# RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

☞Appendix GG ... has been added to the **2017 LRB-6074**

**Appendix A** ☞ LRB 17-5979
**Appendix B** ☞ LRB 17-5982
**Appendix C** ☞ LRB 17-5983
**Appendix D** ☞ LRB 17-5985
**Appendix E** ☞ LRB 17-5986
**Appendix F** ☞ LRB 17-5989
**Appendix G** ☞ LRB 17-5990
**Appendix H** ☞ LRB 17-5995
**Appendix I** ☞ LRB 17-5998
**Appendix J** ☞ LRB 17-6001
**Appendix K** ☞ LRB 17-6004
**Appendix L** ☞ LRB 17-6006
**Appendix M** ☞ LRB 17-6007
**Appendix N** ☞ LRB 17-6012
**Appendix O** ☞ LRB 17-6015
**Appendix P** ☞ LRB 17-6017
**Appendix Q** ☞ LRB 17-6019
**Appendix R** ☞ LRB 17-6021
**Appendix S** ☞ LRB 17-6023
**Appendix T** ☞ LRB 17-6024
**Appendix U** ☞ LRB 17-6025
**Appendix V** ☞ LRB 17-6027
**Appendix W** ☞ LRB 17-6028
**Appendix X** ☞ LRB 17-6031
**Appendix Y** ☞ LRB 17-6036
**Appendix Z** ☞ LRB 17-6037
**Appendix AA** ☞ LRB 17-6038
**Appendix BB** ☞ LRB 17-6039
**Appendix CC** ☞ LRB 17-6040
**Appendix DD** ☞ LRB 17-6041
**Appendix EE** ☞ LRB 17-6042
**Appendix FF** ☞ LRB 17-6043
**Appendix GG** ☞ LRB 17-6046
**Appendix HH** ☞ LRB 17-6047
**Appendix II** ☞ LRB 17-6048
**Appendix JJ** ☞ LRB 17-6049
**Appendix KK** ☞ LRB 17-6050
**Appendix LL** ☞ LRB 17-6051
**Appendix MM** ☞ LRB 17-6052
**Appendix NN** ☞ LRB 17-6058
**Appendix OO** ☞ LRB 17-6059
**Appendix PP** ☞ LRB 17-6065
**Appendix QQ** ☞ LRB 17-6067

# *2017 DRAFTING REQUEST*

## Bill

| | | | |
|---|---|---|---|
| For: | **Joan Ballweg (608) 266-8077** | Drafter: | **mduchek** |
| By: | **Bethany** | Secondary Drafters: | |
| Date: | **11/21/2018** | May Contact: | |

Same as LRB:

Submit via email: **YES**
Requester's email: **Rep.Ballweg@legis.wisconsin.gov**
Carbon copy (CC) to:

**Pre Topic:**

No specific pre topic given

**Topic:**

Guidance documents

**Instructions:**

No specific instructions given

**Drafting History:**

| Vers. | Drafted | Reviewed | Submitted | Jacketed | Required |
|---|---|---|---|---|---|
| /? | mduchek 11/21/2018 | anienaja 11/21/2018 | | | |
| /P1 | mduchek 11/26/2018 | wjackson 11/26/2018 | lparisi 11/21/2018 | | State |
| /P2 | | | dwalker 11/26/2018 | | State |

FE Sent For: **<END>**

**DRAFTER'S NOTE**
**FROM THE**
**LEGISLATIVE REFERENCE BUREAU**

LRB-6046/P1dn
MED:ahe & amn

-Date-

This is a redraft of 2017 AB 880. Please note the following:

1. AB 880 contained provisions regarding judicial review of agency's compliance with guidance document notice and comment provisions (see s. 227.112 (6) and 227.53 (1) (intro.) in the bill) and put that review under judicial review provisions that apply to matters such as contested cases. (Contested cases would include matters such as a denial of a permit to a business, the granting of benefits to a claimant, or revocation of a license.) Our supreme court has stated that review under those provisions "envisions a review of a decision which must be supported by a record and be based upon findings of fact and conclusions of law," including contested cases. *Wisconsin's Environmental Decade, Inc. v. PSC*, 93 Wis. 2d 650, 287 N.W.2d 737 (1980). Since an agency's failure to comply with notice and comment procedures for guidance documents does not directly involve a decision akin to a contested case involving findings of fact or conclusions of law, it is unclear to me how this kind of judicial review would work with respect to review of an agency's failure to follow the procedures in the bill regarding guidance documents. Furthermore, AB 880 did not include anything that directed courts regarding how to review guidance documents under those provisions, so courts would have to use the procedures under s. 227.57, all of which are written to apply to matters such as contested cases.

It seems to me that a better approach would be to have any judicial review of guidance documents be done under s. 227.40, instead of under ss. 227.52 to 227.58. Under s. 227.40, the validity of a rule, including an unpromulgated rule, may be challenged either with a declaratory judgment action or via other kinds of proceedings, *including* proceedings under ss. 227.52 to 227.58 (see s. 227.40 (2) (e)). I could therefore instead modify s. 227.40 to incorporate challenges to guidance documents, including failures to follow the procedures for adoption of a guidance document. This would seem to be a more workable approach, since guidance documents are more analogous to rules than contested cases, and the notice and comment procedures in the bill are more analogous to the rule-making procedures than the contested case procedures. Using this approach would still allow guidance documents that were not properly adopted to be challenged in the context of a contested case proceeding in which the guidance document is material, but the actual review of the guidance document would be more akin to the review of a rule, and a court could similarly rule under s. 227.40 that an agency had failed to adopt something that meets the definition of a guidance document using the procedures prescribed in the bill.

Another alternative would be for the bill to simply stay silent on judicial review, since s. 227.40 already allows for review of so-called unpromulgated rules (see, e.g., *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213). Since the bill expressly provides that guidance documents do not have the force of law and may not be relied upon as such, judicial review of guidance documents may not be necessary at all.

2. I would note that the definition of "guidance document" in the draft, despite having a number of specific carve-outs, is still quite broad and may require agencies to publish various materials and publications online (see s. 227.112 (2) in the bill) that the agency might otherwise not currently disclose even under the Public Records Law for one reason or another. You may therefore want to consider adding a mechanism to the bill that could allow for some kind of further exemptions from the requirements in certain cases. Also, note that the bill gave agencies until July of 2018 to have their guidance documents adopted in accordance with the bill and declared all guidance documents not adopted by that date to be rescinded. As a placeholder, I made changed this date to July 2020, but you may want to consider a sooner or later date, keeping in mind that the potential number of materials that could be subject to these provisions may be very large.

3. The provisions in the draft regarding agency deference would, in my opinion, more or less codify the *Tetra Tech* decision, though it's hard to say for certain whether a court would consider itself bound by the provisions if the supreme court were to ever reverse the *Tetra Tech* decision. But note that the provision in the bill only addresses judicial review of matters under ch. 227, which would not encompass decisions under certain laws that are exempt from ch. 227 or, potentially, rulings in other types of actions.

4. Note that I have included AA1 to AB 880, which better allows for commenting on guidance documents via the legislature's website and the register, as is now done with rules, and requires the Legislative Council Staff to assist agencies with determinations regarding guidance documents.

Michael Duchek
Legislative Attorney
(608) 266-0130
michael.duchek@legis.wisconsin.gov

6046/P1

# State of Wisconsin
## 2019 - 2020 LEGISLATURE

LRB-~~0162/P1~~
MED:amn

## PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-note

1 AN ACT ***to amend*** 13.91 (1) (c), 227.01 (13) (intro.), subchapter II (title) of chapter
2 227 [precedes 227.10], 227.11 (title), 227.53 (1) (intro.) and 227.57 (11); and ***to***
3 ***create*** 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of
4 the statutes; **relating to:** deference by courts to agency interpretations of law,
5 notice and comment requirements for guidance documents issued by agencies,
6 and agency rule-making authority.

---

### *Analysis by the Legislative Reference Bureau*

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

***Agency interpretations of law***

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

Consistent with the Wisconsin Supreme Court's decision in Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018WI 75.

Italics

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

***Guidance documents***

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency to 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. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill 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.

The bill provides that 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. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, and allows certain persons to petition an agency to promulgate a rule in place of a guidance document.

The bill also provides that any action or inaction by an agency related to the requirements of the bill regarding guidance documents constitutes a decision subject to judicial review under the law governing administrative procedure for state agencies.

The bill requires the Legislative Council staff to provide agencies with assistance in determining whether documents and communications are guidance documents as defined in the bill.

The bill provides that on July 1, 2020, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

***Agency rule-making authority; settlement agreements***

The bill provides that 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. The bill provides that 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.

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

2 13.91 **(1)** (c) Perform the functions prescribed in ~~s. 227.15 for the review and~~
3 ~~resolution of problems~~ ch. 227 relating to administrative rules and guidance
4 documents.

5 **SECTION 2.** 35.93 (2) (b) 3. im. of the statutes is created to read:

6 35.93 **(2)** (b) 3. im. Notices of public comment periods on proposed guidance
7 documents under s. 227.112 (1) (a).

8 **SECTION 3.** 227.01 (3m) of the statutes is created to read:

9 227.01 **(3m)** (a) "Guidance document" means, except as provided in par. (b), any
10 formal or official document or communication issued by an agency, including a
11 manual, handbook, directive, or informational bulletin, that does any of the
12 following:

13 1. Explains the agency's implementation of a statute or rule enforced or
14 administered by the agency, including the current or proposed operating procedure
15 of the agency.

16 2. Provides guidance or advice with respect to how the agency is likely to apply
17 a statute or rule enforced or administered by the agency, if that guidance or advice
18 is likely to apply to a class of persons similarly affected.

(b) "Guidance document" does not include any of the following:

1. A rule that has been promulgated and that is currently in effect or a proposed rule that is in the process of being promulgated.

2. A standard adopted, or a statement of policy or interpretation made, whether preliminary or final, in the decision of a contested case, in a private letter ruling under s. 73.035, or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts.

3. Any document or activity described in sub. (13) (a) to (zz), except that "guidance document" includes a pamphlet or other explanatory material described under sub. (13) (r) that otherwise satisfies the definition of "guidance document" under par. (a).

4. Any document that any statute specifically provides is not required to be promulgated as a rule.

5. A declaratory ruling issued under s. 227.41.

6. A pleading or brief filed in court by the state, an agency, or an agency official.

7. A letter or written legal advice of the department of justice or a formal or informal opinion of the attorney general, including an opinion issued under s. 165.015 (1).

8. Any document or communication for which a procedure for public input, other than that provided under s. 227.112 (1), is provided by law.

9. Any document or communication that is not subject to the right of inspection and copying under s. 19.35 (1).

**SECTION 4.** 227.01 (13) (intro.) of the statutes is amended to read:

227.01 **(13)** (intro.) "Rule" means a regulation, standard, statement of policy, or general order of general application ~~which~~ that has the ~~effect~~ force of law and

~~which~~ that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" includes a modification of a rule under s. 227.265. "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, ~~which~~ that:

**SECTION 5.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes is amended to read:

**CHAPTER 227**

SUBCHAPTER II

ADMINISTRATIVE RULES AND

GUIDANCE DOCUMENTS

**SECTION 6.** 227.10 (2g) of the statutes is created to read:

227.10 **(2g)** No agency may seek deference in any proceeding based on the agency's interpretation of any law.

**SECTION 7.** 227.11 (title) of the statutes is amended to read:

**227.11** (title) **~~Extent to which chapter confers~~ Agency rule-making authority.**

**SECTION 8.** 227.11 (3) of the statutes is created to read:

227.11 **(3)** 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. 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.

1 **SECTION 9.** 227.112 of the statutes is created to read:

2 **227.112 Guidance documents. (1)** (a) Before adopting a guidance document,
3 an agency shall submit to the legislative reference bureau the proposed guidance
4 document with a notice of a public comment period on the proposed guidance
5 document under par. (b), in a format approved by the legislative reference bureau,
6 for publication in the register. The notice shall specify the place where comments
7 should be submitted and the deadline for submitting those comments.

8 (b) The agency shall provide for a period for public comment on a proposed
9 guidance document submitted under par. (a), during which any person may submit
10 written comments to the agency with respect to the proposed guidance document.
11 Except as provided in par. (c), the period for public comment shall end no sooner than
12 the 21st day after the date on which the proposed guidance document is published
13 in the register under s. 35.93 (2) (b) 3. im. The agency may not adopt the proposed
14 guidance document until the comment period has concluded and the agency has
15 complied with par. (d).

16 (c) An agency may hold a public comment period shorter than 21 days with the
17 approval of the governor.

18 (d) An agency shall retain all written comments submitted during the public
19 comment period under par. (b) and shall consider those comments in determining
20 whether to adopt the guidance document as originally proposed, modify the proposed
21 guidance document, or take any other action.

22 **(2)** An agency shall post each guidance document that the agency has adopted
23 on the agency's Internet site and shall permit continuing public comment on the
24 guidance document. The agency shall ensure that each guidance document that the
25 agency has adopted remains on the agency's Internet site as provided in this

1 subsection until the guidance document is no longer in effect, is no longer valid, or
2 is superseded or until the agency otherwise rescinds its adoption of the guidance
3 document.

4 **(3)** A guidance document does not have the force of law and does not provide
5 the authority for implementing or enforcing a standard, requirement, or threshold,
6 including as a term or condition of any license. An agency that proposes to rely on
7 a guidance document to the detriment of a person in any proceeding shall afford the
8 person an adequate opportunity to contest the legality or wisdom of a position taken
9 in the guidance document. An agency may not use a guidance document to foreclose
10 consideration of any issue raised in the guidance document.

11 **(4)** If an agency proposes to act in any proceeding at variance with a position
12 expressed in a guidance document, it shall provide a reasonable explanation for the
13 variance. If an affected person in any proceeding may have relied reasonably on the
14 agency's position, the explanation must include a reasonable justification for the
15 agency's conclusion that the need for the variance outweighs the affected person's
16 reliance interest.

17 **(5)** Persons that qualify under s. 227.12 to petition an agency to promulgate
18 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
19 of a guidance document.

20 **(6)** Any action or inaction by an agency related to the requirements of this
21 section constitutes a decision subject to judicial review under s. 227.53.

22 **(7)** Any guidance document shall be signed by the secretary or head of the
23 agency below the following certification: "I have reviewed this guidance document
24 or proposed guidance document and I certify that it complies with sections 227.10
25 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document

or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes."

**(8)** This section does not apply to guidance documents adopted before the effective date of this subsection .... [LRB inserts date], but on July 1, 2020, any guidance document that has not been adopted in accordance with sub. (1) or that does not contain the certification required under sub. (7) shall be considered rescinded.

**(9)** The legislative council staff shall provide agencies with assistance in determining whether documents and communications are guidance documents that are subject to the requirements under this section.

**SECTION 10.** 227.53 (1) (intro.) of the statutes is amended to read:

227.53 **(1)** (intro.) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.112 or 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements:

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

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

**(END)**

# DRAFTER'S NOTE
## FROM THE
## LEGISLATIVE REFERENCE BUREAU

LRB-6046/P1dn
MED:amn

November 21, 2018

This is a redraft of 2017 AB 880. Please note the following:

1. AB 880 contained provisions regarding judicial review of agency's compliance with guidance document notice and comment provisions (see s. 227.112 (6) and 227.53 (1) (intro.) in the bill) and put that review under judicial review provisions that apply to matters such as contested cases. (Contested cases would include matters such as a denial of a permit to a business, the granting of benefits to a claimant, or revocation of a license.) Our supreme court has stated that review under those provisions "envisions a review of a decision which must be supported by a record and be based upon findings of fact and conclusions of law," including contested cases. *Wisconsin's Environmental Decade, Inc. v. PSC*, 93 Wis. 2d 650, 287 N.W.2d 737 (1980). Since an agency's failure to comply with notice and comment procedures for guidance documents does not directly involve a decision akin to a contested case involving findings of fact or conclusions of law, it is unclear to me how this kind of judicial review would work with respect to review of an agency's failure to follow the procedures in the bill regarding guidance documents. Furthermore, AB 880 did not include anything that directed courts regarding how to review guidance documents under those provisions, so courts would have to use the procedures under s. 227.57, all of which are written to apply to matters such as contested cases.

It seems to me that a better approach would be to have any judicial review of guidance documents be done under s. 227.40, instead of under ss. 227.52 to 227.58. Under s. 227.40, the validity of a rule, including an unpromulgated rule, may be challenged either with a declaratory judgment action or via other kinds of proceedings, *including* proceedings under ss. 227.52 to 227.58 (see s. 227.40 (2) (e)). I could therefore instead modify s. 227.40 to incorporate challenges to guidance documents, including failures to follow the procedures for adoption of a guidance document. This would seem to be a more workable approach, since guidance documents are more analogous to rules than contested cases, and the notice and comment procedures in the bill are more analogous to the rule-making procedures than the contested case procedures. Using this approach would still allow guidance documents that were not properly adopted to be challenged in the context of a contested case proceeding in which the guidance document is material, but the actual review of the guidance document would be more akin to the review of a rule, and a court could similarly rule under s. 227.40 that an agency had failed to adopt something that meets the definition of a guidance document using the procedures prescribed in the bill.

Another alternative would be for the bill to simply stay silent on judicial review, since s. 227.40 already allows for review of so-called unpromulgated rules (see, e.g., *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213). Since the bill expressly provides that guidance documents do not have the force of law and may not be relied upon as such, judicial review of guidance documents may not be necessary at all.

2. I would note that the definition of "guidance document" in the draft, despite having a number of specific carve-outs, is still quite broad and may require agencies to publish various materials and publications online (see s. 227.112 (2) in the bill) that the agency might otherwise not currently disclose even under the Public Records Law for one reason or another. You may therefore want to consider adding a mechanism to the bill that could allow for some kind of further exemptions from the requirements in certain cases. Also, note that the bill gave agencies until July of 2018 to have their guidance documents adopted in accordance with the bill and declared all guidance documents not adopted by that date to be rescinded. As a placeholder, I changed this date to July 2020, but you may want to consider a sooner or later date, keeping in mind that the potential number of materials that could be subject to these provisions may be very large.

3. The provisions in the draft regarding agency deference would, in my opinion, more or less codify the *Tetra Tech* decision, though it's hard to say for certain whether a court would consider itself bound by the provisions if the supreme court were ever to reverse the *Tetra Tech* decision. But note that the provision in the bill only addresses judicial review of matters under ch. 227, which would not encompass decisions under certain laws that are exempt from ch. 227 or, potentially, rulings in other types of actions.

4. Note that I have included AA1 to AB 880, which better allows for commenting on guidance documents via the legislature's website and the register, as is now done with rules, and requires the Legislative Council Staff to assist agencies with determinations regarding guidance documents.

Michael Duchek
Legislative Attorney
(608) 266-0130
michael.duchek@legis.wisconsin.gov

11/26/2018

Bethany in Ballweg office
- OK to change judicial review provisions to like rules
- No more than 6 mos. to comply w/ guidance document requirements

# State of Wisconsin
## 2017 - 2018 LEGISLATURE

In 11-26-2018
TODAY ASAP

LRB-6046/P2
MED:amn
+WLJ

## PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT ***to amend*** 13.91 (1) (c), 227.01 (13) (intro.), subchapter II (title) of chapter
2 227 [precedes 227.10], 227.11 (title), 227.53 (1) (intro.) and 227.57 (11); and ***to***
3 ***create*** 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of
4 the statutes; **relating to:** deference by courts to agency interpretations of law,
5 notice and comment requirements for guidance documents issued by agencies,
6 and agency rule-making authority.

---

### *Analysis by the Legislative Reference Bureau*

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

***Agency interpretations of law***

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. Consistent with the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75,

the bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

***Guidance documents***

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency to 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. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill 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.

The bill provides that 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. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, and allows certain persons to petition an agency to promulgate a rule in place of a guidance document. and

The bill also provides that any action or inaction by an agency related to the requirements of the bill regarding guidance documents constitutes a decision subject to judicial review under the law governing administrative procedure for state agencies.

The bill requires the Legislative Council staff to provide agencies with assistance in determining whether documents and communications are guidance documents as defined in the bill.

The bill provides that on July 1, 2020, as of six months after the bill's effective date, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

makes guidance documents subject to the same judicial review provisions as apply to rules

***Agency rule-making authority; settlement agreements***

The bill provides that 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. The bill provides that 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.

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

2 13.91 **(1)** (c) Perform the functions prescribed in ~~s. 227.15 for the review and~~
3 ~~resolution of problems~~ ch. 227 relating to administrative rules and guidance
4 documents.

5 **SECTION 2.** 35.93 (2) (b) 3. im. of the statutes is created to read:

6 35.93 **(2)** (b) 3. im. Notices of public comment periods on proposed guidance
7 documents under s. 227.112 (1) (a).

8 **SECTION 3.** 227.01 (3m) of the statutes is created to read:

9 227.01 **(3m)** (a) "Guidance document" means, except as provided in par. (b), any
10 formal or official document or communication issued by an agency, including a
11 manual, handbook, directive, or informational bulletin, that does any of the
12 following:

13 1. Explains the agency's implementation of a statute or rule enforced or
14 administered by the agency, including the current or proposed operating procedure
15 of the agency.

1 2. Provides guidance or advice with respect to how the agency is likely to apply
2 a statute or rule enforced or administered by the agency, if that guidance or advice
3 is likely to apply to a class of persons similarly affected.
4 (b) "Guidance document" does not include any of the following:
5 1. A rule that has been promulgated and that is currently in effect or a proposed
6 rule that is in the process of being promulgated.
7 2. A standard adopted, or a statement of policy or interpretation made, whether
8 preliminary or final, in the decision of a contested case, in a private letter ruling
9 under s. 73.035, or in an agency decision upon or disposition of a particular matter
10 as applied to a specific set of facts.
11 3. Any document or activity described in sub. (13) (a) to (zz), except that
12 "guidance document" includes a pamphlet or other explanatory material described
13 under sub. (13) (r) that otherwise satisfies the definition of "guidance document"
14 under par. (a).
15 4. Any document that any statute specifically provides is not required to be
16 promulgated as a rule.
17 5. A declaratory ruling issued under s. 227.41.
18 6. A pleading or brief filed in court by the state, an agency, or an agency official.
19 7. A letter or written legal advice of the department of justice or a formal or
20 informal opinion of the attorney general, including an opinion issued under s.
21 165.015 (1).
22 8. Any document or communication for which a procedure for public input,
23 other than that provided under s. 227.112 (1), is provided by law.
24 9. Any document or communication that is not subject to the right of inspection
25 and copying under s. 19.35 (1).

1 **SECTION 4.** 227.01 (13) (intro.) of the statutes is amended to read:

2 227.01 **(13)** (intro.) "Rule" means a regulation, standard, statement of policy,
3 or general order of general application ~~which~~ that has the ~~effect~~ force of law and
4 ~~which~~ that is issued by an agency to implement, interpret, or make specific
5 legislation enforced or administered by the agency or to govern the organization or
6 procedure of the agency. "Rule" includes a modification of a rule under s. 227.265.
7 "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an
8 agency, whether it would otherwise meet the definition under this subsection, ~~which~~
9 that:

10 **SECTION 5.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes
11 is amended to read:

12 **CHAPTER 227**

13 SUBCHAPTER II

14 ADMINISTRATIVE RULES AND

15 GUIDANCE DOCUMENTS

16 **SECTION 6.** 227.10 (2g) of the statutes is created to read:

17 227.10 **(2g)** No agency may seek deference in any proceeding based on the
18 agency's interpretation of any law.

19 **SECTION 7.** 227.11 (title) of the statutes is amended to read:

20 **227.11** (title) ~~**Extent to which chapter confers**~~ **Agency rule-making**
21 **authority.**

22 **SECTION 8.** 227.11 (3) of the statutes is created to read:

23 227.11 **(3)** A settlement agreement, consent decree, or court order does not
24 confer rule-making authority and cannot be used by an agency as authority to
25 promulgate rules. No agency may agree to promulgate a rule as a term in any

1 settlement agreement, consent decree, or stipulated order of a court unless the
2 agency has explicit statutory authority to promulgate the rule at the time the
3 settlement agreement, consent decree, or stipulated order of a court is executed.

4 **SECTION 9.** 227.112 of the statutes is created to read:

5 **227.112 Guidance documents. (1)** (a) Before adopting a guidance document,
6 an agency shall submit to the legislative reference bureau the proposed guidance
7 document with a notice of a public comment period on the proposed guidance
8 document under par. (b), in a format approved by the legislative reference bureau,
9 for publication in the register. The notice shall specify the place where comments
10 should be submitted and the deadline for submitting those comments.

11 (b) The agency shall provide for a period for public comment on a proposed
12 guidance document submitted under par. (a), during which any person may submit
13 written comments to the agency with respect to the proposed guidance document.
14 Except as provided in par. (c), the period for public comment shall end no sooner than
15 the 21st day after the date on which the proposed guidance document is published
16 in the register under s. 35.93 (2) (b) 3. im. The agency may not adopt the proposed
17 guidance document until the comment period has concluded and the agency has
18 complied with par. (d).

19 (c) An agency may hold a public comment period shorter than 21 days with the
20 approval of the governor.

21 (d) An agency shall retain all written comments submitted during the public
22 comment period under par. (b) and shall consider those comments in determining
23 whether to adopt the guidance document as originally proposed, modify the proposed
24 guidance document, or take any other action.

1 **(2)** An agency shall post each guidance document that the agency has adopted
2 on the agency's Internet site and shall permit continuing public comment on the
3 guidance document. The agency shall ensure that each guidance document that the
4 agency has adopted remains on the agency's Internet site as provided in this
5 subsection until the guidance document is no longer in effect, is no longer valid, or
6 is superseded or until the agency otherwise rescinds its adoption of the guidance
7 document.

8 **(3)** A guidance document does not have the force of law and does not provide
9 the authority for implementing or enforcing a standard, requirement, or threshold,
10 including as a term or condition of any license. An agency that proposes to rely on
11 a guidance document to the detriment of a person in any proceeding shall afford the
12 person an adequate opportunity to contest the legality or wisdom of a position taken
13 in the guidance document. An agency may not use a guidance document to foreclose
14 consideration of any issue raised in the guidance document.

15 **(4)** If an agency proposes to act in any proceeding at variance with a position
16 expressed in a guidance document, it shall provide a reasonable explanation for the
17 variance. If an affected person in any proceeding may have relied reasonably on the
18 agency's position, the explanation must include a reasonable justification for the
19 agency's conclusion that the need for the variance outweighs the affected person's
20 reliance interest.

21 **(5)** Persons that qualify under s. 227.12 to petition an agency to promulgate
22 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
23 of a guidance document.

24 **(6)** Any action or inaction by an agency related to the requirements of this
25 section constitutes a decision subject to judicial review under s. 227.53.

(6)

**(7)** Any guidance document shall be signed by the secretary or head of the agency below the following certification: "I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes."

(7)

**(8)** This section does not apply to guidance documents adopted before the effective date of this subsection .... [LRB inserts date], but on July 1, 2020, any guidance document that has not been adopted in accordance with sub. (1) or that does not contain the certification required under sub. (7) shall be considered rescinded.

(6)

(8)

**(9)** The legislative council staff shall provide agencies with assistance in determining whether documents and communications are guidance documents that are subject to the requirements under this section.

**SECTION 10.** 227.53 (1) (intro.) of the statutes is amended to read:

227.53 **(1)** (intro.) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.112 or 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements:

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

227.57 **(11)** Upon review of an agency action or decision ~~affecting a property owner's use of the property owner's property~~, the court shall accord no deference to

1 the agency's interpretation of law ~~if the agency action or decision restricts the~~
2 ~~property owner's free use of the property owner's property~~.
3 **(END)**

Ins 9-2

INSERT 8-17

1 **SECTION 1.** 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.

**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.

19 **SECTION 2.** 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:

**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.

22 **SECTION 3.** 227.40 (2) (e) of the statutes is amended to read:

227.40 **(2)** (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule or guidance document involved was duly challenged in the proceeding before the 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.

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

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

**SECTION 5.** 227.40 (3) (a) of the statutes is renumbered 227.40 (3) (ar) and amended to read:

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

finds that the asserted invalidity of ~~a~~ the rule or guidance document is not material to the case, an order shall be entered denying the application for stay.

**SECTION 6.** 227.40 (3) (b) and (c) of the statutes are amended to read:

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

(c) Failure to set forth the invalidity of a rule or guidance document in a pleading or to commence a declaratory judgment proceeding within a reasonable time pursuant to ~~such~~ the order of the court or to prosecute ~~such~~ the declaratory judgment action without undue delay shall preclude ~~such~~ the party from asserting or maintaining ~~such~~ 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.

**SECTION 7.** 227.40 (4) (a) of the statutes is amended to read:

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

**SECTION 8.** 227.40 (6) of the statutes is amended to read:

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

**INSERT 9-2**

8 **SECTION 9.** 801.50 (3) (b) of the statutes is amended to read:
9 801.50 **(3)** (b) All actions relating to the validity or invalidly of a rule or
10 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.

**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]

# State of Wisconsin
## 2017 - 2018 LEGISLATURE

LRB-6046/P2
MED:amn&wlj

## PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT ***to renumber and amend*** 227.40 (3) (intro.) and 227.40 (3) (a); ***to amend***
2 13.91 (1) (c), 227.01 (13) (intro.), subchapter II (title) of chapter 227 [precedes
3 227.10], 227.11 (title), 227.40 (1), 227.40 (2) (intro.), 227.40 (2) (e), 227.40 (3) (b)
4 and (c), 227.40 (4) (a), 227.40 (6), 227.57 (11) and 801.50 (3) (b); and ***to create***
5 35.93 (2) (b) 3. im., 227.01 (3m), 227.10 (2g), 227.11 (3) and 227.112 of the
6 statutes; **relating to:** deference by courts to agency interpretations of law,
7 notice and comment requirements for guidance documents issued by agencies,
8 and agency rule-making authority.

---

### *Analysis by the Legislative Reference Bureau*

This bill 1) prohibits a court from according deference to agency interpretations of law in certain proceedings and prohibits agencies from seeking deference in any proceeding to agency interpretations of law; 2) establishes various requirements with respect to the adoption and use of guidance documents by agencies, including requirements that agencies must comply with in order to adopt guidance documents; and 3) provides that settlement agreements do not confer rule-making authority.

***Agency interpretations of law***

Generally under current law, when reviewing an agency decision in a contested case or other matter subject to judicial review under the law governing

administrative procedure for state agencies, a court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. Consistent with the Wisconsin Supreme Court's decision in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, the bill limits this directive such that a court performing judicial review of such a decision must accord no deference to an agency's interpretation of law.

The bill also provides that no agency may seek deference in any proceeding based on the agency's interpretation of any law.

***Guidance documents***

Subject to various exceptions, the bill defines "guidance document" as any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that 1) explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency; or 2) provides guidance or advice with respect to how the agency is likely to apply any statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

The bill requires each agency to 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. The bill allows for a comment period of less than 21 days with the approval of the governor. The bill 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.

The bill provides that 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. The bill also contains other provisions with respect to agency use of and reliance upon guidance documents, allows certain persons to petition an agency to promulgate a rule in place of a guidance document, and makes guidance documents subject to the same judicial review provisions as apply to rules.

The bill requires the Legislative Council staff to provide agencies with assistance in determining whether documents and communications are guidance documents as defined in the bill.

The bill provides that, as of six months after the bill's effective date, any guidance document that does not comply with the requirements in the bill is considered to be rescinded.

***Agency rule-making authority; settlement agreements***

The bill provides that 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. The bill provides that 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.

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

2 13.91 **(1)** (c) Perform the functions prescribed in ~~s. 227.15 for the review and~~
3 ~~resolution of problems~~ ch. 227 relating to administrative rules and guidance
4 documents.

5 **SECTION 2.** 35.93 (2) (b) 3. im. of the statutes is created to read:

6 35.93 **(2)** (b) 3. im. Notices of public comment periods on proposed guidance
7 documents under s. 227.112 (1) (a).

8 **SECTION 3.** 227.01 (3m) of the statutes is created to read:

9 227.01 **(3m)** (a) "Guidance document" means, except as provided in par. (b), any
10 formal or official document or communication issued by an agency, including a
11 manual, handbook, directive, or informational bulletin, that does any of the
12 following:

13 1. Explains the agency's implementation of a statute or rule enforced or
14 administered by the agency, including the current or proposed operating procedure
15 of the agency.

1 2. Provides guidance or advice with respect to how the agency is likely to apply
2 a statute or rule enforced or administered by the agency, if that guidance or advice
3 is likely to apply to a class of persons similarly affected.
4 (b) "Guidance document" does not include any of the following:
5 1. A rule that has been promulgated and that is currently in effect or a proposed
6 rule that is in the process of being promulgated.
7 2. A standard adopted, or a statement of policy or interpretation made, whether
8 preliminary or final, in the decision of a contested case, in a private letter ruling
9 under s. 73.035, or in an agency decision upon or disposition of a particular matter
10 as applied to a specific set of facts.
11 3. Any document or activity described in sub. (13) (a) to (zz), except that
12 "guidance document" includes a pamphlet or other explanatory material described
13 under sub. (13) (r) that otherwise satisfies the definition of "guidance document"
14 under par. (a).
15 4. Any document that any statute specifically provides is not required to be
16 promulgated as a rule.
17 5. A declaratory ruling issued under s. 227.41.
18 6. A pleading or brief filed in court by the state, an agency, or an agency official.
19 7. A letter or written legal advice of the department of justice or a formal or
20 informal opinion of the attorney general, including an opinion issued under s.
21 165.015 (1).
22 8. Any document or communication for which a procedure for public input,
23 other than that provided under s. 227.112 (1), is provided by law.
24 9. Any document or communication that is not subject to the right of inspection
25 and copying under s. 19.35 (1).

1 **SECTION 4.** 227.01 (13) (intro.) of the statutes is amended to read:

2 227.01 **(13)** (intro.) "Rule" means a regulation, standard, statement of policy,
3 or general order of general application ~~which~~ that has the ~~effect~~ force of law and
4 ~~which~~ that is issued by an agency to implement, interpret, or make specific
5 legislation enforced or administered by the agency or to govern the organization or
6 procedure of the agency. "Rule" includes a modification of a rule under s. 227.265.
7 "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an
8 agency, whether it would otherwise meet the definition under this subsection, ~~which~~
9 that:

10 **SECTION 5.** Subchapter II (title) of chapter 227 [precedes 227.10] of the statutes
11 is amended to read:

12 **CHAPTER 227**

13 SUBCHAPTER II

14 ADMINISTRATIVE RULES AND

15 GUIDANCE DOCUMENTS

16 **SECTION 6.** 227.10 (2g) of the statutes is created to read:

17 227.10 **(2g)** No agency may seek deference in any proceeding based on the
18 agency's interpretation of any law.

19 **SECTION 7.** 227.11 (title) of the statutes is amended to read:

20 **227.11** (title) ~~**Extent to which chapter confers**~~ **Agency rule-making**
21 **authority.**

22 **SECTION 8.** 227.11 (3) of the statutes is created to read:

23 227.11 **(3)** A settlement agreement, consent decree, or court order does not
24 confer rule-making authority and cannot be used by an agency as authority to
25 promulgate rules. No agency may agree to promulgate a rule as a term in any

1 settlement agreement, consent decree, or stipulated order of a court unless the
2 agency has explicit statutory authority to promulgate the rule at the time the
3 settlement agreement, consent decree, or stipulated order of a court is executed.

4 **SECTION 9.** 227.112 of the statutes is created to read:

5 **227.112 Guidance documents. (1)** (a) Before adopting a guidance document,
6 an agency shall submit to the legislative reference bureau the proposed guidance
7 document with a notice of a public comment period on the proposed guidance
8 document under par. (b), in a format approved by the legislative reference bureau,
9 for publication in the register. The notice shall specify the place where comments
10 should be submitted and the deadline for submitting those comments.

11 (b) The agency shall provide for a period for public comment on a proposed
12 guidance document submitted under par. (a), during which any person may submit
13 written comments to the agency with respect to the proposed guidance document.
14 Except as provided in par. (c), the period for public comment shall end no sooner than
15 the 21st day after the date on which the proposed guidance document is published
16 in the register under s. 35.93 (2) (b) 3. im. The agency may not adopt the proposed
17 guidance document until the comment period has concluded and the agency has
18 complied with par. (d).

19 (c) An agency may hold a public comment period shorter than 21 days with the
20 approval of the governor.

21 (d) An agency shall retain all written comments submitted during the public
22 comment period under par. (b) and shall consider those comments in determining
23 whether to adopt the guidance document as originally proposed, modify the proposed
24 guidance document, or take any other action.

1 **(2)** An agency shall post each guidance document that the agency has adopted
2 on the agency's Internet site and shall permit continuing public comment on the
3 guidance document. The agency shall ensure that each guidance document that the
4 agency has adopted remains on the agency's Internet site as provided in this
5 subsection until the guidance document is no longer in effect, is no longer valid, or
6 is superseded or until the agency otherwise rescinds its adoption of the guidance
7 document.

8 **(3)** A guidance document does not have the force of law and does not provide
9 the authority for implementing or enforcing a standard, requirement, or threshold,
10 including as a term or condition of any license. An agency that proposes to rely on
11 a guidance document to the detriment of a person in any proceeding shall afford the
12 person an adequate opportunity to contest the legality or wisdom of a position taken
13 in the guidance document. An agency may not use a guidance document to foreclose
14 consideration of any issue raised in the guidance document.

15 **(4)** If an agency proposes to act in any proceeding at variance with a position
16 expressed in a guidance document, it shall provide a reasonable explanation for the
17 variance. If an affected person in any proceeding may have relied reasonably on the
18 agency's position, the explanation must include a reasonable justification for the
19 agency's conclusion that the need for the variance outweighs the affected person's
20 reliance interest.

21 **(5)** Persons that qualify under s. 227.12 to petition an agency to promulgate
22 a rule may, as provided in s. 227.12, petition an agency to promulgate a rule in place
23 of a guidance document.

24 **(6)** Any guidance document shall be signed by the secretary or head of the
25 agency below the following certification: "I have reviewed this guidance document

1 or proposed guidance document and I certify that it complies with sections 227.10
2 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document
3 or proposed guidance document contains no standard, requirement, or threshold
4 that is not explicitly required or explicitly permitted by a statute or a rule that has
5 been lawfully promulgated. I further certify that the guidance document or proposed
6 guidance document contains no standard, requirement, or threshold that is more
7 restrictive than a standard, requirement, or threshold contained in the Wisconsin
8 Statutes."

9 **(7)** This section does not apply to guidance documents adopted before the first
10 day of the 7th month beginning after the effective date of this subsection .... [LRB
11 inserts date], but on that date any guidance document that has not been adopted in
12 accordance with sub. (1) or that does not contain the certification required under sub.
13 (6) shall be considered rescinded.

14 **(8)** The legislative council staff shall provide agencies with assistance in
15 determining whether documents and communications are guidance documents that
16 are subject to the requirements under this section.

17 **SECTION 10.** 227.40 (1) of the statutes is amended to read:

18 227.40 **(1)** Except as provided in sub. (2), the exclusive means of judicial review
19 of the validity of a rule <u>or guidance document</u> shall be an action for declaratory
20 judgment as to the validity of the rule <u>or guidance document</u> brought in the circuit
21 court for the county where the party asserting the invalidity of the rule <u>or guidance</u>
22 <u>document</u> resides or has its principal place of business or, if that party is a
23 nonresident or does not have its principal place of business in this state, in the circuit
24 court for the county where the dispute arose. The officer or other agency whose rule
25 <u>or guidance document</u> is involved shall be the party defendant. The summons in the

action shall be served as provided in s. 801.11 (3) and by delivering a copy to that officer or, if the agency is composed of more than one person, to the secretary or clerk of the agency or to any member of the agency. The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff. A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule or guidance document in question.

**SECTION 11.** 227.40 (2) (intro.) of the statutes is amended to read:

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

**SECTION 12.** 227.40 (2) (e) of the statutes is amended to read:

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

**SECTION 13.** 227.40 (3) (intro.) of the statutes is renumbered 227.40 (3) (ag) and amended to read:

227.40 **(3)** (ag) In any judicial proceeding other than one ~~set out above~~ under sub. (1) or (2), in which the invalidity of a rule or guidance document is material to the cause of action or any defense thereto, the assertion of ~~such~~ that invalidity shall be set forth in the pleading of the party ~~so~~ maintaining the invalidity of ~~such~~ the rule or guidance document in that proceeding. The party ~~so~~ asserting the invalidity of

~~such~~ the rule or guidance document shall, within 30 days after the service of the pleading in which the party sets forth ~~such~~ the invalidity, apply to the court in which ~~such~~ the proceedings are had for an order suspending the trial of ~~said~~ the proceeding until after a determination of the validity of ~~said~~ the rule or guidance document in an action for declaratory judgment under sub. (1) ~~hereof~~.

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

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

**SECTION 15.** 227.40 (3) (b) and (c) of the statutes are amended to read:

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

(c) Failure to set forth the invalidity of a rule or guidance document in a pleading or to commence a declaratory judgment proceeding within a reasonable time pursuant to ~~such~~ the order of the court or to prosecute ~~such~~ the declaratory

judgment action without undue delay shall preclude ~~such~~ the party from asserting or maintaining ~~such~~ that the rule or guidance document is invalid.

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

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

**SECTION 17.** 227.40 (6) of the statutes is amended to read:

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

**SECTION 18.** 227.57 (11) of the statutes is amended to read:

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

**SECTION 19.** 801.50 (3) (b) of the statutes is amended to read:

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

**(END)**