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Senator Gary R. George and
Representative Joseph K. Leibham, Co-chairpersons
Joint Legislative Audit Committee
State Capitol
Madison, Wisconsin 53702

Dear Senator George and Representative Leibham:

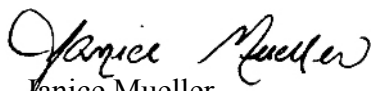
We have completed a review of the Environmental Cooperation Pilot Program, which was established by 1997 Wisconsin Act 27. This pilot program, operated by the Department of Natural Resources (DNR), is intended to provide increased flexibility for businesses in complying with environmental regulations, while maintaining existing levels of environmental protection. The Legislative Audit Bureau is required by statutes to monitor and report annually on this pilot program.

The program allows DNR to sign up to ten cooperative agreements with businesses. No cooperative agreements were established during the program's first two years. Of the nine companies that submitted letters of intent to join the program, three have withdrawn or chosen to pursue their objectives within existing regulations. In February 2001, an agreement with Wisconsin Electric Power Company became the first to be executed under the program. Agreements with the remaining five companies are in various stages of development.

Both DNR staff and program participants identified challenges associated with the Environmental Cooperation Pilot Program. These challenges include encouraging businesses to participate despite the time required to advance through the application process and reach a signed agreement, the uncertainty of the final outcome for program participants, and the process for involving the federal Environmental Protection Agency. Addressing these challenges will be important because the Legislature will likely be asked to consider a new flexible environmental management program, known as Green Tier, which has been proposed by a DNR-appointed committee to enhance the environmental performance of companies.

We appreciate the courtesy and cooperation extended to us by DNR during our review.

Sincerely,


Janice Mueller
State Auditor

JM/DB/ss
Enclosure

ENVIRONMENTAL COOPERATION PILOT PROGRAM

1997 Wisconsin Act 27 created the Environmental Cooperation Pilot Program with the overall objective of encouraging innovation and experimentation in environmental regulation, while maintaining at least the current level of environmental protection. The legislation authorizes the Department of Natural Resources (DNR) to establish up to ten cooperative agreements with owners or operators of businesses covered by or subject to environmental regulatory approvals or permits, such as water pollution discharge elimination permits or air pollution control permits. More than one facility of the same business may be covered under a single agreement. In agreements, which last five years and may be renewed for an additional five years, DNR agrees to reduce administrative requirements and to give businesses greater flexibility in meeting federal and state environmental regulations. In return, participants must evaluate their entire effect on the environment, establish goals to reduce their overall level of pollution, and document their progress toward those goals. Cooperative agreements may replace and supercede provisions of any approval or permit obtained from DNR for the term of the agreement. However, the business is required to pay the same fees under the cooperative agreement as would be paid under the superseded approval or permit. DNR may not enter into agreements with any business after October 1, 2002.

The legislation creating the pilot program requires annual progress reports to the Legislature by DNR and directs the Legislative Audit Bureau to monitor the program. On April 5, 2000, we submitted our first report on the program to the Joint Legislative Audit Committee. In it, we concluded that, because no agreements had been signed, we could not judge the effectiveness of the pilot program in meeting its goals. For this report, we contacted those involved in the pilot program to ascertain what lessons had been learned thus far and to identify the challenges that had emerged during their participation. Specifically, we interviewed:

- representatives of the nine companies that submitted letters of intent to participate in the pilot program;
- staff in DNR with responsibility for the pilot program;
- staff from the Region V office of the federal Environmental Protection Agency (EPA); and
- agency staff from ten other states, eight of which had implemented programs with goals and objectives similar to those of the Wisconsin pilot program.

Pilot Program Process and Incentives

To participate in the program, a business owner or operator must send DNR a letter of intent, which indicates plans to negotiate a cooperative agreement. The owner or operator then submits to DNR an initial proposal, in the form of a draft agreement, outlining what the company hopes to achieve through participation in the pilot program and identifying the specific types of regulatory flexibility requested. After reviewing the owner's proposal, staff in DNR develop a

counterproposal that indicates points of agreement and areas that require greater explanation or negotiation. Statutes require at least 30 days for public comment on the proposed issuance of a cooperative agreement. During this period, the EPA, which also has environmental regulatory responsibilities, is formally invited to comment, and negotiations begin between DNR and the business. If all parties are able to reach consensus, these negotiations may lead to a signed cooperative agreement.

Terms of the cooperative agreements are tailored to individual businesses. For example, DNR can grant incentives such as:

- reduced monitoring, record-keeping, and reporting requirements;
- removal of requirements to screen for pollutants that have not appeared in earlier analyses; and
- creation of facility-wide permits for some waste or pollution sources.

In all agreements, there is deferred civil enforcement of violations of environmental regulations. DNR agrees not to take civil action to collect forfeitures on any violation disclosed in a pilot program participant's environmental performance evaluation report if it is corrected within 90 days, unless the violation presents an imminent or serious public health or environmental threat, or DNR discovers the violation before submission of the evaluation. The program also requires participants to create opportunities for public involvement. Specifically, they are required to establish "interested persons groups" that include residents of the area who review both the design of the environmental management systems and progress toward meeting environmental performance goals. DNR must also provide for public comment on any issuance, modification, or revocation of a cooperative agreement.

In return for these benefits, a participant must commit to superior environmental performance—that is, performance exceeding regulatory standards—by implementing items such as waste reduction goals and pollution limits and by adopting an environmental management system. An environmental management system develops a process to identify the regulated and unregulated environmental effects of a participant's operations, assesses current performance, and creates plans and goals to achieve significant environmental improvements.

DNR staff indicate that another benefit of the current pilot program is that it provides a means for participants to implement innovations that improve the environment and that may not be addressed in current regulations. For example, by recovering ash from landfills for reuse as a supplemental fuel to generate electricity which, in turn, produces a higher-quality ash that is used as a sand and gravel substitute, one participant expects to reduce its use of coal while recovering landfill space. Participants note that the implementation of innovations such as this may not be possible under existing environmental regulation. Therefore, the pilot program provides businesses with a means to seek the needed regulatory flexibility to implement the innovation. In addition to the flexible regulatory benefits already noted, the companies we interviewed also reported that the opportunity to work more closely with DNR in a proactive approach to environmental management was a valuable benefit. By working closely with DNR regulatory

staff on the pilot program project, participants hope to establish a more effective working relationship with DNR for future efforts.

DNR staff believe that, even before a cooperative agreement is finalized, environmental benefits may be derived from a company's participation in the pilot program and from the implementation of an environmental management system. For example, DNR reports that one of the participants in the pilot program implemented an environmental management system in 1997 that:

- reduced total volatile organic compound (VOC) emissions by 10 percent in 2000;
- reduced the volume of waste sent to landfills by 28 percent since 1998; and
- reduced its total emissions of hazardous air pollutants by 11 percent in 2000.

Memorandum of Agreement

During our review of the program in 2000, staff in DNR indicated that, because the EPA did not provide its formal support to the program during its first one-and-one-half years, progress on negotiating and finalizing agreements was impeded. Businesses were concerned that the EPA might not recognize the regulatory flexibility granted by DNR, and that additional rather than less work would be required to follow differing federal and state rules. Moreover, concern was expressed that citizens could bring legal action against businesses for not following federal regulations.

To address these concerns, DNR and the EPA signed the nation's first federal-state memorandum of agreement governing the relationship between the two agencies in the implementation of an innovative regulatory program. The memorandum of agreement, which was signed on March 25, 1999, outlines the responsibilities of both agencies in forming cooperative agreements and fulfills the principles of a joint agreement entered into by the EPA and the Environmental Council of the States allowing for state development of innovative environmental programs. The principal points of the pilot program's memorandum of agreement include:

- assurance to businesses that DNR's cooperative environmental agreements are allowed and supported by the EPA;
- creation of the Interagency Innovations Team, composed of staff from both agencies, to coordinate regulatory change and enforcement decisions for each participating business and to develop evaluation criteria for the program; and
- assurance to the EPA that Wisconsin will continue to provide adequate enforcement against businesses with serious violations.

During the early years of the pilot program, the focus of DNR's efforts was creation of the memorandum of agreement. DNR staff indicate that the EPA has generally fulfilled the responsibilities outlined in the agreement. However, some general provisions of the agreement

have not been met. For example, the Interagency Innovations Team has not been formed, and instead, DNR has formed distinct teams to evaluate each application on a case-by-case basis. Furthermore, while the one signed agreement contains environmental performance measures for the participant to meet, criteria have not been developed to evaluate the pilot program as a whole. Additionally, DNR staff indicate that, because of a request by EPA staff for additional time to examine agreement issues, the federal agency did not adhere to the time lines set forth in the agreement during its review of the first and only agreement signed under the pilot program. Since only one agreement has been signed to date, DNR staff believe it is too early to evaluate the effectiveness of the memorandum of agreement in managing DNR's relationship with the EPA.

Both DNR staff and program participants have identified challenges that emerged during the course of their interactions with each other, the public, and the EPA. DNR's efforts to address the challenges or lessons learned from the pilot program will be important for the Legislature as it considers the proposed Green Tier program, which was developed by a DNR-appointed committee consisting of industry and environmental groups to encourage businesses to achieve superior environmental performance.

Pilot Program Participants

Since 1997 Wisconsin Act 27 was enacted in October 1997, DNR has received letters of intent from nine companies. Two of these companies later elected to withdraw from the program, and one chose to pursue its objectives within the existing regulatory framework.

In February 2001, an agreement with Wisconsin Electric Power Company became the first to be executed under the pilot program. Agreements with the remaining five participants are in various stages of review, and under statute, DNR may not enter into any more agreements after October 1, 2002. Table 1 shows the variety of company types that have applied to participate in the pilot program, as well as their locations and participation status. The sections that follow summarize each participant's involvement in the pilot program.

Table 1

Environmental Cooperation Pilot Program Participants

<u>Participant Name</u>	<u>Facility Location</u>	<u>Company Type</u>	<u>Date Letter of Intent Filed</u>	<u>Status</u>
International Truck and Engine	Waukesha	Engine manufacturer	May 29, 1998	Pending
Cook Composites and Polymers	Saukville	Chemical manufacturer	Mar. 23, 1999	Pending
Kohler Generator	Mosel	Generator manufacturer	Mar. 25, 1999	Withdrawn
Northern Engraving	Sparta, Holmen, and Galesville	Surface coating manufacturer	May 21, 1999	Pending
Madison Gas and Electric	Madison	Electric and natural gas utility	June 4, 1999	Pending
Nestlé USA	Eau Claire, Jefferson, and Stoughton	Food processor	July 12, 1999	Withdrawn
Packaging Corporation of America	Tomahawk	Paper mill	Aug. 27, 1999	Pending
Wisconsin Electric Power Company	Pleasant Prairie	Electric utility	Aug. 31, 1999	Agreement signed
Oconto Falls Tissue	Oconto Falls	Tissue mill	June 27, 2000	Withdrawn

International Truck and Engine

International Truck and Engine, an engine manufacturer, was the first company to submit a letter of intent expressing interest in the pilot program. The company requested regulatory flexibility including:

- a single permit for its entire facility, which would cover all environmental areas such as air and groundwater;
- permission to reuse manufacturing by-products; and
- permission to undertake construction activity that affects air emissions without first obtaining an air permit.

Because of other pending permitting issues and turnover among company staff, no formal action has been taken on the company's application since late 1999. Recently, the company has expressed renewed interest in pursuing a cooperative agreement with DNR.

Cook Composites and Polymers

Cook Composites and Polymers, a chemical manufacturer, applied to the pilot program to implement a waste minimization project designed to eliminate the generation of hazardous waste and the need for a hazardous waste incinerator. DNR has issued a counterproposal, and the parties are in negotiation.

Kohler Generator

Kohler Generator, a manufacturer of power generators, sought public recognition for its environmental efforts, an opportunity to develop environmental management system standards, and reduced monitoring and reporting requirements. Believing that acceptance of the provisions included in DNR's counterproposal would result in a competitive disadvantage for the company, Kohler Generator withdrew from the pilot program in October 1999.

Northern Engraving

Northern Engraving, a producer of surface coatings, chose to participate in the pilot program to obtain the flexibility to construct or modify air emission sources without first obtaining a construction permit. Additionally, the company sought permission to use a streamlined monitoring, record-keeping, and reporting system. After submitting a letter of intent in September 1999, Northern Engraving is negotiating with DNR, but a counterproposal has not yet been developed by DNR.

Madison Gas and Electric

Madison Gas and Electric, a utility company, applied to the pilot program to reduce its transaction costs by improving understanding of the DNR permitting process and enhancing working relations with DNR staff. Additional regulatory flexibility was also sought, including streamlined monitoring requirements and modified compliance dates for new or modified equipment. DNR staff completed a counterproposal in July 2001.

Nestlé USA

Nestlé USA, a food processor, expressed interest in the pilot program to obtain regulatory flexibility, such as a single permit covering all environmental areas for its three Wisconsin facilities, and relief from an enforcement action by DNR. Staff in DNR believed that the request focused on attaining compliance with existing regulations for enforcement relief and, therefore, was inconsistent with the pilot program's objective to promote superior environmental performance. As a result, the company withdrew from the pilot program in July 2000.

Packaging Corporation of America

Packaging Corporation of America, a paper mill, chose to participate in the pilot program to implement technical advances to improve pollutant control. Specifically, the company wanted to

install devices to limit releases of hazardous air pollutants to the environment. Currently, regulatory staff in DNR and the EPA are reviewing the proposal and analyzing data to develop a counterproposal.

Wisconsin Electric Power Company

Wisconsin Electric Power Company, an electric utility, proposed to recover coal ash from its landfill for beneficial reuse as aggregate material for use in construction, or to blend the ash with coal in the generation of electricity. After an 18-month negotiation and approval process, a cooperative agreement with DNR was signed in February 2001. To date, Wisconsin Electric Power Company is the only participant to have finalized an agreement under the pilot program. Under agreement provisions, the company is required to submit an annual written performance report, beginning in February 2002, that includes a detailed evaluation of its interested persons' group, commitments to superior environmental performance, operational flexibility, and annual achievements, as well as an itemization of cost savings realized from the agreement.

Oconto Falls Tissue

Oconto Falls Tissue, a tissue mill, applied to the pilot program seeking permitting flexibility for its existing and future equipment needs. The company's application was not accepted because DNR believed the company could achieve its goals within the existing regulatory framework. Consequently, DNR and Oconto Falls Tissue pursued permit modifications rather than addressing the request through pilot program participation.

Pilot Program Challenges

From their involvement in the pilot program thus far, DNR staff and pilot program participants identified challenges that have, at times, affected progress toward achievement of program goals. These include the support within DNR for the pilot program and the involvement of the EPA. Other challenges include developing ways to efficiently structure participation by interested persons, the high transaction costs for businesses in relation to uncertain outcomes, and difficulty recruiting small businesses to the program. Addressing these challenges in each project has been time-consuming and has resulted in delays in completing the agreements.

The time required to advance a proposal through the various stages of the pilot program is significant. As shown in Table 2, companies have taken between 4 and 16 months to submit a proposal after indicating their intent to participate. While the companies are responsible for preparing and submitting agreement proposals, the next formal step in the process—preparation of a counterproposal—is the responsibility of DNR. To date, only three current participants have received counterproposals from DNR identifying its specific concerns with each participant's proposal. In these instances, it took DNR between 2 and 11 months to develop a counterproposal after the proposal had been submitted by the participant. Three other participants that submitted proposals in fall 1999 have yet to receive counterproposals from DNR.

Table 2

Time Elapsed Between Pilot Program Milestones*

<u>Participant</u>	<u>Date of Letter of Intent</u>	<u>Time from Letter until Participant Proposal</u>	<u>Time from Proposal until DNR Counterproposal</u>	<u>Time from Counterproposal until Signed Agreement</u>
International Truck and Engine	May 29, 1998	16 months	—	—
Cook Composites and Polymers	Mar. 23, 1999	5 months	11 months	—
Northern Engraving	May 21, 1999	4 months	—	—
Madison Gas and Electric	June 4, 1999	15 months	10 months	—
Packaging Corp. of America	Aug. 27, 1999	**	—	—
Wisconsin Electric Power Co.	Aug. 31, 1999	9 months	2 months	6 months

* Does not include three participants that withdrew from the program.

** Letter of intent and participant proposal were submitted simultaneously.

After DNR issues a counterproposal, the EPA is formally invited to review the proposal provisions and to comment during the public comment period. However, DNR staff indicate that informal discussions with EPA staff occur throughout the process. For example, some participants traveled to the EPA's Region V headquarters to present their proposals and discuss what they hoped to accomplish through participation in the pilot program.

Representatives of some companies have expressed frustration with delays in proposal advancement, especially in the development of counterproposals by DNR staff. These participants shared a belief that mixed levels of staff support for the program within DNR contributed to delays in developing agreements. However, while pilot program participants were able to identify difficulties associated with the pilot program, most expressed their support for the pilot program's concept.

Commitment by the Department

The pilot program was created to function within DNR's existing staffing levels. Eight Division of Customer Assistance and External Relations staff within DNR's Bureau of Cooperative Environmental Assistance have served as project managers for the pilot program. Project managers educate other DNR regulatory staff about the pilot program, describe how a particular idea may accomplish DNR's broader goals for environmental management, and serve as liaisons between participants, DNR regulatory staff, and the EPA. Since one cooperative agreement can affect DNR regulation in multiple areas, such as both air and water, project managers also serve

to coordinate the participation of the regulatory staff involved in negotiating specific agreement provisions in each regulatory area.

Project managers perform other DNR functions in addition to their pilot program responsibilities, and they determine how much of their time they allot between pilot program responsibilities and other activities. For example, one project manager reports working half-time on the pilot program, while another project manager reports spending about 5 percent of work time on the pilot program. Project managers state that pilot program workload can vary by project, by the initiative of the participant, and by the stage of the process.

Project managers report that other DNR staff must also balance pilot program work with other regulatory responsibilities. For example, regulators in the air program balance the time required to advance a pilot program proposal and the time required to process regular permit applications. Project managers and program participants indicate that getting DNR staff to invest their time on pilot program work has, at times, been challenging. Some participants in the pilot program have noted the amount of time DNR uses for proposal review and believe that the transition from the standard agency command-and-control structure for environmental management, whereby staff approve or deny specific requests, to a more innovative and negotiated framework has been difficult for some DNR regulatory staff. Additionally, project managers suggest that better coordination among staff regulating the different environmental areas could reduce delays in proposal advancement.

Some project managers are concerned that pilot program objectives may not be clear to all staff or that some may see the pilot program as a deregulation program. Some program participants believe that some DNR regulatory staff may attempt to use the pilot program to impose additional new environmental requirements and regulations. For example, one participant eventually withdrew from the pilot program because of a belief that elements of the DNR counterproposal represented extensive new regulations for that participant, and another participant believes that agreement provisions can be more stringent than existing regulations.

EPA Involvement

The EPA review of proposal elements has been described by participants and by some DNR staff as another challenge for the pilot program. Despite the presence of the memorandum of agreement, some DNR project managers note that it often takes a persistent effort to receive a response from EPA staff on issues and questions pertaining to proposal development. However, project managers also note that this level of responsiveness is not atypical for the EPA. One program participant suggested that only after members of the Wisconsin congressional delegation contacted the EPA was action taken on a proposal. Some are also critical of the EPA for attempting to approach the innovative program from the standard command-and-control regulatory framework. However, representatives of the EPA's Region V headquarters state that the materials they receive for review often lack sufficient detail on which to base a decision. EPA officials report they often must request additional information from DNR in order to respond to specific requests. DNR maintains that since only one agreement has been signed, it is too early to judge the effectiveness of the cooperative relationship with the EPA.

Participation by Interested Persons

Another challenge for pilot program participants has been the time and effort required to form an interested persons group and to work effectively with it once it has been established. One program participant cited problems finding persons willing to serve as members of an interested persons group. Another program participant reported difficulty managing the interested persons group so that specific concerns could be addressed without significant delays in progress toward final agreement implementation. A third pilot program participant expressed concern about comments from statewide environmental interest groups that were not official members of the interested persons group, which came late in the negotiation stage. According to the participant, such last-minute comments led to additional delays.

Transaction Costs and Outcome Uncertainty

As noted by program participants, the development of a cooperative agreement consumes a significant amount of time for company representatives. One participant reported that work on the pilot program proposal was a half-time responsibility for one year. Given the time invested by company staff to negotiate with DNR and internal company costs associated with developing alternative methods of controlling pollution, participants noted concern with the relative uncertainty of the outcome, such as the specific incentives or benefits that may be provided. The normal permitting process provides for more certainty because DNR must approve an application if it conforms with applicable regulations. However, in the pilot program, DNR can negotiate with a company and has the discretion to determine whether or not to enter into a cooperative agreement, as well as the incentives or benefits to be granted. Therefore, participants note that the transaction costs associated with the pilot program may outweigh the benefits. Some suggest that this may be one reason why only nine companies have applied to the pilot program.

Small Businesses Participation

Statutes require DNR to attempt to attract businesses of various types, sizes, and locations to the pilot program. As noted, the nine companies submitting letters of intent come from a variety of locations in the state and represent a variety of industries. However, there has not been a small business presence among program participants. Some believe it would be difficult for a small business to participate because of the significant level of resources necessary. Small businesses may also face fewer regulations than larger corporations and, therefore, may have less need for regulatory flexibility. The recruitment of small businesses to the pilot program has been identified by DNR as an ongoing challenge.

The Proposed Green Tier Program

Nationally, efforts to enhance the environmental performance of businesses by offering regulatory flexibility are relatively new, and Wisconsin's pilot program was among the earliest to be implemented. Recently, a DNR committee consisting of community, industry, and environmental representatives has proposed legislation to create a second innovative approach to environmental management focused on superior environmental performance and regulatory flexibility: the Green Tier Program. The proposed Green Tier program is designed to encourage companies to exceed existing regulatory requirements and to restore natural resources in return

for incentives offered by DNR. Although the proposed structure of Green Tier differs from that of the current Environmental Cooperation Pilot Program, there are also some similarities.

Like programs in other states, the proposed Green Tier program provides public recognition and other incentives to companies whose environmental performance exceeds that required by existing regulations. However, the Green Tier proposal, a modified version of which had been included in the Governor's 2001-03 Biennial Budget Proposal but was removed with other policy items by the Joint Committee on Finance, contains elements that have presented challenges for the current pilot program, such as a role for participation by interested persons, the potential for EPA involvement, and the challenges of negotiating agreements. DNR will need to address these challenges and draw on the lessons learned from the pilot program if the proposed Green Tier program is to be successful.

Administrative Components of the Green Tier Proposal

Like the current pilot program, the Green Tier proposal is a pilot program seeking to provide new and innovative ways to improve the environment by offering incentives, such as regulatory flexibility, in return for environmental performance that surpasses regulatory standards. Both programs strive to accomplish their goals through the involvement of interested persons, such as members of the community, in the design and implementation of cooperative agreements, contracts, or charters. As shown in Table 3, both programs are to receive guidance from a formal advisory group or council. An advisory group for the current pilot program was active at one time but has not continued to meet on a regular basis. The Green Tier proposal contains a statutorily created advisory council with specific responsibilities. Unlike the current pilot program, which was implemented within DNR's existing budget resources, the Green Tier proposal includes a request for 5.0 staff positions and \$300,000 for grants. Of the \$300,000 in grant funds, \$150,000 is to be used to assist non-governmental organizations in participating as interested persons in Green Tier. The remaining \$150,000 is to be used to assist persons in the development of environmental management systems.

Table 3

Administrative Components of the Current Environmental Cooperation Pilot Program and the Proposed Green Tier Program

<u>Administrative Component</u>	<u>Current Pilot Program</u>	<u>Green Tier Proposal</u>
Governance	Cooperative Agreement Advisory Group	Green Tier Council
Staffing and Budget	Existing staff and budget	5.0 new positions and \$300,000 in grant funds
End Date	October 1, 2002	July 1, 2006
Administrative Rules	DNR is not authorized to create rules	DNR is authorized to create rules
Agreement with EPA	Yes	To be determined

Program Components of the Green Tier Proposal

Although both the current Environmental Cooperation Pilot Program and the proposed Green Tier program contain similar administrative components, their structures differ. Green Tier provides two levels of participation. The first level, called Green Tier I, provides public recognition as an incentive, and a limited opportunity for regulatory flexibility. Public recognition incentives for participants include a certificate of recognition, identification on DNR's Internet site, DNR's annual notification of participation to newspapers, and the authority to use the Green Tier logo on written materials.

In return for these benefits, participants in Green Tier I must have implemented, or must implement within one year, an environmental management system that includes at least two environmental objectives, such as improving environmental performance that is regulated; improving environmental performance that is not regulated; or voluntarily restoring, enhancing, or preserving natural resources. In addition, Green Tier I participants must:

- conduct annual environmental management system audits;
- submit annual audit reports to DNR describing any violations discovered, corrective action to be taken and the time period in which it will be taken, and preventative measures; and
- submit annual progress reports on environmental management system objectives.

Although Green Tier I participants are not required to renew their applications annually or periodically, DNR may suspend or revoke participation for a participant that fails to implement or maintain its environmental management system, conduct annual audits, or submit annual reports. Additionally, DNR may terminate participation if a judgment is entered against a participant or if DNR determines that the participant committed a criminal or civil violation that resulted in substantial harm or imminent threat to public health or the environment.

The second tier, called Green Tier II, allows participants to enter into contracts with DNR that provide regulatory flexibility in exchange for more stringent program commitments than are mandated for Green Tier I participants. A Green Tier II participant must demonstrate implementation of an environmental management system, undertake an annual environmental management system audit by an independent auditor approved by DNR, and undergo an annual audit of compliance with environmental requirements that is performed by either the participant or the independent auditor. Reports on both audits must be submitted to DNR. The compliance audit report must describe any violations that were discovered, a commitment to planned corrective actions within a specified period of time, and measures to prevent future violations. In addition to these commitments, participants in Green Tier II must demonstrate a record of environmental performance beyond what is mandated under current requirements and must describe their plans to maintain or improve their performance.

As with Green Tier I, DNR may suspend or revoke participation in Green Tier II if a judgment is entered against the participant or if DNR determines that the participant committed a criminal or civil violation that resulted in substantial harm or an imminent threat to public health or the environment. In addition, DNR may terminate a Green Tier II contract if it determines that the participant is not in substantial compliance with the contract. Persons who are not a party to the Green Tier II contract, including members of the public, may also ask DNR to terminate the contract.

Like participants in the current pilot program, both Green Tier I and Green Tier II participants benefit from deferred civil enforcement of violations of environmental regulations. Under Green Tier I, DNR may not take civil action to collect forfeitures on any violation disclosed in a participant's environmental management system audit if the violation is corrected within 90 days, unless it presents an imminent or serious public health or environmental threat or DNR discovered it before the audit was submitted. Moreover, both the current pilot program and the Green Tier proposal require participants to implement performance evaluation measures under their agreements or contracts. However, performance measurement requirements are more rigorous for participants in Green Tier II than for participants in Green Tier I.

As shown in Table 4, another distinction between the Green Tier proposal and the current pilot program is the mechanism that provides regulatory flexibility and ensures enhanced environmental performance. Under the current pilot program, a participating company may enter into a five-year cooperative agreement with DNR. Under Green Tier I, a company will be required to submit only an application form, and no proposal, for approval by DNR. Under Green Tier II, an individual company may enter into a three- to ten-year contract with DNR, or DNR may issue a charter to an association or combination of Green Tier I or Green Tier II participants organized on any basis, such as business sector or geographic location. Under a

Green Tier II contract, DNR must ensure that a participant’s incentives are proportional to its environmental performance. A Green Tier charter would identify the collective duties and responsibilities of the association.

Table 4

Program Components of the Current Environmental Cooperation Pilot Program and the Proposed Green Tier Program

	<u>Current Pilot Program</u>	<u>Green Tier I</u>	<u>Green Tier II</u>
Instrument	5-year agreement	Approved application or 3-10 year charter	3-10 year contract or charter
Incentives	Regulatory flexibility and deferred civil enforcement	Public recognition, single-point of contact in DNR, reduced inspection frequency, and deferred civil enforcement	Regulatory flexibility and deferred civil enforcement
Involvement of Interested Persons	Interested persons group comments on an environmental management system, reviews a participant’s performance under the agreement, and attends semi-annual progress meetings	Opportunity for public participation during formation of an environmental management system	Interested persons may be involved in development of the contract proposal, and possibly in negotiation of the proposal
Performance Measures	Baseline performance evaluation within 180 days of the agreement and periodic updates, and assessment on administrative cost reductions	Annual report on environmental management system audit, annual audit on regulatory compliance and progress on environmental objectives	Annual report on the environmental management system audit by an independent auditor, and annual audit on regulatory compliance; for charters, annual report on association activities

Eligibility and Application Components of the Green Tier Proposal

Application and eligibility requirements for the proposed Green Tier program differ from those of the current Environmental Cooperation Pilot Program. Eligibility for the current pilot program is not based on compliance with any specific environmental regulations, whereas the Green Tier proposal includes specific compliance criteria for program participation, including more stringent requirements for participation in Green Tier II. Moreover, legislation for the current pilot program allows only ten cooperative agreements to be executed. No statutory participation limit is proposed for Green Tier I, although the proposal would authorize DNR to limit participation if doing so would be in the best interest of the program. Similarly, the proposal would allow DNR to limit the number of letters of intent filed by Green Tier II applicants based on available staff resources.

Table 5 compares the approval procedures for cooperative agreements under the current pilot program and applications, contracts, and charters under Green Tier. Opportunities for public involvement under the Green Tier proposal are different than those available under the current pilot program, and in some instances they have been reduced. The Legislature mandated a public comment period as part of the approval process under the current pilot program. Depending on the comments received during this period, DNR has the discretion to hold a public information meeting on a proposed cooperative agreement. Proposed legislation for the Green Tier program also grants DNR discretion to hold public information meetings on applications for Green Tier I, and letters of intent or proposed contracts submitted by Green Tier II applicants. A public information meeting must be held on a proposed charter to be issued to an association or organization of Green Tier participants. However, unlike the legislation for the pilot program, the proposal for Green Tier does not require DNR to provide a public comment period on applications, letters of intent, or proposed contracts or charters.

Table 5

Eligibility and Application Procedures for the Current Environmental Cooperation Pilot Program and the Proposed Green Tier Program

	<u>Current Pilot Program</u>	<u>Green Tier I</u>	<u>Green Tier II</u>
Maximum Number of Participants	10	Number of participants determined by DNR	Number of letters of intent determined by DNR
Eligibility Requirements	A facility that is required to obtain specified environmental approvals	(1) No criminal judgment of conviction within 60 months, no civil judgment within 36 months, and no citation or enforcement action within 24 months; and (2) environmental management system, or functional equivalent, within 1 year	(1) No criminal judgment of conviction within 120 months, no civil judgment within 60 months, and no citation or enforcement action within 24 months; (2) environmental management system, or functional equivalent; and (3) record of superior environmental performance
Application Requirements	Proposed agreement and description of interested persons group	Description of past and current environmental performance, and future plans	Letter of intent outlining proposed contract provisions and describing involvement of interested persons
Approval Procedures	(1) Letter of intent; (2) application; (3) DNR counterproposal; (4) draft agreement; (5) public comment period; and (6) final agreement	(1) Application; (2) optional public information meeting; and (3) final decision by DNR	Contract: (1) Letter of intent; (2) optional public information meeting; (3) proposed contract; (4) optional public information meeting; and (5) final contract Charter: (1) Public information meeting; and (2) final charter

The enabling legislation for the current pilot program did not require DNR to take action on cooperative agreements within a specified time period. Under the proposed Green Tier legislation, DNR must approve or deny a Green Tier I application within 60 days of providing public notice of the application, or after any informational meeting open to the public. For Green Tier II, DNR is required to provide public notice of the letter of intent within 90 days of its receipt. The legislation authorizes DNR to begin contract negotiations no sooner than 30 days after the notice, and negotiations must be completed within 12 months, unless the parties agree to an extension. If negotiations result in a proposed contract, public notice must be given again, and an informational meeting may be held. DNR must decide whether to pursue a contract with the applicant within 30 days of this notice or the informational meeting, if one is held, unless an extension is agreed upon by the parties.

It is important to note that since legislation has not yet been introduced, the Green Tier proposal may be subject to change. Nonetheless, it appears that effort has been made to address some of the challenges that arose during the implementation of the current pilot program. For instance, the proposed legislation for Green Tier includes time lines for DNR action, which may shorten the time used to negotiate and finalize contracts. Also, the specified incentives in Green Tier I may provide greater certainty about outcomes for participants, which some noted as lacking under the current pilot program. However, other challenges that exist under the current pilot program will remain under the Green Tier proposal. This includes the involvement of the EPA, effective participation by interested persons, and uncertainties associated with negotiated contracts under Green Tier II. DNR may need to take additional steps to address these challenges to enable successful implementation of Green Tier if the program is adopted.

Other States' Programs

In the last five years, many states have implemented alternative regulatory programs for environmental protection that focus on encouraging environmental performance by providing public recognition and flexibility with respect to current regulations. Many of the programs in other states include elements found in either Wisconsin's current pilot program or the Green Tier proposal. Like Wisconsin's current program, some state programs have experienced challenges such as lower-than-expected corporate interest and the need for significant commitment of agency staff and company resources. Since the concept of encouraging companies to operate beyond compliance in return for regulatory incentives is relatively new, and since many innovative state programs are still developing, it is difficult to evaluate their success or effectiveness. No state we contacted had performed an evaluation of its program.

We contacted agency staff from ten states to determine whether these states had implemented innovative regulatory programs similar to the pilot program. In addition to contacting the surrounding midwestern states of Illinois, Indiana, Iowa, Michigan, Minnesota, and Ohio, we also spoke with program representatives from New Jersey, Oregon, Texas, and Virginia. These states were identified by the EPA as having developed alternative regulatory initiatives. Iowa and Ohio have not implemented such programs, and Indiana has terminated its program because of similarities with the EPA's National Environmental Performance Track, which was implemented

in June 2000 to motivate further improvements among top environmentally performing companies.

Our analysis of other states' programs illustrated a range of different incentive options for participating companies. Like Wisconsin's Green Tier proposal, most programs offered public recognition as a benefit to companies. These benefits typically included inclusion in agency publications and Internet sites, use of a special logo, and recognition events. Some of the states granted flexibility from environmental regulations, such as waivers, reduced record-keeping, and reduced monitoring. Some programs, such as Michigan's "Clean Corporate Citizen" program, provided a limited list of available options for regulatory flexibility, while others, like Wisconsin's current pilot program and Green Tier proposal, allowed companies to request and negotiate for regulatory flexibility within certain established parameters, as long as a commitment to exceed applicable environmental regulations was met.

Most of the programs we examined created a tiered structure, similar to the Green Tier proposal's, that involves increasingly stringent eligibility requirements and more attractive incentives for companies participating at the higher levels. For example, Virginia's "Environmental Excellence Program" is divided into two levels: the first level, called "Environmental Enterprise," offers public recognition, single-point of department contact, and technical assistance as incentives. The second level, called "Exemplary Environmental Enterprise," provides higher levels of public recognition, such as site visits by the department secretary, and options for regulatory flexibility.

Some states have drawn from Wisconsin's memorandum of agreement in formalizing their relationships with the EPA. For example, Oregon and Virginia have entered into memoranda of agreement with the EPA that were modeled after Wisconsin's and executed to enable flexibility with regard to federal environmental regulations. The regulatory flexibility of states that do not have similar agreements with the EPA typically is limited to those areas over which states have jurisdiction or delegated regulatory authority.

Although the Wisconsin pilot program did not include authority for DNR to adopt administrative rules, other state programs, including those in Michigan and Oregon, have done so. Other states that have not created administrative rules are considering doing so in order to provide necessary clarification and details for program administration. Under the Green Tier proposal, DNR is authorized to promulgate administrative rules.

Finally, three other innovative environmental programs we examined were similar to Wisconsin's current pilot program and the Green Tier proposal in providing for involvement of interested persons in matters such as the development of proposals or the evaluation of participants' performance. For example, in Minnesota, interested persons are involved from the conceptual stage of a proposal to implementation of an agreement.

Common Program Challenges

Although each state program we examined was unique in its approach to innovative environmental management, some of the programs experienced challenges similar to those faced by Wisconsin's current pilot program. Some program staff were surprised by the low level of

corporate interest. Given that the programs are new and involve different approaches to environmental regulation, some believe that companies have been apprehensive about participation. In addition, staff in Oregon and Minnesota, where programs involve negotiated agreements or permits that provide for regulatory flexibility, have indicated that participation has demanded a significant amount of company and state staff resources. Many program staff are concerned that few small businesses have applied to their programs, and they believe that the resource demands, as well as lesser regulatory burdens, have resulted in a lack of participation by smaller companies. Moreover, it is common for programs that allow negotiated agreements or permits, as Wisconsin's current pilot program does, to have limited participation or few final agreements or permits. For example, as of May 2001, Oregon's "Green Permits" program, implemented in 1997, has issued only two permits.

Representatives of state programs that include active participation by the EPA indicate that this direct involvement by the federal agency has added to the time required to reach agreements or permit approvals. In some states where the federal agency's involvement has been absent or limited, it appears that more agreements have been reached or more permits have been issued. For instance, Michigan's "Clean Corporate Citizen" program, which does not directly involve the EPA, was developed in 1997 and has 39 participants as of June 2001.

Additional Considerations

In reviewing the Green Tier proposal once it is submitted, the Legislature may want to draw on experience from Wisconsin's current Environmental Cooperation Pilot Program and other state programs, to help ensure future success. For example, the Legislature may wish to consider examining additional ways to facilitate greater corporate and public interest.

Some states have made use of expedited permitting, which involves departmental review of permit applications for program participants on an accelerated basis. In addition, some state programs offer financial benefits, such as permit fee reductions or rebates. For example, "Environmental Leader" participants in Indiana's former "100 Percent Club" program were eligible to receive a permit rebate of up to 10 percent of annual fees, up to a maximum of \$5,000 per facility.

Additionally, some state programs offer technical assistance to attract potential participants. Michigan's program staff host workshops on developing environmental management systems throughout that state. Such technical assistance could help attract smaller businesses, which have not typically applied to innovative environmental regulatory initiatives such as Wisconsin's current pilot program because of a lack of expertise or time to develop program components.

Another potential program component could include time restrictions on participation, particularly for programs that offer public recognition as a benefit. For example, many of the state programs that involve public recognition incentives require annual or periodic renewal of applications. Michigan's "Clean Corporate Citizen" program requires annual renewal to ensure these participants continue to meet program criteria. Participants in the "Clean Texas" program must renew their applications every three years. Requiring annual or periodic renewal of

applications or program designations could help to ensure participants' continued progress toward meeting environmental goals that exceed existing regulations. Moreover, it can help to assure the public that a company's designation as a program participant and its use of program promotional items, such as the Green Tier logo, reflects its current environmental performance.

Finally, s. 299.80(16)(b), Wis. Stats., requires DNR to submit a report to the Governor and the Legislature not later than October 1, 2001, describing the success of the Environmental Cooperation Pilot Program and including recommendations for continuation and modification. To develop the report, DNR could:

- outline specifically the steps it has taken to address the pilot program challenges discussed in this report, as well as other challenges encountered during implementation of the current pilot program;
- describe the steps it has taken in designing the Green Tier proposal, to ensure that current pilot program challenges will be addressed; and
- analyze the extent to which the current pilot program has achieved each of the objectives outlined in s. 299.80(2), Wis. Stats., for improving the condition of the environment, including how the program has encouraged business owners to achieve superior environmental performance while ensuring at least the same level of environmental protection.
