# Drafter's Note
## from the
## Legislative Reference Bureau

LRB−0762/P1dn
RCT/MGG/RNK:cjs:jf

December 12, 2012

This is a preliminary version of the iron mining draft, based on the Joint Committee on Finance substitute amendment to the 2011 iron mining bill, Senate Substitute Amendment 2 to 2011 Senate Bill 488 (JCF substitute amendment). There was no analysis written for the JCF substitute amendment. We produced this draft without an analysis in order to provide it quickly. While this draft and the issues raised in this note are being reviewed, we will work on an analysis.

As in the JCF substitute amendment, this draft (in s. 295.78) authorizes DNR to issue an order to an operator of an iron mine if it finds a violation of law or of a mining plan and, in s. 295.78 (1) (d), authorizes DNR to suspend the mining permit if the operator fails to comply with the order, unless the operator seeks review of the order under s. 295.77. Section 295.77 provides for administrative (contested case) hearings in limited situations, but it does not seem to allow an operator to seek review of an order under s. 295.78. Section 295.59 (5) states that an operator may seek a contested case hearing under s. 295.77 on the amount of bonds or other security that DNR requires an operator to provide. Again, s. 295.77 does not seem to cover that situation. There may be other situations in which the opportunity for an operator to have a contested case hearing on a DNR action is desired. For example, the draft makes references to the possibility for modifications (see ss. 295.61 (6) (b), 295.63, 295.64 (2) (a), and 295.645 (2) (b) and (8)), but there is no mention in s. 295.77 of the ability to seek a contested case hearing on DNR's action on modifications. Section 295.77 should be clarified to ensure that the draft is consistent and clearly authorizes contested case hearings in all situations in which the intent is to make contested case hearings available.

Consistent with the JCF substitute amendment, this draft provides that a portion of the net proceeds tax paid by an iron mining company is deposited in the economic development fund (see ss. 70.395 (1e) (b) and 25.49 (2m)). The draft also creates s. 238.14, which states that when this money is appropriated to the Wisconsin Economic Development Corporation (WEDC), WEDC must use the money to make grants and loans to businesses in this state, giving preference to businesses located in an area affected by iron mining. I think, but am not certain, that the intent of the JCF substitute amendment was that this money not be appropriated, in other words, that some further action by the legislature be required before this money could be expended.

The problem is that the money derived from the net proceeds tax is not set aside from the other money in the economic development fund. Section 20.192 (1) (r), the current

appropriation to WEDC from the economic development fund, is very broad. There is nothing to keep the moneys derived from the net proceeds tax from being expended from that appropriation. It might be argued that as soon as money derived from the net proceeds tax is deposited into the economic development fund some or all of the money should be considered to be appropriated to WEDC and that it must be used as specified in s. 238.14. It is not clear who would decide whether this money is appropriated under s. 20.192 (1) (r) or how the money would be kept track of. This aspect of the draft must be clarified. Please let us know what is intended with respect to the use of the money deposited in the economic development fund.

In s. 295.57 (9), this draft specifies that the procedural provisions in the iron mining law apply to DNR approvals needed for an iron mining operation under other environmental and natural resources laws, rather than the procedural provisions that would ordinarily apply to those approvals. Our review of the JCF substitute amendment revealed that ch. 31, relating to dams and bridges, should have been listed in ss. 295.57 (9) and 295.58 (5). I have added those references. Might a bridge or dam be needed to conduct bulk sampling? If so, ch. 31 should also be referenced in the bulk sampling provisions in s. 295.45 (4), (7), (9), and (10).

There are some statutes that refer to the current metallic mining laws, but that will not refer to the new iron mining laws unless they are amended. Should s. 32.02 (12), which provides that companies with metallic mining permits do not have condemnation powers, be amended so that the exemption applies to companies with iron mining permits? Should s. 70.375 (4) (h) be amended to refer to the cost of premiums for bonds required in this draft under s. 295.45 (5) or 295.59? Should s. 283.84 (3m) be amended so that it continues to apply to persons engaged in iron mining, as well as in other metallic mining? Should s. 706.01 (9) be amended so that the second sentence of s. 706.01 (5) continues to apply to companies that engage in iron mining?

This draft requires the operator of an iron mine to post a bond or other security, before beginning mining, in an amount equal to the estimated cost of fulfilling the reclamation plan in relation to the portion of the mining site that will be disturbed by the end of the following year. See s. 295.59 (1) (c). This provision is based on current s. 293.51 (1). Should language be added to the draft authorizing DNR to modify the amount of the security as the cost of reclamation changes?

The JCF substitute amendment requires DNR to modify its rules that currently apply to all metallic mining to clarify that those rules no longer apply to iron mining. It requires DNR to submit the proposed rule modifications to the Legislative Council Staff for review within five months after the legislation takes effect. In order to give an agency the control needed to comply with this kind of deadline, it is also necessary to exempt the agency from the requirement (established by 2011 Wisconsin Act 21) to have the governor approve the scope statement for proposed rule modifications. This draft includes that exemption. 2011 Wisconsin Act 21 added other new steps to the rule–making process that may lengthen that process. This draft contains a provision (included in the JCF substitute amendment) that exempts the required rule modifications from one of these steps, the requirement for an economic impact statement. Please let me know if you want more information about the changes to the

rule–making process made by 2011 Wisconsin Act 21 or about other options for shortening that process.

Our review of the JCF substitute amendment revealed a problem with the provisions concerning DNR issued approvals needed to conduct bulk sampling. Proposed s. 295.45 (9), (10) (a), and (10g) (b) provide deadlines for DNR to act on those approvals, but the language in last session's s. 295.45 (10g) (b) is not broad enough to cover all individual permits for which federal law requires the opportunity for public comment or the ability to request a public hearing. I have remedied the problem in this draft.

Section 295.443 in this draft is based on s. 293.33 in current law. As in s. 293.33, s. 295.443 (in this draft) refers to tribal governments in subs. (1) and (2) but does not in sub. (4). The omission appears to be an oversight. Should a reference to tribal governments be added to s. 295.443 (4)?

In addition to changes specifically described in this note, we made several minor corrections and clarifications, such as fixing cross–references and punctuation.

Please contact us with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266–7290
E–mail: becky.tradewell@legis.wisconsin.gov

1. I modified s. 295.60 (2) to take out the reference to water quality certifications. However, I recommend taking out this entire provision because I think it creates an ambiguity. Section 295.60 (2) seems to be saying that a wetland permit under s. 295.60 must be issued whenever impacts to a wetland are being evaluated. This is in conflict with the scope of the permitting requirement under s. 295.60 which is limited to discharges. For example, if building a bridge that may affect a wetland but will not involve a discharge into the wetland is envisioned as part of a mining operation, no wetland permit would be required because a permit is only required for discharges. However, a counter argument could be made that if evaluating a wetland is necessary in issuing the bridge permit, a wetland permit issued under s. 295.60 would be necessary because all of s. 295.60 applies. If s. 295.60 (2) is removed, similar language in s. 295.60 (3) and (4) (b) will also need to be removed.

2. 2011 Wisconsin Act 118 eliminated the distinction between federal and nonfederal wetlands and contains a provision stating that a wetland permit is considered a water quality certification for purposes of federal law. I eliminated federal vs. nonfederal distinction in this draft and created a similar provision for purposes of federal law. See s. 295.60 (4) (b). OK?

3. As drafted, the wetland general permitting provisions created in 2011 Wisconsin Act 118 will not apply. See s. 281.36 (3g). I did not incorporate these provisions because the timing provisions in s. 281.36 (3g) (h) and in this bill do not mesh. If you want to

incorporate the wetland general permitting provisions, specific language reconciling these provisions will need to be drafted.

4. I rewrote s. 295.60 (13), which provides that s. 281.36 does not apply to wetlands subject to s. 295.60, because the in lieu fee program is incorporated by reference into s. 295.60 and the language in the substitute amendment no longer worked.

5. The following items in this drafter's note point out differences between s. 295.60 and provisions that were enacted as part of 2011 Wisconsin Act 118.

a. Regarding s. 295.60 (1) (c), please note that when the term "functional values" is used in s. 281.36, it is not followed by the phrase "and water quality." Do you want any changes?

b. Regarding s. 295.60 (1) (d), "impact" is not a defined word in s. 281.36, but there are references in s. 281.36 to "direct impacts," "cumulative impacts," and "potential secondary impacts." See s. 281.36 (3n) (b). In this definition of "impact", the terms "direct and indirect" and "temporary and permanent" are not necessary since, when paired, they cover all impacts regardless of their duration or effect. I recommend removing these modifiers.

c. Regarding s. 295.60 (1) (e), the definition of "mitigation" under s. 281.36 (1) (bj) includes the concept of "preservation." Do you want to incorporate that concept into this definition?

d. Regarding s. 295.60 (1) (f), this definition of "mitigation bank" varies slightly from the definition of "mitigation bank" found in s. 281.36 (1) (bL). I do not think that there is a substantive difference except for the reference to "preservation."

e. Regarding s. 295.60 (1) (h), please note this definition of "practicable" varies from the definition of practicable found in s. 281.36 (1) (cp). Do you want any changes?

f. Regarding s. 295.60 (1) (k), "watershed" is a very difficult term to define, and is not defined for purposes of s. 281.36. Do you want to continue to include the definition in this draft?

g. Regarding s. 295.60 (3), please compare this provision with the one found in s. 281.36 (2m). As drafted, s. 281.36 (2m) will not apply to the wetland provisions contained in s. 295.60. See 295.60 (13) (a) in this draft. Let me know if you want any changes.

h. Regarding the use of the term "fill material" in s. 295.60, this term is defined in s. 281.36 (1) (bd). Do you want to incorporate that definition into this draft?

i. The last sentence in s. 295.60 (4) (d) 3. does not state that the fewest acres are to be impacted. Instead it limits the scope of the "minimizing" to the fewest acres. Is that your intent? If not, I think maybe the sentence should be rewritten to make it consistent with the previous sentence. Thus, you may wish the sentence to read "The department shall determine which configuration will result in impacts to the fewest acres."

j. The mitigation provisions in s. 295.60 (9) vary from those found under s. 281.36 (3r) and (3t). As drafted, the provisions under s. 281.36 (3r) and (3t) will not apply except

for the in lieu fee program. See s. 295.60 (9) (d) 4. and (13). Let me know if you want any changes.

k. The provisions relating to conservation easements under s. 295.60 (11) are different from those found in s. 281.36 (8m). 2011 Wisconsin Act 118 expanded the language of sub. (8m) to include "comparable legal instruments." Let me know if you want any changes.

L. Regarding s. 295.60 (12) (b), these exemptions are similar to those found in s. 281.36 (4), but s. 281.36 (4) contains additional language for the provisions that apply to farm, forest, and temporary mining roads. Also, this draft does not include any provisions that are comparable to s. 281.36 (5) and (6). Let me know if you want any changes.

6. In s. 295.60 (12) (a) I changed "statute or rule" to "law" to make it consistent with the language found in s. 295.60 (12) (b).

7. Regarding the definition of "off–site location", the site can be either inside or outside the boundary of the mining site. OK?

Mary Gibson–Glass
Senior Legislative Attorney
Phone: (608) 267–3215

Please note that I made changes to the part of the JCF substitute amendment that specifies circumstances under which a person who intends to engage in a navigable water activity associated with bulk sampling or mining need not be a riparian owner in order to obtain certain permits. See s. 295.605 (3), as created in this draft. I made these changes because I understand that the provision created in the JCF substitute amendment was not consistent with the intent of the original request for that amendment. Please review the provision as revised in this draft to ensure that it now meets that intent. Please also review s. 295.61 (3), as created in this draft, to ensure that the language that specifies that a person applying for a water withdrawal permit need not be a riparian owner is consistent with your intent given the changes made in this draft in s. 295.605 (3).

Please note that the JCF substitute amendment made ss. 30.208, 30.209, and 30.2095 inapplicable to navigable water activities associated with bulk sampling and mining. See s. 295.605 (6) (b), as created in this draft. Please review this part of the draft in view of the changes made in the law under 2011 Act 167 with regard to the procedures that apply to the issuance of ch. 30 individual permits and general permits. You may wish to change the language under s. 295.605 (6) (b) given the changes in the law under Act 167.

2011 Act 167 also requires that, in certain cases, when the Department of Natural Resources is required to give a class 1 notice under ch. 985, stats., it must also give notice by publication on its Web site. Act 167 also allows DNR to give notices through an electronic notification system. Do you want these additional publication methods

established in Act 167 also to apply wherever this draft requires a Class 1 notice? See the following provisions in this draft: ss. 295.45 (10) (b), 295.46 (2) (a), 295.61 (6) (a) 3. b. and (b) 2., and 295.69 (2) (b).

Please review s. 289.35 as amended in the draft. The amended language requires a permit that authorizes a solid waste facility to be located in an area under the jurisdiction of shoreland and floodplain zoning regulations to specify “the location, height, or size of the solid waste facility”. Should “or size” be “and size” instead?

Robin N. Kite
Senior Legislative Attorney
Phone: (608) 266–7291
E–mail: robin.kite@legis.wisconsin.gov