

Green Tier Legislation Background

January 13, 2008

CHANGES TO LRB 3411/1:

- Remove the sunset provision contained in 299.85(11).
- On page 2, delete lines 10-13 and insert the following:
Adoption of a publicly shared environmental policy that is appropriate to the nature scale and environmental impacts of its activities, products, and services. The policy includes a commitment to compliance with environmental requirements, pollution prevention, and continual improvement in environmental performance
- On page 3, insert the following:
A process for setting environmental objectives and developing appropriate action plans to meet the objectives
- On page 3, insert the following:
Establishment of a structure for operational control and responsibility for environmental performance

While I can appreciate the language that is used in the draft, the language above is what we believe we need to accomplish an accurate comparison to the current (i.e. 2004) ISO 14001 standard. We have vetted this with auditors and have been assured the Changes requested above accurately reflect what we need to align the statute and the standard.

NEW LANGUAGE TO BE ADDED TO THE DRAFT

This set of instructions is drawn from information that was used by the Advisors during their deliberations on these draft recommendations. Further information can also be found on the Green Tier Advisors web site which has the notes from the various meetings where this package was discussed. The background narrative below tries to capture some of the points and questions that came up during those discussions.

1. Include provisions which would enable the efficient transition of Environmental Cooperation Pilot Program Companies into the Green Tier Program. The question addressed by the Advisors was whether to include the Pilot Program Participants as a part of the reauthorization. There were two choices considered. One was an integration option that rolls the companies into the Green Tier program such as a grandfathering clause that would recognize the existing cooperative agreements under Tier 2 of the Green Tier program. The second was to have the Pilot Companies go through the full process outlined in 299.83 or some modification thereof to become a Tier 1 or Tier 2 company. Another potential option, although not considered beyond initial discussions, was to simply amend 299.80 to allow the cooperative agreements to go beyond a single renewal.

Based upon discussions with the Advisors, the decision was made that the entry into the Green Tier program would not simply be done through a grandfathering clause. Each of the elements listed below were set as conditions for pilot program companies seeking to make the transition to the Green Tier Program:

- Company submits letter of intent stating desire to transition from ECPP to Tier 2.
- DNR and company redraft ECA to conform to Green Tier program requirements and benefits, ensuring continuity in requirements and incentives from ECA contract and making minor changes so as to conform to Tier II requirements and incentives

- DNR provides public notice on redrafted participation contract. After providing public notice about a redrafted participation contract, the Department may hold a public informational meeting on the redrafted participation contract.
- Company shares the results of the last audit for purposes of establishing the audit baseline.
- If commitments are unchanged from ECA, redrafted contract presumed to be “proportional.”
- 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.

In compiling the draft, we want to make sure that the provisions as they get edited leave the ECPP participants with three choices: 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. To be clear, entry into Tier 1 would be through the traditional process.

2. Include provisions that would expand the potential use of Charters by:

Enabling the extension of flexibility to other regulatory entities that are parties to the charter in order to provide incentives for Tier 1 or Tier 2 participants in the Green Tier program. Based on the discussions of the Advisors, the following elements would be expected in the legislative draft:

- The following conditions would apply to the party receiving the flexibility:
 - Signatory to the charter,
 - Remain a member in good standing of the charter,
 - Meet the basic compliance screening requirements for Tier 1
 - The flexibility provisions would be subject to public notice
 - Flexibility would be subject to consideration through public hearing and comment through the charter development process.
 - The party receiving the flexibility would have to have regulatory authority in the environmental area which is the subject of the charter and the flexibility to be granted through the charter.
- The following conditions would apply to flexibility extended through the charter:
 - The flexibility provisions in the charter would have to contribute to the intent of the charter.
 - The flexibility would be limited to that which is needed to extend the terms of a Tier 2 participation contract
 - The terms of the charter must identify how the flexibility will be monitored and results measured.
 - The flexibility extended would be subject to a proportionality test.

General Background:

The provisions would extend or create flexibility for other regulatory entities that are parties to a charter (e.g. municipalities, special districts and/or other agencies that may be working within delegated responsibilities from DNR that could be a part of the charter relationship even if the signatory to whom flexibility is extended is not a Tier 1 or Tier 2 participant). The presumption, however, is that this is for the purpose of providing incentives to Tier 1 and Tier 2 participants.

For this measure of flexibility to apply, the party receiving the flexibility would have to be a signatory to the charter, remain a member in good standing of the charter, and meet the basic compliance screening requirements for Tier 1 and the flexibility provisions would be subject to the same public notice and

flexibility subject to consideration through that process. The party receiving the flexibility would have to have regulatory authority in the environmental area which is the subject of the charter and the flexibility to be granted through the charter. Specifically, the flexibility provisions would need to be reflected in the charter and would have to contribute to the intent of the charter.

Rationale

The reason for this proposed change is to give some practicality to the flexibility incentive, create a concrete situation in which flexibility can be granted, and yield greater results through charters. Charters pull together many parties who have something to contribute to the solution of environmental problems, to more efficiently administer environmental processes and/or more effectively address environmental issues. Co-regulators may be fully prepared to help improve environmental performance but would not have a need to pursue Tier 1 or Tier 2 participation. Their interests in the charter are related to the regulatory stake that they would have in the work of the charter and in many potential cases would relate to areas where there is overlapping decision making and may relate to the timing of regulatory decisions that are not well timed for those that are regulated.

Example

One working example exists in the Clear Waters Initiative in which the Cities of Madison and Sun Prairie along with Dane County and the Department work together to address storm water issues. While it is clear that the charter can extend flexibility to Tier 1 and Tier 2 parties to the charter, the charter may be limited in the ability to have the co-regulators, other than DNR, set a different methodology for decision making because of requirements set by the Department. The new statutory authority would enable the use of charters to establish an alternate or flexible way in making decisions. Specifically, one of the co-regulators might be able to make decisions differently for the superior performers on issues that are a part of the overall regulatory scheme for storm water control.

Another more hypothetical example would be the provision of industrial waste water controls that are most frequently shared with the water treatment authorities. In this example, the Department and the Water Treatment Authority could set about to consider optional ways of dealing with superior environmental performers (Tier 1 or Tier 2 participants). Flexibility would be given by the Department to the treatment authority so that they could treat superior performers (Tier 1 and Tier 2 participants) with different requirements in recognition of their superior environmental performance and recognize the capabilities of their environmental management systems. These could include the way that reports are done, the kind of monitoring that they do or the requirements that they are expected to apply to industrial clients.

3. Allow the recognition of organized, systematic environmental management programs. The provisions would allow the recognition of organized, systematic environmental management programs to be a recognized part of Green Tier (e.g. organizing chemical processors around their "Responsible Care" program to make and report on commitments to Superior Environmental Performance) but would not recognize individual companies as

Green Tier Participants. Based on the discussions of the Advisors, the following elements would be expected as a part of the legislation:

- Programs recognized through the charter would need to:
 - Utilize the standards identified for functionally equivalent environmental management systems or follow a development progression that leads participants to functional equivalency.
 - Capture and report on the environmental results that are being achieved by participants individually or in total for the program.
 - Provide links to web based information that could be used by members and non-members of the organization involved.
 - Contain provision(s) that meet or establish a progression to the development of an ISO 14000 or functionally equivalent environmental management system.
- The Department would:
 - Formally recognize the programs and publicly report the results of the programs.
 - Include participants in gatherings of Green Tier companies and provide information from Green Tier programs.
 - Supply information to potential participants through Green Tier staff and, where appropriate, regulatory staff.
 - Provide publicity for such programs as specified within the charter.
- The Department may not extend statutory incentives to participants in the programs unless such participants enroll in Tier 1 or Tier 2 independently or through the provisions of the charter.

General Background

The provision would provide recognition for the environmental program as a part of Green Tier thereby facilitating the exchange of environmental information by the participants and providing information on the DNR site that gives environmental performance information about industry participants. The benefit for the organizations is expanded exposure for the environmental programs, and the benefit for the Department is the information obtained about that performance. Several organizations have programs in place that build the capacity of their members to, first, meet compliance requirements and, second, to go beyond compliance. In almost all instances, these programs allow for a progression in the development process but some may stop short of the development of a formal environmental management system.

Rationale

This provision would allow the use of the charters for capacity building and also would encourage the work with larger groups to build the capacity to take on environmental performance management with the ultimate objective of getting participants eventually up to the Tier 1 and Tier 2 levels.

Example

At present, the Wisconsin Asphalt Pavement Association has an environmental performance program in place that reviews and documents the performance of participants every three years in collaboration with the Department. Many of the participants may not have the immediate capacity to develop and implement an environmental management system but could, over time, add incrementally to their programs to create the environmental management system and become participants in Tier 1. While that capacity is developing, the Department remains engaged with the association and participants in the development process.

4. Authorizing the creation of charters that systematically manage environmental performance on a specific issue and creation of flexibility/incentives for voluntary efforts to address the identified issue. Discussions with the Advisors anticipated the following elements in the legislation:
- The following conditions would apply to the party receiving the flexibility:
 - Signatory to the charter,
 - Remain a member in good standing of the charter,
 - Meet the basic compliance screening requirements for Tier 1
 - Remain in compliance with all state environmental requirements in order to continue receiving the flexibility.
 - Flexibility may be temporarily suspended until a participant comes back into compliance.
 - The flexibility provisions would be subject to public notice
 - Flexibility would be subject to consideration through public hearing and comment through the charter development process.
 - The following conditions would apply to flexibility extended through the charter:
 - The provisions in the charter must clearly identify the scope of both the environmental problem(s) being addressed and the terms and conditions under which the flexibility would be extended.
 - The terms of the charter must identify how the flexibility will be monitored
 - The terms of the charter must state the environmental outcomes to be achieved and contain the mechanism to measure and publicly report those outcomes.
 - The flexibility extended must be related to the environmental issue or problem that is being addressed by the charter.
 - The systematic environmental management done through the charter:
 - Would have to include planning, action, verification and correction that introduce the basic steps towards an environmental management system.
 - Contains specific commitments to accomplish the environmental outcomes sought by the charter through that system.
 - Have operational controls sufficient to communicate responsibilities, gather and report valid information and correct when progress towards goals is lagging.
 - Recognizes and provides a path towards an environmental management system functionally equivalent to ISO 14001.

General Background

The provisions would create a customized working relationship to address a given issue for which the department identifies the environmental management to be done by the voluntary participants, the recognition and flexibility that would be provided to participants and the reporting that would be done as a part of the program that would be directly related to the performance that was a commitment of the program.

In order to participate in the charter, parties would have to be a signatory to the charter, agreeing to the terms and conditions contained in the Charter. Once signatories, the expectation is that they would remain a member in good standing of the charter, meet the basic compliance screening requirements for Tier 1 and the provisions would be subject to the same public notice and flexibility subject to consideration through that process.

Rationale

Several elements coming from the Governor's Global Warming Task force are likely to rely upon voluntary approaches and Green Tier Charters could provide a legal framework within which a sustainable path is established. This would be ideal for creating specific incentives to address a specific problem.

Example

The top 25 or top 50 carbon emitters in the state could join into one program which does not require an EMS but contains other requirements and incentives tailored to those requirements and reducing their carbon emissions. There would be clear limits in place for the incentives and flexibility granted. In this instance, provisions may need to be considered if participants perform poorly regarding other media than the one addressed by the group. This could be addressed by a provision that currently applies in the case of Tier 1 and Tier 2 in which the Secretary has the discretion not to approve a participant or proceed with an agreement if it is not in the best overall interest of the program.

5. Challenge the department to extend the benefits of Green Tier by working specifically with other agencies to apply to state purchasing, the award of grants and administrative decisions **by developing guidance**. Discussions with the Advisors anticipate the following to be included in the legislation:
 - Amend section 299.83 (1m) to state that the Department shall attempt to do all of the following:
 - Recognize Green Tier participants through the state procurement process.
 - Recognize Green Tier participants in the award of state grants through the Departments of Natural Resources, Commerce, and Agriculture.
 - Recognize Green Tier participants through administrative decisions made by state bodies provided that the development of such recognition provides public notice and within 30 days after the public notice, interested persons may request the department to grant them authorization to participate in the negotiations. A person who makes a request under this provision shall describe their interests in the issues described in the public notice. The department shall determine whether a person who makes a request under this paragraph may participate in the negotiations based on whether the person has demonstrated sufficient interest in the issues in the public notice to warrant that participation.
 - Provisions developed under this section shall apply to both participants under 299.80 and 299.83 of the statutes.

General Background

When initially conceived, this was going to extend the ability to create the statutory ability to create incentives and grant flexibility through statutory authorities in other agencies. In order to capture the discussion from the Advisors, this was scaled back to be a recommendation that would add an expectation to what the department shall attempt to do through the existing incentive capabilities of the program by tapping into the capabilities of other agencies to offer incentives through the program by adding recognition for grants, purchasing and special consideration where those agencies currently have administrative discretion in each of three areas for multiple agencies:

- Green Tier companies recognized as a part of state procurement.

- Green Tier companies recognized as a part of state grant programs through Commerce, and Agriculture
- Green Tier companies recognized through administrative decisions made by state bodies – Transportation, PSC, Insurance, etc.

The actual change to the statutes would be to amend 299.83 (1m) – Administration of the program to indicate that the department shall attempt to create incentives that draw upon recognition provided by other state agencies through procurement, grants and administrative decision making that recognizes and in appropriate circumstances gives preference to Tier 1 and Tier 2 participants.

Rationale

While there might be value in amending the statutes to give the ability to use Green Tier flexibility in other agencies, the discussion has generally indicated that there has not been enough work done to develop the incentives with the use of existing administrative flexibilities. By setting expectation in the “Administration of the program” section of the law, there could be sufficient legislative direction for the department to work with other agencies in the establishment of incentives and working through those agencies to begin developing the working relationships to consider administrative decision making that might set the foundation for consideration of statutory flexibility in subsequent changes to the law. Currently the law presumes the development and delivery of incentives through the Department and the change would make clear that this can and should be a multi-agency endeavor.

Example

There are many different kinds of state procurement preferences that are given. By executive order or perhaps by working directly with the Department of Administration purchasing preference for Green Tier may be obtained. A second example would be in the development and administration of a grant program for areas such as business development for which there are options to recognize that a company is a Green Tier participant during the evaluation and selection process. A final example that would address the administrative decision making process would be decisions in which we work with Department of Transportation (DOT) on codes for culvert placements. We would have the flexibility to work with participant and DOT (for example) to make the decisions in an expedited fashion given the superior environmental performance of the participant.

6. Clarify that the provisions that extend limited civil immunity to Tier 1 and Tier 2 participants apply to those violations that are discovered in the conduct of routine environmental management systems operations. Discussions with the Advisors anticipated that the following would be included in the legislation:
 - Amending the language related to self disclosure of violations:
(6m) COMPLIANCE REPORTS AND DEFERRED CIVIL ENFORCEMENT. (a) *Compliance reports.* If a violation is discovered through the environmental management system as defined under sub. (1) (dg), or through audits specified under sub. (3) (d) 4. or (5) (c) 2. or 3, the participant shall include all of the following in the report of the violation:

General Background

As currently worded the statute may limit the discovery, disclosure and self reporting of violations only to those discovered through the annual audits done to satisfy the requirements of 299.83. The current language does fail to recognize the continual auditing

and checking that occurs in a functioning environmental management system. The intent, when the original language was drafted, was to have compliance continually monitored and immediately corrected. The change would remove language that might limit this incentive only to problems discovered in audits prescribed to maintain eligibility and not address opportunities for immediate, continual improvement.

The provision would extend limited civil immunity to violations disclosed and corrected during the course of participation in the program and not just annually as a part of the report to the Department.

Rationale – the expectation of continual improvement and the presence of institutional controls is the continual review and immediate correction of problems discovered. There is little distinction that can be drawn between that which is disclosed in an annual audit and that which is disclosed by audits that occur on a regular basis and then annually disclosed. Managing this workload on a continual basis not only makes sense for the administrative overhead but also for the potential ongoing attention to managing environmental risks. Example – most audit protocols call for surveillance and follow up visits making the distinction between annual and other audits very blurry. Similarly, most EM S's in order to be judged effective have elements that require regular monitoring that can lead to early detection of problems that might languish if left for discovery as a part of the annual audit specified in the law.

HOW WILL THESE BE USED TO ADVANCE THE PROGRAM?

Reauthorization, fine tuning and expansion are being recommended to accomplish three objectives:

- Create higher levels of environmental performance and increased numbers of participants delivering superior environmental performance and realizing increased business value through recognition and flexibility.
- Create certainty about the future of the program and the requirements of the program while updating provisions of the law to reflect changes in standards and practice since the law's original passage.
- Improve the administrative efficiency of the program so that more staff resources can be directed to working with prospects for and participants in the program.

The most important and significant part of our recommendations is the reauthorization of the program. The initial development done through the program indicates that real results can be gained through the Green Tier approach. The Advisors had no difficulty reaching consensus on this point. By removing the sunset, as recommended by the advisors, a barrier to participation is also removed since prospective participants will know that the provisions will remain law unless a specific action is taken by the legislature. Prospective participants will know that their investment in the Environmental Management Systems and their commitments to superior along with the resulting incentives will not only have the force of law but will also have staying power.

Over the course of the last 3 years, much has been learned about the development of performance based programs generally and Green Tier specifically. Drawing upon the available information from other programs as well as the direct "day to day" experience here in Wisconsin, there are several items that have been recommended. We would anticipate that the fine tuning that is proposed for the program will make the expectations of the program clearer as the standards are updated and more efficient and fair as the

administrative provisions are adjusted. We also expect to not only improve the information about the program but also the efficiency of the program with the suggested revisions to the reporting periods for the three programs in question (the pilot program, green tier and the compliance audit program). It is particularly important to note that the date selected (December 15) and the biennial frequency of the report will enable the mining of data that the Department currently receives and the presentation of the most current validated data so that comparisons can be made and reporting burdens minimized.

Program expansion also draws from the lessons learned. The first of the recommendations on program expansion recognizes the pioneering work that has been done by the participants in the Environmental Cooperation Pilot Program with all of the original participants having exercised their option for renewal of the agreements. The addition of the provisions would enable pilot program participants to make the transition to the Green Tier program when it made the best business sense for them to do so. Correspondingly, the transition, over time, to the Green Tier program is a step to provide focus to the delivery and management of performance based programs. Provisions have been added to expand the potential use of and value derived from charters. The revisions hold the potential for drawing in more participants, delivering greater value for participants and using charters to address broad environmental problems. The recommendations will also create higher levels of environmental performance, increased participation that results in producing superior environmental performance as well as reinforce the continuous evaluation that takes place in environmental management systems.

HOW WERE THEY DEVELOPED?

Just prior to the Advisors meeting on December 7, 2006, the Advisors started reviewing materials about potential changes to the Green Tier Legislation. In the course of developing the recommendations, there were consultations with participants, prospective participants, DNR's senior managers (Green Tier Coordinators), environmental interest groups and Cooperative Environmental Assistance staff. In addition, there was also investigatory work done with other states, USEPA and Canada to ascertain where improvements could be made and ideas taken from the experience of those other parties and/or the research that has been done on performance based programs. Concepts were debated and the resulting recommendations developed at the March, August, September and December meetings in 2007.

At the Advisors meeting on December 3, 2007 the Advisors worked through the expansions that were being contemplated for charters and local government. Subsequent to that discussion, further work was done with the Advisors, Legislative Staff and Department staff to see what might be possible for consideration during the current legislative session. There were several ideas, including elements of both the charters and local government provisions that were not going to be ready for consideration due to the amount of time remaining in the legislative session and the work yet to be done on the recommendations. Based on the follow-up work after the December 3 meeting, the following recommendations were compiled and considered at a special meeting by conference call on January 10, 2008.