

Committee Name:

Senate Committee – Economic Development, Job Creation and Housing (SC–EDJCH)

Appointments

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The Case for Regulatory Reform in Wisconsin



May 14, 2003

WISCONSIN MANUFACTURERS & COMMERCE

WMC is a statewide, non-profit association representing Wisconsin business. The association has 4,300 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations. More than 500,000 people are employed by WMC members, representing a quarter of Wisconsin's private sector employment.

Promoting a healthy business climate since 1911, WMC is a merger of the Wisconsin Manufacturers Association, the State Chamber of Commerce and the Wisconsin Council of Safety. Throughout its history, WMC has played a leadership role on regulatory matters impacting Wisconsin's business climate.

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EXECUTIVE SUMMARY

There is no delicate way to put it – Wisconsin’s regulatory climate is costing us good paying jobs and is an anvil around our neck as we try to swim out of the current economic doldrums. Our regulatory climate is not the result of any one regulatory scheme or agency, or for that matter, it is not the result of any one administration or legislature. It is “death by a thousand cuts,” the cumulative burdens that makes Wisconsin an inhospitable regulatory island. Yet, Wisconsin policy-makers have a unique opportunity to encourage job creation that can in turn fuel a strong economy by taking simple steps to reform our regulatory systems.

Earlier this year, WMC held listening sessions with its members throughout the state on the condition of Wisconsin’s regulatory climate. The objective was to assess the underlying facts that drive the general perception that Wisconsin’s regulatory climate makes us less competitive. Upwards of 60 participants, representing leading Wisconsin manufacturers, spent hours offering their perspective and providing specific examples of regulatory hurdles they must clear in order to do business in Wisconsin. Part of this effort included follow-up meetings with over 20 regulatory experts from industry; in-house and consulting engineers and lawyers with over 350 years of combined regulatory experience, many with agency backgrounds.

The extent of the problem and the frustration in the business community was startling. The sessions revealed consistent observations that our poor regulatory climate is not merely a perception, but a reality that carries significant weight in business decisions. Larger manufacturers with readily available out-of-state options often don’t consider Wisconsin a viable place to expand operations. For example, representatives from a mid-sized food processor located in Wisconsin were not optimistic over expansion opportunities here considering their regulatory costs in Wisconsin are about seven times that of their similarly sized Indiana plant.

Nearly all listening session participants reported that their companies were put at a competitive disadvantage due to Wisconsin’s regulatory policies and procedures. Participating companies verified with specific examples how the state’s regulatory system makes the cost of doing business here more expensive, and how that generally puts Wisconsin facilities at a cost disadvantage.

Key Regulatory Problems for Wisconsin

- Without exception, companies and consultants with experience in other states found Wisconsin’s regulatory climate more hostile toward business than any other state, including neighboring Midwest states and California.
- The inability to obtain timely permits was the single most significant regulatory impediment facing companies wishing to expand or locate in Wisconsin. Business opportunities have gone to other states because of the ability to provide regulatory approvals more quickly.
- Businesses are more concerned with the administration of the regulatory system than with the environmental standards themselves.
- The expanding scope of existing and creation of new “state only” rules puts Wisconsin at an economic disadvantage in an increasingly competitive marketplace.
- Agency staff who write permits and develop rules are not aware of, or are unconcerned about the business implications of their actions.

The U.S. economy continues to falter, but the prospects for a recovery are strong. While Wisconsin policy-makers may not be able to affect national economic trends, improving our regulatory climate is within their reach. To strongly position ourselves as the national economy recovers, it is important for Wisconsin to act now, lest jobs that will be created during the next expansion find their way to other states.

General Principles for Moving Forward

- There are no simple solutions. Successful regulatory reform measures will likely be iterative, and likely result in process improvements rather than direct modifications to existing substantive requirements.
- Regulatory improvements will be better advanced with agency and other stakeholder buy-in.
- Proposed regulations should be evaluated against a broad range of standards or guidelines, including comparing costs and expected benefits.
- Elected officials should assert their express or inherent authority to review and approve rules and policies before they become law, and when appropriate, avenues for judicial review should be made available.
- Agencies should not exceed their statutory authorities or otherwise advance proposals inconsistent with clear legislative intent.
- A full range of alternative approaches should be evaluated, with a preference for voluntary efforts over regulatory mandates whenever feasible, and there should be clear directives that the most cost-effective alternative be advanced.
- Wisconsin government should become a catalyst for action and adopt “results oriented” approaches to regulatory programs.

This paper is intended to provide background to policymakers on the need to reform Wisconsin’s regulatory climate, and also to provide a preliminary listing of possible solutions for further consideration. These policy options focus on ways to streamline the permitting process and to provide additional tools and guidance for developing and reviewing rules.

Regulation Reform Options: An Overview

- Expand and simplify permit exemptions, allow construction to begin pending permit application review, increase the use of “general” permits, and enforce specific permit approval deadlines.
- Require agencies assess the costs and benefits of their proposal, quantify the risks they are trying to address, and require costs generally be commensurate with benefits.
- Avoid general grants of rulemaking authority, clarify/strengthen policies as to when federal programs can be exceeded (both standards and procedures), and expand legislative review requirements.

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I. CURRENT REGULATORY CLIMATE IMPEDES JOB CREATION

Wisconsin has lost more than 66,000 manufacturing jobs over the past three years.¹ Unfortunately, Wisconsin's economy continues to struggle. Newspapers report plant closings and layoffs almost on a daily basis. By most measures, the national stagnation has hurt Wisconsin more than other states, with Wisconsin's manufacturing sector being hit particularly hard. Unfortunately, many of these lost jobs and even entire industry sectors may never return, even as the rest of the country pulls out of its economic doldrums. A burdensome regulatory climate in Wisconsin creates a distinct competitive disadvantage as companies look for favorable investment opportunities.

Earlier this year WMC held listening sessions throughout the state on the condition of Wisconsin's regulatory climate and regulatory policies and processes that may impede companies wishing to expand or locate in Wisconsin.² Related follow-up meetings among industry regulatory experts reviewed and ratified the observations from those sessions. In identifying possible reforms to lower those hurdles, the general conclusion by all participants was that Wisconsin must act now. This paper is intended to provide background and suggestions to policymakers on the need to improve Wisconsin's regulatory climate.

A. Act Now for Future Growth. The current stagnant economy requires policymakers, public institutions, as well as businesses and the general public to assess and mitigate its implications. Just as the state struggles to cut government programs to fill its \$3 billion budget hole, businesses often trim payrolls to survive an economic downturn. Yet, there is a general sense that the country's economy will soon recover.

Despite optimism for the nation's recovery, past experiences create a fear that Wisconsin's recovery will lag behind, both in terms of timing and degree. Wisconsin depends upon manufacturing more than most states. This increases the risk that our economy will see continued stagnation. The unfortunate reality is that most of our manufacturers, even those based in Wisconsin, have a choice whether to expand here or elsewhere. Therefore, it is imperative that policymakers identify and remove impediments to business investments in Wisconsin or those investments will simply go elsewhere. It is becoming increasingly evident to Wisconsin businesses that the most severe impediment to future growth is our poor regulatory climate. And, unlike national or international economic trends, Wisconsin's regulatory climate is clearly an issue the state can address.

B. Wisconsin's Regulatory Climate Makes Us Less Competitive. Reports on how Wisconsin's regulatory policies quashed job initiatives by Ashley Furniture, the Perrier Group, and the Crandon Mine are notable in the direct connection between jobs lost and regulatory policies. Regardless of the merits of those regulatory decisions, broad press coverage of these events furthered the perception throughout the nation that Wisconsin is not a friendly place to do business, with the implications extending far beyond those controversial projects.

Wisconsin has gained a reputation for fostering a regulatory climate that is unfriendly to business. This national perception is a reality for Wisconsin companies, and we are seeing

¹ Wisconsin Department of Workforce Development, March 2003 Unemployment Data, April 17, 2003

² Listening sessions were held in Milwaukee, Madison, Appleton and Eau Claire in March and April 2003, with more than 60 participants.

the consequences when they make business decisions. Wisconsin's regulatory climate simply makes other states preferable for business expansion plans.

While visiting his company's Green Bay mill earlier this year Pete Correll, CEO of Georgia-Pacific, one of the world's largest paper companies and Wisconsin's largest employers, was asked by the *Green Bay Press-Gazette* why his company is expanding in Oregon and Louisiana rather than Wisconsin. Of Green Bay Correll said, "This is a good mill"; and of its employees, he said, "They are the most productive employees in the company." But of Wisconsin's business climate he stated, "quite frankly, we put two tissue machines in those states [Oregon and Louisiana] because they give you more incentive to invest." And finally he commented, "We are not leaving. We are glad we are here, but when it comes to expansion, Wisconsin is at a disadvantage."

Unfortunately, the Georgia Pacific situation is not isolated. As more major manufacturers are owned and operated outside of Wisconsin's borders, facilities must compete within their own companies for capital expenditures. Increasingly, Wisconsin's regulatory climate is making those facilities less competitive. In its recently released report *The State of Wisconsin's Paper Industry*, the Wisconsin Paper Council concludes, "The general industry view of the Wisconsin regulatory climate is that we have higher transaction costs than in other states – and more costs for internal and external resources, as well as longer time delays. The unfortunate reality is that this view is held by a significant portion of the business community."

Companies in all sectors describe the same problems – a regulatory system that is aggressive and not attuned or responsive to the economic consequences of its actions. During the listening sessions, one company observed that of the numerous states in which they have facilities, Wisconsin has by far the worst regulatory climate, worse even than California.³ As a result, Wisconsin is not even in the running when this Wisconsin-based company considers expansion opportunities. Ample testimony from other participants reiterated these points.

C. Improving our Regulatory Climate and Protecting the Environment.

Environmental standards are not the primary issue. Rather, the most significant disincentive for businesses to invest in Wisconsin is the delay in obtaining needed permits. Wisconsin permit conditions, including associated environment standards, are oftentimes more costly, but not usually the deciding factor in an expansion project. It is the inability to obtain a permit in a timely manner that stops a project cold.

During the listening sessions numerous companies reported that permit delays hurt or killed business expansion opportunities. Typical was the economic development professional explaining how an out-of-state company was prepared to locate in his home county, but the inability to get air permits needed to start construction caused them to reverse their decision and locate in Iowa. The result was a loss of over 50 new, high-paying manufacturing jobs for this rural community. This had nothing to do with environmental protection, as the emissions would have been at a fraction of the allowable levels.

Extensive discussions were held during listening sessions over costly regulatory mandates that result in little, if any, benefits for Wisconsin's citizens. As far back as the 1980s, the

³ The observation that California was a better place to conduct business was made by a manufacturer with operations in both Wisconsin and California, a consultant who practices in Wisconsin and California, as well as a Wisconsin high-tech company seeing California competitors as having important regulatory advantages.

DNR has embarked on regulatory initiatives that have consumed government and private sector resources, and in some cases were subsequently dropped or determined to be unnecessary (e.g., DNR's Mandatory Operation Permits Program). More recently, a WMC funded study found that DNR's expansion of its air toxics program to add 144 new substances and lower regulatory thresholds will cost industry more than \$100 million in the first year of the revised rule. These costs relate to assessing whether companies have any of the 578 regulated substances, and if so, quantifying emissions levels. In other words, virtually all of this money will be spent to prove no problem exists, with little going toward any meaningful environmental improvements.

One would reasonably expect a countervailing argument from regulatory agencies that the environmental and health benefits associated with these proposals exceed or at least are commensurate with the costs. But there is generally no such analysis, nor is there any requirement that agencies even attempt such an evaluation. It sometimes appears that if there are any environmental benefits, no matter how small, the regulatory burdens are dismissed regardless of costs.

Many regulatory programs, then, come with a high price to the economy for little or no known benefit. When this occurs, we may be actually reducing the quality of life for Wisconsin citizens. It is widely recognized that relatively wealthier individuals are more likely to live safer, healthier, and longer lives. And conversely, higher unemployment has been shown to have an adverse effect on safety, health, and longevity. A recently released study attempted to quantify this theory in the context of the economic costs of environmental regulations. This study found that the adverse impacts on income and employment tend to *worsen* individual health or safety and can shorten lifetimes.⁴

In addition, policies that help stimulate rather than hinder economic development efforts could lead to economic growth that, in turn, leads to higher state tax revenues—resources that can be used to improve environmental protection. Conversely, economic stagnation lessens the state's ability to advance meaningful environmental initiatives, witness the current state budget with pending cuts to Wisconsin's brownfield's grant and other environmental programs.

There is little doubt that Wisconsin can improve its regulatory climate without compromising environmental policies. For example, regulatory process requirements often add burden, with little resulting benefit to the environment. And, to the extent a better regulatory climate helps create jobs and wealth, improving our regulatory climate actually improves the well being of Wisconsin citizens, as well as enhances the state's ability to finance important environmental initiatives such as its brownfield's program.

D. We Have Timely Opportunities to Improve Wisconsin's Regulatory System.

Accounts of layoffs in their districts have heightened concern among legislators over the state's regulatory climate and its implications for job creation and retention. There has been much debate about regulatory streamlining, but solutions have been elusive to date.

Governor Doyle has also embraced the need for regulatory reform. He recognizes that in order to deal with Wisconsin's long term fiscal situation, we will need to grow our economy. At Business Day in the Capitol in early 2003 he drew the connection between regulations and

⁴ Mortality Reductions from Use of Low-Cost Coal-Fueled Power: An Analytical Framework; Daniel E. Klein and Ralph L. Keeney (December 2002).

the economy, stating that, “My Administration is committed to ensuring that Wisconsin’s regulatory environment is efficient, predictable, and cost effective.”

Business leaders and member companies are committed to working with policymakers, industry groups and stakeholders to fine-tune and promote alternatives that offer the best opportunity for meaningful improvements to our regulatory climate. Rethinking—and overhauling regulatory policies, if necessary—is an ambitious, but absolutely necessary undertaking.

II. THE INABILITY TO OBTAIN TIMELY PERMITS RESULTS IN LOST BUSINESS OPPORTUNITIES

Delays in issuing permits may be the chief regulatory hurdle driving businesses to other states. Worsening the impact of these delays is the imposition of permit requirements such as monitoring and reporting conditions that often do little to improve the environment.

A. Companies Cannot Build Without Agency Approval. The basic premise for many regulatory programs is that agency approvals must be sought and obtained before undertaking projects in Wisconsin. For example, the following Wisconsin statutory provisions create a sweeping construction ban under the air program:

No person may commence construction, reconstruction, replacement or modification of a stationary source unless the person has a construction permit from the department. Section 285.60(1)(a)1

"Stationary source" means *any facility, building, structure or installation that directly or indirectly emits or may emit an air contaminant* only from a fixed location. Section 285.01(41)

"Air contaminant" means *dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, odorous substances or any combination* thereof but shall not include uncombined water vapor. Section 285.01(1)

In short, a business cannot even put a shovel in the ground until they have in hand an approved construction permit. The process of obtaining a permit is not only time-consuming, but needlessly complicated by inconsistencies among DNR permit writers as to what information need be submitted and what the appropriate permit conditions are. Companies must often submit extensive applications, go back and forth with DNR staff over the "completeness" of the application, and then negotiate its terms. In all, it may take a company six months to a year to obtain needed approvals before they can even begin with a planned business expansion. During this process, it appears that the Air Bureau is more concerned with process than substantive standards and has little concern with how their demands affect business operations.

But air permits are really a procedural requirement which do little, if anything, for environmental protection. DNR has created over 600 pages of rules which regulate air emissions from stationary sources. Those limits apply to a source whether or not it receives a permit. *See*, Wis. Admin Code § NR 406.13. Generally, the permit merely reiterates the various code sections that apply to the facility. However, it is a rare permit that defines a new limitation that is not already set forth specifically in the existing air rules.

B. Companies Cannot React to Changing Business Conditions without a Permit. The inability to obtain timely permits has been a perennial problem for companies wishing to expand in Wisconsin. However, the recent listening sessions, follow-up discussions with industry representatives, and related reports highlighted the extent of the problem with specific examples, including the following⁵:

⁵ For additional examples see Appendix A: Business Stories that Make the Case for Reform.

- A Wisconsin-based manufacturer having facilities in multiple states compares Wisconsin's permit timelines and requirements to other states in which they operate, some of which can process a permit "in a week." He explains how companies must move quickly once market conditions present opportunities, and how Wisconsin facilities are at a severe disadvantage in such instances. He expresses frustration that DNR has no idea how fast his Wisconsin facilities can lose jobs to the company's facilities located in more business-friendly states or countries.
- A representative from a growing high-tech company based in Wisconsin explained how his company is at a competitive disadvantage due to Wisconsin's regulatory climate. He expressed frustration that DNR does not understand the nature of high-tech manufacturing, and in particular, the speed at which technology changes and the corresponding need to respond to customer demands. He gave specific examples of business opportunities put in jeopardy due to delays in obtaining needed air permits.
- A recent news account noted that a \$240 million paper production center in Alabama will be completed before a Wisconsin paper company will even get a permit to make an improvement on a single machine.⁶

The permit problems can be more acute when companies simply wish to change existing operations to meet new business opportunities. Various companies reported that they lost contracts to out-of-state competitors because they did not get timely permits needed to make necessary process changes. Another company could not fulfill contract obligations because promised commitments for a needed permit weren't kept. Stories such as these were consistent in each of the four cities where listening sessions were conducted, as well as at follow-up meetings with industry regulatory experts. In addition, WMC continues to receive additional collaborative examples from frustrated Wisconsin businesses and economic development professionals disillusioned with Wisconsin economic opportunities.

Rather than being isolated examples, the above testimonials were surprisingly consistent from city to city. Thus, such examples strongly indicate we are seeing only the tip of the iceberg, as virtually any expansion project would face similar hurdles in Wisconsin. It became clear that many companies with other alternatives, particularly those that already have operations in other states, will not seriously consider investing in Wisconsin due to permitting and other regulatory hurdles that diminish the return on any Wisconsin investment.

C. Investments go to States that Provide Timely Returns. It is an economic reality that companies will put their capital to fastest and best use, which is often not in Wisconsin. Regulators need to better understand this concept and the fact that most Wisconsin companies are not captive here.

Our largest manufacturers were traditionally based in Wisconsin and run by Wisconsin families. Over time, however, acquisitions and mergers have increased the likelihood that facilities are operated from Helsinki, Finland or Atlanta, Georgia rather than Appleton, Wisconsin. Competition dictates that companies cannot afford to invest in uncompetitive facilities. Instead, corporate expansion opportunities go to facilities that can make products faster and cheaper.

⁶Green Bay Press Gazette editorial (Mar. 9, 2003). Available at: http://www.greenbaypressgazette.com/news/archive/opinion_9042502.shtml

Companies typically make capital allocation decisions on an annual basis for plant upgrades, maintenance and expansions. Facilities within a company make capital allocation requests within that cycle. Companies must weigh the factors that yield attractive returns on investment for shareholders. Increasingly, Wisconsin facilities lose to those in other states as that calculus is done. Why? In Wisconsin it often takes nine to 12 months to secure the construction permit needed to build. Companies with experience in other states report that it takes significantly less time to obtain needed regulatory approvals elsewhere than in Wisconsin. In a competitive economy, even a matter of weeks can make a significant difference in gaining market share and competitive advantage.⁷ As a result, capital upgrades and related jobs happen elsewhere.

D. New Source Review Reform: A Squandered Opportunity for Wisconsin. EPA recently finalized reforms to its burdensome New Source Review (NSR) program. Wisconsin companies have found EPA's past NSR implementation policies to be quite burdensome. Many companies, including those considered "environmentally progressive," have been caught in a web of complicated interpretations as to what federal NSR policy requires. Those policies have also discouraged the application of new pollution-reducing technologies and equipment.

However, DNR successfully urged the Doyle Administration to sue EPA in an attempt to block reforms to the NSR program that for the first time address permitting issues that do little to improve the environment. All of the states that surround Wisconsin were able to take advantage of the reforms as of March 3, 2003. So, while the federal government and other states are taking the path to reduce permitting burdens, Wisconsin has chosen to use limited state resources to further aggravate our competitive disadvantage by blocking reforms to the burdensome federal permit requirements.

E. Conclusion – We Need a Different Perspective. Wisconsin needs to look at permit applications as an economic development opportunity, not as a regulatory opportunity. It needs to act as a catalyst to help attract business and allow projects to happen. Finding ways to quickly issue permits will result in benefits associated with construction projects – more jobs, higher incomes, and additional state tax revenues. And when permits aren't necessary, we need to eliminate them as a prerequisite to business expansion.

⁷ A lot of wasted time has already been spent on attempting to identify just how long it takes to get a permit in Wisconsin. (We believe the pertinent time period starts from the date of application rather than the date the application is "deemed" complete.) But more important is how this time period compares to other states. That is, projects don't turn on whether it takes 6 or 9 or 12 months to get a Wisconsin permit, but whether they can be up and running faster in another state. Using that test, Wisconsin cannot compete.

III. REGULATORY MANDATES ARE PROPOSED WITHOUT CONSIDERING COST, BENEFITS OR STATUTORY DIRECTIVES

Listening session participants listed state mandates imposed without consideration of cost or benefits as the next biggest regulatory issue (second only to permitting). These mandates exceed federal requirements and create inconsistencies and duplication between state and federal programs, thus adding substantial costs without any meaningful benefits.

There are several important initiatives currently being proposed by DNR that have served as case studies on how we regulate businesses in Wisconsin. Occasionally DNR will consider an approach that reduces the regulatory burden without compromising environmental benefits, such as with the air toxics initiative. More often, however, there is little attempt to balance benefits with costs, reconcile pending or existing federal initiatives aimed at the same problem, or reduce unnecessary administrative requirements. While the experience of manufacturers predominately relates to development of air quality rules in recent years, the problems noted here run across other programs within DNR as well as with other agencies.

A. Revisions to Air Toxics Rules. In 1999 DNR began writing significant revisions to the existing air toxics rule (NR 445). In some ways the rule was improved during the 3-year advisory committee process, and included key changes such as new applicability language that excludes sources subject to federal requirements. The positive changes to the rule came about primarily because a comprehensive cost study, funded by WMC, and conducted using protocols agreed to by DNR, identified cost drivers that do not improve the environment.⁸ While this study shows how such an analysis can be used to reduce regulatory costs, without compromising environmental quality, it is important to note DNR has no requirement or normal inclination to do such reviews.

Despite these changes, expanding the program by adding 144 new substances (bringing the total to 577) and lowering many thresholds substantially increases the reach of the rule and creates new burdens for sources already regulated under NR 445. While it was encouraging that regulatory costs were quantified, there was little effort to identify whether these costs brought any meaningful benefits. That is, DNR did not undertake any analysis that the new substances to be regulated posed any actual environmental or health risks. Thus, the benefits were never quantified, much less shown to be sufficient to justify the \$100 million cost to industry.

B. Mercury Emission Affecting Wisconsin Water Quality. In December 2000, DNR accepted a petition from environmental organizations and began writing a Wisconsin mercury rule. WMC estimated the rule would cost targeted utilities over \$1 billion for the first two phases. Due to the lack of available technology, no cost estimate was made for the third 90 percent reduction phase. These costs would be passed on to rate payers, including businesses. One should reasonably expect that such an expensive rule would produce significant and measurable benefits. Yet, it is widely accepted that mercury loadings to the environment are affected by long range transport, and that a Wisconsin rule will have little impact on mercury in Wisconsin lakes.

⁸ NR 445 Hazardous Pollutants Rule Business Impact Analysis, September 2002, Kestrel Management services, LLC. Submitted by WMC to DNR for the official record - September, 2002.

Further, EPA is under court order to develop a federal mercury rule for utilities by December 2003, and EPA has already published a proposed mercury rule for industrial boilers. Wisconsin law directs DNR to adopt the pending federal emission limitations. The failure by DNR to reconcile this state-only initiative with existing or pending federal programs will create expensive and unnecessary inconsistencies and redundancies and is in conflict with the clear legislative directive that the federal program should control how we regulate mercury emissions.

C. Ozone Standards; Nonattainment Designation and Related Implementation Plans.

Since passage of the Clean Air Act Amendments of 1990, the development by DNR of ozone state implementation plans (SIPs) has been one of the most controversial environmental policy debates in Wisconsin. Although there are restrictions on DNR's authority to develop SIPs that contain provisions exceeding the requirements of the Act, DNR often proposes SIP components not required by federal law. For example, in the 2000 SIP revision DNR attempted to impose nonattainment requirements in some attainment counties and impose more stringent than required mandates in nonattainment areas. That proposal was inconsistent with state law and subsequently modified.

The next ozone debate will be over the Governor's recommendations for ozone nonattainment area designations for the 8-hour standard that currently must be sent to EPA by July 2003 (using 2000-02 data). DNR has not formulated its final recommendations, but they have publicly discussed imposing nonattainment designations on counties that meet ozone standards.⁹ The argument that regulation of counties meeting the ozone standard helps nonattainment counties is less than compelling considering the high costs for such regulation and the fact that federal law is too rigid to allow a corresponding "relaxation" of mandates in nonattainment counties. Such an approach to expand DNR's reach to counties meeting the standard is clearly inconsistent with state law.

D. Finding Common Themes. The initiatives noted above are only a sampling of the numerous regulatory initiatives pursued by DNR over the past several years. There are several common themes that arise during a review of the rulemaking process, some of which were noted above. The key themes, and shortcomings that must be addressed, include:

- Failure to quantify the risks regulatory proposals are intended to address and related benefits regulatory initiatives will produce.
- Failure to quantify the regulatory costs of proposals to business and the economy as a whole.
- Failure to properly consider inconsistencies and redundancies with existing or pending federal requirements, or whether federal programs can most cost-effectively address the risks identified.
- Failure to recognize or otherwise operate within statutory authority, or conversely, the lack of clear statutory expression of such authorities.
- Inadequate assessment of control technology or the technical/scientific underpinnings of the problem or proposal.

⁹ At DNR's March 13, 2003 Clean Air Act Task Force meeting in Madison, DNR offered a proposal to designate Dane, Columbia, Dodge and Fond du Lac counties as nonattainment areas.

IV. AGENCIES ARE OFTEN UNAWARE OR UNCONCERNED WITH THE ECONOMIC CONSEQUENCES OF THEIR ACTIONS

The third major theme expressed during the listening sessions was the concern that DNR is an agency generally unaware or unconcerned with the economic consequences of its actions. This concern is more difficult to illustrate, but participants at each session consistently argued that "reform" will fail unless DNR's "attitude" toward business improves.

In describing this concern, participants often expressed a frustration that the department often deemed their companies "guilty until proven innocent." The problem manifests itself in permits with burdensome monitoring and related compliance demonstration conditions premised on the DNR perception that businesses cannot be trusted to meet prescribed emission limitations. For example, expensive monitoring requirements being imposed despite the inability of the production equipment as designed to generate sufficient emissions to come even close to the relevant emission limitation.

In addition, participants explained that permit writers were generally unfamiliar with the industry they were regulating. Experienced industry environmental professionals often proposed valid permit conditions only to be overruled by inexperienced agency personnel. The "training" of agency staff by industry was expensive and caused substantial delays.

On the other hand, the listening sessions were sprinkled with stories of individual permit writers willing to go to great lengths to produce a reasonable permit. Those situations must be noted and commended. Clearly, good relationships between DNR staff and industry personnel go a long way to making compliance and the permitting process go smoothly. However, this raises a serious concern about how dependent upon personality the process really is. If a company is "lucky" enough to get a good permit writer, the process may work. However, law abiding companies should not have to win the "permit lottery" in order to conduct business in Wisconsin.

Another related problem is inconsistencies from region to region and between regional DNR staff and Central Office DNR staff. Some companies reported good working relationships with local permit writers, but encountered disagreements with Madison central office staff that trump local interpretations or decisions. One session participant with facilities in multiple DNR regions noted that the differences between regions could be as pronounced as differences between Wisconsin and other states. This inconsistency leads to regulatory uncertainty, and the related inability to assess obligations and costs.

While some advocated policies that promote consistencies, others highlighted the need to retain flexibility. Most everyone agreed that permit staff in DNR should be willing and able to adjust to unique circumstances a permit application may present, but for the most part, permitting process should be simplified and conducted similarly from region to region. Further, there should be expectations placed upon staff about how long a timely permit should take and how business should be dealt with.

Another reoccurring theme was that permit problems, particularly staffing and resources, are issues of priority. It appears to participants that management places greater emphasis on writing new, Wisconsin-only regulations than on the core mission of processing permits in a timely manner.

V. REGULATORY REFORM OPPORTUNITIES

The listening sessions mostly focused on assessing regulatory impediments to business expansion, but there were also productive discussions on potential solutions. Common themes or problem areas that were repeatedly noted include the inability to obtain timely permits, and regulatory mandates developed without consideration of costs or benefits, that are inconsistent with DNR's regulatory authorities, or beyond comparable federal requirements.

There are a number of possible solutions to the problems identified in this report. Recognizing there are no simple answers to what are invariably complex problems, additional research and refinement of these alternatives is necessary. More important, WMC will work with policymakers and other industry groups in an effort to reach consensus on any proposals. Thus, the purpose here is to further advance constructive discussions on potential solutions by presenting a listing of possible reform proposals.

A. Governing Principles. Developing specific regulatory reform proposals should be guided by key governing principles such as the following:

1. There are no simple solutions. Successful regulatory reform measures will likely be iterative, and result in process improvements rather than direct modifications to existing substantive requirements.
2. Regulatory improvements will be better advanced with agency and other stakeholder buy-in.
3. Proposed regulations should be evaluated against a broad range of standards or guidelines, including comparing costs and expected benefits.
4. Elected officials should assert their express or inherent authority to review and approve rules and policies before they become law, and when appropriate, avenues for judicial review should be made available.
5. On no occasion should agencies exceed their statutory authorities, or otherwise advance proposals inconsistent with clear legislative intent.
6. A full range of alternative approaches should be evaluated, with a preference for voluntary efforts over regulatory mandates whenever feasible, and there should be clear directives that the most cost-effective alternative be advanced.
7. Wisconsin government should become a catalyst for action and adopt "results oriented" approaches to regulatory programs.

B. WMC's Preliminary Regulatory Reform Agenda. Prior to undertaking this effort, WMC developed a regulatory reform agenda that has been endorsed by its Board. Specific proposals noted later will serve to advance this agenda. This agenda includes:

1. Requiring agencies to produce a comprehensive cost-benefit analysis for proposed administrative rules.
2. Encouraging voluntary compliance by waiving civil penalties for violations of existing regulations wherever a business voluntarily discloses a compliance issue and takes corrective action in a reasonable timeframe.

3. Requiring a periodic review and rejustification of existing regulation with the imposition of an automatic sunset if timely reauthorization is not completed.
4. Limiting Wisconsin environmental regulation from exceeding federal requirements, unless there is a clear demonstration of need.
5. Establishing specific, enforceable time limits for the issuance of environmental permits.
6. Providing for legislative review of DNR initiatives that are not traditional rule-making efforts, such as proposed Clean Air Act "state implementation plans."

C. Regulatory Reform Considerations – Air Permit Program. The potential reforms of the air permitting program are as extensive as they are complex. The key objective is to identify initiatives that can expedite business expansion in Wisconsin. The key regulatory impediment to realizing such investments is the general construction prohibition under federal and state law. The focus here, however, with exception of swift implementation of federal New Source Review (NSR) reforms, is on the state, minor source permit program.

The general construction ban under the air program is found at s. 285.60, Wis. Stats., which provides "no person may commence construction, reconstruction, replacement or modification of a statutory source unless the person has a construction permit from the department." Both "stationary source" (any structure) and "air contaminant" (everything but "uncombined water vapor") are so broadly defined that its scope reaches virtually any manufacturing project. With the exception of relocated sources, the statute provides no exemptions, but gives DNR the authority to "exempt types of stationary sources from any requirement of this section if the potential emissions from the sources do not present a significant hazard to public health." s. 285.60(6), Wis. Stats.

The state construction permit program is implemented through Chapter 406, Wis. Admin. Code. Various exemptions are set forth in NR 406. For example, painting or coating operations, automobile refinishing operations, and graphic arts operations are generally exempt if they emit less than 1666 pounds of VOCs per month (10 tons/year), measured before entering control devices.

1. **Expand, Simplify Construction Permit Exemptions.** There are benefits in having clear statutory directives on important regulatory policies such as what sources are required to have construction permits. The Legislature deferred to DNR on the scope of the construction permit program, with the exception of relocated sources. Thus, it may be helpful to seek higher permit thresholds in the statutes. For example, Minnesota generally does not require any permits unless a facility emits: 1) 25 tons/year (tpy) of PM10; 2) 50 tpy of SO₂; or, 3) 100 tpy of VOC. The source must still comply with all applicable standards.
2. **Proceeding at Risk.** Allowing a company to commence construction prior to obtaining a construction permit has been presented as a possible remedy for years, and was enthusiastically supported during the listening sessions. Basically, this would allow companies to begin construction prior to obtaining a construction permit. The companies proceed "at risk" because if final approval requires process or control modifications not incorporated in the original project, they must make those changes prior to operation.

Those participating in our listening session, mostly companies with in-house environmental compliance managers, believe the risks would be minimal considering their experience in understanding regulatory requirements. Others are more skeptical that business would proceed without final permit approvals in hand.

3. ***Self/Industry Certification.*** This concept relates to the establishment of a third-party certification body including non-agency permitting experts that would review and make preliminary determinations of permit applicability and conditions. The concept was discussed with DNR in the context of a "Green Tier" approved program, but could also be effectuated through other statutory directives. DNR could "certify" the reviewing body, and could have final say on permit issuances, but there would be a presumption that the permit application approved by the certified body is approvable.
4. ***Consolidate Construction & Operation Permit Programs.*** Several participants suggested Wisconsin look to other states that do not have separate construction and operations permit programs. This approach may allow for certain efficiencies, but if there remained a requirement that no construction begin prior to the issuance of the unified permit, the fundamental problem with the program remains.
5. ***Establishing Enforceable Time Limits for Permit Issuance.*** This WMC Legislative Agenda item could be accomplished through legislation or rules. The problem is how to make the deadlines enforceable; that is, what happens if an agency misses the deadline. In the past, weak enforcement tools such as the permit guarantee program (noted below) made deadlines meaningless. The presumptive approval concept discussed below is one effective enforcement alternative.
6. ***Presumptive Approval.*** Under a presumptive approval approach, permit applications are deemed approved if the agency misses specified deadlines. Agencies may oppose this approach. Another concern is the possibility, facing an impending deadline, the agency opts for more aggressive permit conditions or simply denies the permit to be "safe." However, it appears that certain permits under the water program are granted in a presumptive approval environment.
7. ***Permit Guarantee Program.*** Another approach is requiring a permit application fee refund if the agency misses its target. This approach provides little by way of leverage to get timely permits, and the remedy (fee refund) doesn't solve the problem – the applicant still cannot proceed without a needed permit. The Legislature adopted the refund approach when passing 1997 Wis. Act 301.

DNR adopted changes to its permit program to comply with this statutory directive, but the rule changes provided little relief. First, DNR was allowed to define the deadlines, which were overly conservative. Second, the threat of refunding a fee provides little incentive to the department to meet even the conservative deadlines. And third, the fee refund doesn't address the construction ban problem, which is still in place.

8. ***General/Registration permits.*** Existing law allows for general construction and operation permits. Under these provisions, DNR is allowed to specify by rule the types of stationary sources that may obtain general permits that cover numerous similar stationary sources. DNR, however, often lessens their value by imposing requirements to address perceived worse case scenarios. Yet, statutory changes to

require expanded use of general permits, and limit DNR's ability to make them overly complex or burdensome would be a reasonable approach.

A similar, but simpler concept is Minnesota's registration permit program. Registration permits are simple, one-page permits for some facilities whose actual emissions are low, and which are not subject to federal regulations. Typical facilities qualifying for a registration permit include auto body shops and schools operating boilers for heat.

9. ***New Source Review.*** Adopting the federal NSR reforms in Wisconsin is a high priority for WMC. This effort should be part of any regulatory reform proposal, and may include legislative oversight if productive.
10. ***Expedited Permit Track.*** Participants in listening session discussed whether providing an expedited permit track upon meeting various criteria such as job creation, fee premium, and a "clean record" was worth pursuing. Generally, the participants did not like this approach based on the premise that no permit applications should suffer the delays we now see.
11. ***Contractor Support.*** Using outside contractors to develop permits could be a viable option, particularly to clear the federal "Part-70" permits back-log, which could also help avoid potential EPA sanctions. Generally, this concept entails an agency hiring consultant firms to undertake most of the permit review tasks. It could be set up as a "pilot project" and expanded to other permits if successful, or be part of an industry certification process noted above (e.g., a certified oversight board hires the consultants). It also may provide a benchmark for timelines that give DNR incentive to improve their approval record.
12. ***Providing Additional Resources to DNR.*** Increasing the air program budget was generally panned at the listening sessions. One potential path for supporting additional resources would be if it was one-time money (not on-going staff expenses) such as for technical investments that improve efficiencies (e.g., web-based permit applications).

D. Regulatory Reform Considerations – Rulemaking Authority & Process. Several policy options exist to address the following key findings relating to agency authority and rule-making deliberations:

- Failure to quantify the risks regulatory proposals are intended to address and related benefits regulatory initiatives will produce.
- Failure to quantify the regulatory costs of proposals to business and the economy as a whole.
- Failure to properly consider inconsistencies and redundancies with existing or pending federal requirements, or whether the federal program can most cost-effectively address the risks identified.
- Failure to recognize or otherwise operate within statutory authority, or conversely, the lack of clear statutory expression of such authorities.
- Inadequate assessment of control technology or the technical/scientific underpinnings of the problem or proposal.

1. Evaluating Cost, Benefits and Risks; Related Rule-making Reviews.

- a. **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 risks they are attempting to address by their proposals and extent to which those risks are mitigated or other benefits are achieved from of the proposal. Thus, costly rules such as DNR's mercury and air toxics proposals can be advanced without any evaluation of costs (industry performed the cost analysis on both proposals), without any evaluation of risks, and without any evaluation of whether the rules produce meaningful benefits.

Under current law (s. 227.114, Wis. Stats.), an agency that proposes an administrative rule that affects small businesses (a business that employs fewer than 25 full-time employees or has gross annual sales of less than \$2,500,000), is required to consider ways to reduce the impact of the rule on small businesses, including creating less stringent compliance requirements for small businesses or exempting small businesses from the rule. In addition, the agency proposing the rule must give small businesses the opportunity to participate in the rule-making process. Agencies are also currently required to prepare a regulatory flexibility analysis of any rule that affects a small business, including a summary of changes made in the rule as a result of suggestions by small businesses and the estimated costs that small businesses may incur to comply with the proposed rule.

For the most part, the existing Chapter 227 requirements have proved ineffective, as agencies do not undertake any meaningful evaluation of costs associated with proposed rules. Generally, a cursory regulatory flexibility analysis is produced that does not quantify costs, and at best, notes how small businesses may be affected. Then, the report merely notes that the agency attempted in some manner to mitigate these impacts. The limited scope of the requirement, businesses with 25 or less employees, assures any evaluation of overall costs of proposals is woefully inadequate.

- b. **Discussion.** 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. WMC requested a business impact analysis using Chapter 227's small business provisions as the statutory and policy basis for such an analysis. DNR participated in a WMC-funded effort to evaluate the costs of the rule on businesses regardless of size. The time-consuming process first broke down the rule into a compliance flow chart, identifying in great detail the steps and decision points needed to comply with the rule. Using this flow chart, industry representatives identified costs associated with each step. So, in addition to identifying total costs, costs were pegged for each administrative step in the compliance process.

The key benefit of the NR 445 business impact analysis was that it provided invaluable compliance process cost information. With that information, DNR and industry representatives evaluated whether each step or requirement could be streamlined or eliminated without compromising outcomes. This process led to important streamlining changes that resulted in over \$150 million cost savings. DNR would agree that in addition to the cost saving, the rule was significantly

improved by this process; mostly because the streamlining efforts are likely to improve compliance.

On the down-side, the NR 445 business impact analysis process did not involve any investigation of the overall risks DNR was attempting to address, much less whether any such risks were actually mitigated by the proposed rule. Despite the streamlining measures, the revised rule will still cost business close to \$100 million in the first year, more than doubling the total cost of the administration of NR 445. These costs are administrative expenses to assess the presence and levels, if any, of the hundreds of regulated substances. It is industry's experience that this process invariably leads to a negative determination; that is, the facility does not emit substances in excess of the applicable standard. Thus, almost all of the \$100 million will be spent to show there is no problem.

Without some nexus to benefits it would be impossible for regulators (or the regulated community) to determine if any given regulatory effort is worthwhile. In the past, such a cost-benefit analysis was often marketed as a quantitative evaluation or a bright-line test. That is, if the costs exceed the benefits, the proposal should not go forward. Conversely, if the benefits exceed the cost, the initiative is worth advancing. Such an approach has several deficiencies, including a battle of data on cost and benefits. In addition, it is generally difficult to quantify benefits.

In any event, quantifying the risks the agency is intending to address should be the first and foremost priority. For example, before requiring bakeries to assess flour dust (a proposed "air toxic") emission levels under NR 445, the DNR should produce evidence that Wisconsin communities are likely to be exposed to unhealthy levels of flour dust. Unfortunately DNR takes the position that flour dust is an irritant and considered hazardous under certain occupational settings and therefore should be regulated as an environmental pollutant.

DNR's Air Bureau and environmental groups argue that this prophylactic approach embodied in the air toxics rule is justified by what is called "the precautionary principle." That principle is premised on the concept that in the absence of adequate proof of risks, regulators should err on the side of safety, and proceed with regulation of a "possible" risk. For this rule, then, companies must undertake expensive and painstaking evaluations to prove through clear evidence that a particular substance – in this case close to 600 such substances – poses no possible risk.

This approach to regulation can be counterproductive and result in regulatory paralysis.¹⁰ It also assumes businesses and society at-large have unlimited resources to mitigate all such risks. In EPA's study *Unfinished Business: A Comparative Assessment of Environmental Problems*, agency experts found there was a misallocation of resources because the most serious risks were not

¹⁰ There are risks associated with virtually every activity. Moreover, the strict application of the principle can actually create substantial risks. For example, life-saving drugs might never make it to sick people, and excessive costs associated with eliminating all risks can reduce life expectancy because of the wealth-health nexus. See, *The Paralyzing Principle*, Cass R. Sunstein (University of Chicago), *Regulation*, pp. 32 (Winter 2002-2003).

necessarily the problems Congress or EPA had targeted for the most aggressive action. According to EPA, "If finite resources are expended on lower-priority problems at the expense of higher-priority risk, then society will face needlessly high risks."¹¹

Much has been written on the need to improve the process of identifying, assessing and comparing risks. However, the point here is that DNR or other agencies have no compunction (or legislative directive) to even consider whether their proposals are mitigating any known risks. Using the precautionary principal, they merely need to show that in the abstract risks may exist (e.g., flour dust at certain exposures levels is considered a lung irritant). Following this misguided policy can result in extraordinary costs to businesses, economic development, and personal income, without any corresponding benefits. In addition, at a time of limited government resources, it results in misplaced policy priorities.

c. Possible Reforms.

(1) Expand Chapter 227 Regulatory Flexibility Analysis Requirements. Expand Chapter 227 small business impact analysis to all businesses and the government and require assessment of costs and benefits; then, require costs and benefits be "commensurate" (e.g., identified risks are cost-effectively reduced).¹²

(2) In-depth Analysis for Major Rulemaking Efforts. To better marshal limited resources, focus efforts for more extensive cost analysis, such as the NR 445 business impact analysis, on major regulatory initiatives.¹³

¹¹ See the Executive Summary of *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* by EPA's Science Advisory Board (1990) at: <http://www.epa.gov/history/topics/risk/01.htm>. The first recommendation of that report is that "EPA should target its environmental protection efforts on the basis of opportunities for the greatest risk reduction."

¹² See 1995 AB 1068 (www.legis.state.wi.us/1995/data/AB1068.pdf), which would require that an agency prepare a report for rules promulgated under specified environmental laws that relates to human health or safety or the environment. The report by the head of the agency must analyze the risks addressed by the rule and the costs and benefits of the rule. The report must compare the risk addressed by the rule to at least three risks that are regulated by state agencies and to at least 3 risks that are not regulated by the state or federal government. As part of the report, the head of the agency must certify all of the following or explain why he or she is unable to so certify the following:

1. That the estimates and analyses in the report are based upon a scientific evaluation and supported by the best available scientific evidence.
2. That the rule will substantially advance the purpose of protecting human health and safety or the environment against the risk that is addressed by the rule.
3. That the rule will produce benefits that will justify the public and private costs of implementing and complying with the rule.
4. That there is no regulatory alternative to the rule that is allowed by the statute under which the rule is promulgated that would result in the same reduction in risk in a more cost-efficient way.

¹³ One way to limit this review to only significant rule proposals would be to give legislative leaders the option to determine what proposal merits detailed assessments. For example, see 2003 AB 81 (www.legis.state.wi.us/2003/data/AB-81.pdf), which allows each majority leader and each minority leader to request an economic statement on one bill or proposed rule each year. The statement would be prepared by an agency or authority designated by DOA and it would describe the direct economic impact by bills or proposed rules on the private sector.

(3) Enact Program Specific Requirements. In addition to or as an alternative to Chapter 227 requirements for all rules, enact program specific statutory framework that sets forth findings needed before an agency can promulgate rules.¹⁴

(4) Provide for Third-Party Review of Impacts. To address the natural bias of promulgating agencies, require third-party review of the business impacts of proposed rules.¹⁵

(5) Provide a Look-Back for Existing Rules. The above alternatives are generally prospective, but certain existing rules may create significant burdens without commensurate benefits. A process for review of existing rules using similar standards may be appropriate.¹⁶

(6) Assure Valid Data and Analysis. Enact standards to assure any analysis of cost or assessment of benefits, and related technology, is based on sound science.¹⁷

¹⁴ For example, s. 285.27(2) (b), Stats., provides:

If an emission standard for a hazardous air contaminant is not promulgated under section 112 of the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant ***if the department finds the standard is needed to provide adequate protection for public health and welfare.***

Those understanding the genesis of the above provision have little doubt the Legislature's intent was that adding new, state-only substances would be the exception not the rule. Also, it was always envisioned that DNR would produce evidence of need for each substance, and not provide the *en masse* rationalization currently used.

To clarify this requirement, this provision could be amended to require a compelling, substance-specific showing that Wisconsin-only air toxics be regulated. Consistent with existing law, that approach would be to quantify the risk associated with a targeted substance and a relating finding that regulation of that substance is necessary to protect public health or the environment from quantified risks. Part of this substance-specific scrutiny could include evaluation of alternatives (e.g., best management practices for dusts; alternative regulatory thresholds) to NR 445's "cookie-cutter" approach.

¹⁵ See 2003 AB 267 (www.legis.state.wi.us/2003/data/AB-267.pdf) that would create a Small Business Regulatory Review Board and require an agency to submit to that board certain proposed rules that may have a significant economic impact on small businesses. The board is authorized to analyze the rule and notify the proposing agency if the board determines that the agency failed to consider ways to reduce the proposed rule's impact on small businesses or failed to properly prepare the regulatory flexibility analysis. The board may suggest ways that the agency can modify the rule and may return the rule to the agency if the rule does not detail how the rule will be enforced.

¹⁶ See 2003 AB 267 (www.legis.state.wi.us/2003/data/AB-267.pdf) that would require every state agency to review all of its rules during the next five years to determine if any of the rules place an unnecessary burden on small businesses, and to repeal or amend any rules that do so.

¹⁷ See 2003 AB 267 (www.legis.state.wi.us/2003/data/AB-267.pdf), based on the federal Data Quality Act, that would require every agency, in cooperation with the Department of Administration, to ensure the accuracy, integrity, and consistency of the data that the agency uses when preparing a proposed rule. The bill gives small businesses the right to seek an injunction against the imposition of a penalty from an agency resulting from the small business's action that was in response to inaccurate information provided by the agency.

(7) Consider Impacts on Other State Policies. A possible parallel analysis to impacts on business and the economy could be requirements that other state policies not be compromised by proposed rules.¹⁸

2. Clarifications to Statutory Authorities; Federal Consistency.

- a. **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.

The statutes are peppered with general and specific statutory authorities, as well related limitations. For example, Chapter 285, Wis. Stats., relating to regulation of air pollution, provides DNR with various authorities and related restrictions. DNR is provided broad authority to “examine any records relating to emissions which cause or contribute to air contamination.” s. 285.13(6), Wis. Stats. They were also granted similarly broad authority to require monitoring and related reporting. s. 285.17(2), Wis. Stats.

On what would appear to be a limitation, DNR can only establish ambient air quality standards for an air contaminant in which an ambient air quality standard is not promulgated by EPA if the department finds that the standard is “needed to provide adequate protection for public health or welfare.”¹⁹ s. 285.21(1)(b), Wis. Stats. But as noted above, DNR had a similar “restriction” under s. 285.27(2)(b), Wis. Stats., for air toxics that was rendered meaningless with DNR’s blanket finding that any substance listed by various bodies as toxic “needed” to be regulated in Wisconsin.

There are limitations in Chapter 285 that do provide more meaningful directives when federal Clean Air Act requirements come into play. For example, under the air toxics program, if a federal standard exists, DNR “shall promulgate by rule a similar standard but this standard may not be more restrictive in terms of emission limitations than the federal standard . . .” s. 285.27(2)(a), Wis. Stats. Under the ozone program, DNR cannot promulgate State Implementation Plans (SIPs) that include components not required by the Act.²⁰

¹⁸ See, for example, provisions proposed by Gov. McCallum in the last budget that would allow the Public Service Commission to conduct an energy assessment of any proposed rule. The energy assessment would evaluate the potential impact of the proposed rule on the energy policies of the state related to electricity generation, transmission, or distribution or to fuels used in generating electricity. If, after making such an assessment, the Public Service Commission concludes that the proposed rule may have a significant impact on those policies, the Public Service Commission may prepare an energy impact statement. An energy impact statement would evaluate the probable impacts of the proposed rule on the state’s energy policies and describe appropriate alternatives to the proposed rule that will reduce any negative impacts on those policies.

¹⁹ In an April 11, 2003 petition for rule-making, environmental groups and individuals such as former DNR Sec. Meyer reference this provision as the basis for DNR’s authority to promulgate requested CO2 climate change rules.

²⁰ Wis. Stat., §285.11 (6), provides: “The rules or control strategies submitted to the federal environmental protection agency under the federal clean air act for control of atmospheric ozone shall conform with the

Administrative rules also contain restrictions or other directives on agency rule-making that are relevant during the development of regulatory programs, though sometimes overlooked. For example, the Natural Resources Board has a specific policy on the promulgation of environmental quality standards.²¹ Relating to the pending 8-hour nonattainment designation, s. 285.23, Wis. Stats, directs DNR to “promulgate by rule procedures and criteria to identify a nonattainment area and to reclassify a nonattainment area as an attainment area.” Relevant to this upcoming debate, DNR’s rule specifies that “The department may, from time to time, issue documents defining, listing or describing any area of the state *where it has determined that any ambient air quality standard for any air contaminant is not being met.*” (No mention of areas contributing to nonattainment areas.)

- b. **Discussion.** We believe that some grants of statutory authority are overly broad, and others are insufficiently limiting. In addition, there is often little recourse if an agency takes a strained reading of its authorities if there is any ambiguity in the statutory language relating to such authority.

The Legislature and Natural Resources Board have adopted numerous policies that establish a strong preference that the state not adopt rules that exceed federal requirements. On some occasions, such as statutory limitations for air toxics standards (if federal standards exist) or ozone implementation plan, DNR is not given an option – they must not exceed federal requirements.

In other areas, the Legislature set forth a general policy that the DNR is allowed to exceed federal requirements, but only upon a finding of need by the DNR. That hurdle, however, is easily cleared by DNR to the point it has become almost

federal clean air act unless, based on the recommendation of the natural resources board or the head of the department, as defined in s. 15.01 (8), of any other department, as defined in s. 15.01 (5), that promulgates a rule or establishes a control strategy, the governor determines that measures beyond those required by the federal clean air act meet any of the following criteria: (a) The measures are part of an interstate ozone control strategy implementation agreement under s. 285.15 signed by the governor of this state and of the state of Illinois. (b) The measures are necessary in order to comply with the percentage reductions specified in 42 USC 7511a (b) (1) (A) or (c) (2) (B).”

²¹ NR 152, Wis. Admin. Code provides, in part:

Whenever the department seeks to adopt a rule, the department shall provide the board with information regarding the following: the authority for the rule; the conformity of the rule with the requirements of federal or state statutes or controlling judicial decisions; and the need for the rule.

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For environmental programs subject to a delegation of authority by the U.S. environmental protection agency, whenever the department seeks to adopt an environmental quality standard more restrictive than a standard provided under corresponding federal law or regulations, the department shall advise the board why the more restrictive standard is needed in Wisconsin to protect public health, safety or the environment.

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If the department has adopted an environmental quality standard which has a corresponding standard adopted under federal law or regulations, and after August 1, 1996, that corresponding federal standard is relaxed by promulgation of a more lenient standard in federal law or regulations, the department shall within 120 days of the federal action notify the board and propose a schedule for the department to advise the board whether the current state standard is needed in Wisconsin to protect public health, safety or the environment.

meaningless should DNR want to press its case. While agencies should retain certain discretion as to whether rules are needed to protect the public or the environment, it is the Legislature's prerogative to specify with more clarity conditions for exceeding federal requirements. For example, the statutes imply that before DNR can regulate a substance as a state air toxic, DNR has to find that the substance poses a quantifiable risk to Wisconsin residents. However, more specific statutory language would make this requirement clear.

There can be similar ambiguities on legislative directives to promulgate state rules that track federal programs. For example, DNR has taken the position it has discretion to adopt or not adopt EPA's recently promulgated and proposed New Source Review (NSR) reforms. However, s. 285.11(16), Wis. Stats., directs DNR to "promulgate rules, consistent with but no more restrictive than the federal clean air act" relating to NSR. Apparently, DNR believes it has substantial discretion to determine it can delete major reforms and still be consistent with EPA's proposals. The use of the word "consistent" apparently creates too much ambiguity to provide the agency a clear directive on this vitally important matter.

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. That is, statutes requiring similar emission or effluent standards are usually silent on consistency of administrative requirements such as monitoring, reporting, and compliance demonstrations. These "paperwork" requirements can often be the dominant cost driver and all efforts should be made to make these requirements also "similar" to the federal program.

Finally, as noted above, it is a basic tenet that elected officials should assert their express or inherent authority to approve all pending regulations before they become law. Chapter 227 (Wis. Administrative Procedures Act) generally provides that rules are to undergo legislative review. But certain, critically important policies are not subject to such review.

For example, Wisconsin faces a crucial decision over the next few months on which counties it will propose as nonattainment for the new 8-hour ozone standard. With such designation comes a multitude of regulatory requirements. While these rules will undergo legislative review once the designation is set, the rules become a federal requirement with little ability for legislative objection. It is curious, then, that the statute states that the DNR documents defining such areas are not rules, and thus, not subject to formal legislative review. ss. 227.01(13)(z), 285.23(2), Wis. Stats. In addition, ozone State Implementation Plans (SIPs) are equally important as they become federally enforceable requirements that dictate what rules must be promulgated. Yet, Chapter 227 legislative review is not required for SIP proposals.

c. Possible Reforms.

(1) Avoid General Grants of Authority. Ambiguities over agencies' authorities could be avoided by clarifying certain broad grants of authorities currently on the books.

(2) Clarify/Strengthen Directives Relating to Federal Standards. A general policy statement, possibly in Chapter 227, could clarify the Legislature's overriding policy position on when state rules can exceed federal requirements rather than rely on program specific policies that are sometimes inconsistent.

(3) Establish Specific Conditions for Exceeding Federal Standards. Confusion over when federal standards can be exceeded could be avoided by abandoning the ambiguous finding of "need" test and instead establishing clear statutory conditions that agencies must meet prior to promulgating standards that exceed federal requirements.

(4) Clarify what is considered Consistent with or Similar to Federal Programs. When the legislative policy is to require "consistency" or "similar" standards, it may be helpful to avoid ambiguous words and specify that state standards *and* procedures—*and* burdens associated with those standards and procedures—are not to exceed the federal standards, procedures and related burdens. Another approach may simply be to direct that the federal standards and procedures are to be adopted in form and substance as state rules. (The downside of the latter approach is that the reduced flexibility cuts both ways.)

(5) Provide Third-Party Review on Authority Issues. On occasion, another agency could provide an objective review of authority and federal consistency issues. The federal Office of Management and Budget may be a potential model. Some states have specific agencies for such reviews. The Department of Administration (DOA) may be an appropriate agency in Wisconsin.

(6) Expand Legislative Review of Key Agencies Policies. Expand Chapter 227 procedures, including legislative review, to all important agency actions such as nonattainment designations and SIP development given the important policy ramifications of these actions. Similarly, it may be sound policy to limit delegations of such decisions.

(7) Compare Requirements Relative to Other States. The ability to compete with other states is a key policy reason to avoid state programs that exceed federal standards. A parallel or supplement criteria could relate to assuring Wisconsin's regulatory burdens do not exceed those in comparable states.

APPENDIX

BUSINESS EXPERIENCES THAT MAKE THE CASE FOR REFORM

Accounts from individual businesses relating to difficulties getting agency approvals to expand operations in Wisconsin were compelling in their consistency. Over the past several months, WMC heard from state manufacturers at listening sessions held throughout the state. Follow-up discussions with leading industry regulatory experts provided additional affirmation that these experiences are not the exception but the norm. For example, at one round-table discussion at WMC, 18 regulatory practitioners reached a general consensus that no state imposes the degree of impediments before businesses than Wisconsin. These experts were both in-house and consulting engineers and lawyers with over 350 years of combined experience in Wisconsin and other states, with many having Wisconsin agency backgrounds.

Unfortunately, to the person, those we spoke with were reluctant to publicly share their accounts for fear of agency retribution. Whether this perception was justified or not, it was pervasive throughout this effort and highlights the crux of our problem – Wisconsin businesses are at the mercy of regulatory agencies due to the general policy premise that virtually no Wisconsin business activities can be undertaken without prior agency approval. The consistencies and sheer number of accounts convince us that the experiences and accounts noted below are typical for most companies trying to do business in Wisconsin.

- A local economic development professional noted that an out-of-state company was prepared to locate in his county, but the inability to get timely air permits needed to start construction caused them to reverse their decision and locate in Iowa. The result was a loss of over 50 new, high-paying manufacturing jobs for this rural community. This had nothing to do with environmental protection as the emissions would have been at a fraction of the allowable levels.
- A Wisconsin-based manufacturer compared permitting requirements in the various states they have facilities. In one example, they had similar equipment being installed in Wisconsin and another state. The other state's emission limitations was actually lower, but Wisconsin's permitting requirements required continuous emission monitoring (CEM), which was expensive and not required in the other state. His frustration stemmed from the fact the equipment as designed and built could only emit 40 percent of the Wisconsin emission limitation, but expensive monitoring equipment was mandated because "DNR simply does not trust Wisconsin companies." Other participants generally confirmed that attitude within DNR and explained how they also were required to install monitoring equipment and undertake emission modeling that were not required in other states in order to obtain needed permits.
- Many participants commented on substantive requirements in Wisconsin. For example, an environmental engineer from one Wisconsin-based manufacturer "polled" other state regulatory agencies on their approach to designating nonattainment areas under the new 8-hour ozone standard. Other states noted their intent to minimize the areas so designated to avoid the severe regulatory burdens associated with the Clean Air Act's nonattainment status; all except Wisconsin, in which DNR staff continues to promote expansion of the designation to counties that have no ozone violations. We heard similar accounts on how other states "go to bat" for their business, and fight rather than capitulate to EPA.
- Several participants commented on trends by noting the demise/departure of many Wisconsin-based manufacturing companies that were once household names for

Wisconsin. If not completely out of Wisconsin, the high-paying manufacturing jobs certainly were shrinking, with the "Wisconsin base" being executives, lawyers, engineers, accountants and others working in "white-collar" positions. In that regard, he asked why labor representatives weren't more concerned over our regulatory climate.

- A mid-sized food processor compared his company's Wisconsin operation to its Indiana operation. Despite production being approximately the same at both facilities, regulatory costs in Wisconsin were seven times that of the Indiana plant.
- A Wisconsin-based manufacturer wants to replace an old boiler with a more fuel efficient and less polluting natural gas boiler. While delays in obtaining the necessary permits are not materially affecting operations, the extensive delays on what should have been a routine approval resulted in unnecessary pollution.
- A small foundry stated his frustration that his company was necessarily captive in Wisconsin, precluding options to expand elsewhere. He explained that DNR permit writers put restrictions on virtually every piece of equipment and control every process in his facility, including hours of operations. In response to his inquiry over their authority, a DNR official told him he couldn't do anything without their prior approval.
- To consolidate operations to cut costs, a Wisconsin-based manufacturer with operations in other states makes a decision to expand capacity in one plant and close one of three other facilities. While the Wisconsin facility would not be shut down it was in the running for the added work. The environmental engineer responsible for Wisconsin was asked how long it would take to obtain necessary permits to begin construction. Knowing it almost always takes longer, the engineer in a futile attempt to get the project for Wisconsin "optimistically" projects a 6-month delay to get an air construction permit. Management concludes that timeline would result in lost business opportunities and decides to locate the project in another state.
- A Wisconsin-based multi-national company with over 20 facilities in the United States dedicates three of four full-time air quality engineers to Wisconsin. They have only two Wisconsin plants.
- A manufacturer with operations in Wisconsin and other states is considering adding a line to meet demand for a popular product. This company has not made a decision if or where to expand much less begun the permitting process. However, their business was actively solicited by the Virginia Department of Environmental Quality. The Virginia DEQ staff noted Wisconsin's reputation for slow permitting and offered a commitment to get the paperwork done faster in Virginia.
- Several companies described problems in shifting from solvent to water-based paints. Despite the environmental and sometimes economic advantages of doing so, switching most often requires a permit modification. Due to delays and costs relating to obtaining the needed permits, companies often give up and continue using less efficient and higher polluting processes.
- Citing concerns about being unable to resolve air permitting issues despite two years of working with DNR, a utility company recently scrapped plans to build a 750 megawatt power plant in the Town of Sherry in Wood County. The project would have brought more than \$1 million in annual revenue to local communities.
- Comparisons with other states included experiences by company and consultants doing business in neighboring Mid-west states and California. They note that those states also have "high environmental ethics" but each are more responsive to industry needs. For example, a Wisconsin-based company with facilities in California, an environmental

consultant who practices in Wisconsin and California, and a high-tech Wisconsin company that competes with California companies, all noted that California has a more business friendly regulatory climate, and the fact California permits are approved quicker.

- Wisconsin companies noted the need to obtain Wisconsin regulatory approvals for routine process modifications needed to meet customer product specifications. Sometimes permits are not provided in timelines promised, resulting in a failure to meet contractual obligations, other times the companies lose existing customers because they simply can't bid on new jobs due to the inability to meet specified schedules obtainable in other states.