

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3657/1dn
RCT:wlj:jf

September 26, 2001

This is the draft concerning environmental standards applicable to metallic mining. Please review proposed s. 293.38 carefully to ensure that it complies with your intent relating to notice to purchasers.

I have searched the state statutes and rules for provisions under which mining is, or could be, subject to less stringent standards than are other activities. As a result, the draft includes several provisions in addition to the provisions identified in the proposed language provided to me. Section 160.19 (12) exempts mining activities and facilities from the groundwater law, while s. 293.15 (11) separately authorizes DNR to establish groundwater quality standards for mining activities. DNR's rules establish a larger design management zone for mining waste facilities than for other solid waste facilities, which means that groundwater standards do not have to be met as close to the area in which the waste is disposed of. This draft eliminates the mining exemption from the groundwater law and the separate authorization for mining groundwater standards. It also prohibits DNR from establishing larger design management zones for mining waste facilities than for other solid waste facilities.

Section 289.05 (2) instructs DNR, in promulgating its rules for mining waste facilities, to take the special requirements of metallic mining operations into account. This language seems inconsistent with the idea that the mining waste rules may not be less stringent than the rules for other solid waste facilities, so this draft eliminates that language.

The proposed modification to s. 293.93 appears to be intended to result in having federal laws apply to metallic mineral mining that would otherwise not apply. The effect of this language obviously could not be to cause an action that would otherwise be legal under federal law to be illegal under federal law. Instead it attempts to incorporate a modified version of federal law into state law. This seems to have practical as well as potential legal problems. It would seem to be difficult for anyone to be certain that he or she has discovered all of the federal laws or regulations that might become applicable to mining under the proposed language. There are likely to be some federal provisions that result in different treatment for mining for which it is hard to tell whether the different treatment qualifies as "an exemption or other limitation on applicability." A federal law might contain an exemption or limitation for a category of activities that includes mining as well as other activities, and questions

would arise about the applicability of the federal law. Legal issues might include a lack of notice as to the applicable law as well as the broad delegation of legislative authority.

This state's environmental statutes and rules generally are as stringent as federal statutes and regulations, in part because the state wants to have EPA approve state, rather than federal, administration. Therefore, it seems to me that if the draft eliminates the state law exemptions and other limitations on applicability that you consider to be undesirable, it is possible to achieve the intent of this drafting request without needing to try to get unspecified, otherwise inapplicable federal provisions to apply. Typically when the legislature wants this state to have a law that is similar to a federal law, potential practical and legal problems are reduced by placing the specific provisions of the law into the state statutes or rules. If the approach in this draft is not adequate, we should try to identify the otherwise inapplicable federal provisions that you want to have apply to mining in this state.

I have included an initial applicability provision to provide that this proposal would only apply to mining for which DNR issues a permit after the effective date of the bill. If you would prefer a different applicability, please let me know.

Please feel free to contact me if you have questions, wish to discuss issues related to the draft, or have redraft instructions.

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