Midwest Environmental
ADVOCATES
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January 25, 2011

Committee on the Judiciary and Ethics
Representative Jim Ott, Chair
Room 317 North
State Capitol
Madison, WI 53708

Re: Public Testimony and Written Comments Opposing Assembly Bill 8

Thank you Representative Ott and committee members for giving me an opportunity to speak about the changes to Chapter 227 of the Wisconsin Statutes as proposed in Assembly Bill 8. My name is Florence Edwards-Miller and I'm speaking in opposition to the Bill on behalf of Midwest Environmental Advocates. MEA is a non-profit, environmental law center that provides technical and legal assistance to people standing together to protect their rights in the environment.

Ordinary citizens have served an extraordinary role in protecting Wisconsin's rich natural heritage throughout the history of our state. Assembly Bill 8 undermines the rights of citizens to meaningfully participate in government by granting unilateral and unchecked power to a Governor while repealing well-defined, transparent and inclusive procedures in the existing law.

Assembly Bill 8 also repeals a well-defined process for reviewing credible economic data to assess the economic impact of a rule. Current law requires an economic report to include the risks to public health and safety, and the environment when reviewing proposed policies. Assembly Bill 8 removes the environment as well as public health and safety as allowable factors to be considered in reviewing the potential impacts of a proposed rule.

The economic *study* of a rule under current law is more comprehensive than that proposed for the economic *analysis* in AB 8. The Bill repeals the safeguards in current law designed to avoid giving unfair advantage to one interest over another. Under current law, agencies are prohibited from working on a rule until the public has been properly notified by publication of the scoping statement.

This Bill allows, and even directs staff, to work with *businesses and associations representing businesses*, long before the public is made aware that rule making is underway.

This Bill mandates an economic analysis be completed for every rule prior to a Governor allowing publication to notify the public of their opportunity to participate. The clear definitions of process, timelines and standards for review relied on by the public in current law would be repealed by the Bill.

The Bill grants a Governor unilateral power to slow or suspend rule-making while at the same time narrowing the scope of the economic review in the current law. The cumbersome, redundant process in the Bill would also apply to Emergency rule-making. Agencies across the board will be hampered and delayed in creating timely emergency rules to deal with issues like the Emerald Ash borer and public health emergencies such as controlling deadly, communicable diseases.

The Bill also opens the door for a Governor to strip agency staff of their authority to enforce science-based standards in existing rules. If the good men and women of the DNR are prohibited from operating scientifically sound programs in compliance with federal law, the US EPA can rescind the state's delegated authority to regulate air and water quality in Wisconsin.

The Wisconsin tradition includes meaningful participation by the public to shape the policies that govern civic life and the protection of natural resources in our great state. Midwest Environmental Advocates strongly opposes Assembly Bill 8.

Agency authority to promulgate rules and implement standards

Current law limits agency promulgation of rules to the authority granted to them by the Legislature. Administrative rules are an essential component of providing the public an even playing field with information equally available to everyone to guide the fair and consistent shaping implementation of public policies. Rule-making under current law facilitates the functioning of our interdependent civil society while fairly balancing interests of all the people of Wisconsin while protecting the air, land and water on which their health and economic opportunity depend.

The Department of Natural Resources has worked for decades to develop rules that meet the standards prescribed in federal environmental laws. Wisconsin's laws, rules and operation of regulatory programs must comply with federal standards in order to

maintain Wisconsin's authority to administer them. When states fail to promulgate rules that comply with federal standards, the federal government can take over the rule-making process.

Environmental laws are complex and require specialized expertise to translate technical standards into clear, implementable language that can be administered fairly and provide measured accountability.

Current law allows for efficient promulgation of rules within clearly defined limits on agency authority. The tension between the public interest and the interests of the regulated community drives a balancing of those interests in the current rule-making process. AB 8 shifts that balance of power to the Governor through a broad granting of minimally defined power over the process and timing of rule-making.

Many agencies are significantly understaffed and adding additional layers of process involving multiple levels of government will certainly impact their already compromised capacity to administer programs in a timely manner. A wholesale change in the clearly defined standards for review and process in the current law has the great potential to diminish the efficiency and quality of rule-making at the expense of public health and the overall economy.

Current law gives agencies the tool through emergency rule-making to address unforeseen circumstances that threaten public health and safety. The work of government is to serve the public through the provision of services and systems that protect public health and the environment while providing economic opportunities. The proposed process for emergency rules in AB 8 requires an economic analysis prior to publishing the rule. There are no time limits in the proposed language in 227.24 that give the public confidence agencies will have the ability to act in a manner consistent with the threat at hand. The current law has worked well and contains sufficient limits on agency power while not hampering their ability to act.

Gubernatorial approval of proposed rules

Assembly Bill 8 adds a cumbersome layer of process to rule-making by requiring the Governor to sign off on every aspect of promulgation including the scoping statement that provides notice to the public of the initiation of rule-making.

Current law prohibits agency staff from providing inside information or an unfair advantage to any member of the public. The following language was deleted in proposed Section 4. 227.135 (2) "a state employee or official may not perform any activity in connection with drafting the proposed rule except for an activity necessary to

prepare the statement." In the absence of clear economic methodologies, standards for review or timing, rule-making will become an insider game. Language in 227.137 (3) directs those conducting the analysis to, "solicit information and advice from businesses, associations representing businesses" without the clear guidance to avoid unfair advantage provided in current law.

Section 1. 227.10 (2m) of the Bill creates new language that prohibits agencies from implementing or enforcing any standard, requirement, or threshold as a term or condition of any license (permit) issued by the agency unless the rule in play has been promulgated according to this subchapter of the Bill which also allows the Governor, by executive order to "prescribe standards."

The unlimited, undefined standards to be prescribed by the Governor with no public notice or participation may not meet the federal environmental standards Wisconsin currently has the authority to administer. The lack of limits or definition of the Governor's power to prescribe standards is likely to lead to uncertainty and delays for the regulated community, especially if they impair Wisconsin's authority to administer federal environmental laws.

The proposed expansion of Gubernatorial power in future rule-making is significant. The language in 227.10 (2m) leaves room for the Governor to reach back in time to insert new conditions and standards in place of those relied on by affected interests. Such broad and unbounded power for a Governor does not provide steady predictability to the regulated community. Such uncertainty would likely delay plans for expansion and investment in Wisconsin now or in the future.

Economic impact analyses for proposed rules

This is the most troubling part of the Bill. The nomenclature in the Bill would suggest an "economic analysis" is more comprehensive than the "economic report" in current law. In fact, the "analysis" diminishes the scope and quality of information to be considered in making a determination on the economic impacts of a proposed rule. Current law allows affected parties to petition the Department of Administration to prepare an economic report with the content, scope and process outlined in 227.137 (1-4) before the rule is presented to the Legislature for review.

The proposed language in the Bill removes the list of affected parties by deleting "a municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons that would be directly and uniquely affected." Under current law, there is a clear time frame for the review as stated in 227.137 (2) (a) which is repealed in the proposed Bill without being replaced with any indication as to the

timing of the proposed economic analyses. Further, the standard for reviewing the economic impacts is clearly defined in current law in language in 227.137 (2) (b) which is also repealed in the proposed Bill without being replaced by an alternate, clear standard. That current standard for review for a rule is that it would "cost affected parties $20 million or more during each of the first 5 years after the rule's implementation to comply with the rule." This is replaced the proposed 227.137 (6) which removes the timeframe in which to review the economic impact of a rule and only states, "a total of $20,000,000 or more in implementation and compliance costs are reasonably expected to be incurred or passed along to businesses and individuals." Such uncertainty will certainly lead to confusion and potentially costly litigation just to determine the scope of the mandated economic analysis, whether or not potentially affected parties even want such an analysis.

The current law requires a thorough review using comprehensive data from the agencies that track statewide economic conditions and that are in a position to balance the many interests in the economy in the context of a specific rule, even emergency rules.

Current law provides for economic study and review of rules and sets out factors to be considered in such analyses. The current language of 227.137(3) (a) requires the economic analysis of a proposed rule to include "An analysis and quantification of the problem, including any risks to public health or the environment, that the rule is intending to address." The words "including any risks to public health or the environment" have been completely removed in the proposed Bill.

The introduction to 227.137 (3) narrows the review of the Bill in scope by limiting named affected parties and by adding the word "economic" in line 4 of Section 12, 227.137 (3). The addition of "economic" furthers the goal of removing public health, safety and the environment as factors to consider when creating public policy. Affected parties are narrowed by removing "associations" and replacing them with "associations representing businesses." Environmental regulations are intended to protect the public interest while providing predictability and fairness to the regulated community.

The current law has balanced the interests of all parties in complying with complex, science-based systems that meet federal standards while protecting the public interest and providing economic opportunity.

Current law provides factors to consider and a process for conducting an economic report that engages agencies who are accountable to the Governor and who have the expertise to assess the impact of a rule across all affected sectors and persons of

Wisconsin. The proposed Bill strips the current law of well-defined standards that prevent the use of the power of the state to hand out special advantages to businesses represented by associations at the expense of small, independent businesses that employ over 40% of the people of Wisconsin

The bill further compromises and endangers public health by in new language in 227.137 (3) (c) that requires the analysis to be based on “the actual and quantifiable benefits of the proposed rule” when combined with the removal of public health and the environment as allowable factors to consider puts the people of Wisconsin at great risk. It is well known many environmental problems make people sick and can even cause their death.

The Bill mandates an economic analysis to be conducted prior to public hearings for a rule whether any sector or individual affected by the rule requests such analysis. The analysis that is , narrows the scope of economic review under current law to instead use information gathered from people and businesses with a pecuniary interest.

Wisconsin is second only to Florida in the number of fishing licenses sold each year. Tourism accounts for a third of our economy. Are businesses dependent on clean water less important than businesses favored with inside information and access a Governor with unilateral decision-making as proposed by this Bill?

Respectfully Submitted by:

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Midwest Environmental Advocates