

**2011 DRAFTING REQUEST**

**Senate Substitute Amendment (SSA-SB488)**

Received: 03/03/2012

Received By: btradewe

Wanted: As time permits

Companion to LRB:

For: Legislative Fiscal Bureau

By/Representing:

May Contact:

Drafter: btradewe

Subject: Environment - mining  
Nat. Res. - nav. waters  
Nat. Res. - wet/shore/flood  
Tax, Business - miscellaneous

Addl. Drafters: mglass  
rkite

Extra Copies:

Submit via email: YES

Requester's email: daryl.hinz@legis.wisconsin.gov

Carbon copy (CC:) to:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Iron mining joint committee on finance substitute amendment

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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	btradewe 03/05/2012	kfollett 03/05/2012		_____			
/P1			jmurphy 03/05/2012	_____	mbarman 03/05/2012		
/P2	btradewe 03/06/2012 btradewe	kfollett 03/06/2012 kfollett	rschluet 03/06/2012	_____	mbarman 03/06/2012		

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/1			rschluet	_____	mbarman	mbarman	
			03/07/2012	_____	03/07/2012	03/07/2012	

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/P1			jmurphy 03/05/2012	_____	mbarman 03/05/2012		
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anna.henning@legis.wisconsin.gov  
becky.tradewell@legis.wisconsin.gov  
rob.reinhardt@legis.wisconsin.gov  
sean.moran@legis.wisconsin.gov  
joseph.kreye@legis.wisconsin.gov  
Robin.Kite@legis.wisconsin.gov  
Mary.gibson-Gl

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rob.reinhardt@legis.wisconsin.gov  
sean.moran@legis.wisconsin.gov  
joseph.kreye@legis.wisconsin.gov  
Robin.Kite@legis.wisconsin.gov  
Mary.gibson-Glass@legis.wisconsin.gov

*No paper  
copies needed  
of 1P2*

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jmurphy \_\_\_\_\_  
03/05/2012 \_\_\_\_\_

mbarman  
03/05/2012

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rob.reinhardt@legis.wisconsin.gov  
sean.moran@legis.wisconsin.gov

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/P1			jmurphy 03/05/2012	_____	mbarman 03/05/2012		

Paper copies  
for  
LFB, RCT & RNK  
only

Vers.      Drafted      Reviewed      Typed      Proofed      Submitted      Jacketed      Required

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**<END>**

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rkite**

Extra Copies:

*I don't think  
drafter need a  
hard copy of the  
111. Ret*

Submit via email: **YES**

Requester's email: **daryl.hinz@legis.wisconsin.gov**

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anna.henning@legis.wisconsin.gov  
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/?	btradewe	<i>1 P115 3/5</i>	<i>pm 3/5</i>	<i><del>P115</del> 3/5</i>			

FE Sent For:

<END>

DRAFT

Senator Darling  
Representative Vos

ASSEMBLY BILL 426/SENATE BILL 488

Iron Mining Regulation

Motion:

Move to amend the bill as follows:

1. *In lieu fee payments for wetland mitigation.* Allow an applicant for a ferrous mining permit to make mitigation in lieu fee payments to a DNR in lieu fee program, if DNR establishes such a program under [2011 Senate Bill 368].  
MGG
2. *ASNRI wetlands.* Remove references to ASNRI wetlands, in light of the enactment of 2011 Assembly Bill 368.  
MGG
3. *Types of wetland mitigation allowed.* Remove types of wetland mitigation from the bill with are not allowed under general state wetlands law, including riparian restoration projects, protection of upland groundwater recharge areas, shoreline stabilization projects, and riparian restoration projects.  
MGG
4. *Geographic scope of wetlands.* For wetlands impacts relating to ferrous mines that occur within the Chippewa ceded territory, require mitigation to be conducted within the ceded territory.  
MGG
5. *Standards for approval or denial of a ferrous mining permit.* Add a condition for approval and an analogous grounds for denial of a ferrous mining permit requiring the DNR to determine that a ferrous mining project is likely to meet or exceed floodplain regulations applicable to municipalities contained in ch. NR 116, Wis. Admin. Code. [Wisconsin's Floodplain Management Program].  
RAK
6. *Floodplain zoning.* Remove the references to floodplain zoning ordinances under proposed section 295.607 [shoreland and floodplain zoning] and instead require that a development or construction activity that is located in a floodplain and authorized by DNR as part of a ferrous mining operation covered by a mining permit under the bill not be required to comply with applicable floodplain zoning ordinances under section 87.30, Stats. [floodplain zoning], other than to satisfy any criteria necessary to maintain eligibility for participation in the National Flood Insurance Program.  
RAK
7. *Ferrous Mining Permit Application Timeline.* Increase the timeline for DNR review of a ferrous mining permit from 360 days to 420 days. Allow one 60-day extension of the 420-day review period if the DNR and the permit applicant  
RAK

mutually agree to the extension and one of the following applies: 1) an extension is necessary to ensure coordination with the Army Corps of Engineers for preparing an environmental impact statement; or 2) new information or a change to the mining proposal necessitates additional time for permit review.

RET  
p. 82

8. *Pre-application notification period.* Clarify that a pre-application notice is not required before filing a ferrous mining permit application if the applicant is re-filing a previously denied mining permit application, if the application is filed within a year of the denial, and the application is a request for approval of the same ferrous mining project as was requested under the denied application.

RET  
p. 120

9. *Determination that a ferrous mining permit application is administratively complete.* Remove the provision prohibiting the DNR from evaluating the quality of the information submitted as part of a ferrous mining permit application when determining whether an application is administratively complete. Instead, authorize the DNR to make one request of the applicant for supplemental information prior to the commencement of the 420-day application review timeline, according to the same procedures specified in 2011 Senate Bill 368, as signed by the Governor. In addition, clarify that the DNR may review the quality of the information submitted to the DNR and request additional information from the applicant at any time during the processing of the permit application by the DNR, but that such review or request does not change the 420-day application review timeline.

check  
not sure  
where or  
what to  
say about quality of info.

10. *Automatic approval of a mining permit application.* Remove the provision regarding automatic approval of a ferrous mining application. Instead, in the event that the DNR fails to approve or deny a mining permit application within the 420-day timeline, including any extension, require the DNR to return to the applicant all fees that the applicant paid to the DNR, including for preparation of an environmental impact statement by a third party. Retain the provision under the bill requiring a DNR decision on the application, regardless of whether the fee refund provision is triggered. Add a provision expressly providing opportunity for a ferrous mining permit applicant to seek an action in circuit court to obtain a writ of mandamus ordering the DNR to issue a decision on the mining permit application in the event that the DNR fails to render a decision on the permit application within the 420-day timeline. Specify that the applicant may choose the venue for the mandamus action, and provide that the DNR shall be responsible for the payment of the applicant's costs, including reasonable attorneys' fees, for such an action.

see  
Katie's  
draft

see  
281.36(2)  
(b)1.

801.50  
(3)

RET  
p. 100

11. *Ferrous Mining Permit Application Fees.* Remove the \$2 million total cap on an applicant's reimbursement of the DNR's costs for evaluating the mining project. Instead, specify that fees paid by the applicant to DNR for the evaluation of the ferrous mining project are limited to: 1) No more than \$2 million for costs incurred by the DNR other than for preparation of an environmental impact statement (EIS); and 2) the full cost for preparation of an EIS, prepared by a

private party and awarded under a competitive bidding process. Retain the schedule of payments by the applicant under the bill for costs incurred by the DNR other than for preparation of an EIS, allow DNR to require payment for costs of the EIS as required in the contract with the private party preparing the EIS.

RNK 12. *Permit procedure for construction of transmission lines and public utilities.* Limit the application of the changes made to the procedure for the construction of high-voltage transmission lines, large electric generating facilities, or specified facilities or equipment for eclectic, natural gas, or water utilities to projects relating to ferrous mining.

RET 13. *Claims for damages resulting from mining.* Modify cross references to specify that the programs under ss. 281.75 and 293.65 (4) and (5), Stats., apply to ferrous mining.

RET 14. *Conditions on high-capacity well approvals.* Require the DNR to impose conditions on high capacity well approvals for ferrous mining that ensure that privately owned high capacity wells will not be impaired, unless by agreement with the private high capacity well owner.

RNK 15. *Water withdrawals.* Replace s. 295.61 (4) (d) under the bill with a requirement that the DNR take testimony at the hearing on the permit application on the factors listed under s. 293.65 (2) (c).

RET 16. *Groundwater monitoring.* Add a provision in the bill requiring a 150-foot mandatory intervention boundary for a ferrous mining waste facility and excavation, as is required for ferrous mining under current law under s. NR 182.075 (1) (c), Wis. Adm. Code. However, specify that any monitoring well for a waste facility or excavation that would be located within the mandatory intervention boundary of another waste facility or excavation on the project site is not required.

JX 17. *Historic preservation.* Remove s. 295.45 (6) from the bill, relating to the application of historic preservation laws to ferrous bulk sampling.

## Tradewell, Becky

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**From:** Konopacki, Larry  
**Sent:** Sunday, March 04, 2012 2:01 PM  
**To:** Tradewell, Becky; Henning, Anna  
**Subject:** RE: Some proposed language

Hi Becky, the only things I would add to Insert 120-7 are requirements that the application is administratively complete at the end of the first 30-day review period if the DNR doesn't notify the applicant that the application is incomplete, and that the application is administratively complete at the end of the 10-day review period that applies after the applicant submits the requested information to the DNR if the DNR does not notify the applicant that all of the requested information has been received or that the submission does not include all of the requested information.

For the next insert, I believe that the intent is to refund both the fees under s. 295.73 (3) (a) plus the fees paid for EIS preparation, even though those fees would have been used to pay a consultant.

Thanks!

Larry

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Larry A. Konopacki  
Wisconsin Legislative Council  
(608) 267-0683  
larry.konopacki@legis.wisconsin.gov

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**From:** Tradewell, Becky  
**Sent:** Saturday, March 03, 2012 12:05 PM  
**To:** Konopacki, Larry; Henning, Anna  
**Subject:** Some proposed language

Here is a first crack at drafting some of the provisions in the draft motion, namely items 7, 9, and 10.

For the first insert, I would put the language beginning after "(a)" on page 120, line 7 of SB-488 and would delete the material in the bill starting there and ending with page 121, line 11.

Insert 120-7

The department shall review an application for a mining permit and, within 30 days after the application is submitted, shall determine either that the application is complete or that additional information is needed. If the department determines that the application is complete, the department shall notify the applicant in writing of that fact within the 30-day period and the date on which the notice is sent is the day on which the application is administratively complete.

(b) If the department determines under par. (a) that an application is incomplete, the department shall notify the applicant in writing and may make one request for additional information during the 30-day period specified in par. (a). Within 10 days after receiving all of the requested information from the applicant, the department shall notify the applicant in writing that it has received all of the requested information. The day on which the department sends the 2nd notice under this paragraph is the day on which the application is administratively complete.

This next insert would take the place of page 125, line 7 to page 126, line 3.

## Tradewell, Becky

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**From:** Konopacki, Larry  
**Sent:** Sunday, March 04, 2012 7:08 PM  
**To:** Hale, Janine; 'Robin Vos'; Rep.Vos  
**Cc:** Hinz, Daryl; Moran, Sean; Reinhardt, Rob; Tradewell, Becky; Smith, Heather  
**Subject:** Brief description of non-fiscal items in omnibus mining motion

Janine and Rep. Vos, you asked that we provide very brief summary of the components of the omnibus motion that is currently being drafted for Monday's Joint Finance executive session. Below we have listed the language requested for each item included in the motion, followed by additional explanatory information for certain items (preceded by a "\*\*\*"). Note that the items related to fiscal policy that are to be included in the omnibus motion are not included in the list below. Also, be aware that some of these items may be modified prior to the drafting of the final version of the motion.

The request for an omnibus motion on behalf of Representative Vos and Senator Darling included the following:

1. *In lieu fee payments for wetland mitigation.* Allow an applicant for a ferrous mining permit to make mitigation in lieu fee payments to a DNR in lieu fee program, if DNR establishes such a program under [2011 Senate Bill 368].
  - \* 2011 Wisconsin Act 118 authorizes the DNR to establish an "in lieu fee subprogram" for wetlands mitigation, in consultation with the army corps of engineers, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features. Wetlands that benefit from the program are required to be open to the public for hunting, fishing, trapping, cross-country skiing, and hiking, subject to reasonable restrictions. The program must be consistent with federal regulations
2. *ASNRI wetlands.* Remove references to ASNRI wetlands, in light of the enactment of 2011 Assembly Bill 368.
  - \* 2011 Wisconsin Act 118 (2011 Assembly Bill 368) removes the distinction of wetlands in areas of special natural resource interest (ASNRI wetlands) from the state's wetlands regulatory structure.
3. *Types of wetland mitigation allowed.* Remove types of wetland mitigation from the bill with are not allowed under general state wetlands law, including riparian restoration projects, protection of upland groundwater recharge areas, shoreline stabilization projects, and riparian restoration projects.
4. *Geographic scope of wetlands.* For wetlands impacts relating to ferrous mines that occur within the Chippewa ceded territory, require mitigation to be conducted within the ceded territory.
5. *Standards for approval or denial of a ferrous mining permit.* Add a condition for approval of a ferrous mining permit requiring the DNR to determine that activities conducted under a ferrous mining project are likely to meet or exceed floodplain regulations applicable to municipalities contained in ch. NR 116, Wis. Admin. Code. [Wisconsin's Floodplain Management Program].
  - \* See explanation after the following item.
6. *Floodplain zoning.* Remove the references to floodplain zoning ordinances under proposed section 295.607 [shoreland and floodplain zoning] and instead require that a development or construction activity that is located in a floodplain and authorized by DNR as part of a ferrous mining operation covered by a mining permit under the bill not be required to comply with applicable floodplain zoning ordinances under section 87.30, Stats. [floodplain zoning], other than to satisfy any criteria necessary to maintain eligibility for participation in the National Flood Insurance Program.

- \* Under current law, the DNR is required to establish floodplain zoning standards to be incorporated into municipal floodplain zoning ordinances. The DNR has established these floodplain zoning standards under NR 116, Wis. Admin. Code. Under current federal law, local units of government must meet certain requirements with respect to floodplain regulation in order to maintain eligibility for participation in the National Flood Insurance Program (NFIP). Such participation is required in order for residents of the area to purchase federally-subsidized flood insurance. Different requirements apply for flood-prone areas, mudslide areas, and flood-related erosion areas. One requirement common to all three types of areas is a requirement that the local government generally must require a permit for all proposed construction and development activity. However, federal regulations authorize participating local governments to grant variances from such permit requirements in specified circumstances. NR 116 also allows for variances and special exceptions from the general floodplain zoning requirements.
7. *Ferrous Mining Permit Application Timeline.* Increase the timeline for DNR review of a ferrous mining permit from 360 days to 420 days. Allow one 60-day extension of the 420-day review period if the DNR and the permit applicant mutually agree to the extension and one of the following applies: 1) an extension is necessary to ensure coordination with the Army Corps of Engineers for preparing an environmental impact statement; or 2) new information or a change to the mining proposal necessitates additional time for permit review.
    - \* Assembly Bill 426, as passed by the Assembly, contains a timeline for DNR review of a ferrous mining permit of 360 days, with no opportunity for extensions. Under current law, no overall timeline applies to the DNR review of a metallic mining permit application.
  8. *Pre-application notification period.* Clarify that a pre-application notice is not required before filing a ferrous mining permit application if the applicant is re-filing a previously denied mining permit application, if the application is filed within a year of the denial, and the application is a request for approval of the same ferrous mining project as was requested under the denied application.
    - \* A pre-application notification, when required under the bill, must be provided to the DNR at least 12 months prior to submission of a ferrous mining permit application and triggers certain fee payments.
  9. *Determination that a ferrous mining permit application is administratively complete.* Remove the provision prohibiting the DNR from evaluating the quality of the information submitted as part of a ferrous mining permit application when determining whether an application is administratively complete. Instead, authorize the DNR to make one request of the applicant for supplemental information prior to the commencement of the 420-day application review timeline, according to the same procedures specified in 2011 Senate Bill 368, as signed by the Governor. In addition, maintain the requirement under the bill allowing the DNR to request additional information from the applicant at any time during the processing of the permit application by the DNR, but that such review or request does not delay the determination of administrative completeness by the DNR.
    - \* Under Assembly Bill 426, as passed by the Assembly, the DNR may not consider the quality of the information in a ferrous mining permit application when determining if the application is administratively complete; the DNR may only consider whether the application includes the required components. Under current law, there is no restriction on the DNR's ability to request additional information from an applicant before an application is considered administratively complete.
  10. *Automatic approval of a mining permit application.* Remove the provision regarding automatic approval of a ferrous mining application. Instead, in the event that the DNR fails to approve or deny a mining permit application within the 420-day timeline, including any extension, require the DNR to return to the applicant all fees that the applicant paid to the DNR, including for preparation of an environmental impact statement by a third party. Retain the provision under the bill requiring a DNR decision on the application, regardless of whether the fee refund provision is triggered. Add a provision expressly providing opportunity for a ferrous mining permit applicant to seek an action in circuit court to

obtain a writ of mandamus ordering the DNR to issue a decision on the mining permit application in the event that the DNR fails to render a decision on the permit application within the 420-day timeline. Specify that the venue provisions under s. 801.50 (3), Stats., apply to the mandamus action, and provide that the DNR shall be responsible for the payment of the applicant's costs, including reasonable attorneys' fees, for such an action.

- \* Under current law, no penalty applies to a failure by the DNR to render a final decision within a certain timeline.
11. *Ferrous Mining Permit Application Fees.* Remove the \$2 million total cap on an applicant's reimbursement of the DNR's costs for evaluating the mining project. Instead, specify that fees paid by the applicant to DNR for the evaluation of the ferrous mining project are limited to: 1) No more than \$2 million for costs incurred by the DNR other than for preparation of an environmental impact statement (EIS); and 2) the full cost for preparation of an EIS, prepared by a private party and awarded under a competitive bidding process. Retain the schedule of payments by the applicant under the bill for costs incurred by the DNR other than for preparation of an EIS, allow DNR to require payment for costs of the EIS as required in the contract with the private party preparing the EIS.
- \* Under current law, there is no cap on the amount of fees that the DNR may collect from an applicant to cover the DNR's costs, including its costs related to preparation of an EIS.
12. *Permit procedure for construction of transmission lines and public utilities.* Limit the application of the changes made to the procedure for the construction of high-voltage transmission lines, large electric generating facilities, or specified facilities or equipment for eclectic, natural gas, or water utilities to projects relating to ferrous mining.
13. *Claims for damages resulting from mining.* Specify that the programs under ss. 281.75 and 293.65 (4) and (5), Stats., apply to ferrous mining.
- \* Under current law (s. 281.75, Stats.), a person who claims that damage to the quantity or quality of his or her private water supply was caused by prospecting or mining may file a complaint with the DNR and may be able to obtain an immediate alternative source of water from the town, village, or city where the private water supply is located. The DNR may hold a hearing on the complaint and must issue an order requiring the mining company to provide water to and pay damages to the person and to reimburse the local government that provided water to the person if the DNR concludes that the mining company is the principle cause of the damage to the private water supply. Also under current law (s. 293.65 (4) and (5), Stats.), a landowner or lessee with an annual family income of not more than \$65,000 may submit a claim to the DNR for a private water supply that is contaminated. If all conditions are met, the DNR may pay an amount up to 75% of the person's eligible costs to restore their private water supply, not to exceed \$12,000.
14. *Conditions on high-capacity well approvals.* Require the DNR to impose conditions on high capacity well approvals for ferrous mining that ensure that privately owned high capacity wells will not be impaired, unless by agreement with the private high capacity well owner.
15. *Water withdrawals.* Replace s. 295.61 (4) (d) under the bill with a requirement that the DNR accept testimony at the public informational hearing on the permit application on the factors listed under s. 293.65 (2) (c), Stats.
- \* Section 293.65 (2) (c), Stats., provides as follows: "At the hearing on the permit application, the department shall take testimony on: 1) The public rights in the lake or stream and the related environment which may be injured by the proposed withdrawal; 2) The public benefits provided by increased employment, economic activity and tax revenues from the mining operation; 3) The direct and indirect social and economic costs and benefits of the proposed mining operation; 4) Whether the proposed withdrawal will consume nonsurplus water; 5) The rights of competing users of such water

resources; and 6) Any other issues identified by the department as relevant to the decision of whether to issue or deny a permit."

- \* Under Assembly Bill 426, as passed by the Assembly, s. 295.61 (4) (d) provides as follows: "Public benefits. As part of its determination under par. (a), the department shall consider whether the public benefits resulting from the mining operation or bulk sampling exceed any injury to public rights and interests in a body of water that is affected by the mining operation or bulk sampling. The department shall recognize that the withdrawal and use of the waters of the state in connection with mining is in the public's interest and welfare and fulfills a public purpose and shall consider all of the following factors: 1) Public benefits that may be provided by increased employment, economic activity, and tax revenues from the mining operation. 2) The direct and indirect social benefits and costs that will result from the proposed mining operation. 3) The rights of riparian owners or other competing users to the water that will be subject to the permit. 4) The extent to which any impacts from mining or bulk sampling will be temporary." The bill requires these factors to be considered by the DNR when deciding whether to issue a water withdrawal permit.

16. *Groundwater monitoring.* Add a provision in the bill requiring a 150-foot mandatory intervention boundary for a ferrous mining waste facility and excavation, as is required for ferrous mining under current law under ch. NR 182, Wis. Adm. Code. However, specify that any monitoring well for a waste facility or excavation that would be located within the mandatory intervention boundary of another waste facility or excavation on the project site is not required.

- \* Under current administrative rules, a "mandatory intervention boundary" for a metallic mining waste facility or a surface metallic mineral mine or prospecting excavation must be created at a horizontal distance of 150 feet from the outer boundary of the mining waste site *or* the outer edge of the mine or prospecting excavation. Groundwater quality is tested at the mandatory intervention boundary. If a "preventative action limit" or groundwater quality enforcement standard is exceeded beyond the boundary, then the DNR must specify responses that the owner or operator of the mine must implement. The responses are designed to prevent any new releases of the substance from traveling beyond the "design management zone," which is a boundary for groundwater testing that lies beyond the mandatory intervention boundary, to the extent technically and economically feasible.

17. *Historic preservation.* Remove s. 295.45 (6) from the bill, relating to the application of historic preservation laws to ferrous bulk sampling.

- \* This change would restore current law with respect to the role of the state historic preservation officer with respect to state agency actions.

18. *Frivolous claims.* Modify s. 227.483 (3) Stats., to add the following to the list of types of findings that constitute a frivolous action: That the petition, claim, or defense was commenced, used or continued primarily for the purpose of causing delay to an activity authorized under a permit, license, or other approval that is the subject of the hearing.

- \* The following types of findings that constitute a frivolous action are already included under current law: "(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another" and "(b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." Only one of these need be found to have occurred for a hearing administrator to find frivolousness in an action of a party.

19. *Administrative review.* Modify s. 295.77 [Review] under the bill to require DNR to authorize a contested case hearing on a decision by the DNR under subchapter III of ch. 295, Stats., as created by the bill, only if a petitioner is aggrieved by one of the following decisions of the DNR and if the petitioner is entitled to a contested case hearing under s. 227.42, Stats., with respect to such decision:

- A decision by the DNR under s. 295.58 to grant or deny a ferrous mining permit or related permit or approval.
- A final decision by the DNR on the environmental impact statement for a ferrous mining permit application.

Provide that a contested case hearing may only be authorized by DNR if requested within the 30 days after the decision by the DNR under s. 295.58 to grant or deny a ferrous mining permit and related permits or approvals. Also require that the final decision of the hearing examiner be issued within 150 days of this decision, and provide that the decision of the DNR with respect to any issue raised in a contested case hearing is affirmed if the hearing examiner does not issue a final decision before this deadline. Also prohibit the issuing of an order preventing activity authorized under the DNR decision while an administrative review process is pending.

- \* Under current law, a master hearing process is conducted with respect to a metallic mining permit application after the EIS is finalized and before a final decision on the permit is rendered. The master hearing includes a contested case hearing portion, and addresses issues with respect to the metallic mining permit and all related permits and approvals that were timely requested. Under Assembly Bill 426, as passed by the Assembly, no contested case hearing opportunity is provided with respect to exploration, bulk sampling, or mining permit applications for ferrous mining projects.

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## Tradewell, Becky

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**From:** Henning, Anna  
**Sent:** Monday, March 05, 2012 9:00 AM  
**To:** Tradewell, Becky; Konopacki, Larry  
**Subject:** RE: Brief description of non-fiscal items in omnibus mining motion

Hi Becky,

I'll want Larry to respond, too, but just to give my initial thoughts (as our morning is already running away from us):

- I believe all of the changes (including the frivolous claims provision) are intended to be specific to ferrous mining.
- Your question came up in the discussions regarding the contested case hearing provision. I believe the intent is to allow DNR discretion to consolidate or have separate hearings, depending on what the department considers to be most expeditious. I don't know whether any one thought about the wrinkle regarding permits for which an application was submitted more than 60 days after a mining permit. My guess would be that the desire would be to delay the start of the clock for requesting a contested case hearing in those instances, rather than to allow an additional hearing.

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**From:** Tradewell, Becky  
**Sent:** Monday, March 05, 2012 8:52 AM  
**To:** Konopacki, Larry  
**Cc:** Henning, Anna  
**Subject:** RE: Brief description of non-fiscal items in omnibus mining motion

Larry,

Sorry you had to work so late yesterday. ( I left at 4:30.)

One small thing: In the explanatory information for # 13, I think that the statutory cross-references are reversed for ss. 281.75 and 293.65.

I see there are two new items at the end of the summary. I'm just asking Gordon to take a look at # 18. I gather that this is not intended to be limited to cases involving iron mining. Please let me know if I'm wrong.

I'll have to give some thought to the contested case provision. My initial question is whether there could be more than one contested case hearing. If one person seeks a contested case hearing on the air permit and another challenges the water withdrawal permit, should those challenges be consolidated? [I haven't yet checked to see whether ch. 227 addresses this kind of situation.] Also, what if the application for one of the required approvals is filed more than 60 days after the mining permit application and DNR makes the decision on that approval after the decisions on the other approvals?

Becky

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**From:** Konopacki, Larry  
**Sent:** Sunday, March 04, 2012 7:08 PM  
**To:** Hale, Janine; 'Robin Vos'; Rep.Vos  
**Cc:** Hinz, Daryl; Moran, Sean; Reinhardt, Rob; Tradewell, Becky; Smith, Heather  
**Subject:** Brief description of non-fiscal items in omnibus mining motion

Janine and Rep. Vos, you asked that we provide very brief summary of the components of the omnibus motion that is currently being drafted for Monday's Joint Finance executive session. Below we have listed the language requested for each item included in the motion, followed by additional explanatory information for certain items (preceded by a "\*"). Note that the items related to fiscal policy that are to be included in the omnibus motion are not included in the list below. Also, be aware that some of these items may be modified prior to the drafting of the final version of the motion.

The request for an omnibus motion on behalf of Representative Vos and Senator Darling included the following:

1. *In lieu fee payments for wetland mitigation.* Allow an applicant for a ferrous mining permit to make mitigation in lieu fee payments to a DNR in lieu fee program, if DNR establishes such a program under [2011 Senate Bill 368].
  - \* 2011 Wisconsin Act 118 authorizes the DNR to establish an "in lieu fee subprogram" for wetlands mitigation, in consultation with the army corps of engineers, under which payments are made to the DNR or another entity for the purposes of restoring, enhancing, creating, or preserving wetlands or other water resource features. Wetlands that benefit from the program are required to be open to the public for hunting, fishing, trapping, cross-country skiing, and hiking, subject to reasonable restrictions. The program must be consistent with federal regulations
2. *ASNRI wetlands.* Remove references to ASNRI wetlands, in light of the enactment of 2011 Assembly Bill 368.
  - \* 2011 Wisconsin Act 118 (2011 Assembly Bill 368) removes the distinction of wetlands in areas of special natural resource interest (ASNRI wetlands) from the state's wetlands regulatory structure.
3. *Types of wetland mitigation allowed.* Remove types of wetland mitigation from the bill with are not allowed under general state wetlands law, including riparian restoration projects, protection of upland groundwater recharge areas, shoreline stabilization projects, and riparian restoration projects.
4. *Geographic scope of wetlands.* For wetlands impacts relating to ferrous mines that occur within the Chippewa ceded territory, require mitigation to be conducted within the ceded territory.
5. *Standards for approval or denial of a ferrous mining permit.* Add a condition for approval of a ferrous mining permit requiring the DNR to determine that activities conducted under a ferrous mining project are likely to meet or exceed floodplain regulations applicable to municipalities contained in ch. NR 116, Wis. Admin. Code. [Wisconsin's Floodplain Management Program].
  - \* See explanation after the following item.
6. *Floodplain zoning.* Remove the references to floodplain zoning ordinances under proposed section 295.607 [shoreland and floodplain zoning] and instead require that a development or construction activity that is located in a floodplain and authorized by DNR as part of a ferrous mining operation covered by a mining permit under the bill not be required to comply with applicable floodplain zoning ordinances under section 87.30, Stats. [floodplain zoning], other than to satisfy any criteria necessary to maintain eligibility for participation in the National Flood Insurance Program.
  - \* Under current law, the DNR is required to establish floodplain zoning standards to be incorporated into municipal floodplain zoning ordinances. The DNR has established these floodplain zoning standards under NR 116, Wis. Admin. Code. Under current federal law, local units of government must meet certain requirements with respect to floodplain regulation in order to maintain eligibility for participation in the National Food Insurance Program (NFIP). Such participation is required in order for residents of the area to purchase federally-subsidized flood insurance. Different requirements apply for flood-prone areas, mudslide areas, and flood-related erosion areas. One requirement common to all three types of areas is a requirement that the local government generally must require a permit for all proposed

construction and development activity. However, federal regulations authorize participating local governments to grant variances from such permit requirements in specified circumstances. NR 116 also allows for variances and special exceptions from the general floodplain zoning requirements.

7. *Ferrous Mining Permit Application Timeline.* Increase the timeline for DNR review of a ferrous mining permit from 360 days to 420 days. Allow one 60-day extension of the 420-day review period if the DNR and the permit applicant mutually agree to the extension and one of the following applies: 1) an extension is necessary to ensure coordination with the Army Corps of Engineers for preparing an environmental impact statement; or 2) new information or a change to the mining proposal necessitates additional time for permit review.
  - \* Assembly Bill 426, as passed by the Assembly, contains a timeline for DNR review of a ferrous mining permit of 360 days, with no opportunity for extensions. Under current law, no overall timeline applies to the DNR review of a metallic mining permit application.
8. *Pre-application notification period.* Clarify that a pre-application notice is not required before filing a ferrous mining permit application if the applicant is re-filing a previously denied mining permit application, if the application is filed within a year of the denial, and the application is a request for approval of the same ferrous mining project as was requested under the denied application.
  - \* A pre-application notification, when required under the bill, must be provided to the DNR at least 12 months prior to submission of a ferrous mining permit application and triggers certain fee payments.
9. *Determination that a ferrous mining permit application is administratively complete.* Remove the provision prohibiting the DNR from evaluating the quality of the information submitted as part of a ferrous mining permit application when determining whether an application is administratively complete. Instead, authorize the DNR to make one request of the applicant for supplemental information prior to the commencement of the 420-day application review timeline, according to the same procedures specified in 2011 Senate Bill 368, as signed by the Governor. In addition, maintain the requirement under the bill allowing the DNR to request additional information from the applicant at any time during the processing of the permit application by the DNR, but that such review or request does not delay the determination of administrative completeness by the DNR.
  - \* Under Assembly Bill 426, as passed by the Assembly, the DNR may not consider the quality of the information in a ferrous mining permit application when determining if the application is administratively complete; the DNR may only consider whether the application includes the required components. Under current law, there is no restriction on the DNR's ability to request additional information from an applicant before an application is considered administratively complete.
10. *Automatic approval of a mining permit application.* Remove the provision regarding automatic approval of a ferrous mining application. Instead, in the event that the DNR fails to approve or deny a mining permit application within the 420-day timeline, including any extension, require the DNR to return to the applicant all fees that the applicant paid to the DNR, including for preparation of an environmental impact statement by a third party. Retain the provision under the bill requiring a DNR decision on the application, regardless of whether the fee refund provision is triggered. Add a provision expressly providing opportunity for a ferrous mining permit applicant to seek an action in circuit court to obtain a writ of mandamus ordering the DNR to issue a decision on the mining permit application in the event that the DNR fails to render a decision on the permit application within the 420-day timeline. Specify that the venue provisions under s. 801.50 (3), Stats., apply to the mandamus action, and provide that the DNR shall be responsible for the payment of the applicant's costs, including reasonable attorneys' fees, for such an action.
  - \* Under current law, no penalty applies to a failure by the DNR to render a final decision within a certain timeline.

11. *Ferrous Mining Permit Application Fees.* Remove the \$2 million total cap on an applicant's reimbursement of the DNR's costs for evaluating the mining project. Instead, specify that fees paid by the applicant to DNR for the evaluation of the ferrous mining project are limited to: 1) No more than \$2 million for costs incurred by the DNR other than for preparation of an environmental impact statement (EIS); and 2) the full cost for preparation of an EIS, prepared by a private party and awarded under a competitive bidding process. Retain the schedule of payments by the applicant under the bill for costs incurred by the DNR other than for preparation of an EIS, allow DNR to require payment for costs of the EIS as required in the contract with the private party preparing the EIS.
- \* Under current law, there is no cap on the amount of fees that the DNR may collect from an applicant to cover the DNR's costs, including its costs related to preparation of an EIS.
12. *Permit procedure for construction of transmission lines and public utilities.* Limit the application of the changes made to the procedure for the construction of high-voltage transmission lines, large electric generating facilities, or specified facilities or equipment for eclectic, natural gas, or water utilities to projects relating to ferrous mining.
13. *Claims for damages resulting from mining.* Specify that the programs under ss. 281.75 and 293.65 (4) and (5), Stats., apply to ferrous mining.
- \* Under current law (s. 281.75, Stats.), a person who claims that damage to the quantity or quality of his or her private water supply was caused by prospecting or mining may file a complaint with the DNR and may be able to obtain an immediate alternative source of water from the town, village, or city where the private water supply is located. The DNR may hold a hearing on the complaint and must issue an order requiring the mining company to provide water to and pay damages to the person and to reimburse the local government that provided water to the person if the DNR concludes that the mining company is the principle cause of the damage to the private water supply. Also under current law (s. 293.65 (4) and (5), Stats.), a landowner or lessee with an annual family income of not more than \$65,000 may submit a claim to the DNR for a private water supply that is contaminated. If all conditions are met, the DNR may pay an amount up to 75% of the person's eligible costs to restore their private water supply, not to exceed \$12,000.
14. *Conditions on high-capacity well approvals.* Require the DNR to impose conditions on high capacity well approvals for ferrous mining that ensure that privately owned high capacity wells will not be impaired, unless by agreement with the private high capacity well owner.
15. *Water withdrawals.* Replace s. 295.61 (4) (d) under the bill with a requirement that the DNR accept testimony at the public informational hearing on the permit application on the factors listed under s. 293.65 (2) (c), Stats.
- \* Section 293.65 (2) (c), Stats., provides as follows: "At the hearing on the permit application, the department shall take testimony on: 1) The public rights in the lake or stream and the related environment which may be injured by the proposed withdrawal; 2) The public benefits provided by increased employment, economic activity and tax revenues from the mining operation; 3) The direct and indirect social and economic costs and benefits of the proposed mining operation; 4) Whether the proposed withdrawal will consume nonsurplus water; 5) The rights of competing users of such water resources; and 6) Any other issues identified by the department as relevant to the decision of whether to issue or deny a permit."
- \* Under Assembly Bill 426, as passed by the Assembly, s. 295.61 (4) (d) provides as follows: "Public benefits. As part of its determination under par. (a), the department shall consider whether the public benefits resulting from the mining operation or bulk sampling exceed any injury to public rights and interests in a body of water that is affected by the mining operation or bulk sampling. The department shall recognize that the withdrawal and use of the waters of the state in connection with mining is in the public's interest and welfare and fulfills a public purpose and shall consider all of the following factors:

1) Public benefits that may be provided by increased employment, economic activity, and tax revenues from the mining operation. 2) The direct and indirect social benefits and costs that will result from the proposed mining operation. 3) The rights of riparian owners or other competing users to the water that will be subject to the permit. 4) The extent to which any impacts from mining or bulk sampling will be temporary." The bill requires these factors to be considered by the DNR when deciding whether to issue a water withdrawal permit.

16. *Groundwater monitoring.* Add a provision in the bill requiring a 150-foot mandatory intervention boundary for a ferrous mining waste facility and excavation, as is required for ferrous mining under current law under ch. NR 182, Wis. Adm. Code. However, specify that any monitoring well for a waste facility or excavation that would be located within the mandatory intervention boundary of another waste facility or excavation on the project site is not required.

\* Under current administrative rules, a "mandatory intervention boundary" for a metallic mining waste facility or a surface metallic mineral mine or prospecting excavation must be created at a horizontal distance of 150 feet from the outer boundary of the mining waste site *or* the outer edge of the mine or prospecting excavation. Groundwater quality is tested at the mandatory intervention boundary. If a "preventative action limit" or groundwater quality enforcement standard is exceeded beyond the boundary, then the DNR must specify responses that the owner or operator of the mine must implement. The responses are designed to prevent any new releases of the substance from traveling beyond the "design management zone," which is a boundary for groundwater testing that lies beyond the mandatory intervention boundary, to the extent technically and economically feasible.

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\* This change would restore current law with respect to the role of the state historic preservation officer with respect to state agency actions.

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19. *Administrative review.* Modify s. 295.77 [Review] under the bill to require DNR to authorize a contested case hearing on a decision by the DNR under subchapter III of ch. 295, Stats., as created by the bill, only if a petitioner is aggrieved by one of the following decisions of the DNR and if the petitioner is entitled to a contested case hearing under s. 227.42, Stats., with respect to such decision:

- A decision by the DNR under s. 295.58 to grant or deny a ferrous mining permit or related permit or approval.
- A final decision by the DNR on the environmental impact statement for a ferrous mining permit application.

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- contested case hearing is affirmed if the hearing examiner does not issue a final decision before this deadline. Also prohibit the issuing of an order preventing activity authorized under the DNR decision while an administrative review process is pending.
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