

**New Governance and the Green Tier Charters:
Benchmarks for Evaluating the Process**

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I. INTRODUCTION

In several areas of traditional government regulation such as the environmental, occupational safety and health sectors, systems of “regulatory reform” have been devised to achieve a broad set of performance and social objectives. Designed as a new manner in which to negotiate the relationship between government agencies, the regulated community and citizens, these programs aim to change the traditional command-and-control framework. These innovative programs, while growing in use throughout the United States and Europe, are still, for the most part, in the experimental phase and thus have few means for measuring the success in achieving often broad and ambitious objectives.

This paper represents the efforts of four students at the University of Wisconsin-Madison¹ to identify and define specific benchmarks for measuring the success of one such program: Wisconsin’s Green Tier Charters. In 2004, students at the University of Wisconsin examined Wisconsin’s Green Tier program generally, and this paper continues that research with a closer examination of the Charter program. Through the analysis of a set of *process* benchmarks—evaluating the climate and systems that are in place to create and implement charters – we aim to offer a framework for viewing the success and potential of this program to meet its stated objectives. These benchmarks were developed in the theoretical context of “new governance,” which is a scholarly body of work that defines objectives of these types of programs to envision an alternative relationship between those traditionally responsible for regulation, those responsible for following regulations, and the citizenry in general that assumedly benefits from this revised system of oversight. New governance programs often

¹ This paper was written for Law 932, Selected Problems of Administrative Law: Regulatory Reform, Professors Louise Trubek and David Trubek, Fall 2005.

highlight the levels of participation by various parties, how easily regulations or standards are created and modified, and the level of transparency that exists in the creation and implementation of these programs.² The benchmarks presented in Section III of this paper offer a method to evaluate how well the Charter program meets certain stated objectives of new governance in this context.

Our analysis begins in Section II with an exploration of the theoretical principles of new governance and some background on the Green Tier program, charters, and the specific charter we have chosen as an example for our analysis. Section III of this paper continues with an in-depth analysis of a Green Tier Charter in the context of these new governance principles and objectives, and presents the benchmarks for measuring the effectiveness of the program.

We recognize that the creation and implementation of charters is an experimental process for the Wisconsin Department of Natural Resources (DNR) and their partners. The Charter program is in but its infancy. Therefore, this paper is neither intended to be critical of the mechanisms of creating and implementing charters nor the organizations that are moving along this learning curve. Rather, we hope that the process benchmarks offered herein both foster productive discussions about how well the Charter program is meeting the expectations and needs of the participants and the general public, and provide an avenue upon which usable performance data can be collected in the near future.

² Charles Sabel and William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1067-1071 (2004).

II. NEW GOVERNANCE AND THE GREEN TIER CHARTER PROGRAM

A. New Governance

New governance has emerged as a philosophy aimed at streamlining or replacing a regulation process that is often characterized as “inefficient, ineffective, and undemocratic.”³ Through innovative and collaborative programs, government agencies that have traditionally relied upon the command-and-control system of regulating environmental, occupational safety, health and other sectors—often with less-than-optimal results—redesign the relationship and roles of stakeholders: those with legitimate interests in the outcome or process. In contrast to these traditional systems, collaborative models are typically characterized by the following principles: 1) a problem-solving orientation, 2) participation by interested and affected parties in all stages of the decision-making process, 3) provisional solutions, 4) accountability that transcends traditional public and private roles in governance, and 5) a flexible, engaged agency.⁴ Charles Sabel and William Simon similarly outline three features found in “experimentalist” approaches to new governance: stakeholder negotiation, continuous improvement and revision of the rule regime, and transparency.⁵ We will use Sabel and Simon’s three features as desired and necessary elements present in new governance programs, and these three elements will guide the development of this paper and the benchmarks presented in Section III.

B. Stakeholder Negotiation

Active stakeholder participation is the first key premise of new governance. Stakeholders play an important part in new governance programs. The group of stakeholders relevant to a new

³ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 4 (1997).

⁴ *Id.* at 10.

⁵ Sabel and Simon, *supra* note 2, at 1067-1071.

governance program are identified as the parties with a legitimate interest in the operations and outcomes of this program. Most typically, they include a broad base of representation from one or more government agencies, the private sector, and public interest groups. In traditional command-and-control regulation systems, stakeholders have a limited role in determining the nature of regulations and limited involvement in the implementation of these regulations. New governance models propose that stakeholders are key to achieving a more efficient and effective system, and so are in contrast to traditional systems of regulation.

The effective stakeholder negotiation process necessitates that groups claiming a significant interest are admitted to the negotiations regardless of whether they are formal parties. These groups may be actively courted to the process if they do not come on their own. Negotiations between the stakeholders should be deliberative and the goal of this process is consensus, although that outcome may not always be feasible. Through a process, which may be mediated by an outside party, negotiations by the stakeholders produce a climate of openness and mutual respect from which acceptable solutions are more likely to arise.

Stakeholder negotiation benchmarks are intended to evaluate the extent to which a program incorporates and emphasizes negotiation and cooperation among all interested parties in the creation of an agreement. There is a balance to be sought, though, between formalizing the processes of including certain parties in the negotiation and allowing for flexibility in creating and implementing an agreement. Inflexible procedures are inherently antithetical to the core principles of new governance. Nevertheless, a number of principle negotiation benchmarks offer the opportunity for parties to assess whether critical elements of new governance are included in the writing of agreements. Important in this analysis are the points where stakeholders enter into this process and to what extent they are empowered to offer input and affect the outcome. The

availability of stakeholder resources and the willingness of all parties to engage in open and collaborative negotiations, will largely determine the extent of multiparty participation in the charter program.

C. Continuous Improvement and Revision of the Rule Regime

Continuous improvement and revision is the second key premise of new governance. Rules that emerge from the stakeholder negotiation process are provisional and incorporate a “process of reassessment and revision with continuing stakeholder participation.”⁶ In contrast to an outcome that remains informal and undefined, it is preferable to have a well-defined outcome with the necessary mechanisms for continuous evaluation revision, since the former requires stakeholders to more effectively define and clarify their expectations and needs. This process will allow stakeholders to identify and participate in venues that are the most important to them, enhancing their ability to meet their self-interest. Stakeholders, through their involvement in the assessment and revision process, continue to advocate for their particular interests and are thus involved in a continuous renegotiation process similar to “adaptive management” techniques used in many fields.⁷

Sabel and Simon note that one way to ensure continuous improvement and revision is to “focus on outcome norms that leave broad discretion to those subject to them.” These “informal norms...defer elaboration to the course of implementation.”⁸ “Application of the norms” will be

⁶ *Id.* at 1069.

⁷ William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, LAW AND NEW GOVERNANCE IN THE EUROPEAN UNION AND THE UNITED STATES, Hart (DeBurca and Scott eds.) 2006.

⁸ Sabel and Simon, *supra* note 2.

an “occasion for their reassessment and revision.”⁹ If the “norms no longer capture the appropriate expectations,” then “the norms can be revisited and revised through the assessment process.”¹⁰ The goal of continuous revision is not to force obedience of the parties to an agreement, but to “induce internal deliberation and external transparency.”¹¹

Continuous improvement and revision is an example of reflexive law, the third stage in the evolution of legal systems, notes Fiorino.¹² Reflexive law “refers to the process by which people learn from and change behavior based on information they receive.”¹³ Reflexive law has “similar goals to that of command-and-control” system, but it accomplishes them in different ways. Reflexive law “attempts to create incentives and procedures that induce entities to act in certain ways and to engage in internal reflection about what form that behavior should take. The state sets the goals, but shares more of the responsibility for achieving them with regulated entities.”¹⁴ These practices are based on social learning, which “focuses on interactions and communication among actors, builds on technical learning and rethinking of objectives that occurs in conceptual learning.”¹⁵ Social learning builds upon technical and conceptual ways of learning. In this context, parties involved in this process develop and share information on new technologies and practices that they develop. As a result, industry becomes part of the search for the collective good, rather than a party that only asserts its economic and political interests.

William Simon also points out that “[e]very negotiated consensus is a started point for a

⁹ *Id.*

¹⁰ *Id.* at 1070.

¹¹ *Id.* at 1071.

¹² Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

continuous effort of implementation”¹⁶ and that a “pragmatist solution incorporates procedures for self-revision.”¹⁷

Evaluation benchmarks for the continuous revision process work to assess how well the system provides for learning and sharing of information to achieve improved results, or an analysis of the “process norms and performance norms.”¹⁸ “The process norms specify how operations are conducted. The performance norms measure the results of such operations.” These benchmarks assess the program’s ability to: 1) encourage systematic, self-conscious planning and self-appraisal within each institutional actor, and 2) facilitate diagnosis and learning among institutions.¹⁹

D. Transparency

Transparency is the third key premise of new governance. The concept is often used in corporate governance literature to indicate the sharing of information by a corporation on “how it operates.”²⁰ In new governance, transparency has a broader application. Transparency refers not only to “open access to information,”²¹ but also to an “increased quality of dialogue and to new forms of communication and interaction.”²²

At a minimum, transparency dictates that the policies and operating norms of the rule regime are explicit and public. At a more ambitious level, transparency means that there are agreed-upon and established procedures and mechanisms for assessing compliance to the rule

¹⁶ William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. (2004).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Fiammetta Borgia, *Corporate Governance and Transparency – Role of Disclosure: How to Prevent New Financial Scandals and Crimes?* American University, School of International Service, Transnational Crime and Corruption Center (TRACCC), June 2005 at 22.

²¹ *Id.*

²² Fiorino, *supra* note 12.

regime and the results are made public. Transparency, then, becomes not only a method for accountability, but also a tool for continued learning within the greater pool of stakeholders. Laggards are able to learn from the experiences of the frontrunners in the particular program, and are thus able to improve their performance. Successful performers are rewarded with greater autonomy while laggards receive sanctions within this system.

Sabel and Simon note that “transparency requires procedures that are not widely found and that are often achieved only with great difficulty.”²³ Obstacles to transparency can be both political and technical, with incentives to keep actions and information less than open and limited mechanisms for making information available to those that need it. In practice, information of both good and bad performers, their decisions, and its processes should be available in an open and timely manner to not only stakeholders, but to the public at large. Through transparency, new governance programs aim to open the system to greater scrutiny, making it more likely that there can be non-judicial solutions to performance problems.

Transparency in new governance applies at two levels.²⁴ At the stakeholder negotiations level, “the parties must commit to volunteer material information.”²⁵ At the general level, the parties must commit “to the kind of information pooling that facilitates peer comparisons and the learning they generate.”²⁶ These two levels can overlap. The negotiations level, for instance, may apply to both negotiations developing an agreement between parties, but also during the amendment process designed to revise that agreement. The general level, for instance, may underlie the *entire* process of developing and implementing a collaborative agreement, where the

²³ Sabel and Simon, *supra* note 2, at 1072.

²⁴ Simon, *supra* note 16.

²⁵ *Id.* at 30.

²⁶ *Id.*

exchange of information and the consolidation of learning are essential to the successful implementation of an agreement.

Given the importance of transparency to new governance, a key question is how to evaluate transparency, or lack thereof, in new governance programs. The new governance literature does not provide much guidance on the specific standards that should be used to evaluate transparency.²⁷ Yet, the literature does hint at several factors that can be used to begin the transparency analysis.²⁸ For example, to evaluate whether the minimum level of transparency exists, one needs to look at whether explicit performance information is available to the public.²⁹ To evaluate whether a higher level of transparency exists, one needs to look at whether there are established measures and procedures to assess compliance and to facilitate the interchange of information for continued learning among the stakeholders.³⁰

In new governance, transparency is a continual process prompted not by command-and-control methods, but by new methods of collaboration with key stakeholders. In this context, transparency has two functions: accountability³¹ and learning.³² “Learning” is achieved through

²⁷ For example, neither Simon’s article on legal liberalism nor Fiorino’s article on new governance and environmental regulation offer benchmarks for evaluating transparency. Both articles discuss the importance of transparency in new governance, but do not offer suggestions on how to evaluate the quality of transparency in new governance programs. For instance, Simon’s article focuses mostly on why transparency would result in more compliance rather than what “transparency” would look like in a “new governance” program.

²⁸ See e.g., Simon’s *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, Fiorino’s *Rethinking Environmental Regulation: Perspectives on Law and Governance*, and Sabel and Simon’s *Destabilization Rights: How Public Law Litigation Succeeds*. The literature on corporate governance provides additional measures that can be modified to apply to new governance programs. For instance, in corporate governance, there are three key elements used to evaluate transparency: (1) leadership and governance; (2) stakeholder relations; and (3) performance reporting. See Borgia’s *Corporate Governance and Transparency – Role of Disclosure: How to Prevent New Financial Scandals and Crimes?* See Borgia, *supra* note 20.

²⁹ Sabel and Simon, *supra* note 2.

³⁰ *Id.* at 1072.

³¹ Accountability of regulated entities is an important objective of transparency and is critical to any analysis of new governance. This paper does not directly address the issue of accountability. The key question of whether transparency in the Green Tier Charters, and in Green Tier generally, actually leads to accountability of the various actors is beyond the scope of this paper. The focus of this paper is to determine whether increased trust (a stated objective of the EccoDev Charter) is likely to occur in the Green Tier Charter process. The assumption is that increased trust and accountability go hand-in-hand; one cannot occur without the other. Thus, accountability and increased trust are interrelated.

the increased flow of information (i.e., transparency) between the regulated agency and the participants in a new governance program. In fact, transparency is a “prerequisite for both trust and effective learning,”³³ which are essential to new governance programs. The ultimate goal of transparency is to increase the trust between the regulated entities, regulators, and various stakeholders.³⁴

Generally, this framework can provide the basis for evaluation, such as: (1) whether the program participants are fully committed to transparency even if it means sharing information with their competitors and (2) whether the level of transparency required by the agreement is sufficient to increase trust among the stakeholders, encourage cooperation between the various parties, and facilitate continuous learning. The former question will depend on the company’s culture and its leadership while the latter will depend on the establishment of specific procedures to measure the requisite level of transparency. In Green Tier, Charter leadership will be a key component in both inquiries.

E. The Interplay Between the Principles

It is important to note that the new governance principles of (1) stakeholder negotiation, (2) continuous improvement and revision of the rule regime, and (3) transparency do not exist in a vacuum. For example, the timing of entry and the level of participation of stakeholders in the negotiation process will most likely determine the willingness of stakeholders to participate in a continuous improvement process and share data required for optimal transparency.

³² Sabel and Simon, *supra* note 5.

³³ *Id.*

³⁴ *Id.*

Optimally, these three principles form the basis for a new governance program and are, therefore, all critical to that program reaching its goals. Transparency, for example, can exist at various levels in a traditional command-and-control program, as can stakeholder involvement, and continuous revision. It is the presence of all three of these components in a program—present at the appropriate time and level—that determines whether this program can truly be called “new governance.”

F. Wisconsin’s Green Tier Charters

The Wisconsin Legislature passed the Green Tier law in March 2004³⁵ to create a voluntary program to “recognize and reward superior environmental performance”³⁶ from the business community of Wisconsin. Developed from the Environmental Cooperation Pilot Program and implemented through the Wisconsin DNR, Green Tier sets a performance standard as stated in Wisconsin Act 276: “Superior environmental performance means environmental performance that results in measurable or discernible improvement in the quality of the air, water, land, or natural resources, or in the protection of the environment, beyond that which is achieved under environmental requirements...”³⁷

Green Tier is a program designed to address inefficiencies in the environmental regulatory system in order to achieve both environmental and economic goals for the state. Because command-and-control systems of environmental regulation treat superior performers and minimum compliers alike, proponents of alternative programs such as Green Tier argue that

³⁵ Wis. Stat. § 299.83.

³⁶ *Green Tier – Frequently Asked Questions*, Wisconsin Department of Natural Resources at <http://dnr.wi.gov/org/caer/cea/environmental/faqs.htm>.

³⁷ Wisconsin Act 276 (2003).

there is little incentive – and on occasion even disincentive—for regulated companies to surpass the minimum requirements of the law. Likewise, there is little recognition of the importance of non-regulated practices in achieving environmental goals. Regulating superior performers requires an investment of staff and resources of the regulating agency that produces little marginal environmental improvement from these businesses. For businesses that exceed minimal standards, and are “beyond compliance,” the traditional regulatory system offers little recognition, flexibility or collaborative methods to improve environmental conditions in the state. Green Tier, however, is not a substitute for the command-and-control systems already in place in the DNR. Businesses participating in Green Tier are not absolved of the requirements to comply with existing regulations. In this manner, Green Tier operates alongside the command-and-control environmental regulations and systems.

Businesses voluntarily participating in Green Tier enter into the program through either Tier 1 or Tier 2, which have increasingly stricter standards for previous and planned environmental performance.³⁸ A major distinction between the two tiers is the presence of an Environmental Management System (EMS), which is required for entry into Tier 2, but not Tier 1. In addition to Tier 1 and Tier 2, Green Tier also offers a “charter” program to facilitate environmental performance by Green Tier participants. A charter is a contract between one or more individual participants (the “association”) and the DNR, and has a lifespan of from three to ten years.³⁹ Charters are created for the purpose of offering benefit and support to one or more participants in either Tier 1 or Tier 2, although it is not required that any of the charter signatories be the parties receiving this benefit. In fact, charters may include several interested parties as participants, such as trade associations, municipalities, individuals and NGOs.

³⁸ See Green Tier, *supra* note 36.

³⁹ Wis. Stat. §299.83(7e)(b).

Charters represent a unique mechanism for environmental oversight in the United States and evolved from a collaborative partnership with Bavaria, Germany.⁴⁰ Although the charters signed to date each revolve around a specific industry, the scope of these contracts need not be limited to trade-specific interests. They may be based on other areas of common interest, such as a watershed or region. Charters are intended to be “flexible, innovative, efficient and enforceable” documents.⁴¹ The creation of charters is an evolving process, developed without a preconceived template for the form and function of the contract, and there are still very few examples from which to draw upon.⁴² In general, however, charters outline specific roles and responsibilities of the association and the DNR, list mechanisms for improved environmental performance including the creation of an EMS, and describe some rules for addressing non-compliance of members and changes to the charter.

Partners in the charters—whether the DNR, businesses, or other public sector entities—choose to enter this agreement for diverse reasons. For the DNR, charters provide a means to streamline the rule-making process by negotiating with a group rather than individuals, potentially reducing the overhead for the agency. The term “rule-making process,” in this sense, should not be confused with traditional regulatory rule systems that dictate businesses operate to specific standards. In new governance, rules refer more to the guidelines defining the process by

⁴⁰ See *WDNR – Bavaria Joint Statement* at <http://dnr.wi.gov/org/caer/cea/bavaria/phase2/jointstatement.htm>: “The initial Environmental Pact of Bavaria was signed in 1995 and was renewed in 2000. Under the pact, the Bavarian government and the business community of Bavaria joined forces to accomplish the goals of ecological protection and economic progress. Wisconsin first began looking at the Bavarian pact during the Thompson administration. Last legislative session, the Republican led legislature passed and Governor Doyle signed into law the Green Tier Bill, modeled after the Bavarian pact.” Also, see Dr. Werner Schnappauf, *A State Government Perspective on the Bavarian Environmental Pact* at <http://dnr.wi.gov/org/caer/cea/bavaria/phase2/schnappaufapril2003.pdf> (p.1): “...we are not pushing for State government solutions, but rather for societal, cooperative, and self-responsible solutions. What the individual can do, he must do himself. The concept of ‘responsibility at the lowest level’ must also be effective in environmental protection.”

⁴¹ See Green Tier, *supra* note 36.

⁴² Interview with Mark McDermid, Bureau Director, Cooperative Environmental Assistance, Wisconsin Department of Natural Resources, Oct. 6, 2005. As of the writing of this paper, there are two participants in the Green Tier Charter program and one applicant. The two participating Charters were signed on October 3, 2005.

which businesses participate in this agreement, and thus these new rules do not define an alternative regulatory structure. For the agency, charters are an effective mechanism for bringing businesses into the Green Tier program on Tier 1 with the expectation that they will more likely move to Tier 2 and the increased environmental expectations of that tier. Additionally, Green Tier and charters represent for the DNR an attempt to redefine a relationship between the agency and businesses, with a shift of the responsibility for environmental compliance mechanisms falling more on the shoulders of businesses. In this new relationship, collaboration between the DNR and a charter association sets the stage for achieving consensus on environmental practices, and allows for innovative solutions and association ownership of performance to define the outcomes.⁴³

Support for the Green Tier program from within the DNR highlights several avenues that will potentially lead to greater performance by businesses and the agency itself. In this program, the business community is given more flexibility to “promote and apply new initiatives to improve environmental performance beyond current standards.”⁴⁴ Participating businesses conduct annual environmental performance assessments and report these results to the DNR, which will “reduce the potential for noncompliance, help facilities move above the compliance threshold, and improve overall environmental performance.”⁴⁵ Additionally, eventual implementation of an Environmental Management System (EMS) is an integral component of the Green Tier program, and “[u]sing EMSs, Green Tier participants are likely to identify and minimize potential environmental risks not addressed by our existing compliance-based

⁴³ *The Environmental Case for Green Tier: Moving from Compliance to Performance*, Wisconsin Department of Natural Resources at <http://dnr.wi.gov/org/caer/cea/environmental/documents/environscase.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

programs.”⁴⁶ The role of parties other than the charter participants is also redefined in the promotional materials for Green Tier: “Communities, neighbors, and other interested parties have increased access to information about facilities enrolled in the Green Tier program, and they have greater opportunities to share comments and concerns. Participating facilities commit to working closely with their local communities and those potentially affected by their operations.”⁴⁷

Businesses enter into charter associations and Green Tier for other reasons. As mentioned above, in Green Tier businesses have the flexibility to explore the use of technologies and techniques that improve environmental performance while benefiting their customers and industries. This reduces the bureaucratic hoops that they must jump through to implement a new technology or method, likely reducing their cost for using this technology. They receive public recognition for their efforts through the use of the Green Tier logo, and are able to address environmental challenges on an industry-wide scale, creating a more efficient system. One of the most compelling motivations for businesses, though, is the revised system of enforcement common in the charters to date. Participants of charters are removed from the traditional system of enforcement and its associated legal penalties, and enter into a system of self-regulation whereby legal enforcement is only an option after other means for correcting compliance problems are exhausted.⁴⁸ Businesses typically absorb the financial cost of creating and implementing charters.⁴⁹

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Green Tier: An Overview of Performance-Based Environmental Management*, Wisconsin Department of Natural Resources at <http://dnr.wi.gov/org/caer/cea/environmental/documents/description.pdf>.

⁴⁹ See Kenneth L. Kowalski, *Pursuing Continuous Environmental Improvement: Why Three Companies Joined Wisconsin's Green Tier*, (unpublished manuscript) for an in-depth look at corporate incentives for entering into this program.

In Section III of this paper, we introduce benchmarks for charters that examine these contracts' adherence to the principles of new governance. For this purpose, we deemed it important to place these metrics in the context of a real, existing charter, and chose the recently signed EccoDev Charter for this purpose.⁵⁰ This Charter, we believe, will most likely reflect the general structure and typical content of future charters that will be written. Using this particular charter in our example is not intended to reflect a bias—either positive or negative—towards the EccoDev Charter specifically. As charters are—by nature—flexible instruments, and our analysis focuses more on general measurements for new governance principles, the value of the benchmarks will come from guiding the DNR and participants in creating and revising charters that accurately reflect these principles.

G. The EccoDev Charter

On October 3rd, 2005, the DNR entered into a charter agreement with a Wisconsin corporation called the Environmental Compliance Corporation for Development and Economic Vitality, Inc. (EccoDev), which is an independent compliance corporation for the Wisconsin Builders Association Development Council.⁵¹ The Wisconsin Builders Association (WBA) is an organization of 25 local home builders associations that collectively represent roughly 8000 members, of who about 130 are land developers.⁵² The WBA applies a broad set of strategies to meet its aims of “...preserving and promoting the American Dream of home ownership” and “strengthening [the homebuilding] industry and providing quality services and products to the

⁵⁰ There are two other Green Tier Charters, the Green Tier/Clear Waters Initiative Environmental Results Program Charter and the Charter for Environmental Performance with CCP, INC. for the Scrap Metal Recycling Industry.

⁵¹ *Charter for Superior Environmental Performance with the Environmental Compliance Corporation for Development and Economic Vitality for Developers in Wisconsin* (hereinafter “EccoDev Charter” or “Charter”), Wisconsin Department of Natural Resources at

<http://dnr.wi.gov/org/caer/cea/environmental/participants/eccodev/index.htm>.

⁵² Interview with John Kisiel, Director of Development Counsel, Wisconsin Builders Association, Oct. 21, 2005.

residents of Wisconsin.”⁵³ Towards these aims, the WBA lobbies for changes in legislation; educates its members, government officials and the public; develops public relations materials; and legally challenges “state agencies that go too far in regulating the housing industry.”⁵⁴ Among its other roles, the WBA describes itself as “one of the most successful lobbying organizations in Wisconsin.”⁵⁵

The WBA views entering into the EccoDev Charter as a positive step towards “opening up dialog with the DNR that wasn’t there before.”⁵⁶ This thirteen page document broadly outlines the responsibilities and commitments of both the DNR and EccoDev with the aim of creating collaboration in order to “provide for greater environmental protection and enhancement than would be available absent this Charter...”⁵⁷ Through this Charter, the parties anticipate that the resulting “significant benefits” are in the “best interest of Wisconsin and its people,” while allowing the Charter participants rewards for business practices that are “beyond compliance.”⁵⁸

The Charter specifically is targeted at developers, although there are mechanisms for educating stakeholders, notably contractors who follow the developers on a building site and potentially could affect the environment more substantially.⁵⁹ EccoDev is, for a large part, a self-regulating organization, with tools for assessment of Charter participants, enforcement options, and provisions for educating and developing the capacity of participants with regards to environmental standards.⁶⁰ The EccoDev Charter covers a broad range of topics, several of which are of interest for our analysis. First, the Charter describes the characteristics of a

⁵³ *About Wisconsin Builders Association* at <http://www.wisbuild.org/site/content/about/>.

⁵⁴ *Wisconsin Builders Association: Policy Agenda 2002-2003* at <http://www.wisbuild.org/pdfs/policy0304.pdf>.

⁵⁵ *Id.*

⁵⁶ Kisiel, *supra* note 52.

⁵⁷ EccoDev Charter, § I.

⁵⁸ *Id.*

⁵⁹ Kisiel, *supra* note 52.

⁶⁰ *See* EccoDev Charter, *supra* note 51.

“generic” Environmental Management System (EMS)⁶¹ which each participant is to have in place “within 12 months of their application for Tier 1 status.”⁶² Second, the Charter briefly outlines the role that an “Interested Persons Group” shall have in this collaboration.⁶³ Third, commitments to training⁶⁴ and reporting of information⁶⁵ to the DNR and the public are established. Fourth, guidelines for compliance and enforcement are discussed.⁶⁶ Finally, general provisions for the operation and amendment of this Charter are presented.⁶⁷ Using the EccoDev Charter as means for discussion, Section III presents the new governance benchmarks.

III. NEW GOVERNANCE BENCHMARKS

A. NEGOTIATION BENCHMARKS

The foundation for evaluating and providing benchmarks for Wisconsin’s Green Tier Charter Program begins with the negotiation process. Although the new governance theory of negotiations encapsulates an ongoing relationship between parties, for purposes of this section “negotiation” refers explicitly to the process and interactions among parties during the development of a charter – i.e., from the initial discussions between the Wisconsin Department of Natural Resources (DNR) and potential charter participants (PCPs), through the draft charter proposals and eventual charter approval. From a new governance perspective, the creation of the charter is arguably the most critical stage for successfully implementing a decentralized, cooperative and flexible program. The manner and degree to which parties negotiate the initial

⁶¹ EccoDev Charter, § II(A-F).

⁶² EccoDev Charter, § II(B).

⁶³ EccoDev Charter, § IV.

⁶⁴ EccoDev Charter, § V(F).

⁶⁵ EccoDev Charter, § V(E).

⁶⁶ EccoDev Charter, § VI and VII.

⁶⁷ EccoDev Charter, § VIII.

terms and conditions of the charter creates a precedent not only for future participation, but also for the relationship between the DNR and charter members that ultimately affects the capacity of the charter to strengthen an environment conducive to continuously improving environmental performance.

For purposes of analysis, the Charter negotiation process is broken into three phases. The pre-Charter phase involves the period under which eligible PCPs are in contact with the DNR and both parties evaluate potential participation in the Charter program. The next phase focuses on the actual drafting of the Charter, and, consequently, involves the period of heaviest negotiations between the DNR, PCPs, and potentially interested third party participants. Following the publication of the draft Charter, the final Charter phase encompasses revisions to the Charter following negotiations and a public comment period, eventually resulting in the publication of a final Charter.

Benchmark 1: Initial communication between the DNR and PCPs

Description: This benchmark focuses on how Charter negotiations are initiated – specifically analyzing the degree to which the DNR proactively recruits eligible entities vs. those entities seeking entry into the Charter program.

Apart from minimal statutory eligibility requirements⁶⁸, the Green Tier legislation provides little in terms of procedure for initiating or encouraging Charter formation discussions between PCPs and the DNR. Evaluating how negotiations are initiated is important because it reveals, at its core, whether the Charter program reflects a command-and-control approach or, in the alternative, a cooperative and committed relationship between regulated entities and the DNR.

⁶⁸ See Wis. Stat. § 299.83(7e)(a),(c).

From one perspective, the initiation of Charter negotiations should be left strictly to eligible entities. The DNR, under the Green Tier program, seeks to move away from a “top-down” approach to environmental management, and to that end seeks to expunge itself, under certain circumstances, from the role of forcing entities to take action. Stated differently, the DNR does not want to appear to force participation because such action reinforces a command-and-control approach that dominates the vast majority of current environmental regulation. Negotiations premised on compulsory participation will be less likely to foster a level of “trust” between the parties necessary to establish a relationship that promotes collaborative governance. Rather, the DNR’s goal is to encourage proactive thinking by businesses and industries by placing the responsibility of initiating Charter development negotiations in the hands of those entities.⁶⁹ Further, from the standpoint of expertise, the actual entities are in the best position to know whether Charter participation is most advantageous for their achievement of superior environmental performance.

The alternative perspective asserts that the DNR should take steps to actively encourage the participation of eligible entities because of the potential benefits that the Charter program brings both to Charter participants and to the DNR. Under a collaborative governance regime, the agency’s role shifts from a regulator and controller to a “convener and facilitator of multi-stakeholder negotiations.”⁷⁰ Accordingly, as a facilitator, the DNR should undertake measures designed to stimulate initial negotiations, especially considering that the agency is in the best position to know and educate eligible entities as to the long-term advantages to the formation of a Charter.

⁶⁹ *Id.*

⁷⁰ Freeman, *supra* note 3.

The negotiation initiation benchmark thus seeks to evaluate whether some “optimal” level of DNR participation is necessary to continuously stimulate pre-Charter development negotiations among eligible entities. If, for example, a vast majority of Charter negotiations are initiated by eligible entities, the necessary role of the DNR in actively pursuing participation is limited. Conversely, indications that inquiries by Charter-eligible entities are infrequent or that negotiations that are initiated are done so as a direct result of proactive DNR measures, might indicate that the DNR is either failing to adequately promote the advantages of the Charter program or that some aspect of the program is causing eligible candidates to be weary of entering negotiations. Either way, examining how Charter negotiations are initiated provides an important benchmark upon which to determine how eligible entities perceive the Charter program.

Unfortunately, it must not be forgotten that there exists a fundamental and deep-rooted level of distrust, particularly on the part of businesses and industries, precipitated by a long and on-going history of command-and-control regulation by the DNR.⁷¹ Accordingly, although the DNR may wish to leave primary control of the initiation of negotiations in the hands of eligible parties, the DNR has a responsibility to establish awareness within the regulated community of the incentives for participation in the Charter program. Failure to do so would illustrate a lack by the DNR to uphold one of its primary goals in the Charter program as a facilitator and convener of negotiations.

Benchmark 2: Amount of control devolved to the PCPs in the drafting and formation of the Charter

Description: This benchmark examines the relationship between the DNR and the PCPs in the drafting of the Charter. It looks at how involved the PCPs are in the actual drafting of the language, and examines how cooperative the process of negotiations and drafting was in the creation of the Charter.

⁷¹ Kisiel, *supra* note 52.

Under traditional rule making, “parties miss opportunities to engage constructively with each other in a sustained way”⁷² in large part because of the adversarial posture that regulated entities and the government take towards one another.⁷³ Consequently, under the command-and-control approach, the government is commonly criticized for its failure to appreciate the value of such entities’ participation in the regulation process as well as the entities’ capacity and willingness for greater involvement in governance.⁷⁴ Against this old governance backdrop, the importance of qualitatively measuring the role that PCPs have in the negotiation process is essential for determining whether the Charter program is diminishing the adversarial relationship and providing a better environment for PCP participation, self-governance, and joint decision-making.

There is, unfortunately, no particular set of determinative factors that can establish when or whether Charter negotiations have provided for sufficient participation and input by PCPs to satisfy the fundamental principles of new governance. Nevertheless, a number of factors can provide a clearer picture as to whether the amount of participation by PCPs is adequate in the eyes of both the DNR and the PCPs themselves.

The first factor warranting consideration evaluates the role that PCPs are taking from a procedural standpoint in Charter negotiation meetings. To what extent are PCPs leading negotiations in terms of proposing: the length and number of meetings, the structure of meetings, and the number of representatives that each respective PCP may have in attendance at the meeting? If they are not leading negotiations, then what degree of input has the DNR allowed and what if any measures have PCPs objected to which the DNR was willing or unwilling to compromise on? Although input into the procedure of negotiations might be considered less

⁷² Freeman, *supra* note 3, at 11.

⁷³ *See Id.* at 15.

⁷⁴ *Id.* at 13.

critical than substantive contributions, the inherent level of distrust common among businesses and industries makes achieving a negotiation environment that less reflects a command-and-control regulatory framework of great importance in increasing the likelihood that the draft Charter is created as a result of joint decision-making, compromise, and cooperation.

It is without question that from a new governance perspective, a crucial condition for the Charter program is the involvement of all parties subject to the conditions of the Charter in the drafting of the Charter language. The first step towards ensuring that participants in a Charter continuously improve environmental performance as they work towards achieving greater regulatory flexibility is to make certain that those participants are heavily involved in the formation of the terms and conditions of the Charter. Factors such as the amount or percentage of Charter language proposed by the PCPs, the amount of compromise and jointly created terms, and whether the Charter language was based on previous Charters (as opposed to specifically tailored to each Charter's unique circumstances and participants), are but a few more specific benchmarks of which the relative involvement of the DNR and PCPs can be assessed.

Of equal importance is the frequency and consistency of PCPs involvement throughout the entire negotiation process – i.e., from drafting the Charter through revisions, public comments, and final publication. A successful Charter development should not be based solely on the existence of collaboration and joint decision-making, but also on whether the presence and participation of the PCPs were as crucial to the development of the Charter as the involvement of the DNR. Thus, an evaluation of the degree to which PCPs jointly created the Charter language should be evaluated in light of their involvement throughout the entire negotiation process, including joint decision-making in the revision and final approval of the Charter.

Lastly, a benchmark that assesses the relationship between the DNR and PCPs' level of participation in the creation of the Charter, must, necessarily, also take into consideration difficulties arising out of internal conflicts between PCPs involved in the negotiation process. Inherent differences and distrust between various businesses involved in forming the Charter are likely the largest obstacles that may impede collective negotiations by the individual PCPs with the DNR. Indeed, "negotiation necessarily takes place against a background in which participants have selfish interests and assumptions about their distributive entitlements."⁷⁵ In order for the Charter program to achieve success and sustainability, there must be, at some level, an assumption of trustworthiness between the parties that allows meaningful negotiations to occur. The degree to which the DNR is forced to take a supervisory or controlling role in order to retain the involvement of all PCPs will factor into the contributions and Charter modifications that PCPs will effectuate during the negotiation process.

Benchmark 3: Participation of third-party stakeholders and the general public

Description: This benchmark examines the most uncertain aspect of the negotiation process – the role of third party participation in the formation of the Charter. It focuses on three discrete issues: (a) the types of third parties that are or should be involved, (b) the points of engagement for third party participation, and (c) the level and form of contribution that third parties are making.

"The goal of negotiation is consensus, or voluntary agreement by *all stakeholders* on the basis of a shared normative understanding."⁷⁶ For the purpose of this paper, stakeholders refer to all parties that have a legitimate interest in the operations and outcome of the Green Tier Charter program. This includes the DNR, Charter members, and other third parties such as environmental groups, homeowners, and local governments. Negotiation is not truly successful

⁷⁵ Simon, *supra* note 16.

⁷⁶ *Id.* (emphasis added).

under a new governance regime unless all affected parties are provided the opportunity to participate, at least in some manner, in the formation of the Charters. Not only does the failure to include affected parties in the Charter creation process diminish the legitimacy of the program,⁷⁷ it also threatens its longevity by effectively denying stakeholders a “degree of ownership over a [Charter]...that increases [stakeholder] commitment to [the Charter’s] successful implementation.”⁷⁸ This is not to suggest that the DNR should expend vast resources locating and incorporating public participation into the Charter creation process. Rather, the DNR should use this benchmark to pinpoint key third party “stakeholders” and take measures to incorporate their expertise and suggestions into negotiations at identifiable points in the process.

There are minimal statutory requirements⁷⁹ related to public participation in the development of a Charter. The DNR must provide both public notice and a subsequent public informational hearing prior to issuing a proposed Charter.⁸⁰ While the Charter section of the Green Tier statute indicates involvement of “interested persons,” there is no clear indication that such persons should be consulted during Charter development negotiations.⁸¹ Consequently, the level and manner of public/third-party participation appears to be left to the discretion of the DNR.

(a) Stakeholders

There exist no set criteria for what types of stakeholders should be included in the process. With respect to the EccoDev (involving the Wisconsin Builders Association), the likely

⁷⁷ See David Trubek and Louise Trubek, *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, Paper presented at the annual meeting of the Research Committee on the Sociology of Law, Paris (July 2005).

⁷⁸ Simon, *supra* note 16, at 24-25.

⁷⁹ Currently, no Green Tier regulations or agency guidance exists. The DNR has chosen not to promulgate any regulations pertaining to the implementation of the Green Tier program in order to avoid shifting the program to a more command-and-control approach. See McDermid, *supra* note 42.

⁸⁰ Wis. Stat. § 299.83(7e)(c).

⁸¹ See Wis. Stat. § 299.83(8)(b).

stakeholders include entities such as contractors, public utility services, homeowners and local governments/municipalities where the developers participating in the EccoDev Charter maintain their areas of business. The common denominator among these suggested entities is their ability to be directly and significantly affected by the conditions and actions established for the participants in the Charter. Participation by each entity can be seen as “adding value” to the Charter as a whole. Involvement of *all* stakeholders in the negotiation process is unlikely and, as the EccoDev Charter demonstrates, merely contacting mass listings of stakeholders does not guarantee involvement. Consequently, the DNR should work in conjunction with PCPs to identify a limited number of *key* stakeholders that are either the most directly affected by the terms of the Charter, or that are most likely to substantially contribute to the creation and continuous revision of the Charter. Limiting the number while increasing the role of a few key stakeholders may increase the chances that the joint decision-making occurring during Charter negotiations is not devoid of third party input.

Although the DNR has had only limited opportunity thus far to petition for third-party participation, results from the development of the EccoDev Charter indicate minimal interest. After requesting a list of stakeholders from the PCPs, the DNR solicited public comments by sending letters to stakeholders and a general “mass emailing” to every individual that had ever submitted a comment on any matter to the DNR.⁸² Despite the substantial number of individuals and stakeholders contacted, the DNR received only one comment on the draft EccoDev Charter from the Wisconsin Chapter of the Sierra Club.⁸³ There were no comments submitted, nor requests for participation in the negotiations by third-party stakeholders.

⁸² McDermid, *supra* note 42.

⁸³ *Id.*

It is important to note that in charters that lack geographic specificity (i.e., there is no pre-identifiable location where charter participations will engage in activity covered under the charter) identifying and engaging third-party stakeholders in the negotiation phase is increasingly difficult.⁸⁴ The point is well illustrated in the EccoDev Charter. Development sites could not be identified during the creation of the Charter. This made identifying affected and interested parties difficult because it was unclear where the development would eventually occur. Accordingly, realistic engagement of third-party stakeholders might not be possible until after charters, such as EccoDev, are implemented and development sites have been selected.⁸⁵

(b) Points of Engagement

The current lack of stakeholder interest is a significant concern with respect to evaluating the Charter program as a new governance process. The point at which stakeholder involvement should commence is an important determination, because it can affect not only the relationship between the parties, but also the likelihood that stakeholders will view their role as substantial enough to warrant the expenditure of resources necessary for continued future participation in the Charter.

The point of engagement in the negotiation process for stakeholders depends on a number of considerations. Foremost, stakeholder participation should begin prior to the draft Charter comment period. Under the current regulatory “old governance” system, permit comments are inherently adversarial – typically involving paper exchanges between the DNR and interested parties where extreme demands or criticisms are made and the DNR is placed in a defensive position of choosing between competing positions.⁸⁶ The elements of negotiation, collaboration and joint decision-making are not present in the permit comment system. Accordingly, limiting

⁸⁴ Kisiel, *supra* note 52.

⁸⁵ *Id.*

⁸⁶ Freeman, *supra* note 3, at 11-12.

stakeholder involvement in the creation of the Charter to paper comment submissions reinforces the command-and-control system that the DNR is attempting to avoid. Further, restricting meaningful stakeholder participation until after the publication of the draft Charter, diminishes the effectiveness of stakeholder participation by preventing stakeholders from establishing a cooperative relationship with the DNR and PCPs that begins during the initial negotiations of the Charter language.

Whether stakeholder participation commences at the onset of Charter negotiations between the DNR and PCPs depends largely upon the reaction and willingness of PCPs to integrate joint decision-making with third parties. The receptiveness of PCPs to stakeholder involvement during the creation phase of the Charter is an important benchmark because it may indicate the actual degree to which PCPs are proactively recruiting key stakeholders that have the personal incentives and resources to “meaningfully participate”⁸⁷ in the development of the Charter. A lack of key stakeholder participation, even during the early stages of Charter language negotiations, is potentially demonstrative that (1) the DNR was unsuccessful in demonstrating the value of stakeholder participation, or (2) that the PCPs and/or DNR could not rid themselves of long-held views of interest groups and private parties as threats to the integrity and viability of the program.⁸⁸

The principle argument, therefore, is that Charter negotiations should, at minimum, be including key stakeholders in the Charter development process as early on as initial meetings discussing and developing potential Charter terms and language. The DNR should evaluate the extent to which PCPs actively recruit key stakeholders as well as whether those key stakeholders demonstrate consistent involvement throughout the entire Charter development process.

⁸⁷ *Id.* at 27-28.

⁸⁸ *See Id.* at 13.

(c) Contributions

As stated in the previous section, stakeholder participation limited to draft Charter paper responses is insufficient from a new governance perspective. Detailing a specific benchmark for judging the contributions of key stakeholders in the negotiation process is unrealistic based on expected variations among Charters. Thus, stakeholder participation should be evaluated based on the nature of participation. The goal is an indication of “meaningful participation” by the key stakeholders.

As Freeman described in her article on collaborative governance, meaningful participation refers to that participation which is “an ongoing feature of the decision-making process,” that, as a consequence, creates a sense of responsibility for the stakeholder in the regulatory regime.⁸⁹ No one factor is determinative in judging whether stakeholders are engaging in meaningful participation. Relevant factors include: the opportunity for stakeholders to formulate both questions and answers to those questions; the ability for stakeholder involvement on broad and substantive, rather than merely isolated, issues; continued engagement during the negotiation process after stakeholders’ initial point of engagement; demonstration of shared responsibility between stakeholders, PCPs, and the DNR during the negotiations as well as a commitment to continued shared responsibility for implementation, monitoring, and revision after the conclusion of the negotiation process; and demonstrated receptiveness by the DNR and PCPs to stakeholder suggestions – especially in areas where such stakeholders hold expertise.⁹⁰

Consequently, key stakeholders should demonstrate a level of participation that indicates substantive contributions to the terms and conditions of the Charter. The presence of stakeholders at the majority of negotiation meetings and a committed effort by both the DNR and

⁸⁹ *Id.* at 27.

⁹⁰ *See Id.* at 27-28.

PCPs to engage in collaborative decision-making with the stakeholders as opposed to viewing their input as adversarial provides a minimum framework upon which to evaluate whether Green Tier Charters consider all interested parties in their development.

Even with key stakeholder involvement during the negotiation phase of the Charter program, a number of critical factors may realistically govern the level of contribution for stakeholders. First, the extent to which limited economic and human resources determine whether stakeholders engage in the negotiation process is an important consideration. At least with respect to local Wisconsin environmental groups, limited resources were cited as the principal reason for a lack of involvement in the creation of the EccoDev Charter.⁹¹ Accordingly, participation by key stakeholders is a serious investment. Voluntary participation at any meaningful level may require a series of successfully implemented and beneficial charters that demonstrate the impact of charters on stakeholders before other stakeholders realize and see justification in devoting time and resources. Secondly, even with adequate resources, contributions by key stakeholders may not be useful or may even be potentially detrimental to the negotiation process where such stakeholders pursue self-interested goals. The DNR and PCPs should evaluate potential incentives to encourage more collaborative contributions. However, as with the previous factor, stakeholders may not choose to act in an unselfish manner until a number of successful charters demonstrate the advantages of cooperative decision-making. Lastly, without a certain degree of trust among key stakeholders, the DNR and the PCPs, stakeholder participation may not reach the level necessary to overcome conflicting goals and the high stakes of collaborative negotiations. The extent, if at all, to which implemented charter

⁹¹ Phone interview with Andrew Hanson, Staff Attorney, Midwest Environmental Advocates, October 17, 2005; interview with Steve Hiniker, Executive Director, 1000 Friends of Wisconsin, October 19, 2005.

programs help to increase trust among parties in future charter negotiations is a critical factor in evaluating the underlying success of the Green Tier Charter program.

Benchmark 4: Revision in response to public comments

Description: This benchmark reflects the actions taken to incorporate or address comments received from the public concerning the Charter at various phases of its creation.

Unlike the current state regulatory permit system, there is no statutory requirement or procedure for dealing with public comments sent to the DNR on the published draft Charter. As previously mentioned, the DNR received only a single Charter comment pertaining to the proposed EccoDev Charter. In response to the comment issued by the Wisconsin Chapter of the Sierra Club, the DNR held a number of meetings, initially with the Sierra Club to discuss the concerns raised in their comments, and subsequently a joint meeting with the both the Sierra Club and the PCPs of the EccoDev Charter (i.e. the Wisconsin Builder’s Association Charter group).⁹² According to the DNR, the use of meetings to resolve public concerns (vs. simply responding to comments in written form as in the permit comment system) through a negotiated and collaborative process with all affected parties present, allowed for modifications to the Charter that satisfied the DNR, PCPs, and the Sierra Club.⁹³

While the use of cooperative meetings to respond to Charter comments promotes the principles of new governance by breaking down the adversarial posture normally present between interested parties and regulators, it is unclear whether the DNR will be able to sustain such a practice in the event that they receive multiple comments on future charters.

Consequently, it is necessary for the DNR to evaluate (1) whether they have the resources to “scale up” negotiated meetings to accommodate multiple Charter comments, and (2) that the

⁹² McDermid, *supra* note 42.

⁹³ *Id.*

DNR has in place alternative procedures to handle and respond to a volume of comments that makes individual meetings impractical. Such measures might include large meetings involving the multiple parties that submitted comments, the DNR, and PCPs. However, the effectiveness of such meetings would require evaluation to determine whether meaningful compromises were reached or whether negotiations among varied interested parties made compromise and joint decision-making impossible.

Lastly, there is no requirement or procedure detailing the amount, if any, that the DNR and PCPs must revise the draft Charter to address public comments. To the extent that the comments reflect the common “permit comment” mentality of being adversarial in nature, new governance principles of joint decision-making and collaboration among interested parties are not advanced by the DNR utilizing resources to merely respond and defend aspects of the Charter. Accordingly, the DNR should determine the most effective use of limited resources to respond to Charter comments in a manner that does not reflect a command-and-control approach.

B. CONTINUOUS IMPROVEMENT AND REVISION BENCHMARKS

In the administration of the Green Tier program, the DNR is charged with promoting environmental performance that voluntarily exceeds legal requirements related to health, safety, and the environment and that result in continuous improvement in the state’s environment, economy, and quality of life.⁹⁴ The Agency must also provide for the measurement of environmental performance.⁹⁵ The primary vehicle for environmental performance and continuous improvement will be each participant’s EMS. However, Charters can be used to create a formal and consistent process to evaluate and improve a participant’s EMS. In addition,

⁹⁴ Wis. Stat. §299.83(1m)(b)(2004).

⁹⁵ Wis. Stat. §299.83(1m)(i)(2004).

Charters can create mechanisms for all Charter participants to share strategies and techniques that they have found effective. Such “networking” can and should be a driver for change and improvement. A Charter’s ability to promote continuous improvement through the generation, evaluation, and exchange of performance data can be considered through the following benchmarks.

(1) Focusing Performance Data Generation and Evaluation

Each Charter is created with specific environmental impacts in mind. The more precisely a Charter defines its objectives, the more effectively a corresponding EMS can accomplish them. Focused and consistently targeted EMSs will allow for easier and more direct comparisons between participants and the identification of the best strategies to address target issues. In addition, the identification of general cross-Charter environmental issues will allow different Charters to compare strategies to address the same environmental issues. The following benchmarks can be used to identify and evaluate the ways in which a Charter provides for focused data collection and evaluation.

Benchmark 5: Identification of target environmental issues that should be tracked and evaluated

Description: This benchmark measures the ability of the Charter mechanism to identify specific environmental issues that are of concern to Charter participants and the DNR.

The EccoDev Charter identifies the following key areas to be addressed in the EMS: construction site sediment control; post-construction storm water management; construction materials recycling; native plants; sites and construction; hydrology; habitat protection; and environmental education.⁹⁶ In addition, the EccoDev Board of Directors will, on an annual basis, develop specifics for what will be tracked and reported in the following years. These specifics

⁹⁶ EccoDev Charter, §II(F).

will relate to the objectives set for the year and any corrective actions that become necessary following an audit.⁹⁷

Benchmark 6: Tracking and evaluation of generic cross-Charter environmental issues

Description : This benchmark measures the ability of the Charter mechanism to identify “generic” environmental issues that are of concern to all Charter participants and the DNR.

The EccoDev Charter contains a list of general environmental indicators that will be included in all Green Tier Charters⁹⁸ in the following general areas: water, air emissions, waste, energy, transportation, spills, land use, and TRI.⁹⁹

(2) Mechanisms for Generation of Performance Data

Charters can provide formal mechanisms for gathering information about the ability of a participant’s EMS to address targeted environmental issues. The identification of baseline practices or standards for the target areas of the Charter is necessary to demonstrate that Green Tier drives environmental improvement. To demonstrate the flexibility of the program, periodic data collection regarding the target areas will be required to show how strategies are changing. The following two benchmarks can be used to identify and evaluate the mechanisms a Charter provides for generating performance data.

Benchmark 7: Identification of “baseline” performance data for each target area to be addressed by participants

Description: This benchmark examines the mechanisms for identifying baseline data for further performance evaluation. It reflects the industry-specific measurements that are the stated goals of a charter.

The EccoDev Charter identifies goals for each of the target areas in the Charter:

⁹⁷ EccoDev Charter, §V(H).

⁹⁸ McDermid *supra* note 42.

⁹⁹ EccoDev Charter, Appendix C.

- I. *Construction Site Sediment Control.*¹⁰⁰ The Charter creates a goal of 80% annual average reduction, as compared to no controls. The Charter does not provide or indicate the need to generate a baseline estimation of site sediment with no controls.
- II. *Post-Construction Storm Water Management.*¹⁰¹ The Charter creates a goal of providing more storm water treatment than is currently required under the law. It cites NR 151.12, Wis. Adm. Code, as containing the baseline legal standards.
- III. *Construction Materials Recycling.*¹⁰² The Charter creates a commitment to work with participants to continuously decrease the volume of construction waste materials. The Charter does not provide or indicate the need to generate a baseline estimation current volume of construction waste.
- IV. *Native Plants.*¹⁰³ The Charter creates a goal of using native vegetation to increase the biodiversity in areas within the site where landscape berms, buffers, or other plantings will be placed by the developer. The Charter does not provide or indicate the need to generate a baseline use of native vegetation.
- V. *Sites and Construction.*¹⁰⁴ The Charter creates a variety of goals in this area, including developing property in a manner that utilizes or enhances existing landscape features and promoting opportunities to increase the use of energy efficient materials and systems. The Charter does not provide or indicate the need to identify as a baseline the current performance of these practices.

¹⁰⁰ EccoDev Charter, §II(F)(1).

¹⁰¹ EccoDev Charter, §II(F)(2).

¹⁰² EccoDev Charter, §II(F)(3).

¹⁰³ EccoDev Charter, §II(F)(4).

¹⁰⁴ EccoDev Charter, §II(F)(5).

- VI. *Hydrology*.¹⁰⁵ The Charter creates a commitment to maintain or improve predevelopment hydrology of site through a variety of practices. The Charter does not indicate a need to determine predevelopment hydrology.
- VII. *Habitat Protection*.¹⁰⁶ The Charter creates a commitment to design projects, when possible, that: utilize waterway general permit specifications, seek to avoid dredging and placement of structures in natural lakes and streams and placement of fill in wetlands, and establish and enhance vegetative buffers. The Charter does not provide or indicate the need to identify as a baseline the current performance of these practices.
- VIII. *Education*.¹⁰⁷ The Charter identifies the need to create educational pieces consistent with the EMS to bridge the periods of subsequent control of sites by builders, contractors, and ultimately homeowners. The Charter does not provide or indicate the need to identify as a baseline the current performance of these practices.

Benchmark 8: Evaluation of mechanisms for the collection of data concerning participant strategies, actions, and results

Description: This benchmark examines the manner and frequency of data collection provided for in the Charter.

The EccoDev Charter contains many requirements that can serve as sources of performance data and demonstrate revision and improvement.

- I. *Environmental Management System*.¹⁰⁸ EccoDev must retain a vendor to create an EMS.

This document will detail each participant's strategies to achieve the goals identified in

¹⁰⁵ EccoDev Charter, §II(F)(6).

¹⁰⁶ EccoDev Charter, §II(F)(7).

¹⁰⁷ EccoDev Charter, §II(F)(8).

¹⁰⁸ EccoDev Charter, §V(A); *see also* Wis. Stat. §299.83(3)(d).

the Charter. Changes and revisions in the EMS will indicate movement towards different and hopefully more successful strategies.

- II. *Annual EMS Audit.*¹⁰⁹ EccoDev must retain a vendor to perform annual audits of each participant's implementation of the generic EMS. The audit will identify areas of non-conformance and non-compliance and the vendor will work with participant to address those areas. The audit findings will evaluate the success of each strategy or practice in the EMS and identify changes made to provide for better environmental performance.
- III. *Newsletter.*¹¹⁰ EccoDev will ensure that a newsletter will be developed for participants and other stakeholders. The content of the newsletter is not described in the Charter, but it could provide information on participants' environmental performance and discuss successful strategies for addressing specific issues. There is no specified frequency for the newsletter.
- IV. *Annual Reports to DNR.*¹¹¹ EccoDev will submit an annual report to DNR containing participant audit results, progress toward each year's EMS objectives, and data about the generic indicators developed for all Green Tier participants. The EccoDev Board of Directors will review the annual report and evaluate the overall effectiveness of the Charter.¹¹²
- V. *Documenting All Failures.*¹¹³ Each EccoDev participant must document all failures that may result in a notice of violation being issued by DNR. In addition, participants will report all failures that cannot be repaired within 72 hours to EccoDev and DNR. For such violations, the participant will send a follow-up report to EccoDev and DNR after the

¹⁰⁹ EccoDev Charter, §V(D); *see also* Wis. Stat. §299.83(3)(d)(4).

¹¹⁰ EccoDev Charter, §V(E).

¹¹¹ EccoDev Charter, §V(G); *see also* Wis. Stat. §299.83(7e)(d).

¹¹² EccoDev Charter, §VIII(E).

¹¹³ EccoDev Charter, §VII(A).

completion of the repair that states the corrective action, and any proposed changes to the EMS necessary to prevent future failures. These reports will identify inadequacies in an EMS and the revisions and changes contemplated to address the failure.

VI. *Contract Language*.¹¹⁴ The Charter states that participants will pursue contracts with contractors, builders, and other construction professionals that outline the requirements of an Environmental Management System (EMS) and the need to adhere to the EMS. Contracts can be examined to determine what strategies are being used by non-participants to improve environmental performance in target areas.

VII. *Random DNR Audits*.¹¹⁵ The DNR agrees to randomly audit EMS program implementation at participant's facilities. The DNR's findings will evaluate the success of each strategy or practice in the EMS and perhaps identify changes that need to be made to provide for better environmental performance.

The EccoDev Charter creates many different potential sources of environmental performance data. These sources can be used to track how practices are revised and improved over the life of the Charter. The Charter, however, does not provide or state the need for baseline (or pre-Charter) performance data in the target areas. Perhaps the parties thought these details were best left to the EMS or the need to create the baseline was implied in the goal itself. Regardless of how the baseline performance data is generated, it will be necessary to demonstrate the magnitude of change driven by the Green Tier program.

¹¹⁴ EccoDev Charter, §II(C).

¹¹⁵ EccoDev Charter, §VI(D).

(3) Mechanisms for Sharing Performance Data

The data and information generated through the various mechanisms above has many different uses. For purposes of continuous revision and improvement analysis, we are interested in whether and how information is shared. If each participant can effectively communicate its successes and failures, all participants will benefit. Effective practices and technologies can be tested and promoted. Ineffective practices and technologies can be eliminated or avoided. Performance data exchange benefits all parties involved – be it Charter participants, the DNR, the Charter organization, or third-party stakeholders. The following benchmarks can be used to identify and evaluate mechanisms for sharing performance data.

Benchmark 9: Mechanisms for performance data to be shared between the participants, the Charter, DNR, and other stakeholders to promote continuous revision and improvement

Description: This benchmark examines how well a Charter is able to disseminate the data it has collected to the stakeholders.

The EccoDev Charter outlines several mechanisms for sharing data in order to improve the performance of participants and to increase the transparency of the Charter:

- I. *Annual EMS Audit.*¹¹⁶ The audit will identify, for the participant and EccoDev, the areas of non-conformance and non-compliance. The vendor's findings will evaluate the success of each strategy or practice in the EMS and identify changes made to provide for better environmental performance.
- II. *Newsletter.*¹¹⁷ The newsletter, which will be distributed by EccoDev and DNR and posted on their websites, could serve as a mechanism to communicate best practices and

¹¹⁶ EccoDev Charter, §V(D); *see also* Wis. Stat. §299.83(3)(d)(4).

¹¹⁷ EccoDev Charter, §V(E).

strategies to other Charter participants as well as the relevant business community.

However, the content or purpose of the newsletter is not described in the Charter.

- III. *Annual Reports to DNR.*¹¹⁸ These reports will share with DNR audit results, progress toward each year's EMS objectives, and information about the generic indicators developed for all Green Tier participants.
- IV. *Documenting All Failures.*¹¹⁹ Participants will provide EccoDev and DNR with information about non-conformance and non-compliance issues. Participants will also provide information about the corrective action they took and any proposed changes to the EMS necessary to prevent future failures. The documentation will identify EMS deficiencies and the new or revised strategies employed to address them.
- V. *Contract Language.*¹²⁰ Participants and the Charter can communicate specific strategies and processes for environmental performance in line with the EMS through their contracts with contractors, builders, and other construction professionals. Diffusion of knowledge through contracts can be an effective way to change and improve the practices of all relevant business sectors.
- VI. *Strategic Discussion with Suppliers and Customers.*¹²¹ EccoDev will bring both suppliers and customers together at least annually in a strategic discussion regarding how the industry will react to and progressively lead in areas such as design for the environment and sustainability. This discussion can be a forum for exchange of information and strategies regarding the Charter and EMS objectives.

¹¹⁸ EccoDev Charter, §V(G); *see also* Wis. Stat. §299.83(7e)(d).

¹¹⁹ EccoDev Charter, §VII(A).

¹²⁰ EccoDev Charter, §II(C).

¹²¹ EccoDev Charter, §V(H).

VII. *Annual Training.*¹²² EccoDev will retain vendors to perform annual training for participants regarding the generic EMS. In practice, the EMS training has also been made available to members of the environmental community such as the Sierra Club.¹²³ This suggests that the training can be an opportunity for discussion of environmental strategies not only among Charter participants, but also with a broader community of stakeholders.

VIII. *Education.*¹²⁴ The Charter will create educational pieces consistent with the EMS to bridge the periods of subsequent control of sites by builders, contractors, and ultimately homeowners. This will be a key component to the Charter's ability to diffuse knowledge to other stakeholders.

The Charter creates a very diverse set of mechanisms for sharing performance data. Meetings, newsletters, and training sessions all present opportunities for participants and other third-party stakeholders to learn from one another and maximize their environmental performance. The DNR should consider whether each mechanism for sharing is as interactive as possible. While reporting and distribution of data is important to continuous improvement and revision, a true dialogue amongst interested parties will allow for sharing and hopefully also creation of new strategies.

(4) Agency Approval of New or Revised Environmental Strategies

As participants seek to demonstrate continuous improvement and superior environmental performance, instances may arise where a participant would like to change its practices in a way that requires DNR approval. The Charter should encourage the use of new methods and

¹²² EccoDev Charter, §V(F).

¹²³ Kisiel, *supra* note 52.

¹²⁴ EccoDev Charter, §II(F)(8).

technology by detailing an efficient process for DNR approval. The following benchmark can be used to identify and evaluate the ways in which a Charter deals with agency approval of new or revised environmental strategies.

Benchmark 10: Specification of a streamlined process for agency approval of new technologies and/or strategies

Within the context of the EccoDev Charter, the DNR, EccoDev and the participants commit to working cooperatively in order to encourage the use of new technology to meet the goals of the Charter. The developers agree to contact the DNR and provide an overview of the methods to be used before installing or using new technology or methods. DNR commits to provide a streamlined, consistent process for reviewing any submissions for the use of new technology and assist developers with technical review.¹²⁵

The actual review process is not laid out in the Charter. Placing more specific language in the Charter could help better assure that a streamlined and consistent process is used. The commitment to streamline the approval process, however general, was identified as a key element for improved environmental performance by John Kisiel of the Wisconsin Builders' Association. He recalled significant delays in past DNR approvals of new methods and technology and was hopeful that the new process would better encourage and reward innovation and creativity.¹²⁶

(5) Amending the Charter as a Means of Revision

As EccoDev, the participants, and the DNR begin to operate under the Charter, and as performance data is generated, there may be circumstances where an amendment to the Charter

¹²⁵ EccoDev Charter, §VII(B).

¹²⁶ Kisiel, *supra* note 52.

is either needed or desirable. The DNR or a Charter organization may want a performance expectation in particular area to be increased because of participant successes. Participants may want a performance expectation to be made more explicit if they are having difficulty capturing it in their EMS. The Charter should provide details on what the amendment process is and when it is appropriate to use. The following benchmarks can be used to identify and evaluate the ways in which a Charter addresses amendments.

Benchmark 11: Identification and specification of an amendment procedure for the Charter

Description: This benchmark evaluates how easily a charter may be amended, incorporating revised procedures into a more formal agreement.

The EccoDev Charter states that the document may be amended only in writing by the signatories to the Charter or their successors.¹²⁷ It is not made explicit whether a unanimous decision is required. Although the Charter does identify when an amendment will require additional public notice, the general appropriateness of amendment is not discussed.

(6) Compliance Assurance as a Process for Continuous Revision

The efficient and early detection of non-conformance and non-compliance issues is a key component to a participant's continuous improvement. By allocating some compliance assurance responsibility to the Charter organization and participant, a Charter can increase the amount of resources and the number of knowledgeable evaluators dedicated to compliance assurance. This translates into more frequent data collection and hopefully quicker and more efficient corrective action. The following benchmarks can be used to identify and evaluate the

¹²⁷ EccoDev Charter, §VIII(I).

ways in which a Charter allows compliance assurance to be a mechanism for continuous revision and improvement.

Benchmark 12: Allocation of significant compliance assurance responsibility to the Charter organization and its participants

EccoDev must retain a vendor to perform annual audits of each participant's implementation of the generic EMS.¹²⁸ EccoDev submits the results of the audit, along with other information, to the DNR in an annual report.¹²⁹ Beyond the annual audit, EccoDev participants will document all failures that may result in a notice of violation being issued by DNR. In addition, participants will report all failures that cannot be repaired within 72 hours to EccoDev and DNR. For such violations, the participant will send a follow-up report to EccoDev and DNR after the completion of the repair that states the corrective action, and any proposed changes to the EMS necessary to prevent future failures.¹³⁰ The DNR may offer comments on the corrective action plan, but EccoDev will be responsible for its implementation.¹³¹ Failure to complete the corrective action within the timeline agreed upon by the parties is grounds for EccoDev to terminate a participant from the Charter.¹³²

Benchmark 13: Incentives for the Charter organization for thorough, accurate, and transparent monitoring of its participants

The DNR agrees that, in exchange for EccoDev's fulfillment of its obligations under this Charter, it will not seek to bring any civil action, issue any order or seek any judgment related to the environmental responsibilities covered under this Charter against any participant who is in

¹²⁸ EccoDev Charter, §V(D).

¹²⁹ EccoDev Charter, §V(G); *see also* Wis. Stat. §299.83(7e)(d).

¹³⁰ EccoDev Charter, §VII(A).

¹³¹ EccoDev Charter, §VIII(C).

¹³² EccoDev Charter, §VIII(D).

compliance with the Charter unless the DNR discovers the violation or a participant creates or may cause an imminent or serious threat to public health or the environment.¹³³ The DNR will be monitoring each participant's performance through random audits.¹³⁴ Deferred civil enforcement is a powerful incentive for participants and the Charter to carefully monitor environmental performance and quickly correct any compliance issues.

The EccoDev Charter both allocates substantial compliance assurance responsibility to the Charter organization and participants, and provides strong incentives for that responsibility to be taken seriously. Through auditing and documentation of non-conformance issues, a greater amount of performance data will be available to participants to ensure that problems are identified and solved quickly.

C. TRANSPARENCY BENCHMARKS

The function of the Green Tier Charter is to provide the participating members with an opportunity to “join together in establishing and reaching collective environmental goals.”¹³⁵ Whether this goal is met depends on the transparency procedures established in the actual Charter. Throughout the Charter process, there are several areas where some level of transparency is required.¹³⁶ These include public notice and hearing of the draft Charter, public input of the contract and Charter discussions, and open access to the performance information generated by the annual audits.¹³⁷

¹³³ EccoDev Charter, §VI(A); *see also* Wis. Stat. §299.83(6m).

¹³⁴ EccoDev Charter, §VI(D).

¹³⁵ Green Tier, *supra* note 48.

¹³⁶ Wis. Stat. §299.83 (7e).

¹³⁷ Linda H. Bochert and Mary Woolsey Schlaefer, *Achieving Environmental Excellence: Green Tier Legislation*, Wisconsin Lawyer, Vol. 78, No. 9, September 2005.

Undoubtedly, these factors are the minimum that must occur in order for transparency to exist.¹³⁸ However, to determine the overall quality of the transparency and whether that level is sufficient to meet the goals of increased cooperation, collaboration, and trust, additional questions must be asked. The next section aims to identify these questions and the specific benchmarks that can be used to evaluate the level of transparency in the Green Tier Charter program.

Benchmark 14: Level of access to information by all relevant stakeholders throughout the charter process

Description: This benchmark measures the availability of information to the DNR and other stakeholders. Specifically, it measures the type of information made available, the frequency of the access to relevant information, and the timing of the information provided.

According to the DNR, “communities, neighbors, and other interested parties will have increased access to information about facilities enrolled in the Green Tier program.”¹³⁹ Moreover, these stakeholders will have greater opportunities to share their comments and concerns regarding the draft Charter or Charter activities.¹⁴⁰ Indeed, the Green Tier Statute requires Charter members and the DNR to engage in several activities that aim to ensure transparency.¹⁴¹ These include public notice and hearing on the draft Charter (and subsequent amendments made to the Charter),¹⁴² access to records,¹⁴³ and an annual progress and performance report to the DNR.¹⁴⁴ Additionally, the EccoDev Charter states that the Charter will create a newsletter for participants and other stakeholders on the progress and activities of the Charter.¹⁴⁵ However, it is unclear whether other stakeholders will be able to access additional

¹³⁸ Sabel and Simon, *supra* note 2, at 1071.

¹³⁹ Green Tier, *supra* note 43.

¹⁴⁰ *Id.*

¹⁴¹ EccoDev Charter; *see also* Wis. Stat. §299.83 (7e)(c).

¹⁴² EccoDev Charter, §V(C) and §VIII(I); *see also* Wis. Stat. §299.83 (7e)(c).

¹⁴³ EccoDev Charter, §VIII(K); *see also* Wis. Stat. §299.83 (7s).

¹⁴⁴ EccoDev Charter, §V(E); *see also* Wis. Stat. §299.83 (7e)(d).

¹⁴⁵ EccoDev Charter, §V(E).

information besides for the draft Charter, proposed amendments, performance report, and the Charter newsletter.

While these activities will ensure some level of transparency, neither the Green Tier Statute nor the EccoDev Charter gives any specifics on these activities. For example, the EccoDev Charter states that the minutes to the semi-annual meetings of the Interested Persons Group will be posted on the DNR and EccoDev's websites.¹⁴⁶ Whether additional information, such as the Charter's annual report to the DNR, public comments, completed participant applications, results of random audits, and violations of non-conformance will be available to other stakeholders is unclear.¹⁴⁷ If they are available, where can one access this information?

Moreover, it is unclear how often EccoDev will create a newsletter, to whom the newsletter will be sent, and whether these will be made available on either the DNR or EccoDev's websites. Also, can other stakeholders access information obtained by the DNR through the "access to records"¹⁴⁸ provision under the Green Tier Statute? Lastly, how timely is the information that is provided? Information must be timely in order for interested stakeholders to act. For example, the public comments to the EccoDev Charter were not made available until our group requested a copy. Once requested, it took roughly a week to receive the comments. At the time our group requested the comments, the public hearing had already taken place and the public comment period was closed. The comments are still not available on the DNR's website.¹⁴⁹

¹⁴⁶ EccoDev Charter, §IV(B).

¹⁴⁷ The DNR intends to make these items available in the future. However, they are uncertain as to when or how. See McDermid, *supra* note 42.

¹⁴⁸ Wis. Stat. §299.83 (7s); *see also* EccoDev Charter §VIII(K).

¹⁴⁹ DNR's website visited last on 12/21/05.

Benchmark 15: Quality of dialogue and informational exchange between the relevant stakeholders

Description: This benchmark measures the quality of informational exchange between DNR and the Charter, the Charter and its members, and the Charter and other stakeholders. Specifically, this benchmark focuses on whether there is a higher quality of dialogue as compared to the command-and-control system and whether there are new forms of communication and interaction between the parties as a result of the Charter program.

In Green Tier, participating members commit to working closer with their local communities and those potentially affected by their operations.¹⁵⁰ To this end, the EccoDev Charter will make available a newsletter of its activities and create an “Interested Persons Group” to allow for other stakeholders’ input.¹⁵¹ As for the newsletter, a key question is what type of information will the newsletter include, to whom the newsletter will be distributed, and how often will the newsletter be created. Additionally, will the Charter proactively send the newsletter to relevant stakeholders or will the Charter simply post the newsletter on its website?

The EccoDev Charter states that the Interested Persons Group (IPG) will consist of at least one person who does business with a land developer who is a participant in the Charter.¹⁵² Beyond that, it is unclear which other stakeholders can be part of the IPG. Will EccoDev proactively seek other relevant stakeholders to participate in the group or will the Charter simply wait for groups to request participation? Moreover, to what extent will the stakeholders participate in Charter decisions, other than attend semi-annual meetings and have their comments reflected in the minutes of the meeting.¹⁵³ What is the intended result of their participation?

The Charter does not specify how EccoDev plans to facilitate communications between the Charter members. The newsletter is one method to distribute information. However, the Charter does not make clear whether there will be additional methods of

¹⁵⁰ Green Tier, *supra* note 43.

¹⁵¹ EccoDev Charter, §IV.

¹⁵² EccoDev Charter, §IV.

¹⁵³ EccoDev Charter, §IV.

communication between the Charter members and the type of information that will be exchanged. Additionally, the DNR and EccoDev will each designate a point person to facilitate communications between the DNR and the Charter. A key question is whether this point person is also available to communicate regularly with the Interested Persons Group or to other stakeholders generally.

Benchmark 16: Established measures and procedures for assessing transparency

Description: This benchmark looks at whether there are established procedures in the Charter to measure transparency. Specifically, this benchmark focuses on how the Charter plans to adjust or modify their internal procedures to ensure transparency in the Charter process.

Neither the Green Tier Statute nor the EccoDev Charter specifies any procedures to assess the level of transparency needed to meet the goals of the parties in the Charter. Without specific procedures in place, it would be difficult to measure this benchmark. However, there are several questions that can be asked to evaluate this benchmark, such as: (1) Does the DNR in any way monitor the data being made available and assess whether that is the appropriate level? (2) Is there a point person in each Charter in charge of ensuring the necessary level of transparency with its members, the DNR, and other stakeholders? (3) Does the Charter have an internal system to evaluate member compliance with transparency goals? (4) Is the member providing the information stakeholders require to evaluate member performance and develop a relationship of trust? And (5) Is there a process in place for identifying and responding to community concerns relating to transparency?

IV. CONCLUSION

Through the use of process benchmarks, it will be possible for the Wisconsin DNR to evaluate how well the Green Tier Charter program is meeting the general goals of new governance: negotiation, continuous improvement and revision of the rule regime, and transparency. Utilizing these benchmarks may be something of a subjective exercise because they evaluate a process (e.g. the presence and nature of an Environmental Management System), rather than specific outcomes (e.g. the environmental standards being met). Subjective analysis, however, does not mean that the conclusions drawn from this type of analysis are weak or unimportant. The principles of new governance as described in academic literature present a clear picture of a system that is strikingly different than traditional command-and-control oversight and regulation. New governance theory believes—as do the proponents of Green Tier—that command-and-control regulation mechanisms are inefficient *and* ineffective. What should replace the inefficient system, it follows, should be something that is better in both efficiency and effectiveness. Achieving one of the aims at the expense of the other would signal a defeat for the program.

This paper has sought to demonstrate the usefulness of incorporating new governance principals of negotiation, continuous improvement and revision, and transparency into the evaluation of the Green Tier Charter program. In developing several of the new governance benchmarks presented here, it became clear that many of the necessary features of new governance were not explicitly spelled out in the legal language of the statute or the specific Charters that were available for review. Particularly of note was the absence of defined mechanisms for including relevant stakeholders in the creation and implementation of a charter at all levels. As they are currently drawn, charters *may* be a method for appropriate inclusion and

collaboration of stakeholders, but they also may not be. That a specific charter does not detail the points at which stakeholders will effectively participate in this process, for example, leaves a door open for abuses or slippage into the traditional regulator/regulated relationship between the DNR and the charter participants.

Appendix A: Table of Green Tier Charter Benchmarks

Benchmark	Title	Description
1	Initial communication between the DNR and PCPs	This benchmark focuses on how Charter negotiations are initiated – specifically analyzing the degree to which the DNR proactively recruits eligible entities vs. those entities seeking entry into the Charter program.
2	Amount of control devolved to the PCPs in the drafting and formation of the Charter	This benchmark examines the relationship between the DNR and the PCPs in the drafting of the Charter. It looks at how involved the PCPs are in the actual drafting of the language, and examines how cooperative the process of negotiations and drafting was in the creation of the Charter.
3	Participation of third-party stakeholders and the general public	This benchmark examines the most uncertain aspect of the negotiation process – the role of third party participation in the formation of the Charter. It focuses on three discrete issues: (a) the types of third parties that are or should be involved, (b) the points of engagement for third party participation, and (c) the level and form of contribution that third parties are making.
4	Revision in response to public comments	This benchmark reflects the actions taken to incorporate or address comments received from the public concerning the Charter at various phases of its creation.
5	Ability of the Charter to identify target environmental issues that should be tracked and evaluated	This benchmark measures the ability of the Charter mechanism to identify specific environmental issues that are of concern to Charter participants and the DNR.
6	Tracking and evaluation of generic cross-Charter environmental issues	This benchmark looks at how well a set of “generic” environmental issues are tracked and evaluated across the collection of Charter agreements. Through the standardization of environmental goals, the DNR is better able to track the success of the Charter agreements and Green Tier.
7	Ability of the Charter to either identify or provide a means to identify “baseline” performance data for each target area to be addressed by participants	This benchmark examines the mechanisms for identifying baseline data for further performance evaluation. It reflects the industry-specific measurements that are the stated goals of a charter.
8	Evaluation of mechanisms for collection of data concerning participant strategies, actions and	This benchmark continues to evaluate the EMS, particularly in how effective the systems are for tracking of information. It examines the manner

	results	and frequency of data collection.
9	Ability of the Charter to provide for mechanisms for performance data to be shared between the participants, the Charter, DNR, and other stakeholders to promote continuous revision and improvement	This benchmark examines how well a Charter is able to disseminate the data it has collected to the stakeholders.
10	Specification of a streamlined process for agency approval of new technologies and/or strategies	
11	Identification and specification of an amendment procedure for the Charter	This benchmark evaluates how easily a charter may be amended, incorporating revised procedures into a more formal agreement.
12	Ability of the Charter to allocate significant compliance assurance responsibility to the Charter organization and its participants	
13	Ability of the Charter to provide incentives to the Charter Organization for thorough, accurate, and transparent monitoring of its participants	
14	Level of access to information by all relevant stakeholders throughout the Charter process	This benchmark measures the availability of information to the DNR and other stakeholders. Additionally, it measures the type of information made available, the frequency of the access to relevant information, and the timing of the information provided.
15	Quality of dialogue and informational exchange between the relevant stakeholders	This benchmark measures the quality of informational exchange between DNR and the Charter, the Charter and its members, and the Charter and other stakeholders. Specifically, this benchmark focuses on whether there is a higher quality of dialogue and whether there are new forms of communication and interaction between the parties that did not exist before the Charter.
16	Established measures and procedures for assessing transparency	This benchmark looks at whether there are established procedures in the Charter to measure transparency. Specifically, this benchmark focuses on how the Charter plans to adjust or modify their internal procedures to ensure transparency in the Charter process.