

Would You Like Some Unintended Consequences With That Tea?

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Wisconsin has a proud tradition of strong political opinions. Recent Tea-Party backed legislation in Wisconsin limiting the power of government will be interesting to follow as the consequences play out, particularly in the environmental arena.

In March 2011, Wisconsin's then-new Republican Governor Scott Walker and the Republican legislature passed the Wisconsin Budget Repair Bill, the state law that famously limits the collective-bargaining rights of public employees. Following that, the legislature passed 2011 Wisconsin Act 21, which includes a "limited government" provision that prohibits any "agency [from] implement[ing] or enforc[ing] any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [state law]."

This will play out in a number of ways. Like other state environmental agencies, the Wisconsin Department of Natural Resources ("WDNR") relies significantly on guidance documents to implement otherwise complex programs. A number of issues are addressed only in WDNR guidance, not in explicit regulations. These include sediment cleanup standards; references to "sediment" were intentionally removed from the state soil cleanup standards. This not only affects state cleanup programs, but also raises issues as to whether the state sediment cleanup standards can be "applicable or relevant and appropriate requirements" under the Comprehensive Environmental Response, Compensation and Liability Act. Similarly, the WDNR's vapor intrusion sampling, analysis and remediation protocols are contained only in state and federal guidance documents.

Recently, the U.S. EPA chose language in a proposed SIP denial that adds fuel to some permitting arguments. In 2008, U.S. EPA required revisions to State Implementation Plans ("SIPs") with respect to PM_{2.5} permitting; Wisconsin made regulatory changes, and requested SIP approval in 2011. On December 18, 2012, the U.S. EPA proposed disapproval of the SIP revision. [77 Fed. Reg. 74817 \(2012\)](#). According to U.S. EPA, Wisconsin's submission is deficient because the Wisconsin regulations do not "explicitly" define the condensable component of PM₁₀ and PM_{2.5} emissions, and do not "explicitly" identify SO₂ and NO_x as precursors to PM_{2.5}. The U.S. EPA's disapproval language gives the Wisconsin Department of Natural Resources the usual additional work to propose and finalize regulatory changes to address the deficiency, but it also gives regulated sources an additional argument that the WDNR lacks the authority to regulate condensable particulate matter and PM_{2.5} precursors.