Vote Record

Committee on Environment and Natural Resources

Date: 4/24/03

Moved by: KEDZIE Seconded by: STEPP

AB _____ SB 61 Clearinghouse Rule _____

AJR _____ SJR _____ Appointment _____

AR _____ SR _____ Other _____

A/S Amdt 1

A/S Amdt _____ to A/S Amdt _____

A/S Sub Amdt _____

A/S Amdt _____ to A/S Sub Amdt _____

A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

☐ Passage ☒ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Committee Member	Aye	No	Absent	Not Voting
Senator Neal Kedzie	☒	☐	☐	☐
Senator Cathy Stepp	☒	☐	☐	☐
Senator David Zien	☐	☐	☐	☐
Senator Fred Risser	☒	☐	☐	☐
Senator Robert Wirch	☒	☐	☐	☐
Totals:	4	1		

☒ Motion Carried ☐ Motion Failed

Vote Record

Committee on Environment and Natural Resources

Date: 4/24/03

Bill Number: 61 AS AMENDED

Moved by: KEDZIE Seconded by: STEPP

Motion: _____

Committee Member	Aye	No	Absent	Not Voting
Senator Neal Kedzie	☒	☐	☐	☐
Senator Cathy Stepp	☒	☐	☐	☐
Senator David Zien	☐	☐	☐	☐
Senator Fred Risser	☐	☒	☐	☐
Senator Robert Wirch	☐	☒	☐	☐
Totals:	2	2	___	___

☐ Motion Carried ☐ Motion Failed

Kedzie, Neal

From: Johnson, Dan (Legislature)
Sent: Friday, February 21, 2003 12:51 PM
To: Kedzie, Neal
Subject: Timeline for Green Tier bill

After giving this some thought, I believe the best course of action for the Green Tier bill would be as follows:

1. Circulate co-sponsor memo on Monday, February 24
2. Close the sign on deadline by Friday, February 28
3. Both bills introduced on Friday, February 28
4. Assembly moves their version quickly to committee hearings and executive session
5. Assembly Bill is scheduled for March 18 floor session
6. On Thursday, March 20, Senate Environment Committee holds a public hearing on Senate Green Tier bill, among others
7. Assembly Bill arrives in committee but Senate Committee does not take up Assembly Green Tier bill
8. Executive Session is held in early April
9. Committee recommends adoption of Senate Green Tier bill and sends to Senate Org.
10. Request is made of Senate Org. to move Senate Green Tier bill to the late April, early May calendar
11. Senate Green Tier bill passes the Senate
12. Discussion between you and DuWayne to concur on Senate Green Tier bill
13. Discussion between you and Mickey or John to concur on Senate Green Tier bill
14. Assembly honors your request and Green Tier is done before June 1

Let me know if you have any thoughts about this timeline.

Dan

March 9, 2003

Neal J. Kedzie
State Senator
11th Senate District
Post Office Box 7882
Madison, WI 53707-7882

Dear Senator Kedzie,

Subject: SB-61 Comments

Thank you for providing one of your staff to meet with me Friday, March 7, 2003 and discuss my comments on proposed SB-61. The following are my comments on the proposed bill.

299.83 (3)

(d) *Environmental management system.* To be eligible to participate in tier I of the program, an applicant shall do all of the following:

1. Demonstrate that it has implemented, or commit itself to implementing within one year of application, an environmental management system, for each covered facility or activity, that is ~~all of the following:~~

~~a. I~~in compliance with the standards for environmental management systems issued by the International Organization for Standardization. ~~or determined by the department to be a functionally equivalent environmental management system.~~

~~b. Determined by the department to be appropriate to the nature, scale, and environmental impacts of the applicant's operations related to each covered facility or activity.~~

Comment - If WDNR is to benefit form this legislation it should simplify their work not add to it. I believe that the effort required by the WDNR to make the functional equivalence determination and the nature, and environmental impacts determination would be substantial. To do this work the WDNR would need to develop a procedure to perform the evaluations and develop the internal competence to make the evaluation which does not currently exist. I do not see how this additional bureaucracy is going to streamline WDNR.

A tremendous amount of work went into the development of ISO 14001 (the environmental management system referenced in the bill) which has already gained substantial domestic and international support. The third party registration process used to provide objective evidence to interested parties like WDNR that an organization meets the ISO 14001 standard is also highly developed and respected by both business and government. Why not simply require conformance to the standard as demonstrated by a third party registration? This would greatly simplify the process and not increase the WDNR workload.

299.83 (3) (d)

~~4. Conduct, or commit itself to conducting, annual environmental management system audits, with every 3rd environmental management system audit performed by an outside environmental auditor approved by the department, and commit itself to submitting to the department an annual report on the environmental management system audit that is in compliance with sub. (6m) (a).~~

Comment - This section confuses the audit criteria to be used for the audit. As drafted this section requires a management system audit. The audit criteria for management system audits are standards like ISO 14001. The purpose of a management system audit is to identify nonconformance of the management system to the audit criteria (ISO 14001). Management system audits are not intended to discover violations to state federal or local laws. Other types of environmental audits (environmental compliance audits) use other audit criteria such as 40 CFR, NR 400, City of Madison Industrial Wastewater Discharge Ordinances and others to determine if an organization is in compliance with (has violated) the audit criteria.

Organizations found to be in conformance to International Organization for Standardization environmental management system requirements by a third party will be performing internal audits of the management system already. (6m) (a) prescribes how and what will be reported to the WDNR from the audit performed under this section and limits the report content to violations discovered during the audit. Because a management system audit is not intended to discover violations the reporting function of this section is meaningless and 299.83 (3) (d) (4) should be entirely removed.

299.83 (3) (d)

~~5. Commit itself to submitting to the department an annual report on progress toward meeting the objectives under subd. 2.~~

Comment - Organization found to be in conformance with International Organization for Standardization environmental management system requirements by a third party will be required to make this demonstration to their registrar to continue their registration. I

can see not benefit to these reports and only additional work for WDNR to review and approve them.

299.83 (5) (c)

1. Demonstrate that it has implemented an environmental management system, for each covered facility or activity, that is ~~all of the following:~~

~~a. I~~ in compliance with the standards for environmental management systems issued by the International Organization for Standardization. ~~or determined by the department to be a functionally equivalent environmental management system.~~

~~b. Determined by the department to be appropriate to the nature, scale, and environmental impacts of the applicant's operations related to to each covered facility or activity.~~

~~2. Commit itself to having an outside environmental auditor approved by the department conduct an annual environmental management system audit and to submitting to the department an annual report on the environmental management system audit that is in compliance with sub. (6m) (a).~~

Comment - My comments here are the same as for 299.83 (3)(d) paragraph 1, 4 and 5 above. It is interesting to note that (6m) (a) makes complete sense for the compliance audits performed under 199.83 (5) (c) (3).

299.83 (6m) COMPLIANCE REPORTS AND DEFERRED CIVIL ENFORCEMENT.

(a) *Compliance reports.* If an audit under sub. ~~(3) (d) 4. or~~ (5) (c) ~~2. or~~ 3. reveals any violations, the participant shall include all of the following in the report of the results of the audit:

~~**299.83 (7m) Environmental Auditors** The department may not approve an outside environmental auditor for the purposes of sub. (3) (d) 4. or (5) (c) 2. unless the outside environmental auditor is certified by the Registrar Accreditation Board of the American National Standards Institute or meets criteria concerning education, training, experience, and performance that are equal to the criteria in International Organization for Standardization standard 14012.~~

Comment - By relying on the internationally recognized 3rd party registration process to provide evidence to WDNR that an organization has an International Organization for Standardization environmental management system we do not need to perform these

system audits, require reports of these audits or to define what qualifies an auditor. Therefore we can also eliminate the following definition from the bill:

299.83 (1) Definitions

~~(dr) "Outside environmental auditor" means an auditor who is functionally or administratively independent of the facility or activity being audited. , but who may be employed by the entity that owns the facility being audited or that owns the unit that conducts the activity being audited.~~

Comment - I find it interesting however that the drafters of this bill found in unnecessary to prescribe any qualifications for auditors performing the audits required by 299.83 (5) (c) (3). I would think that an individual performing these compliance audits should demonstrate some sort of competence to perform them. However, if an organization is registered to the international standard their registrar will ensure that the persons performing the compliance audits required by the international standard are competent to perform these periodic compliance audits see ISO 14001 4.5.1 (last paragraph).

299.85 Environmental Improvement Program.

Comment - Lastly I just wanted to comment that this part of SB-61 is helpful in removing disincentives for organizations to perform environmental compliance audits.

Thank you again for taking the time to consider these comments. Please contact me if you have any questions or would like further clarification or assistance in this matter.

Sincerely,

Kevin A. Lehner
President
Environmental Compliance Systems, Inc.

Johnson, Dan (Legislature)
From: McDermid, Mark
Sent: Friday, March 14, 2003 4:42 PM
To: Johnson, Dan (Legislature)
Cc: Heinen, Paul H; Kluesner, Elizabeth M; Smoller, Jeff; Smith, William H; Hassett, P. Scott
Subject: RE: Senate Bill 61 - environmental audit bill

My apologies for the delay in getting back to you. The amendments that Mr. Lehner has suggested would have the net effect of establishing ISO 14001 as the only standard for Environmental Management Systems, remove the reporting on environmental performance and establish the International Standards Organization as the sole determinant of qualified auditors. Most of his argument is based on the bureaucracy that these provisions would create, contrary to what actually happens in the bill.

Were ISO 14000 the only standard, this would limit participation. The assumption made by Mr. Lehner that ISO and bureaucracy are the only choices is incorrect. Throughout the debate on the Green Tier Legislation, companies made it very clear that they would not participate if ISO 14000 certification is required. Large paper, utility and chemical companies were among them and small business was also quite vocal on this point. Notably, consensus was reached, including the environmental groups because this bill is about environmental results, not systems certification. Limitation to ISO would also run contrary to other provisions contained in the bill. ISO is not the only standard. Chemical Responsible Care, EMAS (Environmental Management Audit Scheme) are two notable examples of full systems more rigorous that ISO 14001 with trained auditors and well published standards. The legislation calls for us to align with federal programs. Presently the National Performance Track Program does review EMS's at facilities with trained auditors and allows those companies to participate. Not accepting that determination from the federal level that deems an EMS equivalent. To argue that a bureaucracy is being created by the bill ignores the resources that have been assigned to it and suggesting that staff will be reallocated to do audits and certification ignores the other cuts that have already been taken by the program.

Mr. Lehner's next suggestion is to remove the reporting on commitments with the presumption that the certification by an ISO auditor that there is continual improvement would be sufficient. This would be a material breach of what was discussed and agreed to within the Committee. As mentioned above, this is about results. Businesses, NGO's and government employees see this as essential to determining the value of both the systems and the flexibility that is given to those that employ the systems. Countless pieces of professional literature point to one of the two material weaknesses of ISO being the inadequacy of reporting (public participation is the other). Both are raised separately from the standard and functional equivalency determination for just that reason. It is important to understand that "continual improvement" does not mean that they met their commitments in the context of either the standard or the audits done.

The amendments suggested would remove the ability of the department to disqualify ISO certifications that would be inappropriately considered under the program. Unfortunately there are some circumstances where ISO certification is used to "greenwash" the company, one of the more notable examples being a nuclear power plant that had their cafeteria certified and then claimed that the plant had ISO certification. The deleted language would remove the Department's ability to quickly deal with such situations.

The final element of the changes would limit any questions relative to Auditor certification. This would limit both the credibility and the scope of the legislation. First, several organizations have unique needs and circumstances. Agriculture is one that comes immediately to mind where the issues may well extend beyond ISO certification questions, looking at management, food safety and food security questions. Producers, especially the large ones, have been quite clear that these skills need to be present to provide overall value to their operation. For them it is not a matter of just meeting the standard. They have multiple standards. Second, scope could be

limited by the changes that have been suggested. For example, we could have an auditor fully certified to audit a company for sustainability (a far more rigorous environmental standard) but unable to verify those results because the amended language would only be satisfied by ISO 14000 Audit criteria.

I have tried to keep this relatively brief. Please feel free to give me a call if you have questions. I will gladly supply additional material if you need it.

-----Original Message-----
From: Johnson, Dan (Legislature)
Sent: Monday, March 10, 2003 1:55 PM
To: McDermid, Mark
Subject: Senate Bill 61 - environmental audit bill

Hi Mark,

A gentleman by the name of Kevin Lehner contacted me to discuss some modifications to SB 61, the environmental audit bill. You may or may not know him, but he says that he's been interested in this bill since last session. He is an environmental auditor.

He e-mailed me today with those modifications and I informed him that before I can do anything, I should discuss such matters with you and anyone else on the Green Tier committee. His suggestions are as follows in the attached document:

<< File: sb_61_commnets_030903.doc >>

I'd appreciate any comments of his suggestions you or other members of the committee may have.

Thank you.

Dan Johnson
Office of State Senator Neal Kedzie
11th Senate District
266-2635

WISCONSIN PAPER COUNCIL
250 N. GREEN BAY ROAD
P.O. BOX 718
NEENAH, WI 54957-0718
PHONE: 920-722-1500
FAX: 920-722-7541
www.wipapercouncil.org

March 24, 2003

MEMORANDUM TO: Senate Committee on Environment and Natural Resources
Senator Neal Kedzie, Chairperson
Senator Cathy Stepp
Senator David Zien
Senator Fred A. Risser
Senator Robert Wirch

FROM: Edward J. Wilusz
Director, Government Relations

SUBJECT: **Senate Bill 61**

Senate Bill 61 would create an environmental results program and an environmental improvement program.

The Wisconsin Paper Council supports Senate Bill 61.

Of particular interest is the ability of individual companies or trade associations to negotiate participation contracts under Tier II of the environmental results program. Wisconsin's paper industry has pursued regulatory innovation for years and participation contracts provide a potentially viable method for realizing meaningful benefits through innovative regulatory approaches.

The paper industry's participation in the Pollution Prevention Partnership with DNR has demonstrated the industry's superior environmental performance and broad participation in the Wisconsin Paper Council Environmental Management System put paper companies in position to take advantage of the potential flexibility offered under Tier II.

ss

MEMO TO: Senator Neal Kedzie
FROM: Caryl Terrell, Sierra Club-John Muir Chapter
DATE: March 25, 2003
RE: Concerns with SB 61

Summary of Main Concerns about **Environmental Improvement Program (299.85)**:

1. This is not much different from Environmental Audit Privilege and Immunity which is a "poison pill" for the Sierra Club.

2. It is simply stapled together with the Environmental Results Program.

3. It requires no commitment to continuous improvement, pollution prevention, EMSs or anything else embodied in Green Tier.

Summary of Main Concerns about **Environmental Results Program (299.83**, Green Tier):

1. Unbudgeted costs in a time of fiscal cutbacks is not appropriate.

2. Why start a new program when DNR cannot maintain existing programs?

3. Sierra Club and others are so dissatisfied with DNR Title V Air Management Program that we have petitioned EPA to revoke Wisconsin's program. Some of our "confidence" in DNR capabilities is reduced.

4. Does SB 61 meet the Basic Concepts for Green Tier? "*The legislation should have sufficient details to be self-implementing. Green Tier legislation should not require that rules be developed by DNR before the program can be implemented. Program should be similar to the Stewardship Track of the EPA's Performance Track Program to allow for delegation of EPA program.*"
    a. Basic Concepts for Green Tier Legislation, submitted in June 2001 package, were fleshed out to a point but with some unresolved issues.
    b. SB 61 does not include portions of that June 2001 package.
    c. More work needed to be done on proportionality, contracts under Tier 2, enforcement, penalties, role of third parties, etc. but no such working meeting has been called since the last meeting in spring 2001.
    d. The Sierra Club was not present at Nov. 6, 2001 meeting on legislative status, did not testify at Dec. 4, 2001 hearing and was brought in only after several meetings that Rep. Duff held with WEPCo and DNR about folding AB 479 into Green Tier.
    e. The DNR Green Tier Committee was not convened to discuss AB 479 as amended to include Green Tier. The only discussion on this was at the Dec. 18, 2002 meeting.
    f. The Sierra Club and others announced at Dec. 18, 2002 meeting that they declined to sign-on to the 2003 effort to pass Green Tier.

5. Learning and documenting "Lessons Learned" from the Environmental Cooperative Pilot Program (ECPP) has not continued nor has it been integrated into Green Tier as intended.

6. Numerous legal questions persist; Need a memo agreed to by sponsors of legislation, DNR and DoJ to clarify several points
    a. . For example, DNR's stepped enforcement procedures include Notice of Inquiry, Notice of Noncompliance, Notice of Violation. Would a facility that had received any of these "early stages" of compliance-enforcement be allowed to enter Tier 1 or Tier 2?
    b. Is there a baseline understanding of "minimal" inspections (such as, annual) for all regulatory programs or is there a need for a memo to outline what minimal inspections are under each regulatory program?
    c. Attached memo mentions several other such questions.

7. The "level of trust" that existed among the parties as recently as June 2001 has seriously eroded. What is the rush? Do it right once.

Discussion in greater depth of these issues with recommended solutions.
Prepared by Bruce Nilles, attorney, Sierra Club, Chicago, IL, with input from Caryl Terrell, 3-24-03; This is not a final list of Sierra Club's concerns and recommendations.

A. Cost

1. The bill mandates DNR assign staff to the program without providing any additional resources.
    a. This program will consume large amounts of staff time and resources, to develop the program and then to advertise and implement the program. Which other DNR programs will have staff and resources diverted for this program?
    b. How will DNR pay for attorney services if proposed consolidation of agency attorneys in DOA and related "charge-back" system are adopted?

Recommendation: The Legislature should require DNR to charge a fee for companies that wish to participate in this program and that fees cover all reasonable program costs, including staff time.

B. Eligibility

2. The whole premise of good actors is flawed because DNR has little information on which to verify these claims.
    a. Because of a lack of funding for compliance and enforcement activities the DNR is unable to conduct regular inspections. Companies should not be rewarded with less frequent inspections on the basis of an absence of inspection data.
    b. Instead, the statute should first provide sufficient resources for DNR to perform meaningful oversight and then it may be possible to conclude whether a company is, in deed, a good actor.
    c. In a recent EPA response to the Title V petition, by MEA and SC-JMC, EPA states that the DNR recently informed them that DNR will not be able to conduct full compliance evaluations of major sources of air pollution. Meaning, DNR doesn't even know how well the most regulated, largest polluters are doing; how can they allow reduced evaluations?
    d. The EPA stated that they also had concerns that the DNR is closing out too many cases each year without formal resolutions and penalties. Note that none of these so called enforcement actions will be picked up in the applicability review for Green Tier because they are not formal prosecutions or citations.

3. The statute ignores the reality that citizens and the federal government also bring enforcement actions against companies for violations of our environmental laws. Companies under investigation by the federal government, or have recently resolved a federal or citizen suit should not be participants in this program.

4. The statute also ignores the fact that many environmental violations, especially criminal violations, are prosecuted as false statement or obstruction of justice charges. Companies that are under investigation or have been prosecuted under false statement or obstruction of justice charges should not be participants in this program.

5. The statute requires DNR to restrict inspections for participants in this program to the lowest frequency required by state law. If there is no statutory reference to frequency of inspections, would someone conclude that this requirement prohibits DNR from ever conducting inspections. This provision should be eliminated or minimum inspection requirements established.

Specific comments:

1. Section 299.83(1)(h) defines the word "violation" too narrowly.

SAME DEFINITION FROM JUNE, 2001 DRAFT pg 5

Recommendation: The word "violation" should be defined to include any requirements under state and federal environmental laws, including Chs. 29-41, 16, and 280 to 299; or any requirement in a permit, license, other approval, or order issued by the department under one of those chapters; or any administrative order issued by US EPA; or a consent decree or settlement agreement with a citizen, state or federal government; or conviction for a false statement or obstructing justice.

299.83(1)(g)

2. Section 299.83(3)(b)1 – prohibits participation by corporations involved in violations that "resulted in substantial harm to public health or the environment or that presented an imminent threat to public health or the environment." This is problematic for several reasons:
    a. It does not include false statements, which are criminal violations, and typically don't include a showing of environmental harm.
    b. It does not necessarily include record-keeping and reporting requirements, requirements that are fundamental to the integrity of any environmental program. If a company has failed to measure the rate of feedstock into a hazardous waste incinerator, it is practically impossible to know the level of toxic pollution emitted.
    c. It is typically very difficult to show that violating environmental statutes results in direct environmental harm. For example, when a company releases excessive smog pollution in SE Wisconsin, we know it contributes to unhealthy conditions for millions of residents, but linking one facility to the state's smog problem is practically impossible.

SAME AS FROM JUNE, 2001 DRAF pg 6

299.83(5)(b)1

Recommendation: Eliminate the requirement to show harm. This same deficiency is present in other parts of the statute, e.g. Section 299.83(5)(b).

3. Section 299.83(3)(b)1 prohibits participation based on the compliance record for a "covered facility or activity." This term is turn, defined to mean "a facility or activity that is included, or intended to be included, in the program." Section

pg 3 299.83 (1m)(am)

299.83(1)(a). This definition is problematic because it allows a company with two or more facilities to ignore serious compliance problems and still be eligible for participation in this program. SAME DEFINITION AS JUNE, 2001 MEMO

Recommendation: The DNR should not be touting the superior environmental performance of one facility owned by a corporation at the same time the corporation is being investigated or actually convicted of serious criminal or civil environmental violations. The statute should be revised to prohibit participation by a corporation if any of its facilities or those owned by its parent company have violated federal or state environmental laws, or are under active investigation or have actually convicted of false statements or obstruction of perjury in the past five years.

4. Section 299.83(3)(b)2 – prohibits participation by companies that have a "civil judgment" entered against them. This requirement ignores the reality that many environmental violations are resolved without a civil judgment and instead involve a settlement agreement between the DNR and the polluter. SAME AS JUNE, 2001 DRAFT - PG 6

5. Section 299.83(3)(b)3 – prohibits participation if, within 24 months before the date of the application, DOJ has not filed a suit to enforce an environmental requirement and the DNR has not issued a citation. This is problematic for several reasons: 299.83(5)(b)(2) SAME AS JUNE, 2001 DRAFT PG 6 299.83(5)(b)(3)
    a. Allows participation if DOJ is prosecuting criminal false statement or obstruction of justice claims;
    b. Allows participation if EPA or the U.S. Attorneys Office is prosecuting either civil or criminal environmental case;
    c. Allows participation if citizen group has successfully brought a citizen suit for environmental violation;
    d. The time period of 24 months is far too short (DNR typically conducts inspections less frequently than every 24 months); and
    e. Does not address violations or referrals to DOJ that happen after the applicant submits the application and before the DNR grants approval for participation.

Recommendation: Prohibit participation if the facility has been prosecuted civilly or criminally by EPA and/or the U.S. Attorneys Office, or issued a citation by EPA or been sued successfully by citizens in prior five years. A successful citizen suit should include filing of a settlement agreement or consent decree in a state or federal court that requires either injunctive relief and/or payment of penalties. Five years is a much more reasonable time frame especially considering the infrequency of inspections. This same deficiency exists in Section 299.83(5)(b)(3). Also, the statute should clarify that violations that occur up to the point of DNR granting a corporation participation require DNR to bar participation in the program.

6. Section 299.83(3)(c) – does not require that the applicant certify to the truthfulness of its submissions to DNR

Recommendation: Require the participant certify the truthfulness, under threat of criminal sanctions, of all information submitted to the DNR (just like taxpayers do to the IRS). NO REQUIREMENT IN JUNE, 2001 DRAFT 299.83(5)(e)

C. Incentives

7. Section 299.83(4m)(b) requires the DNR to post participants on the web. SAME AS JUNE, 2001 DRAFT Pg 8

Recommendation: The DNR should not be in the business of touting the environmental records of corporations when DNR lacks the basic information and resources to make such assertions. Instead, eliminate the requirement to post good actors AND instead require DNR to post bad actors that are currently in violation of our environmental laws and threatening the health and safety in communities throughout Wisconsin. 299.83(7)(b) NOT PART OF JUNE, 2001 DRAFT

8. Section 299.83(4m)(e) – requires that the "DNR shall assign an employee" to provide support and technical assistance, but does not state from where this staff and resources is coming. Also the staff person must be deemed "acceptable" by the facility. NOT REQUIRED TO

DISCOURAGE PARTICIPATION

Recommendation: The Legislature should require the DNR to charge fees for program participants – taxpayers should not be paying for this program. DNR should havetotal control over staff work assignments.

Pg 9 299.83(7)(f)

9. Section 299.83(4m)(f) requires that DNR only inspect facilities at the lowest frequency permitted under state laws. This is problematic because I am not aware of any inspection frequency mandated under state law, though there are inspections required as part of the annual agreements between DNR and US EPA.

CONTAINED IN JUNE, 2001 DRAFT

Recommendation: Eliminate this requirement, or establish minimum inspection frequency requirements and sufficient resources for DNR to implement such a schedule. In addition, clarify that DNR shall, at minimum, inspect at the frequency required by agreements with US EPA, and that DNR is not prohibited from conducting inspections in response to citizen (including legislator) complaints.

299.83(6m)

10. Section 299.83(6m)(d) prohibits the DNR/DOJ from bringing a civil action to collect forfeitures for a violation if the violation is disclosed and corrected within 90 days. There are many situations where the violation is contributing to a threat of harm to human health or the environment and 90 days is far too long. There is an exception for violations that either "presents an imminent threat to public health or the environment or may cause serious harm to public health or the environment, (Section 299.83(6m)(d)2.a), or "[t]he department discovers the violation before submission of a report. Section 299.83(6m)(d)2a. These exceptions are overly narrow and are not protective of public health and the environment. ALSO PART OF THE JUNE, 2001 DRAFT

Recommendation: Clarify that the DNR can issue a compliance order mandating immediate compliance or seek a judicial order requiring immediate compliance if the violation is either 1) causing or contributing to an imminent threat to human health or the environment, or 2) the violation relates to monitoring and reporting requirements. Also, clarify that in situations where violations come to the attention of the DNR (not just those that DNR discovers), either from citizens or EPA, or other sources, then the prohibition on civil enforcement does not apply.

D. Revoking Privileges

11. Section 299.83(7)(b) – limits the situations under which the DNR can terminate the participation of a participant to those violations that "resulted in substantial harm to public health or the environment or that presented an imminent threat to public health or the environment." This is problematic for several reasons.
    a. It does not include false statements or obstruction of justice, which are criminal violations, and typically don't include a showing of environmental harm.
    b. It does not necessarily include record-keeping and reporting requirements, requirements that are fundamental to the integrity of any environmental program. If a company has failed to measure the rate of feedstock into an hazardous waste incinerator, it is practically impossible to know the level of toxic pollution emitted.
    c. It is typically very difficult to show that violating environmental statutes results in direct environmental harm. For example, when a company releases excessive smog pollution in SE Wisconsin, we know it contributes to unhealthy conditions for millions of residents, but linking one facility to the smog problem is practically impossible.

299.83(10)(b)

Recommendation: Clarify that the DNR can terminate participation, without a showing of harm, if a participant violates any requirements under state and federal environmental laws, including Chs. 29-41, 16, and 280 to 299, or any requirement in a permit, license, other approval, or order issued by the department under one of those chapters, or any administrative agreement with EPA, or any judicial consent decree or settlement agreement with citizens or the state and federal governments. Also, the DNR should be required to terminate participation immediately if a participant is convicted of making false statements or obstructing justice. NOT PART OF THE JUNE, 2001 DRAFT

E. Charters

12. Section 299.83(7e) authorizes the DNR to issue a charter to an association to assist corporations to participate in this program. There are only limited restrictions on the types of corporations that can be part of the association.

Recommendation: Prohibit the DNR from issuing a charter to any association that includes a corporation that has been convicted or under investigation under federal or

state environmental laws, false statements or obstruction of justice charges, or has resolved a citizen suit within the past five years. CHARTER CAN BE TERMINATED FOR NON-COMPLIANCE AGAIN, NOT PART OF JUNE, 2001 DRAFT

Recommendation: This was one of the least fleshed out of the Green Tier proposals. The role of the public is very weak. The substance of a charter is undefined. Terminating the charter will be very difficult since the threshold is "substantial noncompliance." The DNR was requested, if and when the law is adopted, to develop several "model" charters to make it easier for this type arrangement to happen. Instead, this concept needs further discussion and a level of common understanding needs to be developed.

F. "Compliance Audit" and "Violations" under Environmental Improvement Program (see also Sierra Club testimony on AB 479 concerning additions and corrections, not attached but will provide on request)

13. Section 299.85(1) – establishes the requirements for an "environmental compliance audit." There is no substance. The only requirements are that "the owner" conduct "a systematic, documented, and objective review" of the "environmental performance of the facility, including an evaluation of one or more environmental requirements." The specific elements of the audit are: (a) a page that is labeled "environmental compliance audit report," (b) there is a date on the page, and (c) if violations identified, a plan for corrective action.

Recommendation: The statute must specify that an environmental compliance audit include an evaluation of ALL environmental requirements and that the audit is conducted in accordance with standards approved by the DNR.

14. Section 299.85(1)(g) – defines "violation" to be "a violation of an environmental requirement." This is unclear and too narrow.

Recommendation: The term "violation" should be clarified to include all requirements under state and federal environmental laws, including Chs. 29-41, 16, and 280 to 299, or any requirement in a permit, license, other approval, or order issued by the department under one of those chapters, or any administrative order issued by EPA, or judicial consent decree or settlement agreement with citizens or state and federal governments, or conviction of making false statements or obstructing justice.

15. Section 299.85(2)(f) allows participation in the Environmental Improvement Program if at the time of submitting an audit report the "department of justice has not, within 2 years, filed a suit to enforce an environmental requirement, and the department or a local government unit has not, within 2 years, issued a citation, to enforce an environmental requirement, because of a violation involving the facility."

This is problematic because it allows participation by corporations that are being investigated or have been prosecuted for false statement or obstruction of justice charges, are under investigation or have been issued a notice of noncompliance or have been sued for environmental violations by US EPA, or citizens. In addition, the time limit of 2 years is far too short. DNR does not regularly inspect each corporation every two years.

Recommendation: The DNR should be prohibited from including participants that are currently under investigation or within the past five years have resolved any violations of state and federal environmental laws, including Chs. 29-41, 16, and 280 to 299, or any requirement in a permit, license, other approval, or order issued by the department under one of those chapters, or any administrative order issued by EPA, or any judicial consent decree or settlement agreement with citizens or the State or Federal Government, or convicted of making false statements or obstructing justice.

16. Section 299.85(3)(f) does not require that a corporation that uncovers a violation identify specific steps to correct the violation and specific steps to assure such violations do not occur in the future.

Recommendation: Clarify that the corporation must describe the specific steps that it will take to come into compliance with all applicable requirements, and specific steps it will take to assure future compliance with all applicable requirements, which may include additional monitoring and reporting.

17. Section 299.85(3m)(a) prohibits the DNR from issuing a compliance schedule for violations of environmental protection laws until after it has issued a public notice on a proposed compliance schedule and received public notice for at least 30 days.

Recommendation: Clarify that the DNR can issue an immediate compliance order or seek immediate court action if the violation is either 1) causing or contributing to an imminent threat to human health or the environment, or 2) the violation relates to monitoring and reporting requirements.

18. Section 299.85(3m)(b) and Section 299.85(4) describe the public comment period and what materials are available to the public.

Recommendation: Clarify that these materials must provide substantive information sufficient for neighbors of the facility and the public to judge whether or not the compliance includes sufficient effort to correct and prevent further problems. The final written report form should be pre-approved by the department, p.31 lines 11-13.

19. Section 299.85(7)(a)1 defers civil enforcement for at least 90 days after receiving an audit report. There is an exception for violations that either "presents an imminent threat to public health or the environment or may cause serious harm to

public health or the environment, (Section 299.85(7)(b)1), or "[t]he department discovers the violation before submission of a report. Section 299.85(7)(b)2. These exceptions are overly narrow and are not protective of public health and the environment.

Recommendation: Clarify that the DNR can issue an immediate compliance order or seek immediate court action if the violation is either 1) causing or contributing to an imminent threat to human health or the environment, or 2) the violation relates to monitoring and reporting requirements. Also, clarify that in situations where violations come to the attention of the DNR (not just those that DNR discovers), either from citizens or EPA, or other sources, then the prohibition on civil enforcement does not apply.

20. Section 299.85(7)(a)3 – authorizes the state to begin a civil action to collect forfeitures if a corporation fails to comply with a compliance schedule. This provision could be read to constrain the remedies available to the state, and exclude criminal enforcement.

Recommendation: Clarify that the state is free to pursue all potential remedies, including civil and criminal penalties, when a corporation violates a compliance schedule.

21. Section 299.85(7)(b)3 creates an exception to the bar on state enforcement when the "violation results in a substantial economic benefit that gives the regulated entity a clear advantage over its business competitors." This language is both confusing and overly stringent.

Recommendation: Strike or define the word "clear" – it has no useful meaning and has no place in a statute. Also, strike "substantial" which is a highly subjective term.

22. Section 299.85(7)(b)5 creates an exception to the bar on state enforcement when the "violation is a violation of the same environmental requirement at the same facility and committed in the same manner as a violation previously reported by a regulated entity under sub. (3), unless the violation is caused by a change in business processes or activities." This exception is so narrow as to be meaningless and would allow a company to enjoy immunity even if it is violating the identical requirement at multiple facilities.

Recommendation: Rewrite this provision as "[t]he violation is a violation of the same environmental requirement owned or operated by the regulated entity and has been previously reported to the state or federal government."

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

MAR 2 6 2003

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March 26, 2003

The Honorable Neal Kedzie, Chairman
Senate Committee on Environment and Natural Resources
The State Captiol, Room No. 313 South
HAND DELIVERED

Re: Senate Bill 61

Dear Chairman Kedzie:

I write today to highlight some concerns of the Department of Justice (DOJ) related to Senate Bill 61 that the committee may wish to consider.

Under the proposed environmental audit immunity provisions of the Green Tier Proposal, a large number of Wisconsin companies would be eligible to apply for an extraordinary grant of immunity from state enforcement of environmental protection laws. Under the relevant provisions, companies that can meet relatively minimal standards are potentially eligible for recognition as a Tier I participant in the Green Tier program, and as such, would qualify for immunity from state enforcement in most circumstances. In no other area of law do we afford citizens or corporations legal immunity for simply obeying the law. 1997 ACT 27

As now proposed, SB61 expressly prohibits the state from bringing a civil action to collect forfeitures for violations if Green Tier program participants self-identify and correct what otherwise would have been an enforceable violation of state law. Exceptions are contained in the bill [Page 33, Line 22] related to special circumstances. I am concerned that these exceptions do not afford the DOJ any real opportunity to protect of the citizens of Wisconsin in even the most egregious cases threatening the public health and environmental well being of our state.

As drafted, these exceptions would permit the state to pursue enforcement against a Green Tier I entity only if: (1) the violation presented an imminent threat to public health or the environment or may cause serious harm to public health or the environment; (2) the department discovers the violation before it is self reported; (3) the violation results in a substantial economic benefit that gives the regulated entity a clear advantage over its business competitors; (4) the violation is identified through other regulatory action; or (5) it is a re-occuring violation at the same site. As a practical matter, these exceptions pose significant burdens to the Department should enforcement action be required. Demonstrating an imminent threat to public health or the environment based upon a single act by one company, for instance, is extremely unlikely. The vast

majority of environmental dangers are based upon the cumulative affect of industry activity over time, not merely based upon isolated and immediate actions by individual market actors. Additionally, demonstrating that a violation resulted in a "clear" economic advantage of a "substantial" nature would necessarily require that the Department conduct an extensive market analysis of an industry with multi-national holdings before proceeding to enforce state law. These examples are just the tip of the enforcement nightmare created by this proposal.

I would respectfully request the committee consider these concerns when considering this legislation. As always, please feel free to give me a call if you have any questions or concerns about this or any other justice-related matter.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

PAL: vlv

REINHART
BOERNER VAN DEUREN S.C.
ATTORNEYS AT LAW

March 26, 2003

Donald P. Gallo, Esq.
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SENT BY FACSIMILE AND
FIRST CLASS MAIL

Senator Neal Kedzie, Chairman
Committee on Environment
and Natural Resources
Room 313 South
State Capitol
P.O. Box 7882
Madison 53707-7882

Dear Chairman Kedzie:

Re: Letter of Support for Proposed Green Tier Legislation

On behalf of the Petroleum Marketers Association of Wisconsin, Wisconsin Fabricare Institute, the Milwaukee Branch of the American Electroplater and Surface Finishers Society and the numerous industry segments that we regularly represent consisting of the chemical industry, tanneries, metal platers, drycleaners, commercial and industrial launderers, petroleum marketers, metal foundries, die casters industrial coaters, printers, food processors, general contractors, concrete, materials and aggregate suppliers; developers, manufacturers, utilities, auto dealers, trucking companies and local units of government, we are writing to express our support for proposed 2003 Senate Bill 61, otherwise known as the Green Tier.

The Green Tier creates two new programs, the Environmental Improvement Program and the Environmental Results Program, that will enhance environmental protection and, at the same time, streamline the paperwork burden that Wisconsin's companies must bear in complying with DNR regulations. The Green Tier is important because it recognizes the efforts of corporate citizens that actively work to comply with environmental regulations and protect the environment, by providing incentives such as regulatory flexibility for positive

environmental performance. This strategy is likely to be much more effective at protecting the environment and less onerous on businesses than the "command and control" methods historically employed to enforce compliance. Following are our comments on some of the specific provisions of the Green Tier that we believe are essential to the ultimate success of this legislation and that we believe must be carried through to the final version of Senate Bill 61.

Environmental Improvement Program

A vital provision of the Green Tier legislation is the creation of a stand-alone self-audit policy under the Environmental Improvement Program that would provide immunity from civil penalties from violations of certain Wisconsin environmental regulations. Subject to certain conditions, this program would be available to all companies subject to environmental regulations. To date, Wisconsin law does not make any provision for self-auditing incentives or privileges. However, the United States Environmental Protection Agency ("EPA") has had a policy in place since 1995 that has been embraced by both EPA and the regulated community, and we believe it provides a good framework for a Wisconsin program.

EPA's Audit Policy has been very successful in achieving real environmental protection by encouraging companies that discover violations of federal environmental regulations as a result of a voluntary compliance audits to report and correct the violations without the fear of civil penalties. Without this provision to eliminate or greatly reduce civil penalties, many environmental violations would likely go unreported. Under the Audit Policy, companies must satisfy a number of certain criteria related to the performance of voluntary audits and history of past convictions for environmental violations in order to qualify for relief provided by the Audit Policy. The Audit Policy is important and effective because it achieves the results of environmental protection without unfairly punishing those companies that are clearly already acting as good corporate citizens by voluntarily implementing routine environmental compliance audits.

The provisions contained in the Environmental Improvement Program created by Senate Bill 61 would allow for the creation of a state self-audit policy very similar to EPA's Audit Policy. As this program has been embraced as an

extremely useful tool both by EPA and the regulated community, we believe it represents a "win-win" situation, and we reiterate our strong support for the Environmental Improvement Program as proposed.

Environmental Results Program

Whereas the self-audit provisions of the Environmental Improvement Program would be available to nearly any entity affected by Wisconsin environmental regulations (with some conditions for eligibility), the Environmental Results Program provides a good opportunity for companies with environmental management systems in place and multiple DNR reporting requirements to reduce their regulatory burden by minimizing points of contact within the Department; reducing DNR inspection requirements; and receiving certain self-auditing privileges that would eliminate civil penalties for disclosure of certain violations of environmental laws identified as a result of an audit of their environmental management systems (similar to the self-audit provisions contained in the Environmental Improvement Program, described above).

The Environmental Results Program would consist of two different tiers, each with different eligibility requirements and potential incentives for joining the program. Without going into the specifics of the statute, we believe this tiered approach will enable smaller companies without dedicated environmental compliance staff to benefit from this program. Because small businesses are the lifeblood of our economy and are the entities most likely to be significantly and adversely affected by the costs of compliance with environmental regulations, we strongly support efforts by our lawmakers to reduce the regulatory burden and make it easier to operate successful businesses in Wisconsin. Therefore, we strongly support the provisions contained in the Environmental Results Program that would make these incentives and regulatory flexibility available to small businesses and we hope that they are retained in the final version of the Green Tier legislation.

In conclusion, we commend the Senate in undertaking Senate Bill 61. We believe this legislation rewards good corporate citizens that are working hard to comply with environmental regulations in the course of operating their businesses, and at the same time results in even greater environmental protection in

Wisconsin. We appreciate the opportunity to make our views known to you, and we hope that you consider our comments in preparing a final version of Senate Bill 61.

Should you have any questions, or if you would like to discuss our comments on this Green Tier legislation in detail, please do not hesitate to contact me at (262) 951-4555.

Yours very truly,

Donald P. Gallo

Waukesh\4953DPG:SJA

cc Mr. Mark McDermid (sent by facsimile)
Mr. Robert J. Bartlett (sent by facsimile)
Mr. Brian Swingle (sent by facsimile)
Mr. John S. Lindstedt (sent by facsimile)

WISCONSIN UTILITIES ASSOCIATION, INC.

44 EAST MIFFLIN STREET ● SUITE 202 ● P.O. BOX 2117 ● MADISON, WISCONSIN 53701-2117 ● TELEPHONE (608) 257-3151 ● FAX (608) 257-9124

To: **Senate Environment and Natural Resources Committee**

From: **Bill Skewes, Wisconsin Utilities Association**

Re: **Support for SB 61**

Date: **March 27, 2003**

On behalf of Wisconsin's investor-owned gas and electric utilities, the Wisconsin Utilities Association (WUA) appreciates the opportunity to provide testimony on SB 61, the proposed Green Tier legislation.

WUA supports this legislation because it is a proactive attempt by policymakers, regulators and the regulated community to provide maximum regulatory flexibility while ensuring environmental protection and recognition of economic necessity. As Wisconsin regulators, the energy industry and the business community seek ways to balance energy, economics and the environment, this legislation provides the fulcrum for that balance.

The current "command and control" model is outdated and fails to take into account the shifting economic realities and opportunities all businesses must face to be successful in a competitive environment. While compliance with environmental regulations is necessary, a new model which provides measurable environmental benefits while maximizing economic opportunities is preferred.

For example, the formalized Environmental Management Systems required by this legislation will be more effective than the simple compliance model because they may be able to identify and minimize environmental risks not addressed by current programs. Also, the provisions which increase citizen input into the activities of facilities will do more to identify potential community issues in the earlier stages and foster a partnership between the business and its communities.

For these and other reasons, WUA supports SB 61 and urges the Legislature to expeditiously pass this bill.

Testimony to the Senate Environment and Natural Resources Committee

Senate Bill 61

March 27, 2003

Brian Borofka
Wisconsin Energy Corporation

Background

- Wisconsin Energy Corporation has been an active participant in the type of regulatory innovation embodied in SB 61
- Environmental Cooperative Agreements by We Energies
  - Pleasant Prairie Power Plant Cooperative Agreement
  - Multi-Emission Cooperative Agreement
- Regulatory innovation program in another state

Three Major Components of SB 61

1. Environmental Results Program – Tier 1
2. Environmental Results Program – Tier 2
3. Environmental Improvement Program

ERP Participation Criteria

- Strong compliance record
  - Enforcement record provisions and violation definition same as developed through consensus by previous committee
- Environmental management system
  - Implemented (Tier 2)
  - To be adopted (Tier 1)
- Measurable environmental improvement
- Public information / participation / input

Benefits of ERP Level 1 Participation

- Recognition
- Reduced level of inspections
  - After EMS implemented
- Assigned DNR point-of-contact

Benefits of ERP Level 2 Participation

- Recognition
- Deferred civil enforcement
  - Allowed 90 days for corrective action resulting from audit findings
- Regulatory innovation and flexibility at a facility or group of facilities
  - Must maintain or improve performance
  - Benefits are proportional to performance
  - Offers opportunity for environmental and economic improvement

Environmental Benefits
of Regulatory Innovation

- We Energies has made specific environmental commitments in its two Cooperative Agreements
  - Sulfur dioxide reductions – 45-50%
  - Nitrogen oxide reductions – 60-65%
  - Mercury reductions – 50%
    - In absence of any regulations
  - Lower opacity limits
  - Voluntary corrective action of plant operations

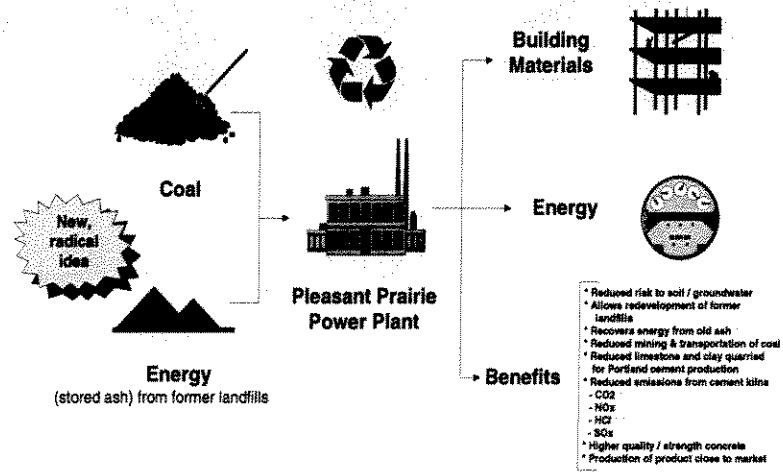
Administrative Benefits
of Regulatory Innovation

- Expedited agency review and/or approval of environmental improvements
  - Cost savings by DNR
- Reduced reporting - same performance
  - Quarterly to semi-annual air reporting
  - 200+ pages of water reporting reduced to 5 pages
- Elimination of redundant non-value added monitoring

Economic Benefits
of Regulatory Innovation

- Pleasant Prairie Cooperative Agreement allows recovery of energy from coal ash that would otherwise be in landfills
- We have recovered energy from this ash equivalent to 825 rail cars of coal

Demonstrated Value of Innovation & Flexibility



Environmental Economics

- Carbon (or energy) usually goes in the opposite direction of cash
  - You must pay for energy
- Our customers in Wisconsin have not paid for 825 rail cars of coal from outside the state

Community Benefits

- We Energies has become more actively involved with local communities as part of the Cooperative Agreement program
  - Open houses & tours
  - Newsletters
  - Special events
  - Community and business outreach
    - Menomonee River Valley

Environmental Improvement Program

- The primary components of the proposed Environmental Improvement Program have been tested in the Cooperative Agreements
- Provides facilities the ability to
  - Conduct self assessments
  - Perform corrective actions
  - Achieve higher environmental performance
- Provides the DNR and local residents a higher degree of compliance assurance

Addressing Concerns

Maintaining Environmental Quality

Safeguards are present in SB 61

- Existing body of law and regulations
- Enforcement
  - State
  - Federal
- Provisions against repeat offenses (Environmental Improvement)
- Final decisions by the DNR
- Proportionality
- Stakeholder involvement

Recommendation

- We Energies recommends passage of SB 61 for the benefits it will provide to Wisconsin's
  - Environment
  - Economy
  - Residents

Senate Committee on Environment and Natural Resources
Testimony of Senator Neal Kedzie
Senate Bill 61
March 27, 2003

Thank you Mr. Chairman for allowing me to speak in favor of Senate Bill 61, relating to the creation of an environmental improvement program and environmental results program

This is a much-anticipated bill and if enacted, will create a multi-level program of providing incentives to businesses, and other regulated entities, to conduct comprehensive environmental examinations of its operations and facilities

In addition, it will create a cooperative partnership between the regulators and the regulated community to promptly rectify any violations that have been found by those examinations

This bill is the culmination of the tireless efforts of many in this room today and I would like to personally thank them for their hard work and persistence on this legislation

Ultimately, this bill will provide a mechanism for small and medium businesses to come into and maintain their compliance with Wisconsin law, and create an expanded program for larger businesses that wish to try to exceed traditional environmental standards, and then give them more regulatory flexibility as an incentive for going beyond compliance

The adversarial nature of our present system assumes that all businesses are possible "bad actors," when that is far from the truth. This legislation explores the potential for businesses and regulators to work together as a team to protect our natural resources

For "good actor" companies with solid environmental management systems and proven track records of improvements, permit approval time would be cut, recordkeeping would be sharply reduced and innovations would be encouraged

REPRESENTING WISCONSIN BUSINESS

Wisconsin Manufacturers & Commerce

Memo

TO: **SENATE ENVIRONMENTAL RESOURCES COMMITTEE**

FROM: **Jeff Schoepke, Director, Environmental Policy**

RE: **Senate Bill 61**

DATE: **March 27, 2003**

Chairman Kedzie, Committee members, thank you for the opportunity to comment today on Senate Bill 61 (SB 61), legislation creating two new initiatives within the Department of Natural Resources. WMC strongly supports this legislation, and encourages the committee to recommend the bill for a full Senate vote.

As the committee is aware, SB 61 is a compromise bill developed late last session. It is the work product of several years of give and take, and dedicated effort by a large number of parties. Last session the bill received broad support, including that of the DNR, and it's passage was blocked only by the end of the Legislative session. WMC offers its appreciation to Senator Neal Kedzie, Representative Phil Montgomery, former Representative Marc Duff and Mark McDermid of the Department of Natural Resources.

SB 61 encourages businesses to conduct environmental performance evaluations by providing limited liability protections in cases where companies agree to address problems an evaluation uncovers. This bill also rewards companies that move beyond environmental compliance by including most of the DNR's Green Tier initiative, including the incentives provided at each level. Synergies between these two new programs, the Environmental Improvement Program and the Environmental Results Program, have lead to their incorporation into a single bill.

Incentives for businesses to review their environmental processes are sorely needed. Companies who fear retribution might not conduct reviews, and problems could go unnoticed. This fear is particularly strong for small businesses, as the complexity of Wisconsin's environmental regulations can be overwhelming and unintentional mistakes might turn out to be environmental violations.

The immunity provisions created by the Environmental Improvement Program ensure that good actors are not punished. To obtain immunity, a company must discover the problems through a voluntary evaluation, report any problems to the DNR, and correct the problem within a reasonable amount of time. In such a circumstance, it does not make sense, nor does it serve any environmental purpose, to have the state impose any penalties.

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Encouraging audits also encourages pollution prevention activities. Opportunities to go beyond compliance with environmental laws often arise out of self audits.

Twenty-six states have adopted environmental audit legislation, including our neighbors Minnesota and Michigan. The environmental benefits of these policies are great, as thousands of corrections have been documented.

In Minnesota's "Environmental Audit Program", for which this Legislation is substantively modeled, more than 1000 companies have participated. The Minnesota Pollution Control Agency reports that it has reached regulated facilities it normally would not reach, has increased awareness of pollution prevention opportunities, and has resulted in more efficient use of agency resources.

The Michigan program is also extremely popular and has operated with a high degree of success. Since 1994, companies in Michigan have reported more than 2100 audits to the Michigan Department of Environmental Quality. During Michigan's FY 2001-2002, 83 Michigan companies reported violations. Of these 83, 69 were brought into compliance upon reporting to the DEQ, 78 were corrected within 1-2 months, and all were fixed within 6 months. The Michigan experience is proof that companies want to participate in such a program, and that there are real environmental benefits.

Like Michigan and Minnesota, Wisconsin companies also want to do the right thing. We have a strong history of environmental stewardship in this state, and Wisconsin companies are known as national leaders on the environmental front. SB 61 provides the incentives Wisconsin's good actors deserve.

The existing command and control environmental regulatory systems, which have had their place in environmental management, need a new look. The breadth of existing regulations and accompanying reporting requirements make mere compliance difficult and are certainly not flexible enough to reward superior environmental performance.

The Environmental Results Program, also created in SB 61, encourages Wisconsin to explore regulatory innovation. Fundamental change to the State's approach to environmental management is needed, to allow increased flexibility for greater environmental benefits and lower costs.

The Environmental Results Program incorporates, and attempts to extend, the concepts of the existing Cooperative Environmental Agreement (CEA) program. As the Committee will likely hear today

from representatives of We Energies Corp., that program has allowed the negotiation of contracts that assure superior environmental performance for the state and regulatory flexibility for We Energies. The contracts of the bill's Tier II will allow similar such agreements.

In short, the Environmental Results Program rewards companies and organizations that push the envelope of environmental performance, a policy goal the state certainly should pursue. In fact, WMC is in the process of reviewing whether a charter under the program might be an appropriate way to address concerns both the DNR and industry has about the performance of state air permitting programs.

WMC believes the combination of these two programs provides small, medium, and large sized companies the incentive to participate and excel in environmental performance. Larger manufacturers, with more sophisticated environmental staff and resources are more likely to be able to take advantage of the ability for negotiated flexibility. Smaller companies are more likely to seek improvements through third-party audits of their performance. In both cases, this bill rewards companies for doing the right thing.

Again, thank you for the opportunity to testify this morning.

WISCONSIN
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MEMORANDUM

TO: Honorable Members of the Senate Committee on Environment and Natural Resources

FROM: Jennifer Sunstrom, Legislative Associate JS

DATE: March 27, 2003

RE: Senate Bill 61

The Wisconsin Counties Association (WCA) would like to thank the members of the committee for the opportunity to make a few brief comments regarding SB 61 which provide incentives and environmental regulatory flexibility to public and private entities for improving environmental performance.

Pursuant to our discussion with the Legislative Reference Bureau, it is our understanding that a public entity under the bill would include all local units of government. It is also our understanding that the ability of counties to implement and enforce local ordinances would not be affected by the terms of any contracts negotiated by the state with participants of the program. If this interpretation of the bill is indeed the case, WCA is supportive of SB 61. WCA has long been an advocate for increased regulatory flexibility which will allow counties across the state to find practicable changes that will result in better protection of Wisconsin's natural resources.

If it is later determined that our understanding of the bill is incorrect, we would respectfully request the opportunity to give further input on the effects of this bill on county government.

If you have any questions, please do not hesitate to contact the WCA office.

Thank you for considering our comments.

REINHART
BOERNER VAN DEUREN s.c.
ATTORNEYS AT LAW

April 10, 2003

Michael H. Simpson, Esq.
Direct Dial: 414-298-8124
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The Honorable Neal Kedzie
Chairman, Committee on
Environment and Natural
Resources
Room 313 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Kedzie:

Re: Support of the Small Business Environmental Council (the "Council") for Senate Bill 61

I appreciated the opportunity to testify on behalf of the Council at your Committee's March 27th Hearing on Senate Bill 61.[1] Enclosed for your information is a description of the Council and its members. The Council appreciates the time you took to meet with us in the past and your efforts, along with the efforts of other members of the Senate and Assembly, on 2001 Assembly Bill 479.

The Council strongly supports both the Environmental Results Program and the Environmental Improvement Program that are contained in Senate Bill 61. I would like to take this opportunity to expand on my comments at the March 27th hearing in support of the Environmental Improvement Program. Specifically, I would like to show how Wisconsin's Environmental Improvement Program will make State law consistent with Federal law, save enforcement dollars, and provide businesses with certainty. Enclosed is a summary of the major reasons why the Council supports the Environmental Improvement Program.

[1] Assembly Bill 228 was introduced on March 25, 2003 and provides for the creation of the same Environmental Results Program and Environmental Improvement Program that is provided for in Senate Bill 61. This bill has been referred to the Assembly Committee on Natural Resources. I am sending a copy of this letter to the members of this Committee for their information.

The Environmental Improvement Program will ensure a higher level of compliance than can be achieved through the traditional "command and control" approach to enforcement. Giving businesses incentives to look for and correct violations will give the State "greater bang for its enforcement buck," especially in these days of severe fiscal and budgetary concerns. The U.S. Environmental Protection Agency ("U.S. EPA") realizes this. In promulgating the current version of its self-policing policy,[2] the U.S. EPA has said:

> "[B]ecause government resources are limited, universal compliance cannot be achieved without active efforts by the regulated communities to police themselves. . . . EPA believes that the incentives offered by [its policy] will improve the frequency and quality of these self-policing efforts.[3]

What are the incentives that the U.S. EPA gives to businesses to encourage self-examination and disclosure and correction of violations? They are:

1. Waiver of 100 % of gravity-based penalties [4] if the policy is fully complied with.

2. Waiver of 75% of gravity-based penalties if most of the elements of the policy are complied with.

3. No recommendation for criminal prosecution unless there is potentially culpable behavior that merits criminal investigation.

4. No routine request for audit reports.[5]

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[2] This policy is known as the U.S. Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations ("U.S. EPA Audit Policy"). This revised policy became effective May 11, 2000 and can be found at 65 FR 19625-19627. This policy modified the U.S. EPA's 1995 audit policy (60 FR 66,706).

[3] 65 FR 19619.

[4] U.S. EPA penalties have two components. First, the economic benefit component which equals the economic benefit the business realized from its violation. Under the U.S. EPA Audit Policy, the U.S. EPA reserves the right to recover this benefit. Second, the gravity component which reflects the seriousness and length of the violation. It is this gravity-based component that the U.S. EPA is willing to waive under its policy.

These incentives provide a business with a way to obtain finality and certainty for violations that are discovered, reported and corrected at the Federal level.

The Environmental Improvement Program proposed in SB 61 will provide businesses with a way to obtain finality and certainty for violations at the State level that are discovered and corrected as part of the audit process. Without this protection at the State level, businesses are left with uncertainty as to what type of enforcement action the State may take for violations that a business discovers and corrects under the U.S. EPA Audit Policy. The U.S. EPA has stated that it

> "will share with state agencies information on disclosures of violations of Federally-authorized, approved or delegated programs."[6]

Unfortunately, this means that under the current Federal and State regulatory structure, businesses who self-discover, disclose and correct violations at the Federal level under the U.S. EPA Audit Policy are exposing themselves to potential enforcement action at the State level where there is no protection from enforcement. Adoption of the Environmental Improvement Program will eliminate this uncertainty.

Why did the U.S. EPA adopt its Audit Policy? The U.S. EPA has stated that the purpose of its Audit Policy is to:

> "Enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of the Federal environmental law."[7]

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[5] 65 FR 19620.

[6] 65 FR 19624.

[7] 65 FR 19618.

The U.S. EPA has had excellent results with this program. It has stated that:

> "The Audit Policy evaluation (published in 1999) revealed very positive results. The Policy has encouraged voluntary self-policing while preserving fair and effective enforcement. . . .

In modifying its Audit Policy in 2000, the U.S. EPA stated that:

> "[t]he revisions issued today do not signal any intention to shift course regarding the Agency's position on self-policing and voluntary disclosure but instead represent an attempt to fine-tune a Policy that is already working well."[8]

The U.S. EPA Audit Policy has been widely used. The U.S. EPA has stated that as of October 1, 1999 approximately 670 organizations had disclosed actual or potential violations at more than 2,700 facilities and that the number of disclosures has increased each of the four years the Policy has been in effect."[9]

The U.S. EPA also believes that:

> "Its Audit Policy provides adequate incentives for self-policing but without secrecy and without abdicating its discretion to act in cases of serious environmental violations." (emphasis added) [10]

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[8] 65 FR 19619.

[9] 65 FR 19619.

[10] 65 FR 19623.

This conclusion stands in stark contrast to the testimony of the Sierra Club at the March 27th hearing in which the Sierra Club described the Environmental Improvement Program as a "pollution secrecy" program.[11]

The U.S. EPA is opposed to state laws which grant blanket immunity particularly where the state law grants

> "immunities for violations that reflect criminal conduct, presents serious threats or actual harm to health and the environment, allow non-complying companies to gain an economic advantage over their competitors or reflect repeated failure to comply with Federal law."[12]

The U.S. EPA has stated that it is willing to work with states to allow them to create immunity laws that are consistent with the U.S. EPA Audit Policy.[13] Exhibit A provides you with a comparison of SB 61's Environmental Improvement Program and U.S. EPA Audit Policy, which, in the Council's view, demonstrates that the proposed Environmental Improvement Program is consistent with the U.S. EPA Audit Policy.

The Council also believes that the Environmental Improvement Program is supportive of the Environmental Results Program. Under the Environmental Results Program a business is eligible not only for immunity protection but also other benefits as long as the business commits to implement an environmental management system and commits to achieve objectives that will improve its environmental performance or commits to voluntarily restore, enhance or preserve natural resources (applies to Tier I participation). In today's economic climate, the Council believes that many small businesses may not have the financial resources to install and operate an environmental management system or create objectives that would allow them to move beyond compliance. The Environmental Improvement Program, however, gives these small businesses the incentive to voluntarily examine its affairs and bring

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[11] See correspondence presented by the Sierra Club "in opposition to SB 61, regarding the environmental results and environmental improvement programs before the senate environment and natural resources committee by Caryl Terrell, Chapter Director."

[12] 65 FR 19626.

[13] 65 FR 19626.

themselves into compliance. Given the limited resources available to the Department of Natural Resources, the Council believes that it is not possible for the Department to routinely and regularly inspect the thousands of small businesses that exist in Wisconsin. The Environmental Improvement Program gives these businesses the incentive to self-police.

It should not be forgotten that in order for a business to avail itself of the protection under the Environmental Improvement Program, the business must disclose the violation and commit to correct it within 90 days or pursuant to a publicly-noticed stipulation schedule. If the business misses this deadline, it is opening itself to easy prosecution by the State because it has already informed the Department of the violation. From the Council's perspective, it is a small trade-off to forego potential penalties in exchange for encouraging businesses in Wisconsin to self-inspect and to correct violations under the threat of future enforcement should they miss deadlines than to hope that someday the Department may find the time to inspect the business and possibly discover a violation.

Thank you again for the opportunity to testify and to provide you with this additional information.

Respectfully submitted

Michael H. Simpson

Michael H. Simpson

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Encs.

cc Senator Cathy Stepp (w/enc.)
Senator David A. Zien (w/enc.)
Senator Fred Risser (w/enc.)
Senator Robert W. Wirch (w/enc.)
Representative DuWayne Johnsrud (w/enc.)
Representative Scott L. Gunderson (w/enc.)
Representative Alvin R. Ott (w/enc.)

Representative Mark. L. Pettis (w/enc.)
Representative Garey D. Bies (w/enc.)
Representative Judy Krawczyk (w/enc.)
Representative Mary Williams (w/enc.)
Representative Spencer Black (w/enc.)
Representative Barbara Gronemus (w/enc.)
Representative John P. Steinbrink (w/enc.)
Representative Mark Miller (w/enc.)
Patrick Henderson, Senate Liaison (w/enc.)

Johnson, Dan (Legislature)
From: Michael H. Simpson [msimpson@reinhartlaw.com]
Sent: Tuesday, April 22, 2003 5:03 PM
To: 'Johnson, Dan (Legislature)'
Subject: RE: SB 61 (environmental audit bill)

Dan-Here is a summary of the comments I passed onto Rep. Miler:

On behalf of the Sierra Club, Caryl Terrell submitted comments to the Senate Environment and Natural Resources Committee in opposition to SB 61 in a letter dated March 27, 2003. This is a summary of the comments that I made to her regarding how I believe small businesses would view their recommendations on the Environmental Improvement Program (EIP). The Sierra Club's recommendations on the EIP are on pages 8-10 of its March 27, 2003 correspondence and include recommendations 13-22.

1. Sierra Club Recommendation No. 13--Provide a more specific definition of Environmental Compliance Audit.

I do not think small businesses would have any objection to this recommendation; however, in my view, no change needs to be made to the definition of "Environmental Compliance Audit" because the definition of this term in Section 299.85(1)(a) closely tracks the definition of an "Environmental Audit" that is contained in the U.S. EPA Audit Policy.

2. Sierra Club Recommendation No. 14--Expand the definition of "violation" contained in Section 299.85(1)(g).

I do not think small businesses would object to this recommendation. This term should encompass both federal and state environmental requirements. In addition, the definition of "violation" should include settlement agreements with citizens groups. A settlement with a citizens group should be treated no differently than a settlement with a governmental entity. One must recognize that settlements are oftentimes compromises without adjudication of guilt, but the Sierra Club's recommendation fits with the concept of preventing "repeat" offenders from taking advantage of this program.

3. Sierra Club Recommendation No. 15--This recommendation, I believe, was made in order to focus on the knowledge of the company rather than the enforcement action taken by the Wisconsin Department of Justice to determine whether a company had a "clean" record for the purpose of participating in the EIP.

I do not believe small businesses would object to this recommendation. I believe it is important that a company have a "clean" record in order to participate in the EIP and that the company not be aware of the violation whether from the Wisconsin Department of Justice or other third parties prior to entering the EIP. In addition, one can examine Condition 4 in the U.S. EPA Audit Policy to see the requirements that a company has to meet in order to ensure that the violation was discovered independent of any governmental or third-party action. As I mentioned to you, I would prefer to use the concepts set forth in the U.S. EPA Audit Policy in lieu of what the Sierra Club is suggesting simply because I believe it is more efficient and less confusing for businesses to work with federal and state requirements that are aligned as far as possible.

4. Sierra Club Recommendation No. 16--A company should specify what type of corrective action it would take.

While I do not believe small businesses would have any objection to specifying the action it intends to take to correct a violation, I do not believe this change is necessary simply because a company must correct the violation to get immunity. Also the proposed legislation mirrors what is required under the U.S. EPA Audit Policy on this point.

5. Sierra Club Recommendation No. 17--Give the DNR the ability to require correction of the violation in less than 90 days if the violation is either causing or contributing to an

299.85(7)(b)(5) to broaden the right of the State to bring an enforcement action for repeat violations.

I believe this recommendation by the Sierra Club would be acceptable to small businesses although this recommendation should only apply to the same facility for which the company previously obtained relief under the EIP. It is interesting to note that, in my view, this exception to the bar on State enforcement is broader than what is provided under the U.S. EPA Policy. Under that policy, the look-back is limited to three years for the same facility and five years for multiple-owned facilities. The EIP exception bars a company from obtaining immunity for a repeat violation that occurs unless the violation was caused by a change in the business processes or activities of the company. Because this provision essentially bars a company from obtaining immunity for a repeat violation, I would suggest limiting its application to a repeat violation at the same facility.

PART OF THE BILL UNDER STIP. PENALTY

Rep. Miller and I also discussed several concepts regarding additional conditions that might be imposed on a company if the company needed more than 90 days to resolve the violation, for example undertaking a pollution prevention study or installing an audit program which would require the company to undertake periodic audits. I think both of these suggestions are worthwhile to consider because they require a company to start looking beyond mere one-time compliance.

Come to think of it, these additional conditions could also be imposed for any relief provided under the EIP. This would help ensure the State that a company had to undertake periodic audits which would keep the company in compliance.

As a result, the EIP program could be viewed as a program to get and keep companies in compliance and the Environmental Results Program could be viewed as a program to encourage companies to go beyond compliance.

If you have any questions regarding these thoughts, I would be more than happy to speak with you in more detail about them.

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GOV'S CONCERNS

1. IF NO STIPULATED PENALTY AGREEMENT CAN BE REACHED, THEN THERE IS NO STIPULATED PENALTY

2. EIP WILL OVERSHADOW ("OUT") ERP BECAUSE PARTICIPATION (ERP) REQUIREMENTS ARE NOT IN EIP. THUS, VERY FEW WILL SIGN UP FOR ERP SO LONG AS EIP IS IN THE BILL

3. IF SOMEONE GETS INTO EIP, WE CAN'T KICK THEM OUT LIKE WE CAN IN ERP

imminent threat to human health or the environment or the violation relates to a monitoring or reporting requirement.

Small businesses would support the concept that the DNR should have the power to order that a violation be immediately corrected in the event that the DNR determines that the violation is causing or contributing to an imminent threat to human health or the environment. This is very comparable to the power that the U.S. EPA has under Condition 5 in its Audit Policy. I do not see the need to require a monitoring or reporting violation to be corrected in less than 90 days unless it also constituted an imminent threat to human health or the environment. Moreover, a company is not eligible for relief under the EIP if the violation relates to a monitoring or reporting requirement (see section 299.85(7)(b)4).

6. Sierra Club Recommendation No. 18--Specify the type of information that the DNR has to place in a public notice and what materials are available to the public.

   This is an issue between the DNR and the Sierra Club. I believe small businesses have confidence in the DNR that it will be able to properly identify what needs to go into a public notice, particularly under the EIP where the purpose of the public notice is to inform the public of a proposed compliance schedule and/or stipulated penalties. The purpose of this particular public notice is much narrower than the types of public notices that are issued under the Wisconsin Cooperative Program, which, I believe, the Sierra Club did have some issues with.

7. Sierra Club Recommendation No. 19--This recommendation covered three issues

   (a) Allow the DNR to issue compliance orders for immediate correction of violations that are causing or contributing to imminent threat to human health or the environment;
   (b) Allow for the issuance of immediate compliance orders for violations that relate to monitoring and reporting requirements; and
   (c) Provide that a company is not eligible for immunity if the violation comes to the attention of the DNR through citizen suits, from the EPA or from other sources.

As mentioned above, I do not believe small businesses would have a problem with recommendations (a) and (c) (see points 3 and 5 above for rationale). I disagree with the Sierra Club recommendation (b) regarding monitoring and reporting requirements (see point 5 above for rationale).

8. Sierra Club Recommendation No. 20--Section 299.85(7)(a)3 be modified to state that the State can bring any type of enforcement action against a company should the company fail to timely correct a violation.

   I have no objection to this concept; however, I disagree with the Sierra Club's reading of the EIP language. I believe that the language in this section already allows what the Sierra Club is seeking.

9. Sierra Club Recommendation No. 21--Allow the State to collect all economic benefit penalties from businesses rather than being limited to "substantial economic benefit that gives the regulated entity a clear advantage" over its business competitors.

   Small businesses would agree with the Sierra Club recommendation. A law-abiding company should in no way be disadvantaged by a company that is violating environmental laws. This recommendation also mirrors the U.S. EPA Audit Policy which gives the U.S. EPA full authority to recover all economic benefit that a violator has obtained from its violation.

10. Sierra Club Recommendation No. 22--modify Section