

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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February 14, 2002

Tim Kalies:

1. This is a preliminary version of the substitute amendment to AB 479 that you requested. It includes the environmental improvement program language from AB 479 without change. The green tier language is based on the draft from the green tier committee, which you provided to me. As we discussed, in some respects the committee's draft is similar to the green tier language that was in the budget bill as introduced, but there are a number of differences from the budget version.

Your request indicated that the definitions for the two programs are still being discussed. Rather than omit the definitions from this draft, I have left the environmental improvement program definitions unchanged and have included the green tier definitions from the budget with only minor changes.

The rest of this note relates to the green tier proposal. One purpose of the following comments is to explain some of the reasons that this draft differs from the green tier committee proposal.

2. I made several changes to the proposed green tier language as it relates to the council. The language that staggers the terms of the members is in a nonstatutory provision near the end of the draft. It is not necessary to include language about reimbursement for the members because that is current law under s. 15.09 (6). Duties of councils are placed outside of ch. 15, in this case in proposed s. 299.83 (9).

3. The green tier committee draft did not indicate how much should be appropriated for the department of commerce grant program, so I put zeros in the appropriation schedule and will include any amount that you want in a redraft. For the green tier administrative appropriation, I used the amounts indicated in the green tier committee draft.

4. The green tier committee's proposed language includes a long subsection titled "purpose and intent." For a number of reasons, we ordinarily do not include intent or purpose statements in statutes. If a draft includes all of the legally binding provisions that are needed to carry out the intent of the requester, as it should, an intent statement is unnecessary and redundant. Courts often state that the legislature intends every word in the statutes to have legal effect. Sometimes when they apply this rule, courts give intent statements substantive effects that the legislature never

intended. As is often the case with proposed intent statements, this proposal includes language that appears to be simply promotional, such as: “The green tier program will . . . result in continuous improvement in the state’s environment, economy, and quality of life.” We can hope that it will do so, but we cannot make it happen by including the proposed intent statement. If it is considered to be necessary to include something like an intent statement to ensure that DNR administers the program in the way that is consistent with the green tier committee’s intent, the draft could include a provision like s. 299.80 (2), which requires DNR to seek to accomplish various things in administering the environmental cooperation program.

5. The definition of “environmental management system” in the green tier committee’s proposal requires conformance with ISO 14001 or a determination by DNR that the system is functionally equivalent to ISO 14001. The requirement for conformance with the ISO standard or functional equivalency is already in the green tier program language (in proposed s. 299.83 (3) (d) 1. and (5) (c) 1.). Including the requirement in the definition as well would be redundant.

6. The green tier committee’s proposal adds a very detailed definition of “functionally equivalent,” including a list of essential elements of ISO 14001. I am not an expert on ISO 14001, but I think that the standard may not include all of the elements in the proposed definition of “functionally equivalent.” For example, I think that the standard may not require superior environmental performance or collaboration with DNR. If ISO 14001 does not include all of the elements of the proposed definition, it would be better to use a different approach than using a definition of functional equivalency, such as including the requirements that an environmental management system must have in the body of the statute.

7. The green tier committee’s proposal includes a definition of “regulated entity.” That term is used in the environmental improvement program, but I do not think it is needed for green tier.

8. The definition of “superior environmental performance” in the green tier committee proposal is quite different from the definition in the budget and I have some questions about it. Under the proposed definition, superior environmental performance would include environmental performance that results in “measurable or discernible improvement . . . in the protection of the ecosystem.” I do not understand what that means. I will need help understanding this concept if it is to be included in the definition. Under the proposed definition, superior environmental performance requires improvement beyond what is achieved under current environmental requirements. I wonder whether using “achieved” accomplishes the intent behind this definition. Because entities sometimes do not comply with current environmental requirements, what is achieved is sometimes less than what should be achieved. An alternative would be to require improvement beyond what is required under current environmental requirements.

The proposed definition adds four items to the list of actions that constitute superior environmental performance. The new items do not seem to include the concept that the applicant must go beyond what the law requires. Except for that omission, some of the items appear to already be covered by the items in the definition from the budget

version of green tier. For example, proposed item 5 may be a subset of item 4 and item 6 may be a subset of items 1 and 2. If the first sentence of the proposed definition is retained, to ensure that the definition is internally consistent it will be important that all of the ways in which an entity may achieve superior environmental performance that are listed in the definition require measurable or discernible improvement in environmental quality.

9. The green tier committee draft deleted the subsection on eligible participants, sub. (2), from the budget version of green tier, but I do not understand why. I think that at least the last sentence of that subsection is needed.

10. The green tier committee proposal adds a sentence to the provision about green tier contracts stating that a contract shall describe the superior environmental performance measures and the incentives under the contract. It is not necessary to add this sentence because under the definition of "green tier contract" these things must be in the contract.

11. The green tier committee draft adds a requirement that an applicant for tier II demonstrate a record of environmental compliance to the requirement in the budget draft that an applicant demonstrate a record of superior environmental performance (see proposed s. 299.83 (5) (d)). It is not clear what a "record of compliance with environmental requirements" would be. I suppose it could be interpreted to mean that the applicant may have no violations of environmental requirements on its "record," but I doubt that is what is intended. The green tier proposal has quite specific requirements about an applicant's enforcement record. If some additional requirement about an applicant's compliance record is intended, the draft will need to be more specific about what the compliance record must be.

12. The green tier committee proposal includes green tier charters. I have tried to include this concept in proposed s. 299.83 (7e), but I am not certain that I have succeeded. It seems to me that a green tier charter is an agreement among various entities to work together to achieve some environmental goal and it seems that the entities could enter into such an agreement now, without any legislation. I do not see the advantage to the entities of getting DNR's approval. If I am missing something, perhaps someone could explain this to me more fully.

13. The green tier committee draft adds deferred civil enforcement for participants in both tier I and tier II. Deferred civil enforcement was originally part of the environmental improvement program, but not part of green tier. Green tier provides for two kinds of audits. One is an audit of the environmental management system and the other is an environmental compliance audit. In the first kind of audit, the participant does not have to report violations of environmental requirements, that is what the second kind of audit is for. In tier I, participants only have to do the first kind of audit, while in tier II they must do both kinds. This draft only provides deferred civil enforcement for participants in tier II because they are the only ones who must report violations, see s. 299.83 (6m). Alternatives would be to require participants in both tiers to do both kinds of audits or to provide for only one kind of audit, required of participants in both tiers, that would require reporting of violations.

There is another difference to consider between the environmental improvement program and green tier related to deferred civil enforcement. The committee's green tier proposal only requires a participant in tier II to report about its violations of environmental requirements annually. Under the environmental improvement program, if an entity discovers an environmental violation through its environmental management system, it must report the violation to DNR within 45 days after the date of findings from the facility's environmental management system. Under the environmental improvement program, if an entity discovers a violation through an environmental performance evaluation, the entity must report the violation within 45 days after the date of the final written report of findings of the environmental performance evaluation.

14. I have modified the green tier committee's proposed sunset provision (see proposed s. 299.83 (11)). It goes without saying that the law is what the statutes say it is until the legislature changes the statutes. Also, it is unnecessary to say that the sunset does not affect various things other than applications received after the sunset date because the sunset provision could not be interpreted to affect those other things.

Please feel free to contact me with questions or comments about this note or about the draft.

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