



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG—08—14

Mr. Matt Moroney
Deputy Secretary
Department of Natural Resources
101 South Webster Street
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Dear Mr. Moroney:

¶ 1. A “responsible unit” (RU) is the governmental entity that develops and implements recycling programs established under Wis. Stat. § 287.09. You have asked the following questions related to responsible units: (1) can a municipality member of a county RU leave the RU and establish itself as an independent RU more than ninety days after the date the county passed its resolution forming the county RU? (2) can a county RU dissolve, returning RU status to individual municipalities? and (3) if procedures for leaving an RU or dissolution are not defined by statute, should the Department of Natural Resources (“DNR”) or a local unit of government implement procedures for these changes through rulemaking or ordinance?

¶ 2. With regard to questions one and two, I conclude that the answer is no. Because the answers to questions one and two are no, I conclude with respect to question three that neither DNR nor local governments may establish procedures for RU withdrawal or dissolution.

¶ 3. Analysis begins with the plain language of the statute. *Rusk Cnty. Dep’t of Health & Human Servs. v. Thorson*, 2005 WI App 37, ¶ 4, 278 Wis. 2d 638, 693 N.W.2d 318. Section 287.09 first establishes, at subsection (1)(a), that each municipality is an RU except as otherwise provided in the statute:

(1) Designation of responsible units. (a) Except as provided in pars. (b) to (d), each municipality is a responsible unit.

¶ 4. Section 287.09(1)(b) then explains how a county may become an RU that includes municipalities within the county:

(b) A county board of supervisors may adopt a resolution designating the county a responsible unit. Except as provided in pars. (c) and (d), a county that has adopted such a resolution is the responsible unit for the entire county.

Section 287.09(1)(b) contains no provision for the dissolution of such RU after it has been established.

¶ 5. Section 287.09(1)(c) provides an opt-out procedure for municipalities that do not wish to become part of a county RU. A municipality may opt out of a county RU by adopting a resolution retaining its independent RU status within 90 days after the adoption of the county resolution creating the county RU:

(c) Within 90 days after the county board of supervisors adopts a resolution under par. (b), the governing body of a municipality that is located in part or in whole in the county may adopt a resolution retaining the municipality's status as a responsible unit.

Wis. Stat. § 287.09(1)(c). This is the sole authority governing opting out of an RU. However, Wis. Stat. § 287.09(1)(d) addresses the practical effect of the absence of alternative opt-out procedures. An RU that later wishes to not administer the recycling program for its geographical territory may contract with another unit of government, federally recognized Indian tribe or band, or a solid waste management system created under Wis. Stat. § 59.70(2) to perform recycling functions:

(d) The governing body of a responsible unit designated under par. (a), (b) or (c) may by contract under s. 66.0301 designate another unit of government, including a federally recognized Indian tribe or band in this state, or a solid waste management system created under s. 59.70(2) to be the responsible unit in lieu of the responsible unit designated under par. (a), (b) or (c). The contract shall cover all functions required under sub. (2), including provisions for financing and enforcing the recycling or other solid waste management program.

Wis. Stat. § 287.09(1)(d).

¶ 6. So the plain language of the statute includes specific provisions for (1) initially designating municipalities as RUs, (2) allowing a county to become an RU, (3) permitting municipalities to opt out of a county RU, and (4) sharing and shifting of RU duties by contract. In contrast to these specific procedures, there is no provision

for a municipality to opt out of a county RU, and no provision through which a county may dissolve a county RU.

¶ 7. Where a statutory scheme specifically enumerates specific powers and procedures, the absence of provision for additional powers is evidence of legislative intent not to confer those powers. *See State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974); *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979) (“The rule is that if a statute provides one thing, a negative of all others is implied.”). Here, under that canon, the specific procedures for the creation of RUs and the time limit to opt out of an RU indicate legislative intent not to permit opt-out at a later date. Interpreting the statute to include alternative procedures would render the 90-day time limit meaningless.

¶ 8. This conclusion is also supported by practical implications of RU designation. Complying with chapter 287 of the Wisconsin Statutes may require construction of expensive infrastructure. Allowing a municipality to withdraw after the 90-day statutory limit could seriously interfere with the county’s budgeting and planning. Likewise, allowing dissolution of a county RU could leave municipalities within that RU unexpectedly without a facility to handle their waste management needs.

¶ 9. This reading is consistent with interpretive commentary by DNR near the time the statute was enacted. While such interpretive commentary is not in itself a dispositive as to a statute’s meaning, the Wisconsin Supreme Court has favorably considered interpretive commentary from DNR on matters within its sphere of administrative authority when consistent with a statute’s plain meaning and statutory history. *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 17, 316 Wis. 2d 47, 762 N.W.2d 652 (giving weight to DNR’s interpretation of a forest fire statute). DNR is vested with authority relating to implementation of the recycling requirements of chapter 287 of the Wisconsin Statutes. *See, e.g.*, Wis. Stat. § 287.03 (including rulemaking, research, technical assistance, and educational programs).

¶ 10. In 1990, DNR published guidance on forming an RU, specifically addressing whether a county may dissolve one:

Is responsible unit status permanent?

No. A county or municipality may at any time enter into intergovernmental agreements to share responsible unit duties and revenues. Note however, that the recycling law does not provide for reversal of a resolution whereby the county declares itself to be a responsible unit. Nor are there any provisions for reversal of a

municipal resolution passed within 90 days of a county resolution. Note also that a municipality need not pass a resolution in order to be a responsible unit unless the county does. Nonetheless, new arrangements are always a possibility for realigning responsible unit boundaries.

. . . .

What can we do if, today, we want to be a responsible unit but we are unsure about five or ten years down the road?

Consider the law's provisions for intergovernmental contracts. Such contracts can include expiration dates, renewal procedures and enough detail to assure that all parties deliver what was agreed upon. If, in the future, such a contract is not renewed, the responsible unit status falls back to the municipalities or to a county who would then be free to either continue on their own or form new contractual arrangements.

(DNR, PUBL-IE 044-90, Forming a responsible unit under Wisconsin Act 355: The recycling law 1-2 (June, 1990)).

¶ 11. This commentary indicates that county RUs may not be dissolved, and municipalities may not withdraw from county RUs, more than 90 days after establishment. DNR advised that counties and municipalities should instead make rearrangements through intergovernmental contracts under Wis. Stat. § 287.09(1)(d).

¶ 12. The meaning of a statute's plain language is also confirmed by its legislative history. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 ("legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation"). The legislative history of Wis. Stat. § 287.09 indicates that omission of the procedures addressed in your question was not inadvertent.

¶ 13. Current Wis. Stat. § 287.09 is the successor to Wis. Stat. § 159.09. Section 159.09 was enacted by 1989 Wisconsin Act 335. Act 335, in turn, was the result of 1989 Senate Bill 300, which was introduced by the Wisconsin Legislative Council. Senate Bill 300 included the basic structure of RU formation that exists today. Subsequent amendments have updated section numbers and recognized that a federally recognized Indian tribe or band may contract with RUs, but the RU formation process has remained unchanged.

¶ 14. Documents of the Wisconsin Legislative Council related to Senate Bill 300 give insight into the RU designation process. Those documents include "Drafting

Instructions for the Central Structure of a Comprehensive Statewide Recycling Program.” The drafting instructions indicate that drafters of the statute were to consider and identify what units of government were to be responsible for implementing the new rules,

IV. COUNTY DUTIES

- A. By July 1, 1990, identify which units of government, either the county or the municipalities within the county, will be responsible for implementing the various components of comprehensive local recycling programs which meet the state goals, i.e., collection, separation, storage and marketing of recovered materials and education and promotion.

Wis. Legislative Council, Resource Recovery Memo No. 6 (Dec. 9, 1988).

¶ 15. The process of assigning and managing RU responsibility was contemplated by the drafters of the statute; the drafters treated decisions about forming and joining an RU as permanent.

¶ 16. A later memo, entitled “Recommendations of the Municipal Responsibilities Working Group,” discussed alternative mechanisms to leaving or dissolving an RU:

4. a. Establish two mechanisms for shifting the responsibility to develop and implement a recycling program from municipalities to a county: (i) authorize a county to develop and implement a recycling program in lieu of or in conjunction with municipal programs unless the governing bodies of the municipalities representing at least 50% of the population of the county reject the county program; and (ii) direct a county to develop and implement a recycling program in lieu of or in conjunction with municipal programs if the governing bodies of the municipalities representing at least 50% of the population of the county petition the county to do so.

b. Allow a municipality in a county which develops and implements a program under par. a, except a municipality whose governing body voted under par. a (ii), to petition the county to develop and implement the program, to develop and implement a program of its own. Establish that such a municipality is not required to participate in the county program.

Wis. Legislative Council, Resource Recovery Memo No. 12 (April. 5, 1989). These recommendations discussed two specific mechanisms through which RUs may shift responsibility. The discussion included no mechanism for dissolution of a county RU or withdrawal of a municipality after 90 days. The most sensible reading of the legislative history supports the conclusion that there is no procedure for a county RU to dissolve, or for a municipality to leave a county RU.

¶ 17. Your third question asks whether DNR or counties should define procedures for a municipality to leave an RU or a county RU to dissolve if there is no statutory procedure. I conclude that neither DNR nor local governments may create procedures for a local municipality member of a county RU to leave the county RU more than 90 days after the date that the county RU is formed, or for a county RU to dissolve.

¶ 18. Administrative agencies may promulgate rules only to the extent enabled by statute. “[A]gencies have only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.” *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep’t of Natural Res.*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612 (internal citations and quotations omitted). Wisconsin Stat. § 287.03 enables DNR to promulgate rules necessary to implement the provision of chapter 287, but not to go beyond the scope of the statutes, or implement processes inconsistent with that chapter. *See Wis. Stat. § 227.11(2)(a)*. Because I conclude that chapter 287 includes no process for a municipality to leave a county RU more than 90 days after establishment of the county RU or for the dissolution of a county RU, I also conclude that DNR may not promulgate rules to create such a process.

¶ 19. Similarly, local governments have only the rulemaking authority granted by legislature. *Ecker Bros. v. Calumet Cnty.*, 2009 WI App 112, ¶ 18, 321 Wis. 2d 51, 772 N.W.2d 240; *Conway v. Bd. of Police & Fire Comm’rs of Madison*, 2003 WI 53, ¶¶ 28-29, 262 Wis. 2d 1, 662 N.W.2d 335 (“In order for the [Board’s rule] to be a valid exercise of administrative power, it is necessary that such action: (1) be based upon a proper delegation of power by the legislature, and (2) not constitute an administrative action in excess of that statutorily conferred authority.”). Because Wis. Stat. ch. 287 creates no authority for local governments to dissolve an RU or to leave a county RU 90 days after the county’s resolution forming the RU, the creation of such procedures by a local government would be outside the authority delegated to it.

¶ 20. Wisconsin Stat. § 287.09(1)(d) provides some flexibility in how an RU meets its waste management obligations. An RU may contract with other

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permissible entities for waste management obligations pursuant to Wis. Stat. § 287.09(1)(d). For example, a municipality that has opted to retain RU status after its county elected to become an RU may contract with the county. Likewise, a county RU may contract with other counties, municipalities, a federally recognized Indian tribe or band in this state, or a solid waste management system created under Wis. Stat. § 59.70(2).

¶ 21. I conclude that Wis. Stat. ch. 287 provides no authority for a local municipal member of a county RU to leave the RU more than 90 days after the date that the RU was formed, or for a county RU to dissolve. Neither DNR nor county or local governments may establish such procedures through rulemaking or ordinance. An RU may, however, contract with other permissible entities for the handling of its waste management obligations pursuant to Wis. Stat. § 287.09(1)(d).

Sincerely,

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