



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR TOM TIFFANY AND REPRESENTATIVE SCOTT SUDER

FROM: Anna Henning, Staff Attorney, and Larry Konopacki, Senior Staff Attorney

RE: Proposed Amendments to 2013 Senate Bill 1 and 2013 Assembly Bill 1, Relating to the Regulation of Ferrous Mining and Related Activities

DATE: February 4, 2013

This memorandum summarizes potential amendments to 2013 Senate Bill 1 and 2013 Assembly Bill 1, which are companion bills relating to the regulation of ferrous mining and related activities ("the bill"). Each pair of amendments described below are identical amendments to the Senate bill and Assembly bill, respectively. For background information and a description of changes the bill makes to current law, please refer to our February 1, 2013 memorandum.

LRBa0042/1 AND LRBa0087/1: MODIFICATIONS RELATING TO GROUNDWATER QUALITY AND WASTE CHARACTERIZATION

Groundwater Quality

Outside the boundaries of a designated "design management zone," a ferrous mining operation must adhere to groundwater quality enforcement standards. Under **the bill**, the boundaries of design management zones for ferrous mining operations are generally 1,200 feet from the engineered structures of a mining waste site, including any wastewater and sludge storage or treatment lagoon, the edge of the mine and adjacent mine mill and ferrous mineral processing and other facilities, or at the boundary of the property owned or leased by the mining operator, or on which the mining operator holds an easement, whichever is closer. However, the bill authorizes the Department of Natural Resources (DNR) to expand a design management zone for a ferrous mining site by an additional 1,200 feet in any direction, if the DNR determines that preventive action limits and enforcement standards will be met at the boundary of the expanded design management zone and that preventive action limits and enforcement standards cannot be met at the boundary of the zone if it is not expanded. The

bill does not authorize the DNR to reduce the horizontal distance to the design management zone below 1,200 feet.

These amendments remove the authority for the DNR to expand the design management zone by an additional 1,200 feet. In addition, the amendments authorize the DNR to reduce the design management zone by a horizontal distance of not more than 600 feet. Under the amendment, the DNR may not reduce the design management zone unless the DNR determines that preventive action limits and enforcement standards or alternative concentration limits will be met at the boundary of the reduced design management zone. When determining whether to reduce the horizontal distance to the design management zone, the amendment requires the DNR to consider the following factors:

- Nature, thickness, and permeability of unconsolidated materials, including topography.
- Nature and permeability of bedrock.
- Groundwater depth, flow direction, and velocity.
- Waste volume, type, and characteristics.
- Contaminant mobility.
- Distances to the property boundary and surface waters.
- Engineering design of the facility.
- Life span of the facility.
- Present and anticipated uses of land and groundwater.
- Potential abatement options if an enforcement standard is exceeded.

The amendments also mirror current law by requiring a ferrous mining operator to monitor groundwater quality at locations approved by the DNR along the boundary of the design management zone and within the design management zone.

Methods for Waste Characterization

An applicant for a ferrous mining permit must perform waste characterization and analysis to identify the quantities, variability, and physical, radiological, and chemical properties of the mining waste associated with a proposed project. As part of that characterization and analysis, an applicant generally must perform testing to determine the leaching potential of the mining wastes and the composition of the resulting leachate. **The bill** requires that, at a minimum, the applicant perform a method of static testing set forth in a specified federal Environmental Protection Agency (EPA) publication. **These amendments**

instead require that, at a minimum, the applicant perform static testing, kinetic testing, and microscopic testing for mineralization characterization.

LRBa0043/1 AND LRBa0088/1: REQUIRING A MEMORANDUM OF UNDERSTANDING WITH FEDERAL REGULATORY AGENCIES

The bill requires an applicant for a ferrous mining permit to take certain steps to provide notice to and meet with the federal Army Corps of Engineers (ACE), but it does not expressly require the DNR to take any particular action to coordinate with ACE or other federal agencies.

These amendments require the DNR to seek to enter into a memorandum of understanding with any federal regulatory agency with responsibilities related to a potential mining operation covering timelines, sampling metrology, and any other issue of mutual concern related to the processing of a ferrous mining permit application.

LRBa0044/1 AND LRBa0089/1: ALLOWING AN APPLICANT TO SET AN ALTERNATIVE PERMIT REVIEW TIMELINE

The bill generally establishes a 420-day timeline for the DNR to review an application for a ferrous mining permit.

These amendments allow an applicant, as part of the application for a mining permit, to specify a longer timeline for the DNR's permit review.

LRBa0053/1 AND LRBa0090/1: LIMITATION ON THE AUTHORITY TO GRANT EXEMPTIONS

Under **the bill**, the DNR must grant an applicant's request for an exemption from the requirements under the new ferrous mining law established under the bill if all of the following apply:

- The exemption is consistent with the purposes of the ferrous mining law.
- The exemption will not violate other environmental laws.
- The exemption will not violate federal law.
- The exemption will either not result in significant adverse environmental impacts, or such adverse impacts will be offset through mitigation.

In addition to the above requirements, the bill provides that federal standards for granting exemptions may apply in some circumstances.

These amendments generally retain the above requirements, except that the DNR may not issue an exemption if the exemption will result in significant adverse environmental

impacts off of the mining site, and no mitigation may be considered in determining if such impacts will result.

LRBa0067/1 AND LRBa0083/1: COST FOR WETLAND DELINEATION

The bill authorizes any owner or lessee of land, or a holder of an easement in land, to request that the DNR provide a wetland determination or wetland boundary delineation for an application for a wetland individual permit under the bill, or for any other approval for which a wetland impact evaluation is required.

These amendments authorize the DNR to assess a ferrous mining permit applicant a fee equal to the DNR's costs in providing wetland boundary determination or delineation services. Fees assessed for these services would not count under the general \$2,000,000 DNR fee cap under the bill, and these fees would be refunded with other fees paid by the applicant if the DNR fails to issue a decision on a mining permit application within the applicable timeline.

LRBa0072/1 AND LRBa0091/1: APPROVAL CRITERION FOR IMPACTS TO PUBLIC HEALTH, SAFETY, OR WELFARE

The bill requires the DNR to issue a permit for a ferrous mine if seven criteria specified in the bill are satisfied. One of those criteria is a requirement that the proposed mining is *not likely to result* in substantial adverse impacts to public health, safety, or welfare.

These amendments modify that provision to require that the proposed mining is *reasonably certain not to result* in substantial adverse impacts to public health, safety, or welfare.

LRBa0073/1 AND LRBa0092/1: TIME HORIZON FOR WATER QUALITY MODELING

Under **the bill**, an applicant for a ferrous mining permit must submit a mining waste site feasibility study together with a mining permit application. The feasibility study must include various descriptions, maps, and data specified under the bill. One component of the feasibility study is a proposed mining waste site design, based on conclusions resulting from the analysis of certain mining waste characterizations and site data. Among other components, the mining waste site design must include the results of engineering and hydrologic modeling to assess the mining waste site performance relative to compliance with groundwater and surface water quality standards. The modeling must examine a period equal to the period in which the mining waste site is proposed to operate plus *100 years* after closure of the mining waste site. **These amendments** require such modeling to examine a period equal to the period in which the mining waste site is proposed to operate plus *250 years* after closure of the mining waste site.

LRBa0076/1 and LRBa0084/1: LOCATION OF MITIGATION OF WETLAND IMPACTS

The **bill** allows an applicant for a wetlands individual permit to propose a wetlands mitigation plan to compensate for adverse impacts to functional values of wetlands. As part of a mitigation plan, the bill requires an applicant to identify and consider mitigation that could be conducted in the same watershed in which the mining site is located. If it is not practicable or ecologically preferable to conduct mitigation at an on-site location¹ or if there is no on-site location that will provide sufficient wetland acreage, the DNR must allow the applicant to conduct mitigation at an off-site location. The bill also requires wetland mitigation to compensate for impacts to wetlands located in the ceded territory to occur within the ceded territory.²

Under **these amendments**, if it is not practicable or ecologically preferable to conduct mitigation at an on-site location or if there is no on-site location that will provide sufficient wetland acreage, the DNR must require that the applicant conduct mitigation within the same watershed in which the wetland to be affected is located, unless mitigation in the same watershed is not practicable or ecologically preferable. If mitigation within the same watershed is not practicable or ecologically preferable, the DNR must require that the applicant conduct mitigation within the same water basin (Lake Superior, Lake Michigan, or the Mississippi River) in which the wetland to be affected is located. If mitigation in the same water basin is not practicable or ecologically preferable, the applicant generally may conduct mitigation at a site elsewhere in the state. However, the amendments retain the requirement that wetland mitigation to compensate for impacts to wetlands located in the ceded territory must occur within the ceded territory.

LRBa0077/1 AND LRBa0086/1: LIMITATION ON THE USE OF OFFSETTING MEASURES FOR NAVIGABLE WATERS IMPACTS

The **bill** requires an applicant for a navigable waters activity approval submitted in connection with a ferrous mine to propose “measures” to offset impacts in order to satisfy the approval requirements set forth under the bill. **These amendments** prohibit the DNR from considering such offsetting measures when evaluating an application for a navigable waters activity approval if the navigable water is any of the following:

- A perennial stream,³ if its drainage area upstream from the farthest downstream point of the navigable water activity is more than two square miles.

¹ The bill defines “on-site location” to mean a location that is on a mining site or within one-half mile of an outer boundary of a mining site.

² “Ceded territory” is defined in the bill to mean the territory in Wisconsin ceded by the Chippewa Indians to the United States in the treaty of 1837, 7 Stat. 536, and the treaty of 1842, 7 Stat. 591. The ceded territory covers roughly the northern third of the state.

³ “Perennial stream” is defined as a stream that has a continuous flow every day of every year in which there is average precipitation.

- A navigable water, other than a stream, that is more than two acres in area every day of every year in which there is average precipitation and that is not a freeze-out pond.⁴
- A Class I, Class II, or Class III trout stream.

LRBa0085/2 AND LRBa0094/2: MISCELLANEOUS CHANGES

Exception From Certain Managed Forest Lands Requirements for Bulk Sampling

Under current law and **the bill**, the DNR may issue orders withdrawing parcels from the Forest Crop Law (FCL) and Managed Forest Land (MFL) programs if the property is not used for purposes consistent with those programs.

These amendments prohibit the DNR from removing a parcel from these programs based on the cutting of forest crops or other activities related to bulk sampling for ferrous minerals by a person who has the necessary approvals from the DNR for bulk sampling. The amendments also require that a revegetation plan include forestry practices that will generally ensure that the timber, forest crops, and other vegetation that will be cut or otherwise affected will be restored unless the property is within a mining site described in a preapplication notification or an application for a ferrous mining permit.

Slope of a Mining Waste Site

Under **the bill**, an applicant must make specified demonstrations to obtain an approval for a ferrous mining waste site. One required demonstration is that the final slopes of the completed mining waste site will be no less than 20% and no greater than 50%, unless the mining waste site is specifically designed for a final use compatible with other slopes. **These amendments** eliminate the minimum waste site slope requirement.

Floodplain Zoning

The bill requires the DNR to issue a permit for a ferrous mine if seven criteria specified in the bill are satisfied. One of those criteria is that the proposed mining is likely to meet or exceed the regulations that apply to municipal floodplain ordinances under DNR administrative rules. The bill also prohibits the application of municipal floodplain zoning ordinances to a mining operation other than to the extent necessary for municipalities to maintain eligibility for participation in the National Flood Insurance Program. In a separate provision, the bill authorizes certain municipalities and tribal governments to enter into local agreements with an applicant for a mining permit.

⁴ "Freeze-out pond" is defined as a natural, self-contained body of water in which freezing or anoxic conditions prevent the body of water from naturally sustaining a fish population at least twice every five years.

These amendments modify the criterion relating to meeting or exceeding administrative rules governing municipal floodplain ordinances. The criterion under these amendments requires the DNR to find that the proposed mining is likely to meet or exceed the requirements of any portion of a municipal floodplain zoning ordinance that remains in effect under the bill, to the extent that the ordinance has not been made inapplicable to the proposed mining in a local agreement.

Removal of Provisions Related to Construction of Utility Facilities

The construction of high-voltage transmission lines, large electric generating facilities, or specified facilities or equipment for electric, natural gas, or water utilities may require approvals from both the DNR and the Public Service Commission (PSC). Under current law, a person who proposes to construct such a project must submit a single permit application to the DNR in lieu of multiple permit applications that might otherwise be required, and combined permit applications must be submitted at the same time the person files an application with the PSC. Under **the bill**, these requirements are optional. **These amendments** remove non-substantive changes in the bill related to this regulatory scheme.

Process for “Subsequent” Applications for Approvals

The bill requires the DNR to approve or deny an environmental and natural resource approval required for a ferrous mining project (related approvals) within the same timeline required for processing the mining permit application, if the applicant submits an application for the approval no later than 60 days after the day on which the application for the mining permit is administratively complete. If the application is submitted more than 60 days after that day, the deadline for approval is extended by the number of days past the 60th day that the applicant submits the application.

These amendments would require that applications for related approvals submitted no later than 60 days after the day on which the application for the mining permit is administratively complete, and those submitted more than 60 days after that day but in time to allow the application to be considered at the public informational hearing for the mining permit, be approved within the same timeline required for processing the mining permit.

The amendments also create a separate process for the DNR to follow when evaluating an application received too late to allow it to be considered at the public informational hearing for the mining permit but before the DNR issues the decision to grant or deny the application for the mining permit. For these applications, the bill establishes timelines for a determination of administrative completeness for (30 days after receipt by the DNR, unless more information is needed by the DNR) and approval of the related approval (generally 75 days after administrative completeness). A public hearing is required on these related approvals.

Lastly, the amendments require that applications for related approvals applied for after the issuance of a mining permit generally are to be evaluated using the processes and timelines for such approvals under current law.

Venue for Judicial Review

The **bill** requires a person seeking judicial review of a contested case hearing on the DNR's final decision regarding a ferrous mining permit application to bring the action in the circuit court for the county in which the majority of the proposed mining site is located. **These amendments** apply this venue requirement to judicial review of any decision of the DNR under the ferrous mining law, including review of decisions relating to exploration and bulk sampling.

Ratio of Measures to Offset Significant Impacts to Navigable Waters

As described above, **the bill** requires an applicant for a navigable waters activity approval submitted in connection with a ferrous mine to propose "measures" to offset impacts in order to satisfy the approval requirements set forth under the bill. Among other authorized measures, an applicant may propose to provide public access to, restore, or enlarge up to *1.5 acres* of navigable waters in exchange for each acre of navigable waters proposed to be significantly impacted under the approval.

Under **these amendments**, an applicant may propose to provide public access to, restore, or enlarge *between 1.0 and 1.5 acres* of navigable waters in exchange for each acre of navigable waters proposed to be significantly impacted under the approval.

Requirement to Consider Impacts on Archeological Sites

The DNR must prepare an environmental impact statement as part of its review of any proposed ferrous mining project. Under **the bill**, archeological sites are not one of the items for which the DNR is specifically required to include a description of the significant long-term and short-term impacts in the environmental impact statement for the project. **These amendments** require the DNR to include in the environmental impact statement for a ferrous mine a description of the significant long-term and short-term impacts, including impacts after the mining has ended, on archeological sites.

Federal Wetlands

Under current law and **the bill**, if a proposed project will impact federal wetlands, the applicant must obtain a permit from the ACE. Under the bill, the DNR may impose requirements on an individual permit related to a federal wetland in addition to those requirements contained in an ACE permit only as necessary to address significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences not addressed in the ACE permit.

In addition to other minor changes made for accuracy and consistency, **these amendments** specify that the DNR process for review of an ACE individual permit related to a federal wetland also applies to DNR review of any other approval for which a wetland impact evaluation for a federal wetland is required.

Construction of Utility Facilities

Under **the bill**, environmental and natural resource approvals required for a ferrous mining project (related approvals) must generally be reviewed under the process and timelines created under the bill. The DNR is also prohibited from assessing a separate application or filing fee for these related approvals.

These amendments clarify that a permit, license, certification, contract, or other authorization related to the construction of any new plant, equipment, property, or facility for the production, transmission, delivery, or furnishing of power are not considered related approvals.

LRBa0093/1 AND LRBa0095/1: MODIFICATIONS RELATING TO TAXATION AND REVENUE

Calculation and Distribution of Net Proceeds Occupation Tax Revenue

A net proceeds occupation tax is imposed on net income from the sale of metallic minerals extracted in the state. Under **the bill**, for ferrous mines, 60% of net proceeds occupation tax revenue is required to be transferred to the investment and local impact fund, a fund from which various mandatory and discretionary payments are made to local governments in the area of a metallic mine. The remaining 40% is transferred to the economic development fund, a general appropriation for economic development programs administered by the Wisconsin Economic Development Corporation (WEDC). The bill directs the WEDC to use this revenue to make grants and loans to Wisconsin businesses, giving preference to businesses in an area affected by ferrous mining. Under **these amendments**, the remaining 40% would instead be transferred to the state's general fund.⁵

These amendments also specify that a person who is subject to the net proceeds occupation tax must use generally accepted accounting principles to determine the person's tax liability.

In addition, these amendments replace a reference to an outdated version of the federal Internal Revenue Code with a general reference to the code.

⁵ The amendments also require that sufficient revenue be deposited in the investment and local impact fund to make required "first dollar payments," prior to any revenue being deposited in the state's general fund.

Discretionary Payments Made to Local Governments

Under current law and **the bill**, the investment and local impact fund board must make specified mandatory payments to local governments in an area affected by metallic mining. If revenues remain after mandatory payments have been made, the board may distribute additional revenues to such local governments for one of 10 specified purposes. **These amendments** require the board to give preference to private sector economic development projects when making such payments.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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