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MEA Calls on Governor Walker to Veto Senate Bill 884

Tuesday, December 11, 2018

After late-night negotiations behind closed doors last week, Wisconsin lawmakers passed legislation that will promote litigation, waste thousands of hours of agency staff time, and create uncertainty for regulated entities and the public. Midwest Environmental Advocates ("MEA") believes that the rushed drafting and vetting process will lead to unintended consequences that will harm the very interests that the bill's authors would like to protect. For this reason, MEA strongly opposes Senate Bill 884¹ and asks Governor Walker to veto the bill.

This bill has many problems, but our comments focus on the following bill provisions which are especially problematic.

- 1. Provisions in the bill allow the legislature to get involved in legal proceedings and to interfere with settlement. This would waste taxpayer money and generate more litigation.**

This bill will affect litigation beyond the contentious cases such as Wisconsin's involvement in litigation regarding the Affordable Care Act. Allowing the legislature to intervene in litigation may introduce additional controversies into relatively straightforward cases, increasing the time and expense of litigation for all parties.

- 2. The bill gives the Joint Committee on Finance (JCF) the ability to oversee and block settlement between litigants and the Department of Justice.**

Such legislative interference with the Attorney General and DOJ's ability to enforce our laws is unprecedented. This would discourage settlement and prolong litigation. It will undoubtedly waste agency resources and clog the judicial system. This would interfere with DOJ's ability to settle environmental enforcement cases as well as cases where the state is being sued for violating the law. Forcing these cases into the courts would allow other interested parties to intervene, which may prolong litigation and make settlement less likely. Removing this tool from DOJ would increase costs for the regulated entities that are parties to such enforcement actions.

- 3. Provisions in the bill that create new legal requirements for guidance documents unnecessarily complicate the law and create a legal grey area in agency rulemaking and enforcement.**

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Existing law already prohibits agencies from relying on guidance documents in legal proceedings. This bill creates separate standards that allow a regulated entity to rely on a guidance document but makes it difficult for an agency to rely on guidance documents to defend its position.

Agency guidance is an important tool that regulatory agencies use to explain complex and technical rules and statutes. For example, the Wisconsin Department of Natural Resources recently posted two final guidance documents regarding recent legislative exemptions for artificial and nonfederal wetlands.ⁱⁱ Adding bureaucracy and confusion to the guidance process eliminates guidance as a reasonable tool for agencies to use to explain legal requirements to regulated entities, local governments, and citizens. Guidance documents can provide clarity and consistency to agency decision-making, which can provide more certainty for the regulated community. Certainly the agency can misuse the guidance process and avoid rulemaking by drafting guidance. But there is already a legal process to address this: by challenging an agency guidance document as an unlawful rule.

This bill would automatically rescind guidance documents that do not comply with these new requirements unless the agency can re-issue the guidance within the next six months. Such action creates uncertainty and wastes many thousands of hours of agency staff time already put into existing guidance documents.

4. The bill gives JCRAR more power in the rulemaking process.

In contrast to current law, this legislation allows the Joint Committee for Review of Administrative Rules (JCRAR) to suspend rules multiple times even if a bill to support the suspension does not pass. Under current law, JCRAR may only suspend a rule following a public hearing and only on the basis of testimony provided at the hearing. In addition, a rule may be suspended only in limited circumstances, based on, for example, the lack of statutory authority or a change in circumstances.

5. The bill eliminates judicial deference to agency interpretations of law.

The legislation prohibits any agency in any proceeding from seeking deference based on the agency's interpretation of law. It also prohibits a court from according any deference to an agency's interpretation of law. The Wisconsin Supreme Court recently rejected judicial deference to agency interpretations of law, though the Court's opinions and rationale were divided.

6. Waives eligibility requirements for municipal flood control and riparian restoration grant for certain projects.

The legislation creates a narrow exception for certain projects funded or executed by the U.S. Army Corps of Engineers from the requirements for a municipal flood control and riparian restoration grant. This makes these projects eligible for up to \$14.6 million in funding through the 2019-21 biennium from the Knowles-Nelson Stewardship program. The Legislative Fiscal Bureau reports that this is for a specific, proposed project in the City of Arcadia in Trempealeau County.

For these reasons, we call on Governor Walker to veto this legislation. Rushing through these changes to the administrative process in an extraordinary session will lead to unintended consequences that will be bad for everyone in Wisconsin.

ⁱ The final, enrolled version of the legislation, as amended and passed by the Legislature, is available at <http://docs.legis.wisconsin.gov/2017/related/enrolled/sb884>.

ⁱⁱ Wisconsin Department of Natural Resources, Wetland permit exemptions, *available at* <https://dnr.wi.gov/topic/wetlands/permitExemptions.html> (providing links to the final guidance documents regarding wetland permit exemptions for artificial and nonfederal wetlands).