

2019 DRAFTING REQUEST

Bill

For: Administration-Budget Drafter: mgallagh
By: Rice Secondary Drafters:
Date: 2/12/2019 May Contact:

Same as LRB:

Submit via email: YES
Requester's email:
Carbon copy (CC) to: doasbostatlanguage@wisconsin.gov
michael.gallagher@legis.wisconsin.gov
michael.duchek@legis.wisconsin.gov

Pre Topic:

DOA:.....Rice, BB0344 -

Topic:

Restore current law with respect to Act 369's provisions related to certain legislative powers and ch. 227.

Instructions:

See attached

Drafting History:

Table with 6 columns: Vers., Drafted, Reviewed, Submitted, Jacketed, Required. It lists three draft versions with their respective drafters and dates.

FE Sent For: <END>

Gallagher, Michael

From: Hanaman, Cathlene
Sent: Tuesday, February 12, 2019 12:38 PM
To: Gallagher, Michael; Paczuski, Konrad
Subject: FW: Statutory Language Drafting Request - 2019-21

From: Rice, Olivia A - DOA <OliviaA.Rice@wisconsin.gov>
Sent: Tuesday, February 12, 2019 12:05 PM
To: Hanaman, Cathlene <Cathlene.Hanaman@legis.wisconsin.gov>
Cc: Kraus, Jennifer - DOA <Jennifer.Kraus@wisconsin.gov>; Rice, Olivia A - DOA <OliviaA.Rice@wisconsin.gov>
Subject: Statutory Language Drafting Request - 2019-21

Biennial Budget: 2019-21

Topic: Legislative powers and duties

Tracking Code: BB0344

SBO Team: GGCF

SBO Analyst: Rice, Olivia
Phone: 608-266-5468
E-mail: oliviaA.Rice@wisconsin.gov

Agency Acronym: 765

Agency Number: 765

Priority: High

Intent:

Revert the changes made to the Legislative powers and duties in 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370, specifically Retention of Legal Representation, Authority Regarding Lease for Legislative Space, Administrative Rules, and Agency Publications.

Attachments: False

Please send completed drafts to SBOSatlanguage@spmail.enterprise.wistate.us

Gallagher, Michael

From: Rice, Olivia A - DOA
Sent: Friday, February 15, 2019 1:09 PM
To: Gallagher, Michael
Subject: RE: Statutory Language Drafting Request - 2019-21

Hi Mike,

You can exclude the changes to Authority Regarding Lease for Legislative Space in the draft, but all else sounds good.

Thank You,



Olivia Rice | Executive Policy and Budget Analyst
Department of Administration
Division of Executive Budget and Finance
OliviaA.Rice@wisconsin.gov
Phone: 608-266-5468

From: Gallagher, Mike - LEGIS <michael.gallagher@legis.wisconsin.gov>
Sent: Friday, February 15, 2019 12:55 PM
To: Rice, Olivia A - DOA <OliviaA.Rice@wisconsin.gov>
Subject: FW: Statutory Language Drafting Request - 2019-21

I think I read this request to broadly to begin with. Unless I hear differently from you, I will just include the items specified, Retention of Legal Representation, Authority Regarding Lease for Legislative Space, Administrative Rules, and Agency Publications.

Thanks.

Mike

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Attachments: False

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IN: 2/16 THOMAS!
State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1981/2
MPG: /
gs

DOA:.....Rice, BB0344 - Restore current law with respect to Acts 369 and 370.

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

(17)

⊕

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

STATE GOVERNMENT

LEGISLATURE

↓ #

Retention of legal counsel by the legislature

Prior to 2017 Wisconsin Act 369, representatives to the assembly and senators, as well as legislative employees, could receive legal representation from the Department of Justice in most legal proceedings. Assembly and senate policies and practices also allowed legislators and legislative employees to retain outside legal counsel in some instances.

Act 369 provided all of the following:

1. With respect to the assembly, that the speaker of the assembly may authorize a representative to the assembly or assembly employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the representative's or employee's duties; and that the speaker may obtain outside legal counsel in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker.

2. With respect to the senate, that the senate majority leader may authorize a senator or senate employee who requires legal representation to obtain outside

DOJ

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✓

legal counsel if the acts or allegations underlying the action are arguably within the scope of the senator's or employee's duties; and that the majority leader may obtain outside legal counsel in any action in which the senate is a party or in which the interests of the senate are affected, as determined by the majority leader.

3. That the cochairpersons of the Joint Committee on Legislative Organization may authorize a legislative service agency employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the employee's duties; and that the cochairpersons may obtain outside legal counsel in any action in which the legislature is a party or in which the interests of the legislature are affected, as determined by the cochairpersons.

This bill eliminates those provisions, restoring previous law with respect to the legislature's retention of legal counsel.

STATE GOVERNMENT

ADMINISTRATIVE RULES; GUIDANCE DOCUMENTS

Deference to agency interpretations of law

Prior to 2017 Wisconsin Act 369, the statutes did not prohibit courts from according deference to agency interpretations of law in most circumstances. Under Act 369, a court may not accord deference to agency interpretations of law and an agency may not seek such deference from a court.

This bill restores the state of the law prior to Act 369 concerning deference to agency interpretations of law.

Suspension of administrative rules

Prior to 2017 Wisconsin Act 369, administrative rules that were in effect could be temporarily suspended by the Joint Committee for Review of Administrative Rules. If JCRAR suspended a rule, JCRAR was required to introduce bills in each house of the legislature to make the suspension permanent. If neither bill to support the suspension was ultimately enacted, the rule would remain in effect and JCRAR could not suspend the rule again. Under current law as established in Act 369, JCRAR may suspend a rule multiple times.

This bill restores the prior law limitations on JCRAR's ability to suspend a rule.

Agency rule-making authority

Under 2017 Wisconsin Act 369, a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. Additionally, no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

This bill repeals those limitations on agency rule-making authority.

Guidance documents

2017 Wisconsin Act 369 established various requirements with respect to the adoption and use of guidance documents, broadly defined, by state agencies,

Handwritten annotations: arrows pointing to the section headers and a '#' symbol next to each header.

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Administrative Register
must

including requirements that agencies must satisfy in order to adopt guidance documents.

Under Act 369, each agency must submit each proposed guidance document to the Legislative Reference Bureau for publication in the register and to provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. Act 369 also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

Also, under Act 369, a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document.

This bill eliminates those and related requirements established under Act 369 with respect to agency guidance documents.

For further information see the **state** 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:

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1 SECTION 1. 13.124 of the statutes is repealed.

2 SECTION 2. 13.91 (1) (c) of the statutes is amended to read:

3 13.91 (1) (c) Perform the functions prescribed in ch. 227 s. 227.15 for the review
4 and resolution of problems relating to administrative rules and guidance documents.

History: 1971 c. 215; 1973 c. 243; 1979 c. 34 ss. 8 to 9b, 2100; 1979 c. 109, 121; 1979 c. 154 s. 45; 1979 c. 204; 1979 c. 221 s. 2202 (33); 1979 c. 328, 355; 1981 c. 335; 1983 a. 308; 1985 a. 182 s. 57; 1989 a. 31; 1989 a. 56 s. 259; 1993 a. 52, 490; 2003 a. 172; 2005 a. 316; 2017 a. 369.

5 SECTION 3. 35.93 (2) (b) 3. im. of the statutes is repealed.

6 SECTION 4. 227.01 (3m) of the statutes is repealed.

****NOTE: I have omitted any treatment reversing changes to the definition of rule under s. 227.01 (13). The changes in Act 369 were purely technical. MPG

7 SECTION 5. 227.05 of the statutes is repealed.

as created by
2017 Wisconsin Act
369A

1 227.40 (1) Except as provided in sub. (2), the exclusive means of judicial review
 2 of the validity of a rule ~~or guidance document~~ shall be an action for declaratory
 3 judgment as to the validity of the rule ~~or guidance document~~ brought in the circuit
 4 court for the county where the party asserting the invalidity of the rule ~~or guidance~~
 5 ~~document~~ resides or has its principal place of business or, if that party is a
 6 nonresident or does not have its principal place of business in this state, in the circuit
 7 court for the county where the dispute arose. The officer or other agency whose rule
 8 ~~or guidance document~~ is involved shall be the party defendant. The summons in the
 9 action shall be served as provided in s. 801.11 (3) and by delivering a copy to that
 10 officer or, if the agency is composed of more than one person, to the secretary or clerk
 11 of the agency or to any member of the agency. The court shall render a declaratory
 12 judgment in the action only when it appears from the complaint and the supporting
 13 evidence that the rule ~~or guidance document~~ or its threatened application interferes
 14 with or impairs, or threatens to interfere with or impair, the legal rights and
 15 privileges of the plaintiff. A declaratory judgment may be rendered whether or not
 16 the plaintiff has first requested the agency to pass upon the validity of the rule ~~or~~
 17 guidance document in question. *strike not score* ✓

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

18 **SECTION 14.** 227.40 (2) (intro.) of the statutes is amended to read:

19 227.40 (2) (intro.) The validity of a rule ~~or guidance document~~ may be
 20 determined in any of the following judicial proceedings when material therein: ✓

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

21 **SECTION 15.** 227.40 (2) (e) of the statutes is amended to read:

22 227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50,
 23 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for

1 review of decisions and orders of administrative agencies if the validity of the rule
2 ~~or guidance document~~ involved was duly challenged in the proceeding before the
3 agency in which the order or decision sought to be reviewed was made or entered.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

4 **SECTION 16.** 227.40 (3) (ag) of the statutes is amended to read:

5 227.40 (3) (ag) In any judicial proceeding other than one under sub. (1) or (2),
6 in which the invalidity of a rule ~~or guidance document~~ is material to the cause of
7 action or any defense thereto, the assertion of that invalidity shall be set forth in the
8 pleading of the party maintaining the invalidity of the rule ~~or guidance document~~ in
9 that proceeding. The party asserting the invalidity of the rule ~~or guidance document~~
10 shall, within 30 days after the service of the pleading in which the party sets forth
11 the invalidity, apply to the court in which the proceedings are had for an order
12 suspending the trial of the proceeding until after a determination of the validity of
13 the rule ~~or guidance document~~ in an action for declaratory judgment under sub. (1).

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

****NOTE: Above and in the treatment of other provisions referencing guidance
documents, I have omitted treatment of changes in Act 369 that were purely technical.
MPG

14 **SECTION 17.** 227.40 (3) (ar) of the statutes is amended to read:

15 227.40 (3) (ar) Upon the hearing of the application, if the court is satisfied that
16 the validity of the rule ~~or guidance document~~ is material to the issues of the case, an
17 order shall be entered staying the trial of said proceeding until the rendition of a final
18 declaratory judgment in proceedings to be instituted forthwith by the party asserting
19 the invalidity of the rule ~~or guidance document~~. If the court finds that the asserted

1 invalidity of the rule or guidance document is not material to the case, an order shall
2 be entered denying the application for stay.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

3 **SECTION 18.** 227.40 (3) (b) of the statutes is amended to read:

4 227.40 (3) (b) Upon the entry of a final order in the declaratory judgment
5 action, it shall be the duty of the party who asserts the invalidity of the rule or
6 guidance document to formally advise the court of the outcome of the declaratory
7 judgment action so brought as ordered by the court. After the final disposition of the
8 declaratory judgment action the court shall be bound by and apply the judgment so
9 entered in the trial of the proceeding in which the invalidity of the rule or guidance
10 document is asserted.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

11 **SECTION 19.** 227.40 (3) (c) of the statutes is amended to read:

12 227.40 (3) (c) Failure to set forth the invalidity of a rule or guidance document
13 in a pleading or to commence a declaratory judgment proceeding within a reasonable
14 time pursuant to the order of the court or to prosecute the declaratory judgment
15 action without undue delay shall preclude the party from asserting or maintaining
16 that the rule or guidance document is invalid.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

17 **SECTION 20.** 227.40 (4) (a) of the statutes is amended to read:

18 227.40 (4) (a) In any proceeding pursuant to this section for judicial review of
19 a rule or guidance document, the court shall declare the rule or guidance document
20 invalid if it finds that it violates constitutional provisions or exceeds the statutory

1 authority of the agency or was promulgated or adopted without compliance with
2 statutory rule-making or adoption procedures.

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

3 **SECTION 21.** 227.40 (6) of the statutes is amended to read:

4 227.40 (6) Upon entry of a final order in a declaratory judgment action under
5 sub. (1) with respect to a rule, the court shall send an electronic notice to the
6 legislative reference bureau of the court's determination as to the validity or
7 invalidity of the rule, in a format approved by the legislative reference bureau, and
8 the legislative reference bureau shall publish a notice of that determination in the
9 Wisconsin administrative register under s. 35.93 (2) and insert an annotation of that
10 determination in the Wisconsin administrative code under s. 13.92 (4) (a).

History: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 29, 449; 1981 c. 278 s. 6; 1983 a. 90; 1983 a. 191 s. 6; 1985 a. 182 ss. 26, 55 (1), 57; Stats. 1985 s. 227.40; 1987 a. 403 s. 256; 1989 a. 31; 1991 a. 316; 1995 a. 27; 1999 a. 82; 2003 a. 145; 2005 a. 249; 2011 a. 21; 2013 a. 20; 2015 a. 197 s. 51; 2017 a. 369.

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

12 227.57 (11) Upon review of an agency action or decision affecting a property
13 owner's use of the property owner's property, the court shall accord no deference to
14 the agency's interpretation of law if the agency action or decision restricts the
15 property owner's free use of the property owner's property.

16 **SECTION 23.** 801.50 (3) (b) of the statutes is amended to read:

17 801.50 (3) (b) All actions relating to the validity or invalidly of a rule or
18 guidance document shall be venued as provided in s. 227.40 (1).

History: 1983 a. 204, 228, 389, 538; 1985 a. 234, 291; 1987 a. 208; 1993 a. 318, 319; 1997 a. 283; 1999 a. 150 s. 672; 2001 a. 30 s. 108; 2001 a. 109; 2007 a. 1; 2009 a. 28, 42, 261; 2011 a. 21, 38, 39, 61; 2017 a. 302, 369.

Cross-reference: See s. 813.02 (4) for exception to sub. (1) as to venue.

Judicial Council Note, 1983: Sub. (1) is designed to separate questions of venue from questions of jurisdiction and competency. A defect in venue is not jurisdictional and does not affect the competence of the court. The cure for a defect in venue is to change the place of trial.

Sub. (2) liberalizes the present venue statute by providing the plaintiff with a broader range of initial venue choices. This subsection also deletes many of the archaic distinctions in the former statute.

The following list contains many, but not all, of the specialized venue provisions not found in chapter 801: s. 48.185 (children's code proceedings); s. 48.83 (adoption of minors); s. 51.45 (13) (n) (civil mental commitments); s. 52.10 (11) (proceedings under the uniform reciprocal enforcement of support act) [s. 52.10 (11) was renumbered s. 767.65 (11) and subsequently repealed by 1993 Wis. Act 326, which created ch. 769, the uniform interstate family support act]; s. 77.12 (forest croplands tax act); s. 111.60 (Wisconsin employment relations act); s. 144.73 (4) [now s. 291.95 (4)] (hazardous waste act); s. 185.44 (1) (cooperative contracts); s. 195.07 (railroad regulation act); s. 196.44 (3) (public utilities regulation act); s. 198.12 (2) (municipal power and water district act); s. 215.02 (5) (savings and loan association act); s. 227.16 (1) (administrative procedure act); s. 232.38 (solid waste recycling authority act); s. 234.22 (housing finance authority act); s. 345.31 (motor vehicle act); s. 421.401 (Wisconsin consumer act); s. 645.04 (1) (insurers rehabilitation and liquidation act); [s. 655.19 (health care liability and patients compensation)]; s. 701.14 (4) (living trusts); s. 752.21 (court of appeals); s. 753.065 (naturalization proceedings); s. 757.89 (Wisconsin judicial commission); s. 776.13 (annulment of corporate charters); s. 779.20 (log liens); s. 799.11 (small claims actions); s. 800.15 (municipal court appeals); s. 880.05 (guardianship actions); s. 882.03 (adult adoptions); s. 971.19 (criminal proceedings); s. 979.01 (inquests of the dead); s. 23.90 (conservation act); s. 45.50 (3) (soldiers and sailors civil relief); and s. 753.34 (5) (Menominee and Shawano counties).

Sub. (3) remains the same in substance.

Subs. (4) and (5) remain unchanged.

Sub. (6) recognizes the authority of the judge to change venue under s. 801.52. [Bill 324-S]

History: 1975 c. 94 s. 3; 1975 c. 414; 1979 c. 208; 1985 a. 182 s. 41; Stats. 1985 s. 227.57; 2015 a. 391; 2017 a. 365 s. 110; 2017 a. 369.

1

(END)



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

This is Insert A

Under 2017 Wisconsin Act 3147

1 AN ACT to create 227.05 of the statutes; relating to: agency publications.

Analysis by the Legislative Reference Bureau

This bill requires a state agency to provide a statutory or administrative rule citation for any statement or interpretation of law that the agency provides in its informational materials.

For further information see the state 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:

2 SECTION 1. 227.05 of the statutes is created to read:

3 227.05 Agency publications. An agency shall identify the applicable
4 provision of federal law or the applicable state statutory or administrative code
5 provision that supports any statement or interpretation of law that the agency
6 makes in any publication, whether in print or on the agency's Internet site, including
7 guidance documents, forms, pamphlets, or other informational materials, regarding
8 the laws the agency administers.

This bill repeals that requirement.

1 SECTION 2. Initial applicability.

2 (1) AGENCY PUBLICATIONS. The treatment of s. 227.05 with respect to printed
3 publications first applies to guidance documents, forms, pamphlets, or other
4 informational materials that are printed 60 days after the effective date of this
5 subsection.

6 SECTION 3. Effective date.

7 (1) AGENCY PUBLICATIONS. The treatment of s. 227.05 takes effect on the first
8 day of the 7th month beginning after publication.

9 (END)

Informational materials
Insert

Gallagher, Michael

From: Rice, Olivia A - DOA
Sent: Wednesday, February 20, 2019 12:08 PM
To: Gallagher, Michael
Subject: 19-1981 Statutory Language Drafting Request - 2019-21

Hi Mike,

Hope you are feeling better. This is a follow up to the voicemail message I just left you regarding 19-1981 or BB0344. We would like to add in a couple of additional repeals of extraordinary session provisions.

1) Require all Capitol security changes to go through the Joint Committee on Legislative Organizations on a 14-day passive review.

2) Eliminate the ability of appointees to serve in the same position they were appointed if the Senate rejects them in the same legislative session.

Please let me know either by phone or email that you are in receipt of this request. If you have any additional questions, please let me know.

Thank You,



Olivia Rice | Executive Policy and Budget Analyst
Department of Administration
Division of Executive Budget and Finance
OliviaA.Rice@wisconsin.gov
Phone: 608-266-5468

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Topic: Legislative powers and duties

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SBO Team: GGCF

SBO Analyst: Rice, Olivia
Phone: 608-266-5468
E-mail: oliviaA.Rice@wisconsin.gov

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Attachments: False

Please send completed drafts to SBOSatlanguage@spmail.enterprise.wistate.us



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1981/P1
MPG:cjs

DOA:.....Rice, BB0344 - Restore current law with respect to Act 369's provisions related to certain legislative powers and ch. 227.

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

Insert

1PZ

1 AN ACT ...; relating to: the budget.

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STATE GOVERNMENT

LEGISLATURE

1. Retention of legal counsel by the legislature

Prior to 2017 Wisconsin Act 369, representatives to the assembly and senators, as well as legislative employees, could receive legal representation from DOJ in most legal proceedings. Assembly and senate policies and practices also allowed legislators and legislative employees to retain outside legal counsel in some instances.

Act 369 provided all of the following:

1. With respect to the assembly, that the speaker of the assembly may authorize a representative to the assembly or assembly employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the representative's or employee's duties; and that the speaker may obtain outside legal counsel in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker.

2. With respect to the senate, that the senate majority leader may authorize a senator or senate employee who requires legal representation to obtain outside

legal counsel if the acts or allegations underlying the action are arguably within the scope of the senator's or employee's duties; and that the majority leader may obtain outside legal counsel in any action in which the senate is a party or in which the interests of the senate are affected, as determined by the majority leader.

3. That the cochairpersons of the Joint Committee on Legislative Organization may authorize a legislative service agency employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the employee's duties; and that the cochairpersons may obtain outside legal counsel in any action in which the legislature is a party or in which the interests of the legislature are affected, as determined by the cochairpersons.

This bill eliminates those provisions, restoring previous law with respect to the legislature's retention of legal counsel.

STATE GOVERNMENT

ADMINISTRATIVE RULES; GUIDANCE DOCUMENTS

2. Deference to agency interpretations of law

Prior to 2017 Wisconsin Act 369, the statutes did not prohibit courts from according deference to agency interpretations of law in most circumstances. Under Act 369, a court may not accord deference to agency interpretations of law and an agency may not seek such deference from a court.

This bill restores the state of the law prior to Act 369 concerning deference to agency interpretations of law.

3. Suspension of administrative rules

Prior to 2017 Wisconsin Act 369, administrative rules that were in effect could be temporarily suspended by the Joint Committee for Review of Administrative Rules. If JCRAR suspended a rule, JCRAR was required to introduce bills in each house of the legislature to make the suspension permanent. If neither bill to support the suspension was ultimately enacted, the rule would remain in effect and JCRAR could not suspend the rule again. Under current law as established in Act 369, JCRAR may suspend a rule multiple times.

This bill restores the prior law limitations on JCRAR's ability to suspend a rule.

4. Agency rule-making authority

Under 2017 Wisconsin Act 369, a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. Additionally, no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

This bill repeals those limitations on agency rule-making authority.

5. Guidance documents

2017 Wisconsin Act 369 established various requirements with respect to the adoption and use of guidance documents, broadly defined, by state agencies,

Insert A

including requirements that agencies must satisfy in order to adopt guidance documents.

Under Act 369, each agency must submit each proposed guidance document to the Legislative Reference Bureau for publication in the Administrative Register and must provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. Act 369 also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

Also, under Act 369, a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document.

This bill eliminates those and related requirements established under Act 369 with respect to agency guidance documents.

6. Informational materials

Under 2017 Wisconsin Act 369, a state agency must provide a statutory or administrative rule citation for any statement or interpretation of law that the agency provides in its informational materials. This bill repeals that requirement.

For further information see the *state* 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. 13.124 of the statutes is repealed.
- 2 SECTION 2. 13.91 (1) (c) of the statutes is amended to read:
- 3 13.91 (1) (c) Perform the functions prescribed in ~~ch. 227 s. 227.15~~ for the review
- 4 and resolution of problems relating to administrative rules and guidance documents.
- 5 SECTION 3. 35.93 (2) (b) 3. im. of the statutes is repealed.
- 6 SECTION 4. 227.01 (3m) of the statutes is repealed.

Insert
3-1

Insert 3-4

1 **SECTION 13.** 227.40 (1) of the statutes is amended to read:

2 227.40 (1) Except as provided in sub. (2), the exclusive means of judicial review
3 of the validity of a rule ~~or guidance document~~ shall be an action for declaratory
4 judgment as to the validity of the rule ~~or guidance document~~ brought in the circuit
5 court for the county where the party asserting the invalidity of the rule ~~or guidance~~
6 ~~document~~ resides or has its principal place of business or, if that party is a
7 nonresident or does not have its principal place of business in this state, in the circuit
8 court for the county where the dispute arose. The officer or other agency whose rule
9 ~~or guidance document~~ is involved shall be the party defendant. The summons in the
10 action shall be served as provided in s. 801.11 (3) and by delivering a copy to that
11 officer or, if the agency is composed of more than one person, to the secretary or clerk
12 of the agency or to any member of the agency. The court shall render a declaratory
13 judgment in the action only when it appears from the complaint and the supporting
14 evidence that the rule ~~or guidance document~~ or its threatened application interferes
15 with or impairs, or threatens to interfere with or impair, the legal rights and
16 privileges of the plaintiff. A declaratory judgment may be rendered whether or not
17 the plaintiff has first requested the agency to pass upon the validity of the rule ~~or~~
18 ~~guidance document~~ in question.

19 **SECTION 14.** 227.40 (2) (intro.) of the statutes is amended to read:

20 227.40 (2) (intro.) The validity of a rule ~~or guidance document~~ may be
21 determined in any of the following judicial proceedings when material therein:

22 **SECTION 15.** 227.40 (2) (e) of the statutes is amended to read:

23 227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50,
24 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for
25 review of decisions and orders of administrative agencies if the validity of the rule

1 ~~or guidance document~~ involved was duly challenged in the proceeding before the
2 agency in which the order or decision sought to be reviewed was made or entered.

3 **SECTION 16.** 227.40 (3) (ag) of the statutes is amended to read:

4 227.40 (3) (ag) In any judicial proceeding other than one under sub. (1) or (2),
5 in which the invalidity of a rule ~~or guidance document~~ is material to the cause of
6 action or any defense thereto, the assertion of that invalidity shall be set forth in the
7 pleading of the party maintaining the invalidity of the rule ~~or guidance document~~ in
8 that proceeding. The party asserting the invalidity of the rule ~~or guidance document~~
9 shall, within 30 days after the service of the pleading in which the party sets forth
10 the invalidity, apply to the court in which the proceedings are had for an order
11 suspending the trial of the proceeding until after a determination of the validity of
12 the rule ~~or guidance document~~ in an action for declaratory judgment under sub. (1).

****NOTE: Above and in the treatment of other provisions referencing guidance documents, I have omitted treatment of changes in Act 369 that were purely technical.
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13 **SECTION 17.** 227.40 (3) (ar) of the statutes is amended to read:

14 227.40 (3) (ar) Upon the hearing of the application, if the court is satisfied that
15 the validity of the rule ~~or guidance document~~ is material to the issues of the case, an
16 order shall be entered staying the trial of said proceeding until the rendition of a final
17 declaratory judgment in proceedings to be instituted forthwith by the party asserting
18 the invalidity of the rule ~~or guidance document~~. If the court finds that the asserted
19 invalidity of the rule ~~or guidance document~~ is not material to the case, an order shall
20 be entered denying the application for stay.

21 **SECTION 18.** 227.40 (3) (b) of the statutes is amended to read:

22 227.40 (3) (b) Upon the entry of a final order in the declaratory judgment
23 action, it shall be the duty of the party who asserts the invalidity of the rule ~~or~~

1 guidance document to formally advise the court of the outcome of the declaratory
2 judgment action so brought as ordered by the court. After the final disposition of the
3 declaratory judgment action the court shall be bound by and apply the judgment so
4 entered in the trial of the proceeding in which the invalidity of the rule or guidance
5 document is asserted.

6 **SECTION 19.** 227.40 (3) (c) of the statutes is amended to read:

7 227.40 (3) (c) Failure to set forth the invalidity of a rule or guidance document
8 in a pleading or to commence a declaratory judgment proceeding within a reasonable
9 time pursuant to the order of the court or to prosecute the declaratory judgment
10 action without undue delay shall preclude the party from asserting or maintaining
11 that the rule or guidance document is invalid.

12 **SECTION 20.** 227.40 (4) (a) of the statutes is amended to read:

13 227.40 (4) (a) In any proceeding pursuant to this section for judicial review of
14 a rule or guidance document, the court shall declare the rule or guidance document
15 invalid if it finds that it violates constitutional provisions or exceeds the statutory
16 authority of the agency or was promulgated or adopted without compliance with
17 statutory rule-making or adoption procedures.

18 **SECTION 21.** 227.40 (6) of the statutes is amended to read:

19 227.40 (6) Upon entry of a final order in a declaratory judgment action under
20 sub. (1) with respect to a rule, the court shall send an electronic notice to the
21 legislative reference bureau of the court's determination as to the validity or
22 invalidity of the rule, in a format approved by the legislative reference bureau, and
23 the legislative reference bureau shall publish a notice of that determination in the
24 Wisconsin administrative register under s. 35.93 (2) and insert an annotation of that
25 determination in the Wisconsin administrative code under s. 13.92 (4) (a).

2019-2020 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1981/P2ins
MPG:cjs

Capital security/INSERT A

Under Act 369, DOA is required to submit any proposed changes to security at the capitol, including the posting of a firearm restriction, to the JCLO for approval under passive review. This bill eliminates that requirement.

Under Act 369, any individual nominated by the governor or another state officer or agency, and with the advice and consent of the senate appointed, to any office or position may not hold the office or position, be nominated again for the office or position, or perform any duties of the office or position during the legislative session biennium if the individual's confirmation for the office or position is rejected by the senate. This bill eliminates that restriction.

END INSERT A

Advice and consent of
the senate/INSERT 3-1

1 SECTION 1. 13.127 of the statutes is repealed.

END INSERT 3-1

INSERT 3-4

2 SECTION 2. 16.84 (2m) of the statutes is repealed.

END INSERT 3-4



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1981/P2
MPG:cjs&cdc

DOA:.....Rice, BB0344 - Restore current law with respect to Act 369's provisions related to certain legislative powers and ch. 227.

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

1 **AN ACT ...; relating to:** the budget.

Analysis by the Legislative Reference Bureau

STATE GOVERNMENT

LEGISLATURE

1. Retention of legal counsel by the legislature

Prior to 2017 Wisconsin Act 369, representatives to the assembly and senators, as well as legislative employees, could receive legal representation from DOJ in most legal proceedings. Assembly and senate policies and practices also allowed legislators and legislative employees to retain outside legal counsel in some instances.

Act 369 provided all of the following:

1. With respect to the assembly, that the speaker of the assembly may authorize a representative to the assembly or assembly employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the representative's or employee's duties; and that the speaker may obtain outside legal counsel in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker.

2. With respect to the senate, that the senate majority leader may authorize a senator or senate employee who requires legal representation to obtain outside

legal counsel if the acts or allegations underlying the action are arguably within the scope of the senator's or employee's duties; and that the majority leader may obtain outside legal counsel in any action in which the senate is a party or in which the interests of the senate are affected, as determined by the majority leader.

3. That the cochairpersons of the Joint Committee on Legislative Organization may authorize a legislative service agency employee who requires legal representation to obtain outside legal counsel if the acts or allegations underlying the action are arguably within the scope of the employee's duties; and that the cochairpersons may obtain outside legal counsel in any action in which the legislature is a party or in which the interests of the legislature are affected, as determined by the cochairpersons.

This bill eliminates those provisions, restoring previous law with respect to the legislature's retention of legal counsel.

2. Capitol security

Under Act 369, DOA is required to submit any proposed changes to security at the capitol, including the posting of a firearm restriction, to the JCLO for approval under passive review. This bill eliminates that requirement.

3. Advice and consent of the senate

Under Act 369, any individual nominated by the governor or another state officer or agency, and with the advice and consent of the senate appointed, to any office or position may not hold the office or position, be nominated again for the office or position, or perform any duties of the office or position during the legislative session biennium if the individual's confirmation for the office or position is rejected by the senate. This bill eliminates that restriction.

STATE GOVERNMENT

ADMINISTRATIVE RULES; GUIDANCE DOCUMENTS

4. Deference to agency interpretations of law

Prior to 2017 Wisconsin Act 369, the statutes did not prohibit courts from according deference to agency interpretations of law in most circumstances. Under Act 369, a court may not accord deference to agency interpretations of law and an agency may not seek such deference from a court.

This bill restores the state of the law prior to Act 369 concerning deference to agency interpretations of law.

5. Suspension of administrative rules

Prior to 2017 Wisconsin Act 369, administrative rules that were in effect could be temporarily suspended by the Joint Committee for Review of Administrative Rules. If JCRAR suspended a rule, JCRAR was required to introduce bills in each house of the legislature to make the suspension permanent. If neither bill to support the suspension was ultimately enacted, the rule would remain in effect and JCRAR could not suspend the rule again. Under current law as established in Act 369, JCRAR may suspend a rule multiple times.

This bill restores the prior law limitations on JCRAR's ability to suspend a rule.

6. Agency rule-making authority

Under 2017 Wisconsin Act 369, a settlement agreement, consent decree, or court order does not confer rule-making authority and cannot be used by an agency as authority to promulgate rules. Additionally, no agency may agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed.

This bill repeals those limitations on agency rule-making authority.

7. Guidance documents

2017 Wisconsin Act 369 established various requirements with respect to the adoption and use of guidance documents, broadly defined, by state agencies, including requirements that agencies must satisfy in order to adopt guidance documents.

Under Act 369, each agency must submit each proposed guidance document to the Legislative Reference Bureau for publication in the Administrative Register and must provide a period for persons to submit written comments to the agency on the proposed guidance document. The agency must retain all written comments submitted during the public comment period and consider those comments in determining whether to adopt the guidance document as originally proposed, modify the proposed guidance document, or take any other action. Act 369 also requires each adopted guidance document, while valid, to remain available on the agency's Internet site and requires the agency to permit continuing public comment on the guidance document. Each guidance document must be signed by the head of the agency below a statement containing certain certifications.

Also, under Act 369, a guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document, and an agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document.

This bill eliminates those and related requirements established under Act 369 with respect to agency guidance documents.

8. Informational materials

Under 2017 Wisconsin Act 369, a state agency must provide a statutory or administrative rule citation for any statement or interpretation of law that the agency provides in its informational materials. This bill repeals that requirement.

1 **SECTION 12.** 227.112 of the statutes is repealed.

2 **SECTION 13.** 227.13 of the statutes is amended to read:

3 **227.13 Advisory committees and informal consultations.** An agency may
4 use informal conferences and consultations to obtain the viewpoint and advice of
5 interested persons with respect to contemplated rule making. An agency may also
6 appoint a committee of experts, interested persons or representatives of the public
7 to advise it with respect to any contemplated rule making. ~~Such a~~ The committee
8 shall have advisory powers only. ~~Whenever an agency appoints a committee under~~
9 ~~this section, the agency shall submit a list of the members of the committee to the~~
10 ~~joint committee for review of administrative rules.~~

11 **SECTION 14.** 227.26 (2) (im) of the statutes is repealed.

12 **SECTION 15.** 227.40 (1) of the statutes is amended to read:

13 **227.40 (1)** Except as provided in sub. (2), the exclusive means of judicial review
14 of the validity of a rule ~~or guidance document~~ shall be an action for declaratory
15 judgment as to the validity of the rule ~~or guidance document~~ brought in the circuit
16 court for the county where the party asserting the invalidity of the rule ~~or guidance~~
17 ~~document~~ resides or has its principal place of business or, if that party is a
18 nonresident or does not have its principal place of business in this state, in the circuit
19 court for the county where the dispute arose. The officer or other agency whose rule
20 ~~or guidance document~~ is involved shall be the party defendant. The summons in the
21 action shall be served as provided in s. 801.11 (3) and by delivering a copy to that
22 officer or, if the agency is composed of more than one person, to the secretary or clerk
23 of the agency or to any member of the agency. The court shall render a declaratory
24 judgment in the action only when it appears from the complaint and the supporting
25 evidence that the rule ~~or guidance document~~ or its threatened application interferes

1 with or impairs, or threatens to interfere with or impair, the legal rights and
2 privileges of the plaintiff. A declaratory judgment may be rendered whether or not
3 the plaintiff has first requested the agency to pass upon the validity of the rule or
4 guidance document in question.

5 **SECTION 16.** 227.40 (2) (intro.) of the statutes is amended to read:

6 227.40 (2) (intro.) The validity of a rule or guidance document may be
7 determined in any of the following judicial proceedings when material therein:

8 **SECTION 17.** 227.40 (2) (e) of the statutes is amended to read:

9 227.40 (2) (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50,
10 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for
11 review of decisions and orders of administrative agencies if the validity of the rule
12 or guidance document involved was duly challenged in the proceeding before the
13 agency in which the order or decision sought to be reviewed was made or entered.

14 **SECTION 18.** 227.40 (3) (ag) of the statutes is amended to read:

15 227.40 (3) (ag) In any judicial proceeding other than one under sub. (1) or (2),
16 in which the invalidity of a rule or guidance document is material to the cause of
17 action or any defense thereto, the assertion of that invalidity shall be set forth in the
18 pleading of the party maintaining the invalidity of the rule or guidance document in
19 that proceeding. The party asserting the invalidity of the rule or guidance document
20 shall, within 30 days after the service of the pleading in which the party sets forth
21 the invalidity, apply to the court in which the proceedings are had for an order
22 suspending the trial of the proceeding until after a determination of the validity of
23 the rule or guidance document in an action for declaratory judgment under sub. (1).

****NOTE: Above and in the treatment of other provisions referencing guidance documents, I have omitted treatment of changes in Act 369 that were purely technical.
MPG

1 **SECTION 19.** 227.40 (3) (ar) of the statutes is amended to read:

2 227.40 (3) (ar) Upon the hearing of the application, if the court is satisfied that
3 the validity of the rule or guidance document is material to the issues of the case, an
4 order shall be entered staying the trial of said proceeding until the rendition of a final
5 declaratory judgment in proceedings to be instituted forthwith by the party asserting
6 the invalidity of the rule or guidance document. If the court finds that the asserted
7 invalidity of the rule or guidance document is not material to the case, an order shall
8 be entered denying the application for stay.

9 **SECTION 20.** 227.40 (3) (b) of the statutes is amended to read:

10 227.40 (3) (b) Upon the entry of a final order in the declaratory judgment
11 action, it shall be the duty of the party who asserts the invalidity of the rule or
12 guidance document to formally advise the court of the outcome of the declaratory
13 judgment action so brought as ordered by the court. After the final disposition of the
14 declaratory judgment action the court shall be bound by and apply the judgment so
15 entered in the trial of the proceeding in which the invalidity of the rule or guidance
16 document is asserted.

17 **SECTION 21.** 227.40 (3) (c) of the statutes is amended to read:

18 227.40 (3) (c) Failure to set forth the invalidity of a rule or guidance document
19 in a pleading or to commence a declaratory judgment proceeding within a reasonable
20 time pursuant to the order of the court or to prosecute the declaratory judgment
21 action without undue delay shall preclude the party from asserting or maintaining
22 that the rule or guidance document is invalid.

23 **SECTION 22.** 227.40 (4) (a) of the statutes is amended to read:

24 227.40 (4) (a) In any proceeding pursuant to this section for judicial review of
25 a rule or guidance document, the court shall declare the rule or guidance document

1 invalid if it finds that it violates constitutional provisions or exceeds the statutory
2 authority of the agency or was promulgated ~~or adopted~~ without compliance with
3 statutory rule-making ~~or adoption~~ procedures.

4 **SECTION 23.** 227.40 (6) of the statutes is amended to read:

5 227.40 (6) Upon entry of a final order in a declaratory judgment action under
6 sub. (1) ~~with respect to a rule~~, the court shall send an electronic notice to the
7 legislative reference bureau of the court's determination as to the validity or
8 invalidity of the rule, in a format approved by the legislative reference bureau, and
9 the legislative reference bureau shall publish a notice of that determination in the
10 Wisconsin administrative register under s. 35.93 (2) and insert an annotation of that
11 determination in the Wisconsin administrative code under s. 13.92 (4) (a).

12 **SECTION 24.** 227.57 (11) of the statutes is amended to read:

13 227.57 (11) Upon review of an agency action or decision affecting a property
14 owner's use of the property owner's property, the court shall accord no deference to
15 the agency's interpretation of law if the agency action or decision restricts the
16 property owner's free use of the property owner's property.

17 **SECTION 25.** 801.50 (3) (b) of the statutes is amended to read:

18 801.50 (3) (b) All actions relating to the validity or invalidly of a rule ~~or~~
19 ~~guidance document~~ shall be venued as provided in s. 227.40 (1).

20 (END)