

Wisconsin Legislative Council Staff August 10, 1998

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## **Information Memorandum 98-32**

# **INNOVATIONS IN ENVIRONMENTAL REGULATION AND PERMITTING ENACTED IN THE 1997-98 LEGISLATIVE SESSION**

## **INTRODUCTION**

The 1997-98 Legislative Session saw the introduction of a number of proposals intended to make fundamental changes to environmental regulation in Wisconsin. By the end of the session, five of these proposals had been enacted into law, three of them in the form of pilot programs. Two of the new programs, the environmental cooperation pilot program and the water pollution credit trading pilot projects, relate to the regulations that are imposed on the dischargers of environmental pollutants. The other three new programs, the permit guarantee program, expedited permit service and the chapter 30 general permit pilot program, address the way in which applications for permits or approvals for activities that affect navigable waters of the state or that cause environmental pollution are handled by the Department of Natural Resources (DNR). This Information Memorandum describes these five new programs.

Copies of all acts referred to in this Information Memorandum may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

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### **I. ENVIRONMENTAL COOPERATION PILOT PROGRAM**

## **A. PROGRAM OVERVIEW**

1997 Wisconsin Act 27 (referred to as "the Act" in this part of this Information Memorandum) creates an environmental cooperation pilot program designed to test a flexible approach to environmental regulation. [s. 299.80, Stats.] The program grants variances to specific current environmental regulations for facilities that implement environmental management systems and achieve at least the pollution reductions that would be achieved under conventional regulation. The goal of the program is to reduce the regulatory burden on industries and allow them to find the best ways to control pollution from their facilities while ensuring at least the current level of environmental protection. The program is based on concepts contained in the standards for environmental management systems developed by the International Organization for Standardization (the so-called ISO 14000 standards) and is intended to allow Wisconsin industries to implement those standards.

The Act directs the DNR to enter into cooperative agreements with not more than 10 participating facility operators (referred to as "participants"). Under the cooperative agreements, the participants will be given relief from certain regulatory requirements, including variances from specific requirements of chs. 280 to 295, Stats., and deferment of civil penalties for violations that are reported and corrected in a timely manner. In return, participants will be required to implement environmental management systems that result in environmental protection that is as good as or better than the environmental protection accomplished under conventional regulation. Participants must involve the public in both the design and evaluation of their environmental management systems and the DNR must give the public the opportunity to comment on proposals to approve, amend or revoke agreements.

The text of s. 299.80, Stats., which creates the environmental cooperation pilot program, is reproduced in the Appendix to this Information Memorandum.

## **B. DNR DUTIES**

The Act creates a list of duties that the DNR must undertake in administering the program. Taken collectively, these duties more constitute a statement of the goals of the program than a specification of DNR functions. The first duty is to provide at least the same level of environmental protection as is provided under conventional regulation. This duty appears to set a philosophical, as well as practical, expectation for the program. Subsequent duties relate to implementing various aspects of the environmental systems management concept, such as:

1. Encouraging facility pollution assessments, pollution reduction strategies, information sharing and improved environmental protection relative to what would be accomplished under conventional regulation.
2. Seeking to increase the flexibility which facility operators have in meeting environmental regulations and decrease the resources expended by both government and facilities in the regulatory process.
3. Promoting public involvement in the development of innovative regulatory schemes, public access to information and increased trust among government, facility operators and the public.

For a complete list of DNR duties, see s. 299.80 (2), Stats., in the attachment.

## **C. COOPERATIVE AGREEMENTS**

### **1. Content of Agreements**

The Act provides a lengthy list of required contents of cooperative agreements. An agreement must contain various information describing the facility covered by the agreement and the regulations that will apply to the facility. In addition, it must specify all of the following:

- a. Any approvals that are replaced by the agreement, any variances granted to the facility and any other operational flexibility granted to the participant.
- b. Measurable waste reduction goals for the facility and operational changes that will be implemented to accomplish those goals.
- c. Enforceable pollution limits and other requirements that are at least as stringent as the limits and requirements that would apply under conventional regulation.

The agreement must also establish a number of responsibilities of the participant. The participant must commit "to achieving measurable or noticeable improvements in environmental performance, to reducing natural resource usage and to reducing waste generation, while achieving a balance among the economic, social and environmental impacts of these efforts that is acceptable to the community in which the facility is located." [s. 299.80 (3) (d), Stats.] Like the first duty of the DNR, described above, this provision sets philosophical as well as practical expectations of the participant. In addition, the agreement must require that the participant do all of the following:

- a. Commit to implement and document an environmental management system that is based on the ISO 14000 standards.
- b. Conduct a baseline performance evaluation and report any violations it discovers in the course of this evaluation.
- c. Take various steps to make information available to the public and to involve the public in decision-making processes.
- d. Assess the success of the project in reducing the time and money spent by the participant on paperwork and other administrative activities that do not benefit the environment.

For a complete list of what the Act requires that an agreement do, see s. 299.80 (3), Stats., in the attachment.

## **2. Other Provisions Relating to Agreements**

The Act directs the DNR to solicit applications for participation in the program from facility operators who are covered by at least one approval under chs. 280 to 295. In selecting participants, the Act directs the DNR to seek to ensure participation of a variety of types, sizes and locations of facilities and to consult with the U.S. Environmental Protection Agency (EPA). The DNR has a great deal of discretion in selecting participants. It may enter into an agreement with an applicant if it determines that the agreement complies with the statutory requirements for agreements and will assist the DNR to fulfill its duties under the program and that the applicant has an adequate program for public participation. The Act specifies that the DNR's decision to enter into or to terminate negotiations with an applicant or to enter into an agreement with a participant is not subject to review under ch. 227, Stats., the statutes that establish procedures for administrative decision-making and judicial review of administrative decisions; however, a cooperative agreement *is* subject to review under ch. 227.

Cooperative agreements are for a term of five years. The DNR may not enter into an initial agreement after the first five years of the pilot program but it may extend an agreement for one additional five-year term, subject to a 14-day passive review by the Joint Committee on Finance.

The DNR may amend or revoke an agreement, unilaterally or with the consent of the participant. The DNR may amend an agreement unilaterally only for cause and after providing an opportunity for a hearing on the amendment. Sufficient cause for amending an agreement includes changes in state or federal environmental laws, violations of the agreement (presumably by the participant, although the Act does not say this) and misrepresentation or failure to fully disclose all relevant information (again, presumably by the participant) in the negotiation of the agreement. The DNR may revoke an agreement unilaterally only for one of four listed reasons and after providing an opportunity for a hearing on the revocation. The reasons for which the DNR may revoke an agreement are the following:

- a. The participant is in substantial noncompliance with either the cooperative agreement, with an approval that is not replaced by the cooperative agreement or a provision of chs. 280 to 295 for which the cooperative agreement does not grant a variance.
- b. The participant has refused the department's request to amend the cooperative agreement.
- c. The participant is unable, or has shown an unwillingness, to comply with pollution reduction goals that apply to the participant under the cooperative agreement.
- d. The participant has not satisfactorily addressed a substantive issue raised by a majority of the members of the interested persons group, described in Section E. 1., below, within a reasonable time after receiving notice of the issue.

Upon expiration of a cooperative agreement, the participant will once again be subject to all provisions of chs. 280 to 295, including those that were superseded by the agreement, and will be required to obtain any applicable approvals. If a participant has made a timely application for those approvals prior to the expiration of an agreement and the DNR fails to issue the approval before the agreement expires, the agreement will continue in effect until the approval is issued.

## **D. REGULATORY FLEXIBILITY**

### **1. Variances**

The Act authorizes the DNR to grant a facility a variance to any requirement of chs. 280 to 295 if all of the following apply:

- a. The variance will result in a measurable reduction in overall levels of pollution caused by the participant.
- b. The variance is consistent with other program requirements.
- c. The variance will do one of the following:

(1) Promote the reduction in overall levels of pollution to below the levels required under conventional regulation.

(2) Provides for alternative monitoring, testing, record keeping, notification or reporting requirements that reduce the administrative burden on state agencies or the participant and that provide the information needed to ensure compliance with the cooperative agreement and the provisions of chs. 280 to 295 and rules promulgated under those chapters for which the cooperative agreement does not grant a variance.

### **2. Reporting of Violations; Deferred Civil Enforcement**

If, in the course of conducting a performance evaluation under a cooperative agreement, a participant discovers a violation of state law or of the agreement, the participant must report the violation to the DNR within 45 days. The report must contain a description of the performance evaluation, the violation, actions taken or proposed to be taken to correct the violation and actions taken or proposed to be taken to prevent future violations. It must also contain a commitment to correcting the violation within 90 days of submitting the report or within a compliance schedule approved by the DNR.

If the participant proposes to take more than 90 days to correct the violation, the report must include a proposed compliance schedule that contains the shortest reasonable period for correcting the violation, a justification of the proposed compliance schedule, a description of measures the participant will take to minimize the effects of the violation during the period of the compliance schedule and proposed stipulated penalties for a violation of the proposed compliance schedule. The DNR may approve a compliance schedule as submitted or propose a different compliance schedule. If the DNR and the participant agree to a compliance schedule, the DNR must

amend the participant's cooperative agreement to incorporate the compliance schedule; if they cannot agree to a compliance schedule, the DNR must commence the process for revoking the agreement.

A compliance schedule may not exceed 12 months. In evaluating a proposed compliance schedule, the DNR must consider all of the following:

- a. The environmental and public health consequences of the violation.
- b. The time needed to implement a change in raw materials or method of production if that change is an available alternative to other methods of correcting the violation.
- c. The time needed to purchase any equipment or supplies that are needed to correct the violation.

The Act protects a participant from civil prosecution for a violation discovered in a performance evaluation under a cooperative agreement, as long as the participant complies with the requirements for the reporting and correction of the violation. The state may commence a civil action against a participant only if the participant fails to report or correct a violation in a timely manner. If a participant violates a compliance schedule, the DNR may impose the penalties stipulated in the compliance schedule but may not commence a civil prosecution without first revoking the agreement.

The Act does *not* protect a participant from civil prosecution in the case of a violation that presents an imminent threat or may cause serious harm to public health or the environment or that the DNR discovers before the participant reports it to the DNR. A participant is not protected from *criminal* prosecution in any way.

## **E. PUBLIC PARTICIPATION**

### **1. Interested Persons Groups**

Act 27 requires each participant to establish an interested persons group. The Act does not specify the duties or functions of such groups, but makes several references to them. It requires that an application for participation in the program include a description of the process used by the applicant to establish an interested persons group that includes residents of the area in which the facility proposed to be covered by the agreement is located, a list of members of the interested persons group and a description of the involvement of the interested persons group in the development of the proposed cooperative agreement. It also requires that an agreement ensure that members of the interested persons group have the opportunity to comment on the participant's environmental management system and are involved in reviewing the participant's performance. The agreement also must require a process that seeks consensus between interested persons and the participant over issues concerning the participant's performance. It establishes the failure of a participant to satisfactorily address a substantive issue raised by a majority of the members of an interested persons group as grounds for revoking an agreement.

In summary, a participant must establish an interested persons group and a process for addressing concerns of the group's members. In addition, the participant must involve the group in the development of the proposed cooperative agreement and environmental management system and in the review of the participant's performance. Although the Act gives no more guidance on these requirements, their importance is underscored by the authority of the DNR to revoke an agreement for the participant's failure to address the group's concerns.

### **2. Public Review of Agreements**

The DNR must provide a comment period of at least 30 days on the proposed issuance, modification or revocation of a cooperative agreement. Prior to the public comment period, the DNR must prepare a draft of the proposed action, plus a fact sheet describing the principal factual, legal, methodological and policy questions considered by the DNR; describing how the proposed action is consistent with the DNR's duties and with the requirements for cooperative agreements under the program; and identifying any variances that would be granted by the proposed action. The DNR must also prepare a public notice that does all of the following:

- a. Describes the facility that is the subject of the proposed action.
- b. Identifies the proposed action and states whether any variances would be granted by the proposed action.
- c. Identifies an employee of the DNR and an employee of the applicant or participant from whom additional information can be obtained regarding the proposed action.
- d. States that a draft of the proposed action and fact sheet are available upon request.
- e. States that comments regarding the proposed action may be submitted to the DNR and states the last date of the comment period.
- f. Describes the procedures the DNR will use to make a final decision on the proposed action and describes how a person may request and participate in informational meetings, public hearings or contested case hearings on the proposed action.

Prior to the comment period, the DNR must mail the notice to the applicant or participant, the EPA, members of the interested persons group, and any other person who requests the notice. It must also make the notice available at other locations, including DNR offices and local libraries, and post or publish the notice in local public buildings and newspapers.

The DNR must hold a public informational meeting on a proposed action if the comments received during the comment period demonstrate considerable public interest in the proposed action.

### **3. Public Access to Records; Trade Secrets**

In general, the DNR must make all records, reports and other information obtained in administering the program available to the public. The Act creates an exception to this requirement for trade secrets. If a person makes a sufficient showing to the DNR that information obtained in the administration of a cooperative agreement is entitled to protection as a trade secret of that person, the DNR may not divulge the information except to representatives of the DNR or the federal government for enforcement of state or federal law. The trade secrets exception does not apply to discharge or emission data or to information contained in a cooperative agreement. If the DNR's refusal to release information that is treated as a trade secret is challenged, the DNR must notify the applicant or participant and the applicant or participant must pay the reasonable cost of the state to defend the refusal.

## **F. OTHER PROVISIONS**

### **1. New or Increased Discharges or Emissions**

The Act requires that a participant notify the DNR before increasing the amount of a discharge or emission or commencing a new discharge or emission of a pollutant from a facility covered by a cooperative agreement. The notice must identify the pollutant involved and describe any plant expansion, production increase or process change that would cause the new or increased discharge or emission. If the new or increased discharge or emission is not allowed under the cooperative agreement, the DNR may amend the agreement to allow it (if such an amendment is consistent with other requirements of the program) or may require the participant to obtain the appropriate permits or other approvals for the discharge or emission.

### **2. Facility Reports**

The Act provides that reports submitted by a participant under a cooperative agreement fulfill the reporting requirements that would apply under conventional regulation. However, an agreement does not relieve a participant from any requirements for immediate reporting, such as requirements for the immediate reporting of hazardous substance spills.

### **3. Fees**

The Act specifies that a participant must pay the same fees under a cooperative agreement that the participant would have paid under conventional regulation. Thus, if a facility would be subject to a wastewater discharge permit and associated fee but is granted a variance to the permit requirement under an agreement, the facility must nonetheless pay the fee.

#### **4. Evaluation of Pilot Program**

The Act directs the DNR to submit annual progress reports on the pilot program to the Governor and to the environmental standing committees of the Legislature. By the end of the fourth year of the program, the DNR must submit a report to the Governor and the Legislature evaluating the success of the program and containing recommendations concerning the continuation of the program and any changes that should be made to the program.

In addition, the Act authorizes the Joint Legislative Audit Committee to direct the Legislative Audit Bureau (LAB) to monitor the pilot program and to submit annual reports to the Legislature regarding the program. Since the Joint Committee can direct the LAB to monitor any state program without specific authorization, this provision can best be understood as a request that the LAB monitor the pilot program.

### **G. PROGRAM IMPLEMENTATION TO DATE**

The statute establishing the environmental cooperation pilot program took effect October 14, 1997. Early in 1998, DNR staff publicized the program to potential participants through trade associations and other channels. The DNR is now negotiating cooperative agreements with two companies. The first annual report on the program will be due to the Governor and the Legislature in the fall of 1998.

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## **II. WATER POLLUTION CREDIT TRADING**

Act 27 directs the DNR to establish one or more pilot projects to evaluate the trading of water pollution credits. [s. 283.84, Stats.] A pilot project must be consistent with the federal Clean Water Act.

The DNR may select an area in which to conduct a pilot project if the area contains a water body that the DNR has identified to the EPA as having impaired water quality and the water body is subject to pollution from both agricultural and municipal sources and from both point and nonpoint sources. In addition, there must be potential participants in the area that have exhibited an interest in a pilot project.

Under a pilot project, the DNR may allow a person who is subject to a water pollution discharge permit to increase the discharge of pollutants above the level authorized in the permit if the person does one of the following:

- a. Reaches an agreement with another person who is subject to a water pollution discharge permit to decrease the discharge of pollutants below the level authorized in that person's permit.
- b. Reaches an agreement with another person who is not subject to a water pollution discharge permit to decrease the discharge of pollutants below that person's actual discharge level.
- c. Reaches an agreement with the DNR or a local governmental unit under which the person provides funds for the DNR or the local governmental unit to use to reduce water pollution in the project area.

In addition, the agreement must result in an improvement in water quality. The increase and decrease of discharges provided for in the agreement must involve the same pollutant or the same water quality standard. Agreements are limited to a term of not more than five years. Persons engaged in metallic or nonmetallic mining or mineral prospecting may not participate in a pilot project.

The DNR is required to establish a local committee for each pilot project to advise it regarding the pilot project. The committee must include representatives of permit holders in the project area. The DNR may use an existing priority watershed or lake committee for the required local committee, provided that it includes the required representation from permit holders.

The DNR is required to submit annual reports, beginning no later than September 1, 1998, to the Governor, the Secretary of Administration and the Land and Water Conservation Board. The reports must address the progress and status of each pilot project in achieving water quality goals and coordinating state and local efforts to improve water quality.

The DNR is currently developing three separate water pollution credit trading pilot projects on the Rock River in southern Wisconsin, the Fox and Wolf Rivers in eastern Wisconsin and the Red Cedar River in western Wisconsin. The pilot projects are generating strong interest from many interested parties, including municipal and industrial dischargers, nonpoint sources and public interest advocates. The local committees, which include all of these interests, are addressing a wide range of technical, administrative and legal issues related to designing a trading system. Private sector participants are helping to finance the projects including, in one project, the funding of scientific studies to monitor and model the river. All three of the pilot projects are focusing on controlling sources of phosphorus, looking particularly at trades in which point sources of phosphorus, especially publicly-owned treatment works, will offset their own discharges by helping to bring about reduced nonpoint source phosphorus discharges from agricultural activities. All three of the pilot projects are in early stages of development and it is not anticipated that any trades will take place in the immediate future. The first annual report on the program is due on September 1, 1998.

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### **III. PERMIT PROCESSING**

#### **A. PERMIT GUARANTEE PROGRAM**

Acts 27 and 301 create a DNR permit guarantee program. [s. 299.05, Stats.] It directs the DNR to promulgate rules under which an applicant for a license or approval is guaranteed to receive a final determination on the application within a deadline or to receive a refund of fees paid with the application. The rules must specify the types of licenses and approvals to be included in the program and the deadlines applicable to each. The Acts identify a broad group of licenses and approvals that the rules may include and a subset of that group that the rules must include. The rules *may* include any licenses or approvals required under a wide range of statutes relating to actions affecting navigable waters of the state (portions of ch. 30, Stats.) and environmental pollution (all of chs. 280 to 292, Stats., and subch. II of ch. 295, Stats.), but they may *not* include licenses or approvals related to either metallic or nonmetallic mining or to prospecting for minerals. At a minimum, the rules *must* include all of the following:

1. All approvals under ss. 30.10 to 30.205 and 30.21 to 30.27, Stats. These approvals relate to navigable waters, including declarations of navigability and permits or approvals for the establishment of bulkhead lines, placement of structures or deposits in navigable waters, removal of material from navigable waters, diversion of water from waterways, modification of water-ways and the construction of boathouses, bridges, piers, wharves and rafts. The program does not apply to approvals for activities in the Lower Wisconsin State Riverway.
2. High-capacity well permits under s. 281.17 (1), Stats.
3. Water pollution discharge permits and storm water discharge permits under subch. IV, ch. 283, Stats.
4. Air pollution control construction and operation permits under subch. VII, ch. 285, Stats.
5. Solid waste facility operating licenses under subch. III, ch. 289, Stats.
6. Hazardous waste facility operating licenses under subch. IV, ch. 291, Stats.

Act 27 directs the DNR to prepare draft rules to implement the permit guarantee program within one year of the effective date of the program. The DNR has promulgated rules to implement the part of the program relating to solid and hazardous waste facilities, which is the portion that was created by Act 27. The DNR staff is now developing a unified rule that will include the other program elements, which were added by Act 301.

## **B. EXPEDITED PERMIT SERVICE**

Act 27 authorizes the DNR to provide expedited processing of an application for a permit or other approval for a fee that is in addition to the fee ordinarily charged for the permit or approval. [ss. 30.28 (2r), 31.39 (2r) and 281.22 (2m), Stats.] (These provisions are similar to a previously existing provision of the DNR's air management rules [s. NR 410.03 (2) (o), Wis. Adm. Code], although no parallel statutory provision exists for the air management rule). The Act authorizes the DNR to charge the fee by rule if the applicant makes a written request for expedited processing and if the DNR verifies that it will be able to comply with the request.

The authority of the DNR to provide expedited permit service applies to the following actions:

1. All approvals under ss. 30.10 to 30.205 and 30.21 to 30.27, Stats., which are approvals relating to navigable waters (the same ch. 30 approvals that the DNR is required to include in the permit guarantee program, described in the preceding section).
2. All approvals under ss. 31.02 to 31.185 and 31.33 to 31.38, Stats., which constitute most approvals related to dams, including permits to construct, operate, maintain, raise, enlarge, abandon or remove a dam.
3. A determination under s. 281.22 (2m), Stats., that an activity in a wetland complies with state water quality standards (referred to as a "water quality certification").

Under prior law, the fees for permits under chs. 30 and 31 were based on the amount of time required for review of a permit application. Fee categories applied to applications requiring less than three hours to review, applications requiring from three to nine hours to review and applications requiring more than nine hours to review. Act 27 requires that, if the DNR promulgates rules to implement its authority to charge additional fees for expedited review of applications under chs. 30 and 31, the rule must also include time limits for making final determinations on applications in each of those fee categories. It also requires that, if the DNR promulgates such a rule for water quality certifications under s. 281.22 (2m), the rule must include a time limit for making water quality certifications.

The DNR promulgated emergency rules to implement the expedited permit service option, effective April 1, 1998, and is now preparing a final rule. Both the emergency rule and the draft final rule set the fee for expedited permit service at \$2,000. To date, five expedited permit reviews have been conducted.

## **C. CHAPTER 30 GENERAL PERMIT PILOT PROGRAM**

1997 Wisconsin Act 174 creates a pilot program under which the DNR is authorized to issue a general permit for a type of activity for which a permit or other approval is required under ch. 30, Stats., to apply within a specified area. [s. 30.207, Stats.] The general permit would allow any person to conduct the activity within the permit area without obtaining separate ch. 30 permits. For example, a group of property owners or a developer could apply for a general permit for the construction of boat shelters within the area of a lakefront development project; the property owners or developer could then construct boat shelters within the area covered by the general permit, according to conditions specified in the general permit, without obtaining separate permits under s. 30.12, Stats., for each shelter. In another example, the DNR could issue a general permit on its own motion for the repair or reconstruction of railroad bridges within the entire pilot area. Railroads could then proceed more expeditiously with such projects under the terms of the general permit.

The pilot program applies to a limited portion of the state referred to as the Wolf River and Fox River basin area. That area consists of portions of the watersheds of the Wolf and Fox Rivers and Lake Winnebago in Calumet, Fond du Lac, Outagamie, Waupaca, Waushara and Winnebago Counties. In addition, the Secretary of the DNR may designate another area of the state to which the pilot program would apply, although the Secretary may only designate another area for inclusion in the program within six months of the effective date of the first general permit issued for the Wolf River and Fox River basin area. Also, it appears that the Secretary may make only one such designation.

In addition to the geographic limitation, the pilot program is limited in duration, sunseting five years after the effective date of the first general permit issued under the pilot program.

A general permit may authorize any activity for which a permit or other approval would be required under ch. 30. These are approvals relating to navigable waters (the same ch. 30 approvals that the DNR is required to include in the permit guarantee and expedited permit review programs, described in the preceding sections) plus permits for moorings under s. 30.772, Stats.

The DNR may issue a general permit under the pilot program on its own motion or based on an application received by it. Any of three types of entities may apply for a general permit: a local entity; a group of 10 or more riparian land owners who will be affected by the issuance of a general permit; or a contractor who is or has been involved in the construction of structures in or along navigable waters. "Local entity" is defined as "a city, village, town, county, qualified lake association, as defined in s. 281.68 (1), nonprofit conservation organization, as defined in s. 23.0955 (1), town sanitary district, public inland lake protection and rehabilitation district or another local governmental unit, as defined in s. 66.299 (1) (a), that is established for the purpose of lake management." [s. 30.77 (3) (dm) 1., Stats.] An application must include information identifying the applicant and describing the proposed permit area and the activities to be covered by the proposed permit. In addition, it must identify at least five persons who own real property adjacent to the navigable waters in the proposed permit area; if there are fewer than five such property owners, the application must identify all such property owners.

Act 174 creates a somewhat unique process for the review of applications for general permits, composed of two parts. The first part is an initial review and decision to either deny or continue reviewing the application. The second part is a more detailed review, including an environmental assessment, consultation with affected parties and public hearings, followed by the decision to either deny or approve the application.

Within 90 days of receiving an application, the DNR must either deny the application and specify the reasons for the denial or specify the DNR's plan for further review of the application. The Act does not give any specific guidance, either procedural or substantive, for this initial review. If the initial review does not lead the DNR to deny the application, the DNR must prepare a plan for more detailed review, including a timetable for any required notice and hearing. The DNR must conduct an environmental analysis of the application and consult with any of certain identified entities "as the department considers appropriate." The entities identified for consultation are the following:

1. Any local entity (as defined above) that has an interest in the quality or use of, or that has jurisdiction over, the navigable waters located in the proposed permit area.
2. Any contractor who is or has been involved in the construction of structures or improvements in or along navigable waters located in the proposed permit area.
3. Any riparian owners whose property rights may be affected by the issuance of the general permit.
4. Any other interested party, as determined by the department or the applicant.

At this point, the DNR must also comply with any applicable hearing requirements. If a hearing would be required on an individual permit for an activity covered by the proposed general permit, the DNR must comply

with that same hearing requirement. However, if the activities covered by the proposed general permit could be permitted individually without a hearing, then no hearing on the general permit is required.

The DNR must issue a general permit if it finds all of the following: (1) the cumulative adverse environmental impact of the activity in the proposed permit area is insignificant; and (2) the issuance of the general permit will not injure public rights or interest, cause environmental pollution or result in material injury to the rights of any riparian owners. The Act provides that this standard supersedes any conflicting standard under ch. 30 for the approval of individual activities. Although not stated explicitly, it appears that the DNR may impose conditions or standards on activities conducted under a general permit.

A person engaging in an activity under a general permit must give the DNR at least 15 days advance written notice. The notice must identify the person engaging in the activity and the location of the activity and include a signed statement that the person will conduct the activity in conformance with the standards contained in the general permit. Upon receipt of a notice, the DNR has 15 days to review the specific proposed activity. It may prohibit the activity if it determines that the activity, as proposed in the notice, would not meet the standards for approval of the general permit. Failure of the DNR to respond to the notice within 15 days constitutes approval to proceed with the activity.

Act 174 establishes fees for the pilot program. It creates a general permit application fee of \$2,000, but specifies that the DNR must refund 50% of the fee if the application is denied. In addition, the Act creates a fee of \$100 to be submitted with the written notice of intent to commence an activity under a general permit.

The Act directs the DNR to prepare a report on the issuance of general permits under the pilot program. The DNR must submit the report to the Legislature no sooner than three years after the effective date and no later than 60 days after the end of the pilot program.

The DNR has held discussions with potential applicants for general permits under the pilot program. Although it has not yet received any formal applications for general permits, it expects to receive one or more applications this year. Similarly, the DNR has not issued any general permits on its own motion, although it has identified some types of activities that might be appropriate for such a permit.

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## **APPENDIX**

### **Section 299.80, Stats.**

#### **299.80 Environmental cooperation pilot program.**

(1) DEFINITIONS. In this section:

(a) "Approval" means a permit, license or other approval issued by the department under chs. 280 to 295.

(b) "Cooperative agreement" means an agreement entered into under sub. (6).

(c) "Environmental management system" means an organized set of procedures implemented by the owner or operator of a facility to evaluate the environmental performance of the facility and to achieve measurable or noticeable improvements in that environmental performance through planning and changes in the facility's operations.

(d) "Environmental performance" means the effects, whether regulated under chs. 280 to 295 or unregulated, of a facility on air, water, land, natural resources and human health.

(e) "Facility" means all buildings, equipment and structures located on a single parcel or on adjacent parcels that are owned or operated by the same person.

(f) "Interested person" means a person who is or may be affected by the activities at a facility that is covered or proposed to be covered by a cooperative agreement or a representative of such a person.

(g) "Performance evaluation" means a systematic, documented and objective review, conducted by or on behalf of the owner or operator of a facility, of the environmental performance of the facility, including an evaluation of compliance with the cooperative agreement covering the facility, approvals that are not replaced by the cooperative agreement and the provisions of chs. 280 to 295 and rules promulgated under those chapters for which a variance is not granted under sub. (4).

(h) "Pollutant" means any of the following:

1. Any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, heat, wrecked or discarded equipment, rock, sand, cellar dirt or industrial, municipal or agricultural waste discharged into water or onto land.
2. Any dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, odorous substances or any combination of those things emitted into the air, but not uncombined water vapor.

(i) "Violation" means a violation of a cooperative agreement, of an approval that is not replaced by the cooperative agreement or of a provision of chs. 280 to 295 and rules promulgated under those chapters for which a participant has not received a variance under sub. (4).

(2) PILOT PROGRAM. The department shall administer a pilot program under which it enters into not more than 10 cooperative agreements to evaluate innovative environmental regulatory methods. In administering the program, the department shall do all of the following:

(a) Provide at least the same level of protection of public health and the environment as provided by the environmental regulatory methods under chs. 280 to 295.

(b) Encourage facility owners and operators to systematically assess the pollution that they cause, directly and indirectly, to the air, water and land.

(c) Encourage facility owners and operators to implement efficient and cost-effective pollution reduction strategies for their facilities, while complying with verifiable and enforceable pollution limits.

(d) Encourage facility owners and operators to achieve superior environmental performance, both with respect to the effects of a facility that are regulated under chs. 280 to 295 and those effects that are unregulated, to reduce usage of natural resources, to minimize transfers of waste discharges among air, water and land and to reduce waste generation, while achieving a balance among the economic, social and environmental impacts of these efforts that is acceptable to the community in which the facility is located.

(e) Recognize and reward facility owners and operators who have demonstrated excellence and leadership in environmental stewardship or pollution prevention and who can achieve reductions in emissions and waste generation through implementation of innovative measures.

(f) Encourage the transfer of information about methods for improving environmental performance and the adoption of these methods by others.

- (g) Consolidate into a cooperative agreement environmental requirements relating to a facility owned or operated by a participant that are otherwise included in separate approvals to the extent that consolidation is practical and efficient.
- (h) Grant the owners and operators of facilities greater flexibility than would otherwise be allowed under chs. 280 to 295 and rules promulgated under those chapters.
- (i) Seek to reduce the time and money spent by government and owners and operators of facilities on paperwork and other administrative tasks that do not result in benefits to the environment.
- (j) Encourage public participation, and consensus among interested persons, in the development of innovative environmental regulatory methods and in monitoring the environmental performance of projects under this section.
- (k) Seek to improve the provision of useful information to the public about the environmental and human health impacts of facilities on communities.
- (l) Provide public access to information about performance evaluations conducted by participants in the program under this section.
- (m) Encourage facility owners and operators and communities to work together to reduce pollution to levels below the levels required under chs. 280 to 295.
- (n) Seek to increase trust among government, facility owners and operators and the public through open communication and support of early and credible resolution of conflicts over issues concerning the environment and environmental regulation.

(3) CONTENT OF COOPERATIVE AGREEMENTS. A cooperative agreement shall do all of the following:

- (a) Identify the facility or facilities, the activities and the pollutants that are covered by the cooperative agreement.
- (b) Specify any approvals and provisions of approvals that are replaced by the cooperative agreement.
- (c) Commit the participant to implement an environmental management system that is based on the standards for environmental management systems issued by the International Organization for Standardization, or an alternative environmental management system that is acceptable to the department, at the covered facilities and commit the participant to documenting the environmental management system.
- (d) Commit the participant to superior environmental performance, to achieving measurable or noticeable improvements in environmental performance, to reducing natural resource usage and to reducing waste generation, while achieving a balance among the economic, social and environmental impacts of these efforts that is acceptable to the community in which the facility is located.
- (e) Specify waste reduction goals in measurable and verifiable terms.
- (f) Identify changes in raw materials, in the design, methods of production, distribution or uses of products or in the reuse, recycling or disposal of materials that the participant will implement to achieve process efficiencies, to reduce the pollution of the air, water and land and to reduce water use, energy use or indoor chemical exposure.

(g) Contain pollution limits that are verifiable, enforceable and at least as stringent as the pollution limits under chs. 280 to 295 and rules promulgated under those chapters.

(h) Describe the operational flexibility granted to the participant and any variances granted under sub. (4).

(i) Contain the requirements that would be included in any approvals that are replaced by the cooperative agreement, as modified under pars. (g) and (h).

(j) Require the participant to submit a baseline performance evaluation within 180 days of the date that the cooperative agreement is entered into and to update the performance evaluation periodically.

(k) Require the participant to report any violations discovered during a performance evaluation as required in sub. (12).

(l) Ensure that members of the interested persons group, established as required under sub. (5) (b), have the opportunity to comment on the participant's environmental management system and are involved in reviewing the participant's performance under the cooperative agreement and require a process that seeks consensus between the participant and interested persons over issues concerning that performance.

(m) Require the participant to assist interested persons to understand the implementation of the cooperative agreement.

(n) Require the participant to provide information to the public about the participant's environmental performance and the results of the project, including environmental, social and economic impacts, and to meet with interested persons at least once every 6 months to discuss the implementation of the participant's environmental management system and to receive comments on the progress of the project.

(o) Describe how the participant will measure the opinions of its employees and the public concerning its participation in the program under this section.

(p) Require the participant to assess the success of the project in reducing the time and money spent by the participant on paperwork and other administrative activities that do not directly benefit the environment.

(q) Specify that the term of the agreement is 5 years with the possibility of a renewal for up to 5 years as provided in sub. (6e).

(4) VARIANCES. (a) If chs. 280 to 295 or rules promulgated under those chapters authorize the department to grant a variance from a requirement that would otherwise apply to a facility covered by a cooperative agreement and the participant qualifies under the standards provided in the statutes or rules for granting the variance, the department may grant a variance from that requirement.

(b) If a variance is not authorized under par. (a), the department may grant a participant a variance from a requirement in chs. 280 to 295 that would otherwise apply to a facility covered by a cooperative agreement if the variance results in a measurable reduction in overall levels of pollution caused by the participant and is consistent with subs. (2) and (3) (g) and does one of the following:

1. Promotes the reduction in overall levels of pollution to below the levels required under chs. 280 to 295.

2. Provides for alternative monitoring, testing, record keeping, notification or reporting requirements that reduce the administrative burden on state agencies or the participant and that provide the information needed to ensure compliance with the cooperative agreement and the provisions of chs. 280 to 295 and rules promulgated under those chapters for which the cooperative agreement does not grant a variance.

(5) APPLICATION. The department shall solicit applications for participation in the program under this section. The owner or operator of a facility that is required to be covered by at least one approval under chs. 280 to 295 may apply to participate in the pilot program by submitting all of the following:

- (a) A proposed cooperative agreement that satisfies sub. (3).
- (b) A description of the process used by the applicant to establish an interested persons group that includes residents of the area in which the facility proposed to be covered by the agreement is located, a list of members of the interested persons group and a description of the involvement of the interested persons group in the development of the proposed cooperative agreement.

(6) ENTERING INTO COOPERATIVE AGREEMENTS.

(a) The department shall review each application submitted under sub. (5). Upon completion of that review, the department shall decide whether to enter into negotiations with the applicant. In determining whether to enter into negotiations and in selecting participants, the department shall seek to ensure participation by a variety of types, sizes and locations of facilities and shall consult with the federal environmental protection agency. A decision by the department not to enter into negotiations is not subject to review under ch. 227. If the department decides to enter into negotiations, it shall prepare a draft cooperative agreement and provide public notice of its decision in the manner provided in sub. (8) (d).

(b) During negotiations concerning a proposed cooperative agreement, the department may not modify or revoke any approval for a facility that would be replaced by the cooperative agreement if the applicant is not violating the approval.

(c) The department may terminate negotiations with an applicant concerning a proposed cooperative agreement and the decision to terminate negotiations is not subject to review under ch. 227.

(d) Except as provided in par. (e), the department may enter into a cooperative agreement with an applicant if the department determines that the applicant's efforts described under sub. (5) (b) were adequate, that the cooperative agreement complies with sub. (3) and that entering into the agreement will assist the department to comply with sub. (2). The decision by the department to enter into a cooperative agreement is not subject to review under ch. 227. A cooperative agreement is subject to review under ch. 227.

(e) The department may not enter into an initial cooperative agreement after October 1, 2002.

(6e) EXTENSION OF COOPERATIVE AGREEMENT. If the department determines that renewal of a cooperative agreement is consistent with sub. (2) and if the participant agrees to renewal, the department may notify the joint committee on finance that the department proposes to renew the cooperative agreement. If, within 14 working days after the date that the department submits the proposal, the cochairpersons of the committee notify the secretary that the committee has scheduled a meeting for the purpose of reviewing the proposal, the department may not renew the cooperative agreement until the committee approves the proposal. If the cochairpersons of the committee do not so notify the secretary, the department may renew the cooperative agreement. A cooperative agreement may be renewed for one 5-year term.

(6m) EXPIRATION OF COOPERATIVE AGREEMENT. If a participant timely submits an application for an approval that is replaced by a cooperative agreement and submits any information requested by the department to enable the department to act on the application, but the department does not issue the approval before the cooperative agreement expires, sub. (9) (a) continues to apply and the provisions of the cooperative agreement continue to apply until the approval is issued.

(7) AMENDMENT, REVOCATION OF COOPERATIVE AGREEMENT.

(a) This subsection applies to the amendment or revocation of a cooperative agreement, notwithstanding any provisions of chs. 280 to 295 concerning the amendment or revocation of approvals.

(b) 1. The department may amend a cooperative agreement with the consent of the participant.

2. The department may, after an opportunity for a hearing, amend a cooperative agreement for cause, including any of the following:

- a. A change in federal or state environmental laws.
- b. A violation of the cooperative agreement.
- c. Obtaining a cooperative agreement by misrepresentation or failure to fully disclose all relevant information.

(c) 1. The department may revoke a cooperative agreement at the request of the participant.

2. The department may, after an opportunity for a hearing, revoke a cooperative agreement if it finds any of the following:

- a. That the participant is in substantial noncompliance with the cooperative agreement, with an approval that is not replaced by the cooperative agreement or with a provision of chs. 280 to 295 or rules promulgated under those chapters for which the cooperative agreement does not grant a variance.
- b. That the participant has refused the department's request to amend the cooperative agreement.
- c. That the participant is unable, or has shown an unwillingness, to comply with pollution reduction goals that apply to the participant under the cooperative agreement.
- d. That the participant has not satisfactorily addressed a substantive issue raised by a majority of the members of the interested persons group, established under sub. (5) (b), within a reasonable time after receiving notice of the issue.

3. If the department revokes a cooperative agreement, it shall do all of the following in a written revocation decision:

- a. Delay any compliance deadlines established in the cooperative agreement if a delay is necessary to provide the participant with a reasonable amount of time to obtain approvals required under chs. 280 to 295 that were replaced by the cooperative agreement.
- b. Establish practical interim requirements, that do not allow pollution in excess of that allowed under chs. 280 to 295 at the time that the cooperative agreement was entered into, to replace specified requirements of the cooperative agreement until the department issues the approvals required under chs. 280 to 295 that were replaced by the cooperative agreement.

4. A participant shall comply with the department's revocation decision and with all requirements of the cooperative agreement for which the department does not establish interim requirements

until the department issues the approvals required under chs. 280 to 295 that were replaced by the cooperative agreement.

(d) A final decision under par. (b) or (c) is subject to review under ch. 227.

#### (8) PUBLIC NOTICE; MEETINGS.

(a) The department shall provide at least 30 days for public comment on the proposed issuance, amendment or revocation of a cooperative agreement.

(b) Before the start of the public comment period under par. (a), the department shall prepare a draft of the cooperative agreement, cooperative agreement amendment or notice of cooperative agreement revocation and a fact sheet that does all of the following:

1. Briefly describes the principal facts and the significant factual, legal, methodological and policy questions considered by the department.
2. Briefly describes how the proposed action is consistent with subs. (2) and (3).
3. Identifies any variances that would be granted under sub. (4) by the proposed action.

(c) The department shall prepare a public notice of a proposed action under par. (a) that does all of the following:

1. Briefly describes the facility that is the subject of the proposed action.
2. Identifies the proposed action and states whether any variances would be granted under sub. (4) by the proposed action.
3. Identifies an employee of the department and an employee of the applicant or participant who may be contacted for additional information about the proposed action.
4. States that the draft of the proposed action and the fact sheet under par. (b) are available upon request.
5. States that comments concerning the proposed action may be submitted to the department during the comment period and states the last date of the comment period.
6. Describes the procedures that the department will use to make a final decision on the proposed action, describes how persons may request public informational meetings, contested case hearings or public hearings and how persons may make requests to appear at those meetings and hearings.

(d) Before the start of the public comment period, the department shall mail the public notice under par. (c) to the applicant or participant, the federal environmental protection agency, the members of the interested persons group established under sub. (5) (b) and all persons who have asked to receive notice of proposed actions under par. (a). The department shall mail the public notice to any other person upon request. The department shall make a copy of the public notice available at the department's main office, at any other department office in the area of the facility subject to the proposed action and at public libraries in that area. The department shall circulate the public notice in the area of the facility subject to the proposed action by posting the notice in public buildings, publishing the notice in local newspapers and by any other methods that the department determines are effective.

(e) The department shall hold a public informational meeting on a proposed action under par. (a) if the comments received during the public comment period demonstrate considerable public interest in the proposed action.

(9) EFFECT OF COOPERATIVE AGREEMENT. (a) For the purposes of chs. 280 to 295, a cooperative agreement entered into under this section is considered to be an approval that is identified under sub. (3) (b) as

being replaced by the cooperative agreement. (b) A provision of an approval that is identified under sub. (3) (b) as being replaced by a cooperative agreement is superseded by the cooperative agreement.

(10) FEES. A participant shall pay the same fees under chs. 280 to 295 that it would be required to pay if it had not entered into a cooperative agreement.

(11) REPORTING BY PARTICIPANTS.

(a) Reports submitted under a cooperative agreement fulfill the reporting requirements under chs. 280 to 295 relating to the facility, activities and pollutants that are covered by the cooperative agreement, except for any requirements for immediate reporting.

(b) A participant shall notify the department before it increases the amount of the discharge or emission of a pollutant from a covered facility and before it begins to discharge or emit a pollutant that it did not discharge or emit from a covered facility when the cooperative agreement was entered into. The notification shall describe any proposed facility expansion, production increase or process modification that would result in the increased or new discharge or emission and shall state the identity and quantity of the pollutant planned to be emitted or discharged. If the increased or new discharge or emission is not authorized under the cooperative agreement, the department may amend the cooperative agreement under sub. (7) in a manner consistent with subs. (2) and (3) or require the participant to obtain an approval if an approval is required under chs. 280 to 295.

(12) REPORTS OF VIOLATIONS. A participant shall submit a report to the department within 45 days after completion of a performance evaluation if the performance evaluation reveals violations at a facility covered by a cooperative agreement. The report shall contain all of the following:

(a) A description of the performance evaluation, including who conducted the performance evaluation, when it was completed, what activities and operations were examined and what was revealed by the performance evaluation.

(b) A description of all violations revealed by the performance evaluation.

(c) A description of the actions taken or proposed to be taken to correct the violations.

(d) A commitment to correct the violations within 90 days of submitting the report or within a compliance schedule approved by the department.

(e) If the participant proposes to take more than 90 days to correct the violations, a proposed compliance schedule that contains the shortest reasonable periods for correcting the violations, a statement that justifies the proposed compliance schedule, a description of measures that the participant will take to minimize the effects of the violations during the period of the compliance schedule and proposed stipulated penalties if the participant violates the compliance schedule.

(f) A description of the measures that the participant has taken or will take to prevent future violations.

(13) COMPLIANCE SCHEDULES.

(a) If the department receives a report under sub. (12) that contains a proposed compliance schedule under sub. (12) (e), the department shall review the proposed compliance schedule. The department may approve the compliance schedule as submitted or propose a different compliance schedule. If the participant does not agree to implement a compliance schedule proposed by the department, the

department shall schedule a meeting with the participant to attempt to reach an agreement on a compliance schedule. If the department and the participant do not reach an agreement on a compliance schedule, the department shall initiate the procedure under sub. (7) (c) 2. to revoke the cooperative agreement. If the parties agree to a compliance schedule, the department shall amend the cooperative agreement to incorporate the compliance schedule.

(b) The department may not approve a compliance schedule that extends longer than 12 months beyond the date of approval of the compliance schedule. The department shall consider the following factors in determining whether to approve a compliance schedule:

1. The environmental and public health consequences of the violations.
2. The time needed to implement a change in raw materials or method of production if that change is an available alternative to other methods of correcting the violations.
3. The time needed to purchase any equipment or supplies that are needed to correct the violations.

#### (14) DEFERRED CIVIL ENFORCEMENT.

(a) 1. This state may not commence a civil action to collect forfeitures for violations at a facility covered by a cooperative agreement that are disclosed in a report that meets the requirements of sub. (12) for at least 90 days after the department receives the report.

2. If the participant corrects violations that are disclosed in a report that meets the requirements of sub. (12) within 90 days after the department receives a report that meets the requirements of sub. (12), this state may not commence a civil action to collect forfeitures for the violations.

3. This state may not commence a civil action to collect forfeitures for violations covered by a compliance schedule that is approved under sub. (13) during the period of the compliance schedule if the participant is not violating the compliance schedule. If the participant violates the compliance schedule, the department may collect the stipulated penalties in the compliance schedule or may revoke the cooperative agreement. After the department revokes a cooperative agreement, this state may commence civil action to collect forfeitures for the violations. 4. If the department approves a compliance schedule under sub. (13) and the participant corrects the violations according to the compliance schedule, this state may not commence a civil action to collect forfeitures for the violations.

(b) Notwithstanding par. (a), this state may at any time commence a civil action to collect forfeitures for violations if any of the following apply:

1. The violations present an imminent threat to public health or the environment or may cause serious harm to public health or the environment.
2. The department discovers the violations before submission of a report under sub. (12).

(15) ACCESS TO RECORDS. (a) Except as provided in par. (b), the department shall make any record, report or other information obtained in the administration of this section available to the public.

(b) The department shall keep confidential any part of a record, report or other information obtained in the administration of this section, other than emission data, discharge data or information contained in a cooperative agreement, upon a showing satisfactory to the department by any person that the part of a

record, report or other information would, if made public, divulge a method or process that is entitled to protection as a trade secret, as defined in s. 134.90 (1) (c), of that person.

(c) If the department refuses to release information on the grounds that it is confidential under par. (b) and a person challenges that refusal, the department shall inform the applicant or participant of that challenge. Unless the applicant or participant authorizes the department to release the information, the applicant or participant shall pay the reasonable costs incurred by this state to defend the refusal to release the information.

(d) Paragraph (b) does not prevent the disclosure of any information to a representative of the department for the purpose of administering this section or to an officer, employee or authorized representative of the federal government for the purpose of administering federal law. When the department provides information that is confidential under par. (b) to the federal government, the department shall also provide a copy of the application for confidential status.

(16) **REPORTS CONCERNING THE PROGRAM UNDER THIS SECTION.** (a) Beginning not later than November 1, 1998, the secretary of natural resources shall submit an annual progress report on the program under this section to the governor and, under s. 13.172 (3), the standing committees of the legislature with jurisdiction over environmental matters.

(b) Not later than October 1, 2001, the secretary of natural resources shall submit a report to the governor and, under s. 13.172 (2) the legislature on the success of the program under this section. The report shall include recommendations concerning the continuation of the program under this section and any changes that should be made to the program.