

## **JOB CREATION ACT BILL INTRODUCED**

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**MADISON...**Legislation to implement the Job Creation Act of 2003 (AB 655/SB 313) was officially introduced today by Senate Majority Leader Mary Panzer (R-West Bend) and Assembly Speaker John Gard (R-Peshtigo). The two leaders said introduction of this act is the pinnacle of the dozens of job creation and economic development bills taken up and acted on by the Legislature this year.

“While some people merely talk about job creation and economic development ideas, this Legislature has delivered with concrete proposals and bi-partisan action on this issue critical to Wisconsin’s future,” said Panzer. “We have listened to the business community time and time again to find out what we need to do to create a climate that creates jobs. The Job Creation Act of 2003 will be a key building block to that end.”

The leaders said that they would attempt to pass the Job Creation Act of 2003 before the Legislature adjourned the November floor session this week. Gard said he hoped that the bill would meet with broad bi-partisan support and be quickly signed into law by Governor Doyle.

“At the Wisconsin Economic Summit in October, Governor Doyle laid out a personal goal of creating the ‘most aggressive regulatory reform policy in the Midwest’ and ‘the most aggressive time limits on issuing air permits by the end of the year,’” said Gard. “The Job Creation Act of 2003 delivers on those goals. This legislation is a perfect example of a Republican legislature and a Democrat Governor working together to meet shared goals.”

Expanded details of the Job Creation Act of 2003 are attached.

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# The JOB CREATION ACT OF 2003

## RULEMAKING PROCEDURES (CHAPTER 227)

### **Economic Impact Reports**

Creates the right for affected parties to petition agencies to prepare an Economic Impact Report on their regulatory proposals. The report would include:

- An analysis and quantification of the economic impacts and an analysis of the benefits expected to arise from proposed rules.
- An agency finding that the benefits are commensurate with or exceed the expected costs.
- An analysis of existing or anticipated federal programs intended to address the identified problem.

Agencies presently have no requirement to assess the costs and benefits of rules. There is also no requirement to compare the benefits of new regulations against the risks a rule intends to mitigate.

For example, industry has estimated the cost of DNR's mercury reduction rule to exceed \$1 billion for ratepayers and yet not lead to a single lake being pulled from the list of those with fish advisories. That rule has high costs and little benefit. Rules have the effect of law, and as such, agencies should be required to assess their economic costs.

### **Gubernatorial Approval of Rule**

Assures agency accountability by providing for gubernatorial approval of all agency rulemaking prior to submittal to the Legislature for review.

This provision requires a publicly elected official, whose name is on a statewide ballot every four years, to approve administrative rules instead of unelected bureaucrats.

### **Independent Review by DOA**

Provides an independent review by the Department of Administration (DOA) for certain proposals, including sufficiency of Economic Impact Reports, sufficiency of statutory authorities, and consistency with related state and federal programs. DOA can return the draft rule or guidance to the agency, preventing its implementation until such time its concerns are addressed.

Similar to the federal Office of Management and Budget (OMB), DOA has additional technical and legal expertise to help advise the Administration and other agencies on the appropriateness of proposed rules. Allowing this OMB-inspired review not only better utilizes all of the resources of state government but provides for more objective, third-party review of rules before they become law.

### **Agency Records & Judicial Review**

Requires agency to document its justification for a rule by expanding analysis and related record requirements. Existing law merely requires the agency "reference" its authority, and provide a "brief" summary of the rule that goes out to hearing. Requiring agencies to provide better analysis and justification in the rule record would put a end to the often

impossible game affected parties and courts must play to break open an agency's "black box" of information and discern agency reasoning behind a rule. Under this bill, the agency's record would be expanded to include:

- A summary of the relevant legal interpretations and policy considerations underlying the proposed rule.
- A summary of existing and anticipated federal regulatory programs intended to address similar matters.
- A summary of the factual data, studies and other sources of information on which the proposed rule is based, the methodology used to obtain and analyze this information, how this information supports the regulatory approach chosen for the rule, and how this information supports any required agency's findings.
- The analysis and supporting documentation relating to the fiscal implication of the rule, including any prepared Economic Impact Reports.
- A detailed statement explaining the need for basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purposes.
- An analysis of policy alternatives to the proposed rule, including reliance on federal regulatory programs, and an explanation for the rejection of any alternatives.

Rather than rubber stamping the agency's reasoning when reviewing the validity of a rule, the court would be required to make a "substantial inquiry" of above analysis and record. The record could be "necessarily and appropriately supplemented" by evidence presented to the court. Based on this review of the factual basis and related reasoning employed by the agency, the court will invalidate the rule if the decision-making process is arbitrary and capricious. Less deference will be given agencies on those rules that the Legislature intended to be comparable to federal standards.

### **Miscellaneous Rulemaking Procedures**

Clarifies other Chapter 227 procedures to assure the regulated community has a fair opportunity to challenge agency actions that adversely affect their businesses. These provisions include:

- Allow petitions for review filed by nonresidents of Wisconsin to be brought in the county where the property is located or the dispute arose, rather than forcing non-residents to go to Dane County.
- Authorize administrative law judges to award frivolous action costs and fees in administrative proceedings against parties who bring legally or factually frivolous claims.
- Allow an applicant one crack at substitution of an Administrative Law Judge (ALJ) in a manner similar to the rights of a litigant in the circuit courts
- Require random assignment of cases to ALJ's by the Division of Hearings and Appeals.
- Prohibit ALJ's from deciding constitutional issues.

## AIR MANAGEMENT (CHAPTER 285)

### Air Permit Streamlining

Obtaining necessary air permits in a timely manner is the single biggest regulatory impediment for manufacturers looking to expand or build in Wisconsin. Throughout the state, manufacturers and economic development professionals recounted specific examples of jobs lost because other states can provide faster approvals. This bill modifies Chapter 285 to help assure timely permits, and otherwise streamline and consolidate administrative hurdles impeding business expansion. These provisions would include:

- Require DNR to promulgate new permit exemptions for sources that do not present any meaningful air quality threat.
- Create a registration permit program for small sources to avoid needless permit negotiations on simple processes, and allow source to commence construction pending issuance of a registration permit.
- Expand the use of general permits for similar activities conducted by multiple companies, and allow source to commence construction pending issuance of a general permit.
- Allow persons to petition for exemptions, and registration and general permits, and require DNR to act on the petition within 30 days.
- Allow DNR to consolidate air construction and operating permits into one facility-wide permit, eliminating duplication in the permitting process.
- Require DNR to make permit streamlining a priority; to continually assess its permit program for opportunities to consolidate permits, expand exemptions and make available registration/general permits and construction permit waivers; and, to submit a report to the Legislature within 6 months on its permit streamlining efforts, including related draft rules.
- Require quick codification of federal New Source Review regulations. *Every state surrounding Wisconsin is implementing these reforms as Wisconsin drags its feet.*
- Clarify that permit applicants may challenge part of a permit decision while allowing unchallenged parts of a permit to move forward.
- Allow for a waiver of construction permit requirements in situations where the requirement presents an undue hardship.
- Allow permit applicants to use private consultants for certain permitting activities, such as making permit completeness determinations and preliminary determinations.
- Prohibit DNR from including a monitoring requirement in a permit if the applicant demonstrates that the cost of compliance with the requirement exceeds the cost of requirements imposed on similar sources by an adjacent state.

- Require DNR to issue a “completeness determination” within 20 days that triggers deadlines for permit actions.
- Reduce the length of permit deadlines and provide for penalties for missed deadlines.
- Allow sources to continue operation pending renewal if renewal application is submitted before existing permit expires. (Now, if the renewal application is not submitted at least 12 months before the permit expires, the operation must cease.)

None of these components lower environmental standards – business must still meet all applicable emission standards – but they do reduce unnecessary red tape and related delay and costs companies face when trying to expand or locate in Wisconsin.

### **Clarifying when DNR can Exceed Federal Requirements**

The scope of required permit approvals is defined by the overall scope of the underlying programs. For example, when DNR expands its air toxics program to cover hundreds of substances not covered by federal law, businesses face permitting burdens correspondingly more burdensome than federal and other state programs. These additional permitting costs and related substantive requirements put Wisconsin companies at a cost disadvantage. While the Legislature imposed limiting criteria for when DNR can exceed federal programs, such as they must be “similar,” “no more restrictive,” or “consistent with” federal standards, these criteria are often meaningless in practice.

Provisions in the Jobs Creation Act provide additional clarification of when DNR may exceed federal requirements. The bill would:

- Require DNR base its finding of need for state-only hazardous air standards on documentation that includes a risk analysis and a related finding there is inhalation exposure above recognized environmental health standards. DNR is also to evaluate and select cost-effective compliance alternatives.
- Expand existing requirement that DNR adopt similar, no more restrictive hazardous air standards, to require related administrative requirements also be no more burdensome than the comparable federal requirements.
- Clarify that if federal hazardous air standards address state-only pollutants, those state pollutants are not regulated by DNR.
- Modify existing law requiring “rules or control strategies” in ozone State Implementation Plans (SIPs) to “conform” to the Clean Air Act to require that all SIPs include only measures required to obtain EPA approval.
- Eliminate the DNR’s authority to develop ambient air quality standards. (DNR has never used this authority, and cited their lack of resources to do so as a reason for denying a recent petition to regulate emissions of CO<sub>2</sub>.)

### **Review of State Implementation Plans & Nonattainment Recommendations**

Under existing rule-making procedures (Chap. 227), State Implementation Plans (SIPs) and nonattainment designation recommendations are not considered rules despite the fact they create federal mandates to produce dozens of rules and related regulatory programs. Thus, under current law, there is no opportunity for meaningful public or legislative review on these critical policy determinations required by the Clean Air Act.

This bill requires a streamlined legislative review requiring DNR to submit proposed SIP revisions and nonattainment designation recommendations, with supporting documents, to the Legislature 90 days before due EPA. The Legislature may request revisions within 30 days of receipt; and DNR must address legislative concerns prior to submittal to EPA.

The bill also requires DNR to submit a report to the Legislature on existing SIP requirements not required by the Clean Air Act and recommendations for SIP revisions to remove such unnecessary requirements. The bill also clarifies that Wisconsin may not recommend nonattainment designation of any county unless that county violates the relevant standard, unless otherwise required by the Clean Air Act.

## **NAVIGABLE WATERS (CHAPTER 30)**

Virtually any human activity that takes place in the vicinity of a “navigable” water is subject to jurisdiction of the Wisconsin DNR under the Chapter 30 program. This program is notorious for slow decisions, inconsistent decisions, and vague or non-existent standards. Because key terms such as “navigable” and “the bank” of a navigable waterway have been defined to the broadest extent possible, thousands of projects each year are subject to this program. The Job Creation Act modifies Chapter 30 to streamline permit requirements currently impeding construction and related economic development activities.

Under the bill, Chapter 30 permits would be sorted permits into three categories:

1. De minimus exemptions for those projects already exempt under law or subject to other regulatory oversight.
2. General permits for routine projects that typically have been approved.
3. Individual permits for significant projects.

Individual permits would be further modified as follows:

- DNR review would be subject to completeness deadlines.
- DNR review would be subject to decision deadlines.
- Public input would be gained via a “public hearing,” as opposed to the current “contested case hearing,” which is more time-consuming and adversarial.
- Decisions would be reviewable by an Administrative Law Judge, *OR* Circuit Court.

## MISCELLANEOUS REFORMS

The bill also modifies miscellaneous programs to lessen regulatory burdens identified as impeding economic growth and job creation or otherwise placing unnecessary burdens on the business community.

- Require a 180-day deadline for the Public Service Commission for rulings on deregulation petitions.
- Enact statutory restrictions on the ability of the Department of Workforce Development ability to require apprentice to journeyman jobsite ratios. Such limitations limit the ability to properly train new apprentices
- Allow the Department of Regulation and Licensing, after consultation with the real estate board, to enter into reciprocal licensing agreements with other states.
- Clarify current law regarding the sales tax on temporary services. Under Wisconsin statutes, sales tax is imposed on the specifically listed services at retail in this state. Only the services explicitly listed in the Wisconsin statutes are subject to sales taxes. Recently, however, the Wisconsin Department of Revenue (DOR), through their sales tax audit practices has begun to tax businesses on temporary services.
- With PSC approval, allow utilities currently contributing money to the public benefits fund to retain some of those dollars if they are used for energy conservation programs for industrial, commercial, and agricultural customers in the utility's area. PSC would set standards in rule for use of such dollars.
- Clarify that all commercial credit agreements must be in writing. This provision does not impact the consumer act.
- Clarify the nonmetallic mining reclamation law (Chapter 295) to ensure that operators may not be required to post financial assurance with more than one unit of government (regulatory authority) in relation to same mining site.