



April 21, 2014

The Honorable J.B. Van Hollen  
Wisconsin Attorney General  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

Receipt of copy of the within acknowledged  
this 24<sup>th</sup> day of April  
20 14 Time 2:23  
Attorney General of Wisconsin  
By C. Cushman

RE: Request for Formal Opinion

Dear Attorney General Van Hollen:

I am writing to request a formal opinion regarding the powers of local governments with respect to membership in county recycling responsible units (RUs) established pursuant to s. 287.09, Wis. Stats. Under s. 287.09(1), RUs are delegated the responsibility of developing and implementing local recycling programs to fulfill duties established under s. 287.09(2).

Specifically we wish to know:

For a county RU that was formed by resolution under s. 287.09(1)(b):

1. Is there any authority and procedure by which a local municipality member of a county RU may leave the county RU and establish itself as an independent RU more than 90 days after the date the county passed its resolution forming the county RU?
2. Is there any authority and procedure by which a county RU may dissolve, returning RU status to individual member municipalities?
3. If not defined by statute, should the procedure be defined by the DNR, as administrator of the state recycling law, or should the state leave this to each individual county?

**Background:**

1989 Wisconsin Act 335 established the foundation for the state recycling law, administered under ch. 287, Wis. Stats., and ch. NR 544, Wis. Adm. Code. The law delegates responsibility to implement recycling programs in compliance with state laws to local units of government called responsible units. Under s. 287.09, every municipality (city, town, and village) is a responsible unit, and must have established its responsible unit status by 1994, five years after the law was signed into effect.

The law provides local governments with two alternatives to being an individual municipality RU:

- a) A county may, by resolution, declare itself to be a responsible unit; all municipalities within the county have a 90-day window to opt out of the county program from the date of county adoption of the resolution.
- b) One or more municipalities and/or one or more counties that are responsible units may, by intergovernmental agreement under s. 66.0301, Wis. Stats., designate another unit of government to be the RU.

The process to establish a county RU through resolution is outlined in s. 287.09(1). Under this process, a county board of supervisors may adopt a resolution designating itself as the RU for all municipalities within the county. Individual municipalities in that county who wish to "opt out" and maintain their municipality status as an RU must adopt a resolution within 90 after the county board adopts its resolution.

At present, there is no apparent provision in Wisconsin law for:

- (a) a municipality to leave a county RU after the 90-day opt-out window has closed, or
- (b) a county to dissolve its role as the county RU, returning RU status to each member municipality.

**Discussion:**

Section 287.09 describes the duties and powers of municipalities and counties with respect to state recycling laws. Every municipality is a responsible unit (s. 287.09(1)). A municipality is defined as a city, village or town (s. 287.01(4)), and a responsible unit is defined as “a municipality, county, another unit of government, including a federally recognized Indian tribe or band in this state, or solid waste management system ...” (s. 287.01(9)).

Under s. 287.09(2), every RU was required to submit an implementation plan to DNR for approval by January 1, 1993, and adopt an ordinance to enforce their recycling program. By 1994, the state confirmed that every municipality in the state was either an individual RU or a member of a consolidated RU satisfying the criteria of a DNR approved effective recycling program under s. 287.11.

Section 287.09(1)(b) through (e), provides options for municipalities not wishing to function as an individual municipal RU. One option is to join a county-designated RU, either through resolution or through intergovernmental agreements under s. 66.0301. All 34 of the current county RUs formed through resolution, although a number have added new member municipalities through cooperative agreements. All county RUs have been in existence since 1994.

While there has been some change in county RU membership over the years, overall membership has been very stable. And while the structure, financing, and administration of county RU programs vary widely, county RUs generally provide a broad range of services often financed through assessment of a fee on member municipalities. With municipalities increasingly challenged to meet local operating budgets, a growing number are exploring the option of leaving a county RU on the assumption they can provide recycling services more cheaply on their own.

Most recently, the DNR was approached by two county RUs formed under resolution (Pierce and Waukesha counties) questioning the authority for a member to leave the RU and asking for direction on the procedure by which such a separation could occur, if legally possible. The DNR has also been approached directly by a number of members of county RUs, again seeking direction on the procedure to leave a county RU formed under resolution.

Because the statutes appear to be silent on this issue, DNR is seeking a formal opinion from the Attorney General about the authority and procedure by which members may leave a county RU formed under resolution. DNR is also seeking direction on the authority of a county RU to dissolve, if, for example, its financial viability were undermined due to an exodus of member municipalities.

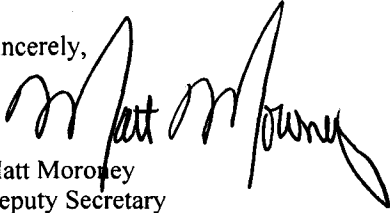
This is not an inconsequential matter to many county RUs; the answer could have significant financial repercussions. A number of county RUs have made or are considering making multi-million dollar investments in recycling infrastructure, such as construction and operation of highly sophisticated recycling processing facilities or long-term agreements with private recycling vendors. As described in the attached letter dated October 29, 2013 from Brad Lawrence, Pierce County Corporate Counsel, these investments and agreements are made on the premise that the resolution binding member municipalities to the county RU is permanent. As stated by Mr. Lawrence on page 5 of his letter, “... allowing local municipalities to “opt-out” after the 90-day window would leave the county in a terrible position of planning and paying for capital costs to serve the local municipality with no way to recover these costs when the local municipality has a change of heart after the 90-day window.”

There has been some debate over whether the omission of language designating an opt-out provision beyond the 90-day window set forth in s. 287.09(1)(c) was intentional or an oversight. While it has been argued that the omission was intentional and thus, local municipalities may not leave a county RU after the 90-day window closes, it has also been suggested that the omission may have been an oversight, and hence further guidance is needed regarding the process by which local municipalities may leave a county RU when more than 90 days have passed since the county’s adoption of the

resolution. The DNR has been challenged to provide direction on this matter and, therefore, is requesting a formal opinion from the Attorney General.

If you or your staff should have any questions, please contact Nicole Denow, DNR attorney for recycling issues, at 608-266-0911, or Cynthia Moore, DNR Recycling Program Coordinator, at 608-267-7550.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Moroney". The signature is fluid and cursive, with the first name "Matt" and last name "Moroney" clearly distinguishable.

Matt Moroney  
Deputy Secretary

Attachments:

- Letter from Brad Lawrence, Corp Counsel, Pierce County, dated October 29, 2013.
- Email correspondence between Kendra Bonderud, LFB, and Cynthia Moore, DNR, July 11, 2011
- DNR publication WA1623, Responsible Unit Cooperation and Consolidation (not dated)
- DNR publication IE044, Forming Responsible Units, 3/91