

Green Tier Advisors
December 5, 2008
Legislation Issue Paper 6.0

ISSUE SUMMARY: The issue is the status, direction and strategy for Green Tier Legislation for the upcoming session of the Legislature. The legislation is based on the recommendations that have previously been made by the Advisors.

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BACKGROUND:

Part 1 – Update and General Concurrence with the Process

The final version of the drafting instructions for the legislature is in the Legislation Recommendation and the Legislation Background documents. Both will be included as attachments to the e-mail that goes out to the Advisors. Both have, however, been previously distributed to the Advisors.

On December 1, 2008, Senator Mark Miller will convene a small group to review the language that has been drafted for reauthorization and for the technical changes portion of the Advisor’s recommendations. Invited participants in that meeting are Linda Bochert, Mike Simpson and Paul Kent from the Advisors. Mark McDermid, Jeffrey Voltz, Pat Henderson, Paul Heinen and Tim Andryk will be participating from the Department. Other invited participants include Brian Borofka from We Energies, Denny Caneff and Lori Grant from Rivers Alliance, Steve Hiniker from 1000 Friends and Dan Johnson from Senator Kedzie’s office. Beth Bier from Senator Miller’s Office has been coordinating the drafting and arranged the meeting. A copy of that language to be discussed is included below.



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The meeting is an opportunity to discuss the language with those drafting (Rebecca Tradewell) and reviewing (John Stoltzenberg) from the Legislative Reference Bureau and Legislative Council respectively. There may be some conversation on the expansion part of the drafting (draft language has not yet been received) but only if time allows on the other language. The objective of the meeting is to see if consensus can be reach on the reauthorization and technical changes language that has been drafted. If consensus can be reached, there may also be some discussion on the strategy that will be employed for the introduction and consideration of the legislation.

Part 2 – “Look Behind” for the Compliance Audit

The discussion at the meeting with Senators Miller and Kedzie explored the potential problems associated with a complete repeal of the look behind language for entities that complete and submit compliance audit findings of suspected violations. During the course of the meeting, we agreed to go back and have a further discussion with the Advisors and come back to the Committee after that discussion. Linda Bochert very graciously agreed to draft some options based on the discussions. The options are listed below:

Option 1: Repeal s. 299.85(2)(f):

Option 2: Amend s. 299.85(2)(f) to read:

(f) The department of justice has not, within 2 years, filed a suit to enforce an environmental requirement, and the department has not, within 2 years, issued a citation to enforce an environmental requirement, because of a violation involving the facility.

Option 3: Renumber s. 299.85(2)(f) as (2)(br) and amend to read:

(br) Upon receipt of the notice under par. (b), the department may consider whether the department of justice has, within 2 years, filed a suit to enforce an environmental requirement because of a violation involving the facility. If the department determines that the violation involved in such a suit or citation is of such significance that the regulated entity's participation in the Environmental Improvement Program would damage the program integrity, the department shall notify the regulated entity that it is not eligible for participation.

Part 3 – Other State Agency Participation

During the meeting with Senators Miller and Kedzie, a question was raised as to what the department (DNR) could do in circumstances where resolution on an environmental issue or approach requires participation from state agencies other than DNR. In the example provided, resolution on the environmental issue (i.e. Stormwater management) required participation from the state agency responsible for managing Stormwater (i.e. Commerce) but the state agency was either unwilling or uninterested in participating.

Programmatic experience on this issue cuts two ways. The department has seen both positive, active engagement and an overall lack of engagement. Two examples are provided to illustrate and contrast experiences, to date:

DATCP provided substantive and frequent engagement in the development and execution of the Dairy Business Association Charter as well as on-going engagement post-Charter signing. By contrast, Commerce has chosen not to participate with Clear Waters Board of Directors on the specific issue of Stormwater management which is a fundamental part of the charter. During the meeting last week the lack of participation was specifically raised in the discussion to see if some language could be added to the law to get them to engage.

The options before the Advisors are three-fold:

Recommend the Department do nothing with legislation/do not include in the statute;

Recommend the Department manage the issue administratively; or

Recommend the Department manage this issue by modifying Wis. Stats. 299.83

If the Advisors recommend the department manage the issue by modifying Wis. Stats 299.83, there are several issues to consider. Do the Advisors recommend the department manage the issue:

Broadly in the context of 299.83,

Specifically in the context of participation contracts,
Specifically in the context of Charters, or
Generally in the context of participation contracts and Charters.

Part 4 – 12 month limitation on Plans of Correction

In both 299.83 and 299.85 there is an explicit limitation to 12 months for any plans of correction that can be accepted by the Department for self disclosed violations. This was discussed with the Senators and we agreed to have a further discussion with the Advisors. There appeared to be some reluctance to removing the time limit and some sensitivity to shifting to 24 months or somehow allowing the time to extend beyond one year if EPA was also inclined to do so under their audit policy.

Below is a brief analysis of the issue that was prepared by Linda Bochert.

My suggestion is to amend s. 299.85(6)(b) to delete the following phrase: “(b) The department may not approve or issue a compliance schedule that extends longer than 12 months beyond the date of approval of the compliance schedule.” This section deals with the length of time a facility that has conducted an audit may be given to implement appropriate corrective actions for issues identified in the audit. Often corrective actions can be implemented relatively quickly; however, if significant capital expenditures are required, it may take some time. The remainder of this section lists the factors the department should consider in approving a compliance schedule, and those factors provide guidance to the department’s exercise of its discretion. Ss. 299.85(3m) and (3)(e) of the current law already call for the shortest reasonable period of time for corrective action and require public notice and the opportunity for public comment for a compliance schedule that goes beyond 90 days, so there are built-in constraints on the allowable period of time. The limitation of a 12 month compliance schedule, with no mechanism to consider an extension of that period, seems unnecessary and artificial and I suggest we consider removing it.

Please note that the same language is also used in 299.83.

The next draft of the legislation is expected before the holidays. The next meeting of the committee will be just after the holidays. Senator Miller’s goal is to have legislation ready for introduction by the end of February.