (4) (b) 3. of the statutes is created to read:

22          227.14 (4) (b) 3. For rules that the agency determines may have a significant  
23 fiscal effect on the private sector, the anticipated costs that will be incurred by the  
24 private sector in complying with the rule.

25          **SECTION 14.** 227.185 of the statutes is created to read:

**BILL**

1           **227.185 Approval by governor.** After a proposed rule is in final draft form  
2 and approved by the department of administration under s. 227.138 (3), the agency  
3 shall submit the rule to the governor. The governor may approve, modify, or reject  
4 the proposed rule. If the governor approves a proposed rule, the governor shall  
5 provide the agency with a written notice of that approval. No proposed rule may be  
6 submitted to the legislature for review under s. 227.19 (2) or filed with the office of  
7 secretary of state or revisor unless the governor has approved the proposed rule in  
8 writing. This section does not apply to emergency rules promulgated under s. 227.24.

9           **SECTION 15.** 227.19 (2) of the statutes is amended to read:

10           **227.19 (2) NOTIFICATION OF LEGISLATURE.** An agency shall submit a notice to the  
11 presiding officer of each house of the legislature when a proposed rule is in final draft  
12 form and approved by the governor. The notice shall be submitted in triplicate and  
13 shall be accompanied by a report in the form specified under sub. (3). A notice  
14 received under this subsection on or after September 1 of an even-numbered year  
15 shall be considered received on the first day of the next regular session of the  
16 legislature. Each presiding officer shall, within 7 working days following the day on  
17 which the notice and report are received, refer them to one committee, which may  
18 be either a standing committee or a joint legislative committee created by law, except  
19 the joint committee for review of administrative rules. The agency shall submit to  
20 the revisor for publication in the register a statement that a proposed rule has been  
21 submitted to the presiding officer of each house of the legislature. Each presiding  
22 officer shall enter a similar statement in the journal of his or her house.

23           **SECTION 16.** 227.19 (3) (intro.) of the statutes is amended to read:

24           **227.19 (3) FORM OF REPORT.** (intro.) The report required under sub. (2) shall be  
25 in writing and shall include the proposed rule in the form specified in s. 227.14 (1),

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1 the material specified in s. 227.14 (2) to (4), a copy of any economic impact report  
2 prepared by the agency under s. 227.137, a copy of the report prepared by the  
3 department of administration under s. 227.138, a copy of the written approval of the  
4 governor under s. 227.185, a copy of any recommendations of the legislative council  
5 staff, and an analysis. The analysis shall include:

6 **SECTION 17.** 227.19 (3) (a) of the statutes is amended to read:

7 227.19 (3) (a) A detailed statement explaining the need for basis and purpose  
8 of the proposed rule, including how the proposed rule advances relevant statutory  
9 goals or purposes.

10 **SECTION 18.** 227.19 (3) (am) of the statutes is created to read:

11 227.19 (3) (am) An analysis of policy alternatives to the proposed rule,  
12 including reliance on federal regulatory programs, and an explanation for the  
13 rejection of those alternatives.

14 **SECTION 19.** 227.19 (3) (b) of the statutes is amended to read:

15 227.19 (3) (b) An A summary of public comments to the proposed rule and the  
16 agency's response to those comments, and an explanation of any modification made  
17 in the proposed rule as a result of public comments or testimony received at a public  
18 hearing.

19 **SECTION 20.** 227.19 (3) (cm) of the statutes is created to read:

20 227.19 (3) (cm) Any changes to the analysis prepared under s. 227.14 (2) or the  
21 fiscal estimate prepared under s. 227.14 (4).

22 **SECTION 21.** 227.40 (4m) of the statutes is created to read:

23 227.40 (4m) (a) In any proceeding under this section for judicial review of a  
24 rule, the court shall conduct the review without a jury. The review shall be confined  
25 to a substantial inquiry of the agency record, as necessarily and appropriately

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1 supplemented by evidence presented to the court. The agency record includes the  
2 economic impact report and documentation required under s. 227.137 (3), the  
3 analysis and documentation required under ss. 227.14 (2) and 227.19 (3), and public  
4 comments on the rule.

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

8 (c) When reviewing whether a rule is invalid as promulgated for failure to  
9 comply with statutory rule-making procedures under this chapter, the court shall  
10 determine the adequacy of the factual basis to support the rule and the related  
11 reasoning employed by the agency to reach its conclusions. When determining the  
12 adequacy of the factual basis to support the rule, the court shall consider relevant  
13 comments on and alternatives to the rule's approach offered by affected parties  
14 during the rule-making process. Based on this review, the court shall find the rule  
15 invalid if the agency's decision-making process was arbitrary and capricious.

16 (d) The court shall find a rule invalid if it determines that the adequacy of the  
17 rule-making process or that the validity of the regulatory approach was impaired by  
18 a material error in agency procedure or a failure of the agency to follow prescribed  
19 procedure.

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

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

6 (g) If a court finds that the agency's analysis and determinations under s.  
7 227.137 (3) are arbitrary and capricious, the court shall find the rule invalid as  
8 without compliance with statutory rule-making procedures set forth in this chapter.

9 **SECTION 22.** 227.43 (1g) of the statutes is created to read:

10 227.43 (1g) The administrator of the division of hearings and appeals shall  
11 randomly assign hearing examiners to preside over any hearing under this section.

12 **SECTION 23.** 227.44 (2) (d) of the statutes is created to read:

13 227.44 (2) (d) The name and title of the person who will conduct the hearing.

14 **SECTION 24.** 227.445 of the statutes is created to read:

15 **227.445 Substitution of hearing examiner.** (1) A person requesting a  
16 hearing before a hearing examiner may file a written request for a substitution of a  
17 new hearing examiner for the hearing examiner assigned to the matter. The written  
18 request shall be filed not later than 10 days after receipt of the notice under s. 227.44.

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

20 (3) Upon receipt of the written request, the original hearing examiner shall  
21 have no further jurisdiction in the matter except to determine if the request was  
22 made timely and in proper form. If the hearing examiner fails to make a  
23 determination as to allowing the substitution within 7 days, the hearing examiner  
24 shall refer the matter to the administrator of the division of hearings and appeals for  
25 the determination and reassignment of the hearing as necessary. If the written

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1 request is determined to be proper, the matter shall be transferred to another  
2 hearing examiner. Upon transfer, the hearing examiner shall transmit to the new  
3 hearing examiner all the papers in the matter.

4 **SECTION 25.** 227.45 (7) (intro.) of the statutes is renumbered 227.45 (7) and  
5 amended to read:

6 227.45 (7) In any class 2 proceeding, each party shall have the right, prior to  
7 the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon  
8 motion by a party or by the person from whom discovery is sought in any class 2  
9 proceeding, and for good cause shown, the hearing examiner may make any order in  
10 accordance with s. 804.01 which justice requires to protect a party or person from  
11 annoyance, embarrassment, oppression, or undue burden or expense. ~~In any class  
12 1 or class 3 proceeding, an agency may by rule permit the taking and preservation  
13 of evidence, but in every such proceeding the taking and preservation of evidence  
14 shall be permitted with respect to a witness:~~

15 **SECTION 26.** 227.45 (7) (a) to (d) of the statutes are repealed.

16 **SECTION 27.** 227.46 (1) (intro.) of the statutes is amended to read:

17 227.46 (1) (intro.) Except as provided under s. 227.43 (1), an agency may  
18 designate an official of the agency or an employee on its staff or borrowed from  
19 another agency under s. 20.901 or 230.047 as a hearing examiner to preside over any  
20 contested case. In hearings under s. 19.52, a reserve judge shall be appointed. A  
21 hearing examiner does not have authority to address or make decisions regarding  
22 possible constitutional issues. Subject to rules of the agency, examiners presiding at  
23 hearings may:

24 **SECTION 28.** 227.46 (1) (h) of the statutes is amended to read:

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

3           **SECTION 29.** 227.46 (2) of the statutes is repealed.

4           **SECTION 30.** 227.46 (2m) of the statutes is repealed.

5           **SECTION 31.** 227.46 (3) of the statutes is repealed.

6           **SECTION 32.** 227.46 (4) of the statutes is repealed.

7           **SECTION 33.** 227.46 (6) of the statutes is amended to read:

8           227.46 (6) The functions of persons presiding at a hearing or participating in  
9 ~~proposed or~~ final decisions shall be performed in an impartial manner. A hearing  
10 examiner or agency official may at any time disqualify himself or herself. In class  
11 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of  
12 personal bias or other disqualification of a hearing examiner or official, the agency  
13 or hearing examiner shall determine the matter as part of the record and decision  
14 in the case.

15           **SECTION 34.** 227.47 (1) of the statutes is amended to read:

16           227.47 (1) Except as provided in sub. (2), every ~~proposed or~~ final decision of an  
17 agency or hearing examiner following a hearing and every final decision of an agency  
18 shall be in writing accompanied by findings of fact and conclusions of law. The  
19 findings of fact shall consist of a concise and separate statement of the ultimate  
20 conclusions upon each material issue of fact without recital of evidence. Every  
21 ~~proposed or~~ final decision shall include a list of the names and addresses of all  
22 persons who appeared before the agency in the proceeding who are considered  
23 parties for purposes of review under s. 227.53. The agency shall by rule establish a  
24 procedure for determination of parties.

25           **SECTION 35.** 227.483 of the statutes is created to read:



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

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

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

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

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

18           **SECTION 36.** 227.485 (5) of the statutes is amended to read:

19           227.485 (5) If the hearing examiner awards costs under sub. (3), he or she shall  
20 determine the costs under this subsection, except as modified under sub. (4). The  
21 decision on the merits of the case shall be placed in a ~~proposed~~ decision and  
22 submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within  
23 30 days after service of the ~~proposed~~ decision, to the hearing examiner and to the  
24 state agency which is the losing party an itemized application for fees and other  
25 expenses, including an itemized statement from any attorney or expert witness

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1 representing or appearing on behalf of the party stating the actual time expended  
2 and the rate at which fees and other expenses were computed. The state agency  
3 which is the losing party has 15 working days from the date of receipt of the  
4 application to respond in writing to the hearing examiner. The hearing examiner  
5 shall determine the amount of costs using the criteria specified in s. 814.245 (5) and  
6 include an order for payment of costs in the final decision.

7 **SECTION 37.** 227.53 (1) (a) 3. of the statutes is amended to read:

8 227.53 (1) (a) 3. If the petitioner is a resident, the proceedings shall be held in  
9 the circuit court for the county where the petitioner resides, except that if the  
10 petitioner is an agency, the proceedings shall be in the circuit court for the county  
11 where the respondent resides and except as provided in ss. 73.0301 (2) (b) 2., 77.59  
12 (6) (b), 182.70 (6), and 182.71 (5) (g). ~~The proceedings shall be in the circuit court for~~  
13 ~~Dane County if~~ If the petitioner is a nonresident, the proceedings shall be held in the  
14 county where the property affected by the decision is located or, if no property is  
15 affected, in the county where the dispute arose. If all parties stipulate and the court  
16 to which the parties desire to transfer the proceedings agrees, the proceedings may  
17 be held in the county designated by the parties. If 2 or more petitions for review of  
18 the same decision are filed in different counties, the circuit judge for the county in  
19 which a petition for review of the decision was first filed shall determine the venue  
20 for judicial review of the decision, and shall order transfer or consolidation where  
21 appropriate.

22 **SECTION 38.** 227.57 (11) of the statutes is created to read:

23 227.57 (11) If the decision of the hearing examiner is inconsistent with the  
24 position taken at the hearing by the agency, the court shall give no deference to the  
25 examiner's decision when conducting its review.

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1           **SECTION 39.** 289.27 (5) of the statutes is amended to read:

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

9           **SECTION 40.** 448.02 (3) (b) of the statutes is amended to read:

10          448.02 (3) (b) After an investigation, if the board finds that there is probable  
11          cause to believe that the person is guilty of unprofessional conduct or negligence in  
12          treatment, the board shall hold a hearing on such conduct. The board may use any  
13          information obtained by the board or the department under s. 655.17 (7) (b), as  
14          created by 1985 Wisconsin Act 29, in an investigation or a disciplinary proceeding,  
15          including a public disciplinary proceeding, conducted under this subsection and the  
16          board may require a person holding a license, certificate or limited permit to undergo  
17          and may consider the results of one or more physical, mental or professional  
18          competency examinations if the board believes that the results of any such  
19          examinations may be useful to the board in conducting its hearing. A unanimous  
20          finding by a panel established under s. 655.02, 1983 stats., or a finding by a court that  
21          a physician has acted negligently in treating a patient is conclusive evidence that the  
22          physician is guilty of negligence in treatment. A finding that is not a unanimous  
23          finding by a panel established under s. 655.02, 1983 stats., that a physician has acted  
24          negligently in treating a patient is presumptive evidence that the physician is guilty  
25          of negligence in treatment. A certified copy of the findings of fact, conclusions of law

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1 and order of the panel or the order of a court is presumptive evidence that the finding  
2 of negligence in treatment was made. The board shall render a decision within 90  
3 days after the date on which the hearing is held ~~or, if subsequent proceedings are~~  
4 ~~conducted under s. 227.46 (2), within 90 days after the date on which those~~  
5 ~~proceedings are completed.~~

6 **SECTION 41.** 448.675 (1) (b) of the statutes is amended to read:

7 448.675 (1) (b) After an investigation, if the affiliated credentialing board finds  
8 that there is probable cause to believe that the person is guilty of unprofessional  
9 conduct or negligence in treatment, the affiliated credentialing board shall hold a  
10 hearing on such conduct. The affiliated credentialing board may require a licensee  
11 to undergo and may consider the results of a physical, mental or professional  
12 competency examination if the affiliated credentialing board believes that the  
13 results of the examination may be useful to the affiliated credentialing board in  
14 conducting its hearing. A finding by a court that a podiatrist has acted negligently  
15 in treating a patient is conclusive evidence that the podiatrist is guilty of negligence  
16 in treatment. A certified copy of the order of a court is presumptive evidence that the  
17 finding of negligence in treatment was made. The affiliated credentialing board  
18 shall render a decision within 90 days after the date on which the hearing is held ~~or,~~  
19 ~~if subsequent proceedings are conducted under s. 227.46 (2), within 90 days after the~~  
20 ~~date on which those proceedings are completed.~~

21 (END)