

May 2, 2023

Honorable Eric Holcomb
Governor
State of Indiana
Statehouse
Indianapolis, IN 46204

RE: Request for veto of HEA 1623

Dear Governor Holcomb,

The undersigned organizations urge you to veto HEA 1623, the administrative rulemaking bill. Our organizations represent tens of thousands of Hoosiers who support sensible and effective state standards to protect our air, water, natural resources, our families' health, and our quality of life.

What started as an effort to achieve the commendable goals of more efficiency, fairness, and transparency in state agency rulemaking procedures and outcomes has become a procedural obstacle course that will slow down the rulemaking process, impose substantial new paperwork burdens on agency staff, and expand the ill-advised doctrine of "no more stringent than" in state law.

Concerns with "no more stringent than" language

The no more stringent than provisions for IDEM's rules governing coal combustion residuals (coal ash) are particularly damaging and unjustified. As you know, two years ago the General Assembly, at the urging of Indiana electric utilities, directed IDEM to adopt a new permit program for coal ash impoundments and landfills. This rulemaking is underway and IDEM released a draft rule last December.

IDEM's proposed coal ash rule relies on the EPA CCR Rule, making a few modest revisions to the federal language, and fills in the gaps in the EPA rule by extending current IDEM rule provisions for coal ash (restricted waste site) landfills to coal ash surface impoundments. These existing rules contain common sense yet especially important protections that the utilities are already complying with, for example:

- Require post-closure financial assurance for 30 years, with detailed closure/post-closure cost estimates.
- Require groundwater monitoring be done twice a year, with corresponding reports of results to IDEM within 60 days of sampling.
- Contain minimum standards for monitoring well design and installation.
- Maintain all existing closure and post-closure requirements for landfills that are in place now.

The bill's no more stringent than language will create uncertainty and controversy. The term "no more stringent than" is not defined in the bill, nor is there any deciding body identified to resolve disputes over application of the term. For example, is a provision in the coal ash rules that requires two instead of one annual groundwater report "more stringent" than the reporting provisions of the federal rule? Comparing two different state and federal numeric standards is an objective determination; comparing differing narrative standards may be wholly subjective.

Given the ambiguity and subjectivity of an undefined “no more stringent than” requirement, its enactment into law may cause IDEM to feel disempowered from implementing basic protections under the law because of the likelihood of legal challenges.

HEA 1623’s no more stringent than language not only will restrict future agency rules but also roll back sensible standards now in place, as is the case with IDEM’s coal ash rules.

Concerns with pesticide rules language

The pesticide rulemaking provisions in sections 71 to 78 also contain no more stringent than language that will limit Indiana’s flexibility to adopt agency standards that reflect our state-specific circumstances. Moreover, in determining the scope of state regulation of restricted use pesticides, the language in HEA 1623 substitutes the judgment of lay members of the General Assembly for the technical expertise of the state chemist’s office and pesticide review board (sections 73 and 74).

Provisions likely to delay timely rulemakings

Among the bill’s provisions that will or may cause more delay in completing a rulemaking are:

- Shortening the time between a rule’s adoption and expiration from seven years to five years. This will require more paperwork for agency staff even when there’s no objective reason to change or eliminate an existing rule.
- Expanding the scope of the “regulatory analysis” and transferring responsibility for this analysis from the Office of Management and Budget to the agency proposing the rule. This change may also raise questions about the independence of this analysis.

We are reminded of last year’s legislative session when major rulemaking reform language was added to a conference committee report after an Indiana Senate committee declined to move the original bill, while at the same time a separate bill creating an Administrative Rules Review Task Force was headed for enactment. You vetoed the bill that contained the rulemaking language, HEA 1211. The new rulemaking bill is no less sweeping than last year’s version.

The accelerated sunset period, and changes to the rule analysis process, along with the no more stringent than language, are provisions that go beyond the recommendations of the 2022 Task Force report.

Essential expiration and readoption of rules provisions repealed

We also call your attention to Sections 44 and 45 of the bill, which repeal the existing statutory language in IC 4-22-2.5 and replace it with new language (IC 4-22-2.6) concerning “expiration and readoption of administrative rules”, yet leaves out repealed language which provided that “rules incorporating a federal regulation by reference”, or a “rule that is required to receive or maintain delegation, primacy or approval for state implementation or operation of a program established under federal law” do not expire.

Even though there is separate language in IC 4-22-2-19 concerning rules needed to receive or maintain a federal program, that section only applies to “Action preceding effectiveness of authorizing statute”, which is separate from the repealed expiration and readoption provisions of existing law, and the new provisions in HEA 1623.

Allowing state rules based on federal rules or implementation of a federal program to expire, even if temporary, may adversely affect Indiana’s ability to maintain these delegated programs.

Public participation and transparency

We acknowledge that HEA 1623 contains positive provisions related to public participation opportunities and increased transparency in the rulemaking process. But the overall effect of HEA 1623 will be to create a more complicated, time-consuming rulemaking process that is likely to slow down the pace of rulemaking and leave the public and the regulated community with less confidence in the process rather than more.

Economic benefits unlikely to result from HEA 1623 rulemaking changes

The rulemaking changes contained in HEA 1623 will do little to attract new business, create jobs, or promote economic growth in Indiana but could very well have the opposite effect. Indeed, study after study reveals that states with strong environmental policies have not inhibited their industries' competitiveness, stifled employment, or hindered economic growth. Hampering our state agencies' ability to provide for public health and safety, and protect our environment and natural resources, will diminish our quality of life, harming the essential role that quality of life and quality of place play in attracting and retaining talent, and in business recruitment.

Please veto HEA 1623.

Sincerely,

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Citizens Action Coalition

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