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Progress Report on the
Cooperative Environmental
Agreement Legislation

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Prepared by the

Wisconsin Department of Natural Resources

Progress Report on the Cooperative Environmental Agreement Program

I. The Cooperative Environmental Agreement Program

II. Current Status

- A. Outreach
- B. Applications
- C. Working with the U.S. Environmental Protection Agency
- D. Challenges

III. Future Steps

IV. Summary of Cooperative Environmental Agreement Legislation

Appendices

- A. Legislative Council's Information Memorandum 98-32, August 10, 1998
- B. Outreach Materials
- C. Poll of Flexibility
- D. Summary of ECOS/EPA Regulatory Innovation Agreement

I. THE COOPERATIVE ENVIRONMENTAL AGREEMENT PROGRAM

Governor Thompson introduced the Environmental Cooperation Pilot Program as part of the 1997-1999 Biennial Budget. It is designed to evaluate innovative environmental regulatory methods.

Under this program DNR can enter into up to ten Cooperative Environmental Agreements in the next five years with persons who own or operate facilities required by law to be covered by licenses or permits. An environmental management system forms the basis for whole-facility regulation.

The intent of agreements is to establish superior environmental performance and reduce administrative burdens by superseding administrative requirements of permits and approvals specified in the agreement. Agreements are designed to promote the reduction of overall levels of pollution through this more flexible approach.

Agreements will include: a commitment to superior environmental performance; an environmental management system; specific waste reduction goals; any approvals replaced by the agreement; any operational flexibilities and variances granted; a commitment to release periodic performance evaluations; and a plan to involve the public. Both regulated and non-regulated environmental impacts are eligible for inclusion in the Agreement.

DNR and the participating company are signatories to the agreement however, other parties can be involved in the negotiating process. The participating company is required to include public participation in this process and DNR will provide an opportunity for public comment for at least 30 days on any proposed issuance, amendment, or revocation of a Cooperative Environmental Agreement. The law also allows for public informational meetings if desired.

The following table illustrates common issues raised by industry regarding the current regulatory system and how the Cooperative Agreement program relates to those issues.

Table I: Regulatory Issues and Environmental Management Opportunities

Common Theme/Issue	Relation to Cooperative Agreement Program, ISO 14001 Pilot & WDNR
<p>Permit process is complex, information-intensive, and time-consuming.</p>	<p>Breakthrough legislation in the 1997-1999 Biennial Budget allows DNR the opportunity for ten cooperative agreements over five years with persons who own or operate facilities that are covered by licenses or permits under current law. Flexible approaches envisioned under this programs can streamline permit processing.</p>
<p>Permit rules focus on a single media and do not allow cross-media or pollution prevention trade off.</p>	<p>An ISO 14001 EMS shows the total facility's environmental impacts and goals for continual improvement. An EMS sets forth how it will assess the company's environmental performance.</p>
<p>Environmental reporting is fragmented, redundant, complex, and paper-intensive; it poorly addresses public concerns and needs.</p>	<p>ISO 14001 is a whole-facility approach for environmental management which integrates all media into one plan. WDNR is committed to helping facilities create an effective public outreach program through the Cooperative Agreement for interested persons.</p>
<p>Prescriptive compliance procedures, and the associated penalties, discourage companies from trying innovative approaches to protecting the environment.</p>	<p>ISO 14000 is a performance standard rather than a compliance standard. It provides a framework for establishing an environmental policy, setting performance objectives for the EMS, and continually improving the system. The Cooperative Agreement will offer deferred civil enforcement for self-discovered violations that can be quickly remedied.</p>
<p>Small business lack access to compliance and pollution prevention assistance and cannot afford the time and expense of implementing an ISO 14001 EMS.</p>	<p>WDNR will provide assistance at the request of the facility. Industry sector specialists from the Bureau of Cooperative Environmental Assistance are involved and ready to help.</p>
<p>The correlation between program activities relating to a specific organization and the associated fees or fines is sometimes perceived as onerous and unclear.</p>	<p>The Cooperative Environmental Agreement program is designed to reduce administrative burdens, reduce overall levels of pollution through a flexible approach, and provide one-stop permitting in measurable and verifiable terms.</p>

II. Current Status

Outreach

The first year of the Cooperative Environmental Agreement Program has been primarily spent in setting up the program, educating the public, DNR staff and companies about the program, and in soliciting companies' participation. A fact sheet and application outline were developed and mailed to 400 major air sources in Wisconsin and to the members of the Small Business Advisory Council, the Small Business Environmental Council, and the ISO 14000 Working Group. A cover letter co-signed by Governor Thompson and Secretary Meyer introduced the program and invited companies to participate in the Cooperative Agreement Program (See appendix B.)

From the initial mailing we received 49 requests for additional information on the Cooperative Agreement Program. These interested companies were sent the 3-page application form.

Face-to face meetings explaining the program have been held at 11 companies along with numerous public speeches to provide information and answer specific questions on this program.

An informal poll was taken of DNR staff and business leaders asking what type of regulatory flexibility is either most commonly asked for or would be valuable to businesses in the State. The list (see appendix C) breaks down into 5 main categories: Testing, Reporting and Recordkeeping; Permitting; Standards and Regulations; Compliance, Inspection and Enforcement; and Resources.

Applications

Arbitrary application deadlines of June 1 and December 1 of each year were established. The two Wisconsin facilities submitted applications for this program so far are:

Kohler -- Generator Facility located in the Town of Mosel
Navistar International in Waukesha

Both companies have completed a baseline environmental evaluation of their facilities using an EMS protocol developed by the University of North Carolina.

The companies also submitted general flexibility requests which include:

1. Reduced sampling frequency for wastewater discharges.
2. Removal of requirements to monitor for pollutants not in the system based upon previous analyses.
3. One-stop permitting with one individual contact from the DNR.
4. Simplification of regulations and standards.
5. Reduced inspections as a result of implementation of an ISO 14001 Environmental Management System.
6. Public Sector endorsement of the Project, good public relations from the DNR, and credit for previous pollution prevention activities.
7. That regulatory flexibility be used where applicable to negotiate future agreements.
8. Single permit to cover a facility with a single, simplified reporting form.
9. A facility-wide permit cap.
10. Recognition of the Cooperative Agreement as enforceable as a Title V air permit.
11. Administrative approval of reuse of waste products.

WDNR is beginning the negotiation process with these two facilities.

EPA

EPA recognizes the need to support innovative regulatory programs being developed in the States. Accordingly, they negotiated an agreement to foster regulatory innovation with the Environmental Council of States (ECOS), which was signed in April 1998. This agreement solidifies a partnership where the states are a natural laboratory for testing new reinvention ideas and where EPA promotes clearer, cheaper, smarter environmental regulatory innovation at all levels of their organization (see appendix D).

The Cooperative Environmental Agreement program is one innovation that will be tested under the ECOS/EPA Regulatory Innovation Agreement. The agreement sets principles and expectations to guide both parties in the testing and measurement of regulatory innovations. This forms the basis for a partnership which differs from the current Federal oversight approach.

The statutory authority for the Cooperative Environmental Agreement Program only requires that EPA be consulted early in this process. US EPA is not a signatory to the Cooperative Environmental Agreements. However, a basic tenant of this program is to have the Cooperative Environmental Agreements viewed by the regulatory community and the public as enforceable documents. Therefore, it is important for US EPA to participate in the Cooperative Agreement process to make this happen.

Two meetings with US EPA Region were held to discuss specifics on the relationship between Wisconsin DNR and EPA in the Cooperative Environmental Agreement Program. We are currently working toward a Memorandum of Agreement on this program that would give WDNR the ability to undertake this pilot program without undue Federal oversight. A process is envisioned where EPA would be kept informed about the Agreement negotiations but would not be directly involved except at specified check points (such as the state granting any variances from current regulations).

Challenges

The biggest challenge is interesting small businesses in the Cooperative Environmental Agreement Program. Small businesses have told us they won't consider participating in this pilot for a variety of reasons. These include: resource shortage, concern with engaging stakeholders, and not needing regulatory flexibility due to their limited regulatory exposure.

WDNR also faces a challenge in developing educational tools. Companies have approached WDNR on getting more information on what is expected of an interested person's group. Tools are needed so that the public both understands and knows how to impact the process.

III. Future Steps

The following objectives have been set for the next phase of this program:

1. By January 1999, have the first Cooperative Environmental Agreement negotiated and signed.
2. By December 1999, have two additional Cooperative Environmental Agreements negotiated and signed.
3. Pull an external committee together with representatives of government, environmental and business groups together to look at implementation issues for this program.
4. Develop a survey mechanism to determine interested person confidence in this process.
5. Track companies' environmental performance by using the UNC ISO 14000 data protocols.
6. Work with trade associations to help get small businesses involved in the program.
7. Develop a memorandum of understanding with US EPA on implementation of the Cooperative Environmental Agreement Pilot Program.

IV. Summary of Cooperative Environmental Agreement Legislation

Ten cooperative agreements will evaluate innovative environmental regulatory methods that meet the following goals: (See also Appendix A.)

- Provide the same level of protection of public health as current regulations.
- Encourage systematic assessment of impacts to environment (ISO 14001).
- Encourage efficiency and cost-effective, verifiable strategies.
- Encourage superior environmental performance.
- Recognize and reward leading companies.
- Encourage the transfer of information.
- Consolidate permitting requirements.
- Grant regulatory flexibility.
- Reduce government transaction costs.
- Encourage public participation.
- Improve public information and access to performance information.
- Encourage facilities to work with communities.
- Increase trust among affected parties.
- Assess administrative burden and costs associated with operating under the agreement.
- Specify the term of the agreement for 5 years with a possible extension of an additional 5 years.

Content of Agreement

- Identify covered facility(s).
- Specify permits and approvals covered.
- Commit to an environmental management system.
- Commit to superior environmental performance.
- Specify goals in measurable terms.
- Identify specific changes.
- Contain enforceable pollution limits that are at least as stringent as current limits.
- Describe operational flexibility and variances.
- Carry requirements from any current approvals replaced.
- Require participants to submit a baseline performance evaluation within 180 days of the agreement.
- Require reporting of any violations discovered in a performance evaluation.
- Ensure that interested persons group(s) has the opportunity to comment on the EMS and review performance data.
- Require companies to assist interested persons to understand the implementation of the agreement.
- Require companies to periodically provide information to the public about their performance and check in with the interested person's group every 6 months.
- Describe how the company will measure public opinion on their participation in the Agreement.

Variations

WDNR can issue any currently authorized variance as part of this program.

In cases where variance authority is not specified, WDNR can issue variations if it results in a measurable overall reduction in pollution and either goes beyond compliance or provides for relief from administrative burden.

Application for an Agreement

Applicants should be covered by at least one approval issued by WDNR. The application consists of a draft agreement that covers all points in the content section of the legislation, and a description of the process and membership of the interested persons group. WDNR shall strive to select participants in a variety of types of facilities, sizes, and locations. WDNR shall consult with the EPA.

Public Notice of Meetings

- The public is given 30 days to comment on any issuance, amendment, or revocation of an agreement.
- A draft agreement, fact sheet and public notice shall be prepared for all actions and distributed widely.
- WDNR will hold a public informational meeting if there is a request. Agreements shall:

Extension, Expiration, Amendment, or Revocation

An agreement can be renewed for one additional five-year period by concurrence of the Legislature.

Specifically:

- When an agreement expires and a company submits information for approvals needed in lieu of the agreement.
- The agreement is held in place until appropriate approvals can be issued.
- WDNR can amend an agreement with consent of the company.
- WDNR can, after an opportunity for hearing, amend an agreement for cause.
- WDNR can revoke an agreement at the request of the participant.
- WDNR can revoke an agreement for: substantial non-compliance, failure to amend an agreement following department request, inability to meet reduction goals, or not addressing a substantive issue raised by a majority of interested persons within a reasonable time.
- A procedure for revocation is included in the statutory language.

Effect of the Agreements

The agreements will be considered enforceable documents and can supersede permits and approvals.

Fees

Participants shall pay the same fees as they would have if not under the cooperative agreement.

Reporting by Participants

Reporting under the Agreement fulfills environmental requirements except for the requirement of immediate reporting. Any change that consists of a modification not covered by the agreement shall be reported to the department.

Reports of Violations

Violations discovered during performance evaluations shall be reported within 45 days.

Compliance Schedules

WDNR can negotiate a compliance schedule for reported violations that does not exceed 12 months beyond the approval date of the compliance schedule.

Deferred Civil Enforcement

WDNR will not commence civil enforcement for 90 days on any violation uncovered as part of the performance evaluation (enforcement discretion).

- WDNR will not commence civil enforcement as long as participants are meeting a compliance schedule agreed to by both parties. If a compliance schedule is not being met, WDNR can collect stipulated penalties or revoke an agreement. Once an agreement is revoked, WDNR can commence civil enforcement.
- WDNR can commence civil enforcement at any time in case of imminent threat or serious harm to public health or the environment; or if WDNR discovers the violations before the performance evaluation uncovers them. (Note: None of these apply to criminal enforcement.)

Access to Records

All records, unless they receive confidential treatment as a trade secret or confidential business information, are considered open to the public.

Report on Progress of the Program

The Secretary of WDNR shall submit annual progress reports to the Governor and the Legislature. After the 48th month, a comprehensive report shall be made to the Governor and Legislature regarding continuation of the program.

Appendices

*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.

	<u>Page</u>
I. ENVIRONMENTAL COOPERATION PILOT PROGRAM	3
A. Program Overview	3
B. DNR Duties	3
C. Cooperative Agreements	4
D. Regulatory Flexibility	6
E. Public Participation	7
F. Other Provisions	9

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	<i>Page</i>
G. Program Implementation to Date	10
II. WATER POLLUTION CREDIT TRADING	11
III. PERMIT PROCESSING	13
A. Permit Guarantee Program	13
B. Expedited Permit Service	13
C. Chapter 30 General Permit Pilot Program	14
APPENDIX--Section 299.80, Stats.	19

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 fulfil 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 employe of the DNR and an employe 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.

The Environmental Cooperation Pilot Program

Wisconsin Department of Natural Resources
Bureau of Cooperative Environmental Assistance

Q: What is the Environmental Cooperation Program?

The Environmental Cooperation Program is a pilot program designed to evaluate innovative environmental regulatory methods. It was introduced by Governor Thompson and passed by the State Legislature as part of the 1997-1999 Biennial Budget. The program provides DNR with the authority to enter into up to ten cooperative environmental agreements over the next five years with persons who own or operate facilities that are covered by licenses or permits under current law.

Q: What is included in the cooperative environmental agreement?

- Plans to implement an environmental management system.
- A commitment to superior environmental performance. Specified waste reduction goals in measurable and verifiable terms.
- Pollution limits that are at least as stringent as those prescribed in current law
- Any approvals that are replaced by the agreement.
- Any operational flexibility and variances granted.
- All applicable rules and regulations covering a company are eligible for inclusion.
- A commitment to release periodic performance evaluations and report any violations discovered
- A plan for public involvement and participation.

Q: What can companies expect?

Companies participating in this program can look for ways to achieve superior environmental performance through the most cost effective means possible. Whole-facility regulation and pollution prevention are key in these agreements. Institution of an environmental management system will allow a systematic review of a company's impact on the environment. As part of the agreement, flexibility in regulations will be afforded to companies who meet these criteria.

Q: Who are the parties to the cooperative environmental agreement?

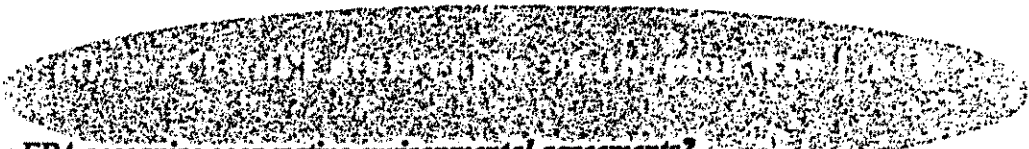
Only DNR and the participating company are signatories to the agreement. EPA, the public, and other stakeholders will be involved in the negotiating process.

Q: How will the public be involved in negotiations?

Anybody who is or may be affected by the activities at a facility that wants to enter into an agreement may participate in negotiations through public comment and meetings. DNR will provide at least 30 days for public comment on any proposed issuance, amendment, or revocation of a cooperative environmental agreement. Furthermore, DNR will hold a public informational meeting if the comment period demonstrates considerable interest in the agreement. In addition, companies are required to establish a group of interested persons when they develop a cooperative agreement.

Q: How will the public know who is in negotiations for a cooperative environmental agreement?

DNR will make this information available on our home page on the world wide web at www.dnr.state.wi.us. DNR will provide additional information regarding who is participating and when reports are submitted. Reports themselves will be available through the nearest DNR Service Center, DNR Cooperative Environmental Assistance Bureau, and the participating company.



Q: Does EPA recognize cooperative environmental agreements?

As part of the Environmental Performance Partnership Agreement between US EPA Region V and the State of Wisconsin, we will develop a Memorandum of Understanding that outlines EPA's partnership in negotiations, EPA's use of the cooperative agreement, and the rights of EPA and DNR.

Q: How do cooperative environmental agreements affect permits, approvals, and regulations?

Permits and Approvals - These agreements can reduce administrative burdens for participants and the state and could supersede requirements of permits and approvals. Agreements are designed to promote the reduction in overall levels of pollution through a more flexible approach. Each cooperative environmental agreement will specifically identify which permit or approval provisions of a permit are waived.

Regulations - A cooperative environmental agreement may waive procedural or administrative provisions of state and federal regulations on a facility-specific basis as identified by the agreement. If new regulations are adopted during the agreement's effective period the agreement will be modified to incorporate these regulations.

Q: How can DNR ensure agreements are followed?

DNR can ensure this in a number of ways. They include:

- Required systematic reviews of environmental performance by the participants. If a review reveals violations of the cooperative environmental agreement the participant has 90 days to correct the violation.
- If a longer compliance schedule becomes part of the cooperative environmental agreement, the agreement can specify penalties if a participant does not meet obligations.
- DNR can terminate or renegotiate an agreement.

Q: What happens if a company expands?

A company is required to notify DNR if they emit or discharge a new pollutant or increase emissions or discharges that are not covered in the cooperative agreement. DNR will then have the option of amending the cooperative agreement or requiring the participating company to follow existing permit and approval procedures.

Q: How will the records and reports generated by this program be treated?

The Department will make available to the public any information obtained as part of the cooperative environmental agreement that cannot be shown to meet the test of a trade secret. Records are treated no differently than under current Wisconsin open records laws.

Q: How will companies be chosen to participate in cooperative environmental agreements?

Companies who wish to participate need to contact the Bureau of Cooperative Environmental Assistance to receive an application. The Bureau can be reached by phone at 608/267-9700 or by e-mail at cea@dnr.state.wi.us. DNR is looking for companies of various types and sizes to participate. Once applications are received they will be reviewed by Bureau of Cooperative Environmental Assistance staff in consultation with other DNR staff and US EPA. The DNR Secretary then makes the final decision.



TOMMY G. THOMPSON

Governor
State of Wisconsin

January 17, 1998

Dear Business Leader:


We would like to invite you and your business to participate in an exciting new environmental program that could help shape Wisconsin's future.

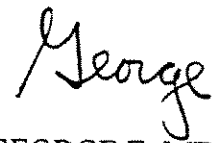
The budget bill that I signed on October 11th included a program that both Secretary Meyer and I worked hard to develop. This program is called the Environmental Cooperation program and it is designed to make Wisconsin business more competitive for the future.

The Wisconsin Department of Natural Resources (DNR) has been authorized to develop pilot projects with companies from a variety of business sectors willing to test an alternative to the traditional rules and regulations approach. The DNR will enter into ten cooperative agreements, which would be specific to each of the companies and embodies a whole-facility, multi-media approach, building off an environmental management system. One of our main goals is to establish a collaborative process involving business, government, and the public in order to reach consensus that is a "win" for each. The DNR will recognize superior environmental performance by providing flexibility in certain regulatory procedures. In addition, DNR will work to ensure that the federal government commits to this innovative approach as part of its "reinventing government" initiative.

This program provides those companies and their leaders an opportunity to step forward in the best Wisconsin tradition of innovation in government and business. They will be pioneers who will show the way to others. The DNR is assigning dedicated and creative staff to work with these firms in a true partnership. Together we will find new ways to save time and money for business and government alike while meeting our obligation as good environmental citizens. Please contact DNR's Linda Wiese to find out more. Her phone number is: (608) 267-3125.

Sincerely,


TOMMY G. THOMPSON
Governor


GEORGE E. MEYER
Secretary of Department of
Natural Resources



The Environmental Cooperation Pilot Program

Wisconsin Department of Natural Resources
Bureau of Cooperative Environmental Assistance

The Environmental Cooperation Program is a pilot program designed to evaluate innovative environmental regulatory methods including whole-facility regulation. It was introduced by Governor Thompson and passed by the State Legislature as part of the 1997-1999 Biennial Budget. The program provides DNR with the authority to enter into up to ten cooperative environmental agreements over five years with persons who own or operate facilities that are covered by licenses or permits under current law.

Application Materials for the Environmental Cooperation Pilot Program

Interested facilities should do as much groundwork as reasonable before fully developing their Cooperative Environmental Agreement (The Agreement) proposal. This groundwork includes:

- Engage appropriate stakeholders and interested persons;
- Develop interested persons group and involvement plan consistent with proposal requirements (see below);
- Gain Interested Persons Group's commitment to participate in project development;
- Work on determining what flexibility is needed or requested for the project;
- Contact DNR's Bureau of Cooperative Environmental Assistance to discuss proposal ideas, even if only at very preliminary stages.*

* this information is important for DNR to discuss preliminary flexibility options with EPA

Applications to participate in the pilot program include four key components:

- I. Information on the Interested Persons Group
- II. Facility Specific Information
- III. Environmental Performance Plan
- IV. Measurement and Performance Evaluation

These four items make up your facility's Proposed Cooperative Environmental Agreement. Each component, as described below, includes further details on which your facility should focus. Please provide written information on each component. All items must be included as part of the application in order to be considered a pilot candidate.

For additional information on application procedures, please see the Cooperative Environmental Agreement legislation (Sec. 299.80 WI statutes) or contact WDNR's Bureau of Cooperative Environmental Assistance at (608)267-9700.

I. Interested Persons Group Information:

An "interested person" is 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. This includes residents of the area in which the proposed facility is located and any other interested stakeholders. Participating facilities must establish a documented "Interested Persons Group". WDNR can assist companies in this area if requested.

- Information on the Interested Persons Group must include a description of the process used to establish the Interested Persons Group, a list of Interested Persons Group members, and a description of the involvement of the group in the development of The Proposed Agreement;
- The facility must ensure that, and provide a description how, the Interested Persons Group is involved in performance reviews and can comment on the facility's environmental management system (EMS)¹. Participating facilities must commit to meet with interested persons at least once every six months to discuss EMS implementation and receive comments on project progress;
- Facility must ensure that, and provide a description how, interested persons are assisted by the facility to understand implementation of The Agreement;
- Facility must ensure that, and provide a description how, information is provided to the public about the facility's environmental performance and project results, including environmental, social and economic impacts.

II. Facility Specific Information:

- Name of facility (or facilities), manufacturing processes, facility practices, and pollutants to be covered by the agreement;
- Specific approvals or provisions currently in the participating facility's existing permits and approvals that the facility wishes to be modified by The Agreement;
- Description of operational flexibility and any variances requested by the facility;
- Commitment of participating facility to implement and document an environmental management system (EMS) based on the standards issued by the International Organization for Standardization or an acceptable alternative EMS. The commitment to implement an EMS must include an estimated time line for development and adoption.

III. Environmental Performance Plan:

- Commitment of facility to superior environmental performance and to achieve measurable or noticeable improvements in environmental performance. This must include a facility's commitment to contain pollution limits that are verifiable, enforceable and at least as

¹ An "environmental management system" is 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 improvements in that environmental performance through planning and changes in the facility's operations

- stringent as current legal limits;
- Identification of changes in materials, product design, production methods, distribution or uses of products, and reuse, recycling or disposal of materials that the facility will implement to achieve process efficiency and reduce its environmental impact and an estimated time line for achieving this;
- Specific waste reduction goals in measurable and verifiable terms.

IV. Measurement and Performance Evaluation:

- Description of how facility will measure the opinions of its employees and the public concerning its participation in the program;
- Requirement of facility to assess the success of the project in reducing the time and money spent by the facility on paperwork and other administrative activities that do not directly benefit the environment;
- Commitment of facility to complete Environmental Management System data protocols provided by WDNR. The data protocols were developed by University of North Carolina and the Environmental Law Institute for the purpose of gathering data on environmental performance of companies that institute an EMS. Collected data, to be sent to a nationwide database maintained by University of North Carolina, includes specific information on stakeholder involvement, cost/benefit analysis, environmental performance and compliance under the framework of an EMS.
- Commitment of facility to submit a baseline performance evaluation within 180 days of the date The Agreement is entered into and to provide periodic updates to that performance evaluation;
- Commitment of facility to report any violations discovered during a performance evaluation. *Under proper circumstances, facilities covered by a cooperative environmental agreement are granted immunity for reported violations as long as those violations are corrected within 90 days or another agreed upon time frame.*

Application deadlines are June 1, 1998; December 1, 1998; June 1, 1999; December 1, 1999; June 1, 2000; December 1, 2000; and June 1, 2001.

Completed applications should be mailed to:

**Lynda Wiese, Director
Bureau of Cooperative Environmental Assistance
Department of Natural Resources (CO/8)
PO Box 7921
Madison, WI 53707-7921**

Appendix C

Flexibility Suggestions for Cooperative Agreement Program

(WDNR has gathered these suggestions but has not edited or made any judgments on the merits of any proposals)

Testing, Reporting & Record Keeping

- Reduce reporting, testing and/or monitoring requirements
- Reduce testing for certain parameters that are related to other parameters
- Less frequent pretreatment monitoring for pollutants not in system.
- Get rid of sampling for parameters not in feedstock (electroplating)
- Reduced pretreatment monitoring and reporting for low discharge facilities
- Lessen sampling frequency
- Lessen record keeping
- Relief from daily records
- Consolidated data reports
- Streamline Title V reporting (fewer things to report on)

Permitting

- One or two permit writers who can make decisions (too much back and forth with other people).
- Primary contact for all permits - someone familiar with the facility
- Extended permits (up to ten years).
- No plan review for permit modifications.
- If wastewater treatment or pretreatment modifications were prepared by a professional engineer, waive DNR plan review and approval requirement.
- Permit flexibility for process modifications.
- Streamlined/fast tracked reviews/permits for innovative technologies/p2 activities.
- Expedited permit reviews for firms that can demonstrate a reduction in releases (to change production cap based on releases).
- Expedited permitting
- Company-wide permit for portable sources
- Special landfill disposal permit
- Waive preconstruction notice period
- Like replacement exemption
- Multi-media review for expanded operations
- Combine Federal and State reinvention programs into a single agreement

Standards/Regulations

- Expedited government assistance and decision making
- Air emission caps for a facility
- Greenhouse Gases
- New source performance standards could be written to apply to all equipment and firms after a number of years (encourage creative replacement or upgrade of older polluting equipment with cleaner approaches to production).
- Flexibility in what you must submit if you want to try a new technology.
- Remove barriers for establishment of a waste materials exchange

- Develop regulatory summaries and measurement techniques
- Look at soluble rather than total BODs

Compliance/Inspection/Enforcement

- Extended compliance schedules for installation of innovative technologies/meeting more stringent standards; however, no penalty should be incurred for not meeting more stringent standards since they were "voluntarily" agreed to.
- Reduced inspections based on third party inspections/existence of EMS
- No enforcement for violations discovered during 3rd party inspections based on correction of problem.
- Audit privilege

Resources

- Information sharing through the industry
- Public sector endorsements of projects
- Mentoring of small businesses
- Pull POTW into negotiations
- Credit for what was done with pollution prevention, waste minimization in the past
- Funding or loan mechanism on capital equipment
- Financial assistance for ISO 14000

Appendix D

Joint EPA/State Agreement to Pursue Regulatory Innovation

"...We must encourage innovation by providing flexibility with an industry-by-industry, place-by-place approach to achieving standards,.... But we will require accountability that such standards be met. Rather than focusing on pollutant-by-pollutant approaches, attention must shift to integrated strategies for whole facilities, whole economic sectors, and whole communities."
[Excerpt from President Clinton's "Reinventing Environmental Regulation," March 16, 1995]

The U.S. Environmental Protection Agency and the states agree on the need to experiment with new approaches to improve our nation's environment. These new approaches can help us identify cleaner, cheaper, smarter ways to ensure that all Americans enjoy a clean environment and healthy ecosystems. Through this joint commitment, EPA and the states agree to encourage, evaluate, implement, and disseminate ideas that seek better ways of achieving our environmental goals. This agreement presumes that EPA and the states will find ways to help good ideas succeed, and that joint EPA and state efforts to promote and test new ideas will result in the maximum benefit to the American people and their environment.

Two years ago, EPA and the states entered into an historic agreement to establish the National Environmental Performance Partnership System (NEPPS). That agreement recognized that we have achieved significant progress since environmental protection programs were created more than 25 years ago. Yet to meet today's new challenges, we agreed that states and EPA must manage for environmental results, increase public involvement, and use environmental indicators to track our progress. We agreed that states and EPA must become true partners in implementing federal programs, and that different state programs need different levels of federal involvement.

This new partnership creates an environment in which state and local regulatory innovations can, and should, flourish. As the primary, front-line delivery agent for environmental programs, states are a natural laboratory for testing new ideas. State and local environmental professionals are closest to environmental problems and communities, and can often develop the most practical solutions. These professionals should be encouraged to seek innovative solutions that may not fit within the traditional approaches. We agree that our efforts to promote innovation must, in the end, be directed toward achieving our public health and environmental goals in a more efficient or effective way.

EPA also seeks to promote regulatory innovations at all levels. This agreement complements, but does not supplant, other national or state efforts to develop regulatory innovations. Its purposes are to: improve environmental protection in the United States; to improve EPA/State environmental management practices; and to provide timely decision-making on good ideas.

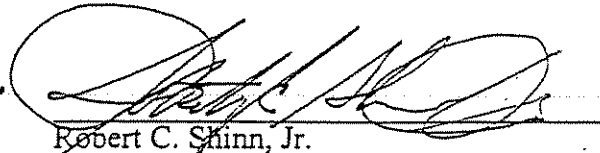
EPA agrees to establish a process that ensures timely review and decision-making on state innovation proposals based on implementation of the above seven principles. The states agree to consult early with EPA, to develop proposals consistent with the above principles, and to involve stakeholders. EPA and the states agree on the need for a clearinghouse of regulatory innovations so that promising ideas can be shared across state lines and within EPA.

We agree that the principles and process described in this agreement should be open to continual improvement. As part of ongoing review and evaluation, EPA and the states agree to evaluate the need to further institutionalize the broad principles and process to help future innovations succeed.

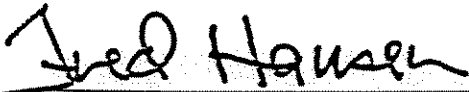
Through this agreement, as detailed in Part 2, states and EPA are committed to work together and with all stakeholders to apply the lessons learned from successful innovations in creating the best possible system to achieve greater environmental protection at a reasonable cost. We agree to encourage innovation that will prepare us for meeting our environmental challenges well into the 21st century.



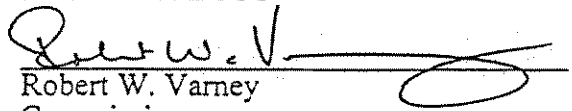
Carol M. Browner
Administrator
U.S. Environmental Protection Agency



Robert C. Shinn, Jr.
Commissioner,
New Jersey Dept of Environmental Protection
President of ECOS



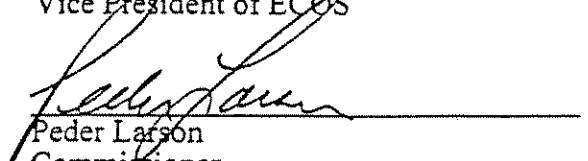
Fred Hansen
Deputy Administrator
U.S. Environmental Protection Agency



Robert W. Varney
Commissioner,
New Hampshire Dept of Environmental Services
Vice President of ECOS



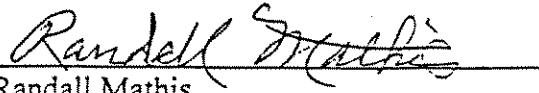
J. Charles Fox
Associate Administrator for Reinvention
U.S. Environmental Protection Agency



Peder Larsson
Commissioner,
Minnesota Pollution Control Agency, and
Co-Chair
ECOS Regulatory Innovations Task Group

April 1998

DATE



Randall Mathis
Commissioner, Arkansas Department
of Pollution Control & Ecology, and
Co-Chair
ECOS Regulatory Innovations Task Group

Severe impacts

- Can it be done in time frame
2003 compl.
- System wide effect on
reserve margins

Scheduled maintenance outages
could be doubled.

Reserve margins dip into
single digits.

↑ purchase power costs

250 - 500 M.
ON WISCONSIN

3-5% rate increase

HOUGH, FASSBENDER, OSBORNE & ASSOCIATES, INC.

Memorandum

To: Rep. Mark Duff
Copy: Patrick Stevens
From: Bob Fassbender *BF*
Date: December 14, 1998
Re: Environmental Audit Successes

I thought the attached article on Texas' environmental audit legislation may be relevant to your December 15 hearing on DNR's Cooperative Environmental Agreement Program. At the time of the article (unfortunately it is undated) over 289 businesses and institutions have committed to the State's self-audit program.

I also discussed Michigan's audit program with Frank Baldwin, Michigan DEQ. He informed me that in less than one year, from November 1997 (the time Michigan's amended audit program was enacted) to September 1998, 267 businesses filed their intent to conduct audits with DEQ.

Also attached is an executive summary of a recent NCSL study (published October 1998) on environmental audit legislation. That study found that 25 states have enacted environmental audit privilege or immunity legislation to encourage greater use of environmental audits. The summary sets forth a finding that it is unclear whether audit legislation results in more audits by comparing those that would "very likely" conduct an audit versus those that would be "not likely at all" if a state passes audit legislation. Obviously, those very likely to conduct audits would do so in response to such legislation, causing audits to be undertaken that would not otherwise be accomplished. Michigan's Baldwin believes there was insufficient time from recently enacted legislation to properly analyze the positive results on audit legislation (implying he believed that a study over a longer time period would show a positive connection between audit legislation and the number of audits being conducted.).

I have no doubt – having advised businesses on environmental issues for close to 20 years – audit legislation will result in more audits, which in turn, results in identifying and fixing problems that would otherwise go undetected. Michigan, Texas and other states committed to voluntary audit programs, then, are proving what many of us already knew – businesses will conduct more self-audits in response to even modest assurances of enforcement protections. Tomorrow it would be interesting to compare these programs with DNR's cooperative program, which after expenditure of significant DNR resources has resulted in two potential participants (compared to 267 and 289 audits in Michigan and Texas, respectively). Considering the Legislature's concern over limited state financial resources, audit legislation can help regulated industries comply with environmental laws and shift the State's limited enforcement resources into areas of greater concern.

Please feel free to give me a call if you have any questions on this information. Thank you for your consideration (we will miss your presence on the committee).



Creating a Climate of Cooperation Results in Improved Environmental Compliance

by John Riley
 Director of Litigation Support
 Texas Natural Resource Conservation Commission

Businesses and other institutions in Texas are investigating themselves, and are turning up environmental violations that might have otherwise gone undetected. Due to a new approach to environmental protection that is designed to achieve improved compliance with environmental standards, self-policing is dramatically increasing.

Texas's law -- which promises that business and institutions won't be penalized if they audit their compliance with environmental laws, report the results to state officials and, of course, fix the violations -- takes nothing away from traditional enforcement. In fact, since the law passed in May of 1995, Texas's traditional enforcement programs have posted record numbers of enforcement orders and associated penalties. The audit law has been simply another tool, another resource, in the effort to improve our environment.

In spite of Texas's demonstrated increased efficiency in bringing environmental enforcement actions, we can only cover so much ground and look at so many operations. Businesses and institutions often suspect they have problems, but they are not properly motivated, when they may be fined for their efforts, to devote significant resources to self-discovery. The limited relief from self-incrimination offered by Texas's law provides the proper motivation. Let's face it: businesses and institutions have superior resources and more specific knowledge to better detect their own problems.

If our environment can be vastly improved by following environmental laws, then the faster we get businesses and other institutions to comply, the faster we will all enjoy the benefit of a cleaner environment. As a result of this law, the cooperation between the state and the regulated community in identifying and addressing environmental problems shortens the environmental response time. The atmosphere present in an accusatory and antagonistic enforcement process is immediately replaced with a solution-oriented dialogue. By creating this climate of cooperation, we have enlisted hundreds of new eyes and ears to the discovery process. Obviously, learning that a problem exists is the first step to addressing the problem and improving the environment.

But what is the cost of this new approach? Extracting penalty dollars in an enforcement prosecution does not clean the air, water, or land. Enforcement for enforcement sake is an empty victory. By removing the punishment aspect of environmental protection, with the associated delay and hostility, for people who voluntarily detect their problems and apply the proper solutions, we are actually cashing in on the deterrence value of the traditional enforcement process. We are getting the very thing we seek: environmental improvement. The hardest part in implementing this new approach to environmental protection is getting people to understand that levying fines is not the objective; cleaning up the environment is. If achieving better compliance with our environmental laws means giving up the money obtained in fines, the trade is worth it.

Furthermore, Texas's self-audit law still allows the state to serve up punishment and levy fines if a company doesn't follow through on its commitment to fix the problem. Self-disclosed environmental violations due to intentional, knowing, or reckless conduct are not protected, and fines and jail sentences can still be imposed. Texas still has the authority to investigate any environmental problems anywhere.

So far, more than 289 businesses and institutions -- ranging from large oil and gas companies to the University of Texas and the

city of Lubbock -- have committed to the self-audit program. That is 289 investigations we may not have to perform. Texas's law does not limit our ability to conduct our own investigation and develop our own enforcement case, even where a self-audit has been done. It does not tell us where to go and what to do. However, it does potentially provide us with a clear picture of where and when to use our limited resources. Protecting the environment means we have to use our enforcement resources wisely by putting them where we can get the biggest environmental benefit.

To date, voluntary disclosures range from the discovery and the correction of simple no-impact violations, to the discovery and correction of situations that may have actually impacted the environment, if left unaddressed. For those who are skeptical about allowing a company to escape penalties in the face of potential environmental harm, the law is clear: self-disclosed violations don't qualify for immunity from punishment if the environmental harm "off site" has been substantial, if someone has been injured, or if compliance is not pursued with due diligence.

Texas's self-audit law is designed to improve our environment. And it contains ample safeguards to achieve this goal. All indications are that this new approach to environmental protection is working.

More About Environmental Self-Audits

To receive more information on CSE or CSE Foundation, or to comment on our publications, call, write, or E-mail:

Citizens for a Sound Economy
Citizens for a Sound Economy Foundation
1250 H Street, NW, #700, Washington, D.C. 20005-3908
1-888-JOIN-CSE, (202) 783-3870, Fax (202) 783-4687
E-mail cse@cse.org

[Return to Contents/Search](#)
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National Conference of State Legislatures

Environment, Energy and Transportation Program

State Environmental Audit Laws and Policies: An Evaluation

Executive Summary

Environmental audits can help regulated industries comply with environmental laws and shift a state's limited enforcement resources into areas of greater concern. An environmental audit is a voluntary internal evaluation of a facility's operations or of a specific activity at the facility. Companies use them to measure compliance with environmental regulations, identify problems early and correct them quickly, ensure that pollution control systems are functioning properly, and improve the company's overall environmental program by making it more proactive.

Twenty-five states have enacted environmental audit privilege or immunity legislation--and 11 states have adopted environmental audit policies--to encourage greater use of environmental audits. The legislation typically grants information generated through an audit a privilege against disclosure in an administrative or judicial proceeding, and limited immunity from fines and penalties if a company voluntarily discloses the audit results and corrects the violation in a timely manner. Policies encourage the use of audits and disclosure of violations by treating them as mitigating factors in enforcement actions and either not assessing a fine or penalty, or reducing the amount.

The National Conference of State Legislatures (NCSL), with assistance from Abt Associates Inc. of Cambridge, Mass., conducted telephone interviews with 988 manufacturing facilities--and with environmental regulatory agencies and offices of attorneys general in 28 states--during 1998 to try to determine the effects of environmental audit laws and policies on the level of audit activity. Specifically, NCSL sought to determine whether the existence of an environmental audit privilege and immunity law--or of an environmental audit policy--encourages facilities to conduct more audits, and to disclose more compliance violations discovered during an audit, than facilities in states that have no law or policy. NCSL also sought to determine the level of awareness among state agencies of environmental audit activity by regulated entities.

NCSL found that the existence of environmental audit privilege and immunity laws or audit policies does not appear to influence the level of audit activity. Eighty percent of facilities reported that they were conducting audits. There was no difference in the responses based on whether the state in which the facility operates has an audit law, an audit policy, or no law or policy. NCSL also determined that the existence of environmental audit privilege and immunity laws or audit policies does not appear to influence the disclosure of violations. Between one-fourth and one-third of facilities had disclosed a violation. Again, there was no difference among facilities operating in states that have an audit law, an audit policy, or no law or policy.

Facilities reported that the two most important reasons for conducting audits are 1) to measure compliance with environmental requirements and 2) to identify problems internally and correct them before they are discovered by a regulatory agency. For those facilities that do not conduct audits, the two most important reasons are 1) that they have few problems complying with environmental requirements and 2) a concern that a regulatory agency might attempt to obtain an audit report and use the information in an enforcement action. NCSL found that, among facilities that do not conduct audits, it is not clear whether enactment of an audit law or adoption of an audit policy would encourage them to begin an audit program. Roughly the same percentage of facilities indicated that a law or policy would be *very likely* as indicated that it would be *not likely at all* to convince the facility's company to begin an audit program.

The interviews with state agencies revealed that they generally are not aware of the level of audit activity because the agencies do not routinely request audit reports from regulated entities. The only way most state agencies know whether an audit is being conducted is for a regulated entity to disclose a violation. Three-fourths of the states that have environmental audit immunity provisions in their laws have received voluntary disclosures of violations pursuant to the law, although the number of disclosures varies significantly by state. The violations disclosed typically are minor violations that are quickly corrected and are granted immunity from fines or penalties. Regulatory agencies routinely work with facilities to help them comply with environmental regulations, whether or not the state has an audit law or policy.

Prepared Testimony for Wisconsin Assembly Environment Committee
December 15, 1998

Lynda Wiese, Wisconsin Department of Natural Resources

My name is Lynda Wiese. I am the Director of the Bureau of Cooperative Environmental Assistance at the Department of Natural Resources. As we are 14 months into the Environmental Cooperation Pilot Program, I welcome this chance to update committee members on the status of the pilot program.

By way of background, the Environmental Cooperation Pilot Program was enacted as part of the '97-99 budget package. This law gives DNR the ability to enter into 10 Cooperative Agreements with companies to examine innovations in environmental protection. DNR was just awarded by the Council of State Governments with 13 other states for innovation in forwarding the use of Environmental Management Systems to better a company's environmental performance. The Environmental Cooperation Pilot Program rewards companies who develop an environmental management system and work with the State to develop "cleaner, cheaper and smarter" ways to protect the environment.

Piloting this program allows DNR to gather data in a reasoned, measured and evaluative mode. For Wisconsin to consider changes to our environmental laws, we need hard data. For example, other states have moved to enact audit privilege and immunity laws. A recent study by the National Conference of State Legislatures has shown that the existence of State environmental audit laws has no apparent effect on whether or not companies perform environmental audits. Offering companies participation in the Environmental Cooperation Pilot Program and measuring performance will give us the information we need to make informed decisions.

The pilot companies will commit to achieving superior environmental performance and involve the opinions of interested persons from the community in the process. Companies participating will develop systematic methods of managing their environmental impacts. DNR will grant regulatory flexibility and defer civil enforcement on violations that are "detected and corrected". What that means for pilot companies is that minor violations such as record keeping lapses that can be corrected within 90 days will not be subject to any civil enforcement actions from DNR.

As part of the annual report, we listed two challenges that have appeared during our first year of implementation. One is to engage small businesses in this program. A variety of reasons including staff shortages, concerns with engaging stakeholders and limited regulatory exposure have been stated by small business as reasons for their lack of interest in this program.

We also noted in the first year that there is a need for additional educational materials or tools to assist businesses in convening groups of interested persons from their communities as part of this Cooperative Agreement process.

An ambitious slate of goals has been set for the up-coming year. DNR will convene a representative group of individuals involved with this program to look at implementation and advise DNR on issues arising from this pilot program.

I have additional copies of the November 2 report and would be glad to answer any questions from the committee on this program. Thank you.



Wisconsin Electric
231 W. Michigan
P.O. Box 2046
Milwaukee, WI 53201-2046
Phone 414 221-2345

December 15, 1998

Representative Marc C. Duff
Room 306 North
State Capitol
P.O. Box 8952
Madison, WI 53708-8952

Subject: **Cooperative Agreement Program**

Dear Representative Duff:

We want to thank you for this opportunity to provide input on the status of the Cooperative Agreement Program. Wisconsin Electric Power Company was a participant in the Department of Natural Resource's ISO 14000 Working Group that initially examined some of the opportunities for alternative non-traditional regulatory approaches that were subsequently examined in the development of Assembly Bill 100.

Wisconsin Electric is a strong supporter of the Department of Natural Resource's quest in seeking new and better ways to ensure Wisconsin's environmental quality is not jeopardized. We also support the adoption of formal environmental management systems (EMS) such as ISO 14000 as a means for owners and operators to better manage the environmental aspects of their facilities. One of Wisconsin Electric's facilities was recently recognized for its adoption of a formal ISO 14000-based EMS, and our staff have provided guidance to other companies on both EMS's and formal pollution prevention (P2) programs. These efforts have also included the formal publishing and public review of our EMS documentation, pollution prevention programs and targets, and environmental compliance record. We have undertaken these activities voluntarily, and have made public commitments to improve our environmental performance.

While we find the Cooperative Agreement Program to offer an opportunity to explore alternative regulatory approaches, we have chosen not to participate to date. Our reasons for not participating stem from three general areas of concern.

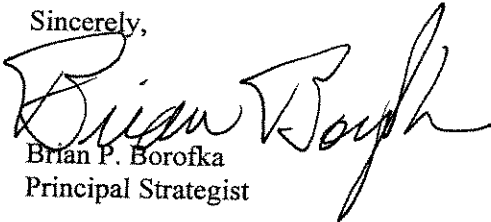
- Interested Persons Group – The Cooperative Agreement Program application requires that the facility develop and assist an interested persons group, including establishing and providing assistance to members of this group, conducting periodic meetings, and providing information on the environmental, social and economic impacts of the facility. At this time we can not prudently commit the resources necessary to establish a program that would meet the stated objectives of the Department, especially as it relates to the social and economic impacts. We also have concerns regarding the type and level of information that we must commit to providing within a competitive business market.
- Environmental Performance Objectives – Wisconsin Electric has long been a leader in seeking and adopting new technologies and approaches that reduce the impact of our operations. We have already addressed many of the critical opportunities for pollution prevention. The Cooperative Agreement Program would require the company to commit to further steps, many of which may not yield a measurable benefit to environmental quality.

- Performance Evaluation – The Cooperative Agreement Program requires that we measure the public's and our employee's opinions regarding our participation in the program. We would also be required to submit our environmental performance data to a national data base developed by the University of North Carolina. While we continually communicate with our employees and other interested parties, we do not find these requirements of the Program to add value equivalent to the potential expenditure of resources that may be required. We also have concerns regarding the sanctity of data bases maintained by third parties.

While Wisconsin Electric has these concerns about the program, we would be willing to work with you and the Department of Natural Resources in exploring potential modifications to the existing program such that we and other companies in Wisconsin would participate. We have professional staff with recognized experience in formal environmental management systems, pollution prevention, and environmental performance evaluation.

Please do not hesitate to contact me if you have questions or would like to discuss this in more detail. Thank you for considering our comments.

Sincerely,



Brian P. Borofka
Principal Strategist