

**BOARD OF
DIRECTORS**

SUSAN DAVIDSON
President
Madison

MANDELA BARNES
Milwaukee

DAVE CLAUSEN
Vice President
Amery

DAN COLLINS
Sturgeon Bay

TOM DAWSON
Madison

MAUREEN FREEDLAND
La Crosse

JIM GOODMAN
Wonevot

ALANA MCKEEVER
Madison

WILLIAM H. LYNCH
Milwaukee

MELISSA SCANLAN
Founder
Norwich, VT

KELLY PARKS SNIDER
Madison

GORDON STEVENSON
Secretary
Black Earth

STEPHANIE TAI
Madison

DAVID WERNECKE
Treasurer
Baraboo

WENONA WOLF
Madison

ARLEN CHRISTENSON
Emeritus Board Member
Madison

STAFF

KIMBERLEE WRIGHT
Executive Director

JIMMY PARRA

SARAH GEERS

TRESSIE KAMP

JACKLYN BRYAN

ROBERT D. LEE

PEG SHEAFFER

LAUREN RUDERSDORF

RY CARPENTER

JODI HABUSH SINYKIN
Of Counsel



Comments in opposition to Assembly Bill 1070

Monday, December 03, 2018

Midwest Environmental Advocates (“MEA”)ⁱ strongly opposes Assembly Bill 1070 because it will promote litigation, waste thousands of hours of agency staff time, and create uncertainty for regulated entities and the public. 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 these reasons, we ask you to vote no on AB 1070.

This bill has many problems, but our comments focus on three: (1) political interference with the Attorney General and Department of Justice’s (“DOJ”) ability to enforce state law and settle litigation, (2) creating uncertainty for regulated entities, other levels of government, and the public, and (3) threatening Wisconsin’s ability to control federally-delegated environmental programs under the Clean Water Act, Clean Air Act, and Safe Drinking Water Act. Below we provide examples of especially problematic bill provisions.

First, the bill provisions that allow the legislature to get involved in legal proceedings and to interfere with settlement will waste taxpayer money and will 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.

The bill also 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. To provide just one example, this could interfere with DOJ’s ability to sue and immediately settle environmental pollution cases. 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.

Second, the bill provisions that create new legal requirements for guidance documents unnecessarily complicates the law and creates a legal grey area in agency rulemaking and enforcement. 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 do not allow an agency to rely on guidance documents to defend its position.

MIDWESTADVOCATES.ORG

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. 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 try to 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. Such action creates uncertainty and wastes many thousands of hours of agency staff time already put into existing guidance documents. Because it would be unclear which guidance documents would be automatically rescinded under this provision, it would also create uncertainty for the agency, the regulated community, and the public.

Third, the bill eliminates independent decision-making in administrative hearings. Instead, it requires the agency head to make the final decision in any administrative hearing. This represents a perversion of this quasi-judicial process because the agency itself will always be a party in the contested administrative hearing. Currently an agency can ensure a fair process by allowing an independent agency to issue the final administrative decision.

Requiring an agency head to make the final decision introduces politics into the judicial process and calls into question whether such administrative hearing procedures would maintain compliance with federal law in federally-delegated programs like the Clean Water Act, Clean Air Act, and Safe Drinking Water Act.

For these reasons, we ask you to vote no on AB 1070. 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.

¹ Midwest Environmental Advocates is a nonprofit environmental law center that works for healthy water, air, land and government for this generation and the next. We believe that every citizen has the power to make a difference.