

Green Tier Advisors

March 6, 2007
Legislation 2.0

ISSUE SUMMARY: To help focus the discussions on March 5, 2007 a straw proposal with separate elements has been compiled to lay out some of the areas where changes might be made to the law. They represent a compilation of several discussions as well as a distillation of suggestions, concerns and issues that have arisen at prior meetings. The purpose of the discussion on March 5 is to select the concepts that warrant drafting and for the Advisors to provide direction for the drafting of recommendations for subsequent consideration at the next meeting. The elements listed below would reauthorize Green Tier, fine tune the existing statutory language and expand the program:

1. reauthorization,
2. fine tuning to improve implementation and clarify performance
3. expand the potential for charters
4. include an option for local government
5. increase the incentives potential for Green Tier
6. include the other agencies in the provisions of Green Tier
7. Grandfather Environmental Cooperation Pilot Program participants into Green Tier
8. creation of a new point of entry to performance-based environmental management that leads to Green Tier

In the narrative below, reauthorization and fine tuning are packaged while items 3 through 8 have been developed as separate initiatives that could be included to expand the Green Tier program.

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BACKGROUND:

This issue paper supplements the issue paper that was done for the December meeting (Legislation 1.2 dated December 6, 2006).

Proposals for 299.83 of the Wisconsin Statutes for Green Tier:

Reauthorization.

- o Given the need to provide both certainty for both current and future participants, the sunset provisions of 299.83 would be removed (299.83 (11)). Under the present statutory language no applications could be accepted by the Department after July 1, 2009.

Fine Tuning - these changes provide for updating references and procedural fixes

1. Environmental Management System – the starting time for the 12 months given to Tier 1 companies to demonstrate functional equivalency would be changed to start at the time that the entity receives the letter being accepting into Tier 1.
2. Environmental Management System requirements – the definitions for the 12 elements in the statutory definition of a functionally equivalent environmental management system would be aligned to the 2004 ISO 14000 standards. This will make the compliance requirement clearer, expand the public involvement portion of the definition and clarify where documentation is needed for the 12 elements. One option is to put in general statutory language that directs the department to use the most recent, adopted version of the ISO 14000 standard to determine that an entity's EMS is a functionally equivalent EMS.
3. Enforcement Exemption – as of January 2007 the Secretary of DNR could no longer waive the citation and civil judgment provisions to enable a company into Tier 1 or Tier 2. This ability to provide a

waiver with the same public notice and procedural safeguards would be put into the law without an ending date.

4. Amendment Language – allow for the amendment of both Tier 2 contracts and charters as was done in the pilot program by going through a public notice and amendment process. Right now the statute is silent on this point.
5. Use of the logo – clarify the language related to the use of the logo such that it is clear whether the logo can be used on products.
6. Report to the Legislature – move the due date to July 1 of each year for the report to the legislature on the progress of the program.
7. Logo's – The department is given the ability to create a logo for the program and by making this plural their may be options that would differentiate between tiers and more effectively recognize the participants. No plan exists to create more but this could be a point of contention if more than one is created. A provision would also be added to give the Department the authority to set guidelines for the use of the logo(s), which is not currently given in the statute.
8. Enforcement Record – the statutorily defined environmental requirements for entry into Green Tier would be amended to include citations, civil judgments and criminal judgments for environmental statutes that are enforced by other state agencies (e.g. Chapter 101- Commerce and Chapter 94 – DATCP). The language related to citations, civil judgments and criminal judgments would be expanded to include environmental requirements enforced by other agencies. It should also be noted that the current requirements do not specifically reference federal enforcement actions for civil and criminal judgments, which the Advisors may want to consider adding.
9. Public Notice requirements – amend the language so that the 30 days for processing starts at the point of a complete application and language is added that the parties may agree to a different time frame.
10. Limited Civil Immunity – as currently worded the statute may limit the discovery, disclosure and self reporting of violations only to those through the annual audits done at the facility. The intent was to have compliance continually monitored and immediately corrected and the current language may run contrary to the intent at the time that this was developed. The change would remove language that might limit this incentive only to problems discovered in annual audits.

These elements address issues that have arisen in the implementation of Green Tier.

Program Expansion and Improvement.

1. Charters

- 1.1. The language in the charters sections currently reads “The department may issue an environmental results charter to an association of entities to assist the entities to participate in tier I or Tier II of the program and to achieve superior environmental performance.” The suggested change would be: “The department may issue an environmental results charter to an association of entities to assist the entities to participate in tier I or Tier II of the program or to achieve superior environmental performance.” This would provide the capability to independently develop flexibility and incentives (short of full participation in Tier 1 and Tier 2).
- 1.2. Allow for sector flexibility with formal enrollment in a sector (e.g. through a trade association) and with a sector plan.
- 1.3. Allow the provision of flexibility to one party of the charter based on superior environmental performance of another party to a charter. An example might be flexibility given to a dairy processor based upon superior environmental performance that is achieved by dairy producers who are parties to the same charter. Similarly, flexibility might be granted to suppliers of an original equipment manufacturer (OEM) based upon the overall commitment of the OEM to use sustainable products.

2. Flexibility Language –

- 2.1. Simple amendment to the language in the Green Tier Law that states that the Department may grant a variance from chapters 29 to 31, 160, and 280 to 295 (Environmental Statutes) regardless whether specified in rules or statute if the variance results in measurable reduction in overall levels of pollution.

- 2.2. Simple amendment to the language in the Green Tier Law that states that the Department may provide for alternative monitoring, testing record keeping, notification or reporting requirements that reduce the administrative burden on state agencies and participants.
- 2.3. Expressly authorize the development of permitting processes, processing time frames and review processes that are different from processes used by those not in the Green Tier Program through Green Tier charters and contracts.
- 2.4. Provide that Green Tier may extend flexibility granted to national performance program participants without formal modification of rules.
- 2.5. Provide that Green Tier may extend flexibility through reciprocity with other states through their performance programs.
3. Local Government Track – give the department the ability to grant a conditional functional equivalency determination to local units of government that have engaged in the development of systems that define the overall environmental footprint, a series of programs that will reduce that footprint, audits to assure compliance and a plan to reach functional equivalency over a defined period with interim benchmarks. In return, the department could provide specific flexibility. Examples might include storm water management, “development” decision making and direct permitting of government operations.
4. Flexibility from other agencies and recognition of performance for other agencies has been offered in several different contexts. For purposes of discussion, there are three potential approaches to this expansion enumerated below:
 - 4.1. limited expansion by enabling Green Tier development in the environmental portions of other agencies responsibilities (e.g. DATCP authorities under Chapter 94 or Commerce authorities under Chapter 101).
 - 4.2. specific expansion to discreet provisions that are known to hold interest at this time such as the Uniform Dwelling Code.
 - 4.3. general expansion limited by specific objectives within DNR Green Tier instruments (contracts and charters) that provide the department the ability to create agreements that would grant flexibility and other incentives through other agencies and allows those agencies to deviate from program requirements in order to accomplish objectives that yield environmental and economic results.

If the decision is that the Advisors would like to consider making recommendations in this area then more detailed language and concepts can be developed for the June meeting.
5. Environmental Cooperation Pilot Program Participants
 - 5.1. Tier 2 Process for environmental cooperation pilot program participants:
 - 5.1.1. Company submits letter of intent stating desire to transition from ECPP to Tier 2 and simply describing the measures they propose to take to maintain and improve performance.
 - 5.1.2. DNR and company (without any third parties) redraft ECA to conform to Green Tier program requirements and benefits
 - 5.1.3. DNR provides public notice on redrafted participation contract.
 - 5.1.4. Company shares the results of the last audit for purposes of establishing the audit baseline.
 - 5.1.5. If commitments are unchanged from ECA, redrafted contract presumed to be “proportional.”
 - 5.1.6. Limitation and/or review of decision - DNR could not deny an application from an ECPP participant unless significant issues are raised during public comment that the company is unwilling or unable to address.
 - 5.2. ECPP participants would still have a choice: 1) let their environmental cooperative agreement expire; 2) apply for Green Tier and start from scratch with new negotiations; or 3) transition to Tier 2 as described above.
6. Create a new point of entry for performance based programming. These are random thoughts about what might be included in an entry level program in order to spur discussion.
 - 6.1. Compliance
 - 6.1.1. Offer “simple disclosure” if the company agrees to have a third-party conduct a compliance audit and address any environmental compliance findings in a timely manner and move towards Green Tier participation.

- 6.1.2. Provide encouragement for compliance self-inspections by participants (with no action taken by DNR with regards to findings)
 - 6.1.3. Create an enforcement option and/or settlement mechanism for companies that agree to pursue a performance and undertake programs to address their environmental compliance issues.
 - 6.2. Trust/Relationship
 - 6.2.1. Assign a “top point of contact” (TPOC). This individual would be a “senior sponsor” or “management review team” within the department
 - 6.2.2. Offer a one time rapid regulatory response to with that would serve as an incentive to develop the EMS
 - 6.3. Technical Assistance
 - 6.3.1. Offer state-sponsored training sessions for Green Tier participants: EMS, Train the trainer, Auditing, Compliance etc.
 - 6.3.2. Provide a time and place for meeting with Green Tier companies and others on the entry track for best practices.
 - 6.3.3. UW technical and research assistance
 - 6.3.4. Provide Regulatory benchmarking
 - 6.4. Process Improvement
 - 6.4.1. Offer waivers for (legislatively-mandated) user-fees
 - 6.4.2. Encourage and fast-track experimental and innovative pilot projects
 - 6.4.3. Provide greater policy flexibility guidance for the regulator
- The concept is to have a part of the program that engages those businesses and organizations interested in starting the development of a performance-based relationship.

DISCUSSION:

The purpose of the review is to identify those concepts that would be drafted and included in a package of recommendations for changes to the Green Tier law. Reauthorization, fine tuning and program expansion are the general categories where changes are contemplated. Each is driven by experience with the program to date. Each has also been informed by discussions with the Advisors, program participants and Department staff.

Reauthorization would provide both certainty that the program is going to continue to develop and affirmation that performance based relationships can yield environmental results within a legal framework that compliments traditional approaches to managing environmental risk. By addressing reauthorization in the current legislative session, the door is open to work through the legislative process but also leaves the door open to reintroduction in the 2009-2011 Legislative session should there be a need to do so. The general sense of discussions with Advisors, participants and staff has been that reauthorization is the basic component of the Green Tier package and should proceed in the current legislative session.

Fine tuning addresses the experience of the program to date. The changes that are included in the options above will address questions of processing and the timing of decisions and reporting that were not anticipated at the time that the original language was addressed. In addition, the changes suggested will also bring the references in the statutes up to date with changes in standards that have occurred since the original language was drafted in 2000. Two of the fine tuning changes address the logo question by removing the uncertainty about how the logo may be used and whether there might be more than one. Finally, the changes would reflect:

- give and take in the development of application materials,
- more frequent communications about problems,
- the experience of the working relationships that have developed.

Program expansion suggests several changes that could expand the depth and scope of the program. The suggestions for charters recognize that little was know about charters at the time that the language was crafted in the initial legislation. What has emerged is a realization that charters have the potential to reach many new participants to contribute environmental results and provide a new legal framework for getting results. The

concepts suggested would expand “what” charters might do as a tool on their own, the “scope” of charters to reach larger groups in an organized way and enable charters to package incentives.

Incentives have been a fundamental part of the development of the program. While the general “proportionality” language has provided a virtually open book for incentives development, there has been a consistently stated interest in seeing incentives or suggestions of incentives listed in the law. The changes suggested would provide a basic outline for incentives in much the same way as was done for the pilot program. One key question is whether some or all of these incentives should also be extended to Tier 1 of the program given that some have felt that more was needed for the kind of investment that organizations are making on the front end of Green Tier.

Local units of government represent major potential for the program but generally lack some of the resources necessary to bring about systems implementation across the breadth of the local government. Similarly, governments tend to have projects (brownfields development, innovative land use development, economic development initiatives, etc.) that might benefit from the kind of flexibility that Green Tier envisions and the projects align well with the environmental results that Green Tier expects. The suggestion is to find a way to enable the flexibility and realize the results through a modified use of Green Tier with local units of government.

Other agencies have worked with the Department in the development of Green Tier, notwithstanding the limitation that only DNR statutory provisions are the subject of recognition, adaptation and flexibility. How far to engage other agencies will be a strategic question as the legislative package is pulled together. Several approaches from case specific recognition (e.g. just looking at the Uniform Dwelling Code) to overall recognition in other agencies have been suggested. Some direction is needed in how narrow or broad provisions should be crafted.

The Environmental Cooperation Pilot Program (ECP) has been invaluable in demonstrating what flexibility can yield in the form of significant environmental results and the kind of performers that differentiate themselves through Green Tier programs. With resources limited and the term of the original pilot program coming to an end, a proposal has been set out that would allow the companies, at their pace, to avail themselves of the Green Tier program. With limited administrative investment, the companies would be able to protect their investment in the current agreements and continue to be recognized for their environmental results.

The final item is a very first cut at an entry level program. At several of the discussions with the Advisors mention has been made of the need for a place that companies can start, short of the significant EMS commitment that goes with Tier 1. Similarly, there have been discussions about companies that have problems being prime for consideration of “systems” approaches that would keep them out of trouble. They would be prime candidates for affirming positive behaviors and positive management changes. There are several concepts that have been identified that might be elements of an entry level program. As indicated in the introduction, these are random thoughts and there may be other logical elements that could be included in the options.

DISCUSSION SYNOPSIS (from prior meetings):

There was no formal discussion at the meeting on December 6, 2006 but there was an issue brief prepared and distributed (Legislation 1.2). Advisors were encouraged to review the brief and provide comments to staff for a more specific analysis that would be done for the March 6, 2007 meeting.