Report From Agency

REPORT TO LEGISLATURE

NR 135 and 340, Wis. Adm. Code
Reclamation of nonmetallic mining sites

Board Order No. WA-14-06
Clearinghouse Rule No. 06-024

Basis and Purpose of the Proposed Rule

The proposed changes to ch. NR 135 will eliminate some existing rule language and administrative procedures that are no longer necessary. The main change is to eliminate language that allows active mines and new county programs to gradually come into compliance with the state nonmetallic mining reclamation law. Since the start-up deadline has passed, this language is no longer necessary. In addition, after more than five years of experience implementing this rule, and on the advice of the Nonmetallic Mining Advisory Committee (NMAC), language clarifications and simplifications of administrative procedures are deemed necessary. Finally, recent statutory changes to s. 30.201, Stats., have mandated changes to ch. NR 340, Nonmetallic Mining and Reclamation Associated with Navigable Waterways and Adjacent Areas that require that additional forms of financial assurance be available to mine operators. Changes to ch. NR 135 will harmonize two similar rules, chs. NR 340 and 135.

The proposed revisions:

a. *Remove "start-up" language from the rule.* These rule changes will address the above items as well as remove "start-up" language from the rule that is no longer applicable. Numerous provisions were included in the original rule for special permitting and review processes for nonmetallic mining operations that were active when the mine reclamation program began. These are no longer necessary or applicable and should be removed.

b. Clarify and simplify through improvements to fee collection and timing of annual report submittal. Currently operators pay fees by anticipating unreclaimed acreage in the upcoming year and provide annual reports based upon the previous year. The proposed language revises s. NR 135.39 so that only one deadline is required for both fee submittal and for the submittal of the annual report. In addition, both fees and the report would now be based on unreclaimed acreage in the previous year.

c. Propose fee increases. Fee increases are proposed in the rule to reflect adjustments for inflation. This will affect the portion of the fees collected by regulatory authorities which are forwarded to the DNR to cover its administrative costs. (Proposed revised Table 1 is included below). In addition, fees that the DNR would assess if the DNR was forced to become the regulatory authority (RA) would also be adjusted. To date the DNR has not been required to assume the contingency role as the RA.

TABLE 1: Department Share of Annual Fees Collected by County and ~~Local~~ Municipal Regulatory Authorities.

Mine Size in Unreclaimed Acres, Rounded to the Nearest Whole Acre	Annual Fee
1 to 5 acres, does not include mines < 1 acre	$ ~~30~~ 35
6 to 10 acres	$ ~~60~~ 70
11 to 15 acres	$ ~~90~~ 105
16 to 25 acres	$ ~~120~~ 140
26 to 50 acres	$ ~~140~~ 160

Note: The average acreage of a nonmetallic mining operation is 15 acres. The average fee increase per nonmetallic mine would be $15 per year.

d. Clarify dispute resolution. Currently, DNR can work to assist in the resolution of disputes between nonmetallic mine operators and their regulatory authority. Under the current rule language, the process and the outcomes of this resolution are vague. The proposed revisions to s. NR 135.52 clarify the roles of each party, the steps to be taken and corresponding timeframes. The proposed revisions will require the DNR to provide a written opinion, but not a binding decision.

e. Clarify language based on experience. The proposed revisions include various minor wording changes to rule language that address very specific issues which have arisen over the past five years as well as several changes to definitions. One of these changes relate to the safety and stability of slopes that exceed 3:1 after site reclamation. Several minor changes to reclamation plan submittal requirements, public hearings, conditional approvals and explanatory notes are also proposed.

f. Harmonize Financial Assurance with ch. NR 340, Nonmetallic Mining and Reclamation Associated with Navigable Waterways and Adjacent Areas. The use of additional options that can be employed to satisfy ch. NR 340 financial assurance requirements, as provided in recent statutory changes. The anticipated changes to ch. NR 340 will reflect the mandated changes to s. 30.201, Stats., and will also make the financial assurance provisions of ch. NR 340, more consistent with corresponding provisions of ch. NR 135.

Summary of Public Comments

Two people offered verbal comments at the hearings. In addition 7 individuals or organizations submitted written comments. Detailed responses to the comments received are included in the attached Summary of Responses to Public Comments. A meeting with representatives of the Wisconsin Transportation Builders Association and the Aggregate Producers of Wisconsin was held in Madison on May 19 to discuss the dispute resolution process. A regularly scheduled meeting of the Nonmetallic Mining Advisory Committee was held on May 26 in De Forest to discuss the comments and rule changes.

Modifications Made

Minor changes were made in response to public comments. The changes are detailed in the attqached Response to Comments.

Appearances at the Public Hearing

April 13, 2006 – Wausau

In support:

Darrin Johnson, Wood County Land Conservation Dept., P.O. Box 8095, Wis. Rapids, WI 54495
Justin Cavey, Marathon County CPZ, 210 River Drive, Wausau, WI 54403

Patrick Gatteman, Adams County LWCD, 402 Main Street, Friendship, WI 53934
James Burgener, Wisconsin County Code Administrators, 210 River Drive, Wausau, WI 54403

In opposition – none

As interest may appear:

John Fink, Fahrner Asphalt Sealers, Inc., P.O. Box 95, Plover, WI 54467
Dean Graff, Door County Soil & Water Conservation Dept., 421 Nebraska St., Sturgeon Bay, WI 54235

April 14, 2006 – Madison

In support – none
In opposition – none

As interest may appear:

Pat Osborne, Executive Director, Aggregate Producers of WI, 10 E. Doty, Suite 500, Madison, WI 53703
Richard Marino, The Kraemer Company, P.O. Box 235, Plain, WI 53577

Changes to Rule Analysis and Fiscal Estimate

Except for minor editorial changes, the rule analysis was not changed. The fiscal estimate was modified to reflect the anticipated increase in funds received by the Department.

Response to Legislative Council Rules Clearinghouse Report

The recommendations were accepted, except for comments 2.c., 3. and 5.f. For the Department's response, see comments 6., 3.2 and 27 respectively in the attached Response to Public Comments.

Final Regulatory Flexibility Analysis

The existing rule contains several provisions designed to help small businesses that are not affected by these proposed revisions. For additional information on how the current rule addresses impacts to small business please see the original evaluation ("Attachment 7" to SW-18-95) entitled "Small Business Analysis" that is attached.

The revisions provide less stringent requirements and reduces the burden in complying with fees and annual reports. The revisions do this by this by consolidating the compliance and reporting requirements through synchronization of the due dates for fees and reports as opposed to the current procedures which have two separate due dates. In the current rule fees are paid in advance and reports are based on the previous year. The revision simplifies the situation by requiring that fee submittal and annual reporting are for the same calendar year.

The proposed rule revision will have no significant economic effect. The proposed revision contains a minor fee increase based on inflation and applies to those fees that are collected by counties and municipalities on behalf of the DNR. While fees will increase slightly for large and small businesses alike, this increase this will be offset by streamlined procedures for fee collection and corresponding reporting requirements that will improve efficiency and result in lower transactional costs.

Finally, this rule package contains a proposed revision to Ch. NR 340 program requirements for financial assurance. In those cases where operators are regulated by Ch. NR 340, there will be more financial assurance options available to the operator.

All revisions affect administrative procedures and act to improve efficiency, reduce cost and provide added financial assurance options. Thus, the revisions have no effect upon public health, safety or welfare nor on the environment.

There were no issues raised by small business during the rules hearings or through public comments. It is hoped that these beneficial revisions will be in place by end of year.

Summary of Responses to Public Comments

General Support For NR 135 Revisions

1. COMMENT: As you know, Wisconsin Transportation Builders Association (WTBA) worked extensively and cooperatively with the Department during the development of NR 135. We are pleased to continue this partnership. We would like to compliment (the) Department for their continuing, professional oversight of this program. We also appreciate the Department's willingness to undertake extensive, open, constructive dialogue with the members of the Non-metallic Mining Advisory Council to develop this rule revision.

WTBA would like to go record in support of most of the proposed changes to NR 135. We are especially pleased with the language clarifying topsoil requirements, the safety and stability of final grading and slopes, and how fees are assessed on unreclaimed acreage. We believe that the language clarifying the sharp distinction between public hearings on the reclamation plan vs. the operations permit will also be very helpful. We also appreciate the Department's willingness to undertake extensive, open, constructive dialogue with the members of the Non-metallic Mining Advisory Council to develop this rule revision. WTBA wishes to thank the Department for its professionalism and continuing commitment to working with the industry to assure that nonmetallic mines are safely reclaimed in the spirit of Wisconsin environmental law.

SOURCE: WTBA

RESPONSE: The Department appreciates the comments and shares the sense that this rule revision has been the product of an open and productive process. As was the case during the original rulemaking process, the process has been candid and open and participants have been able to express their views and participate in developing solutions. The Department continues to welcome the constructive participation of the Nonmetallic Mining Advisory Committee (NMAC) in what we believe is an exemplary partnership model. It is worth saying that the Department has and continues to appreciate the efforts of the NMAC and the advice received not only during the recent rule revision process but during our regular meetings that began at the beginning of program implementation. The ability to gather on-going feedback through the NMAC, and all the stakeholders that they so aptly represent, has proven invaluable. The continued dialogue and constructive partnership has provided quality feedback and a wealth of ideas ranging from program enhancements to critical solutions. The Department looks forward to a continued partnership with the NMAC and all those they represent.

2. COMMENT: I am writing to express the support of the Wisconsin Counties Association (WCA) for the proposed changes to administrative rule NR 135. WCA is extremely appreciative of the willingness and effort put forth by you (Tom Portle) and the Wisconsin Department of Natural Resources to seek and achieve consensus among all stakeholders throughout the entire rule making process.

SOURCE: Wisconsin Counties Association (WCA)

RESPONSE: The Department wishes to specifically thank WCA for the comment. For a more complete expression of appreciation as to the process as a whole, please see the response to comment number 1.

3. COMMENT: In particular, we support the department's proposed changes to simplify and synchronize the annual report and annual payment of fees on unreclaimed acreage. This is a common sense improvement the department deserves credit for initiating. (Reference Section 26 [NR 135.36 (2)] and Section 32 [NR 135.39 (2) (a) and (b)].

We are especially pleased with the language clarifying topsoil requirements, the safety Construction & Supply and stability of final grading and slopes, and how fees are assessed on unreclaimed acreage. We believe that the language clarifying the sharp distinction between public hearings on the reclamation plan vs. the operations permit will also be very helpful.

In summary, the proposed rules are generally beneficial in that they clean up outdated provisions and clarify the existing code. However, we are concerned with some of the proposed changes and feel there are issues the proposed rules do not adequately address. Those issues and specific recommendations are outlined below

SOURCE: Aggregate Producers of Wisconsin (APW)

RESPONSE: The Department wishes to specifically thank APW for the comment. For a more complete expression of appreciation as to the process as a whole, please see the response to comment number 1.

3.1 COMMENTS: Wisconsin Legislative Council Rules Clearinghouse

There were a number of editorial comments received from Legislative Council Department. These have not been reproduced but have been incorporated into the text of the rule as appropriate. Those comments that are substantive appear in the responsiveness summary at the appropriate location.

3.2 COMMENT: "The rule repeals the definition of "registered geologist" in s. NR 135.03 (18) and create a definition of "registered geologist in s. NR 135.03 (9m). However, current ss. NR 135.56 (1) and (2) and 135.61 use the term "registered geologist" or "registered professional geologist." Should these terms be amended?

SOURCE: Wisconsin Legislative Council Rules Clearinghouse

RESPONSE: The Department agrees and the suggested changes with regard to consistent use of terms have been made.

RECLAMATION STANDARDS

Topsoil

4. COMMENT: "NR 135.09(1) Topsoil management: REMOVAL SWCD agrees that the original language should be modified, but not to the extent that all of the topsoil may be removed from the site. Change the first sentence to read: "Adequate volumes of existing topsoil and/or topsoil substitute (material) shall be managed as specified in the reclamation plan in order to achieve reclamation to the approved post-mining land use." Door County expresses reservations as to the wisdom of allowing all the topsoil to be removed from the site. Door County expresses a preference that an adequate volume of soil be maintained on-site and managed as per the reclamation plan as opposed to a scenario where an operator would need to purchase the soil at the time of site reclamation.

SOURCE Door County

RESPONSE: It is typical to require maintenance of adequate material on-site. While typical it is not a prescriptive requirement. There can be instances where the topsoil was sold prior to the NR 135 rule and where the operation is limited in space. In such cases it may make sense to purchase the soil at the time of actual reclamation. The situations is further complicated by the fact that soil is both a commodity that is included in the definition of a nonmetallic mineral and a resource necessary to achieve the approved post-mining land use. In a larger sense, an RA has a large measure of control in how arrangements for adequate soil are made in the negotiations attendant to the reclamation plan review and approval process.

Final Grading and Slopes

5. COMMENT: Final Grading and Slopes. Add the statement "The reclamation plan may designate a maximum of 25% of total length of highwalls which do not require final grading or some type of high wall reduction." Door County is concerned that the rule intention is watered down to a point where no

reclamation is required. Door County considers the current revision unacceptable and would rather that the current language remained unchanged.

SOURCE Door County

RESPONSE: There is no current basis in ch. 295, Stats., upon which to write rule language that would satisfy Door County. In the initial 1993 version of the reclamation statutes there was no clear distinction between zoning and reclamation. In fact, the original the first statutory language included the concept of a buffer zone or "setback" from a property line and read: "*Buffer areas necessary to assure appropriate final slopes after nonmetallic mining reclamation.."* However, early in the consensus rulemaking process, it was decided to make as clear a line between reclamation and zoning as possible. The revised statute (1997) reflects this distinction between reclamation and zoning and the concept of a "buffer area" was removed. The current statutory language is given in s. 295.12 (2) Stats., and it is upon this language that ch. NR 135 is based. In s. 295.12 (2) Stats., the emphasis is given on reclamation to meet *"… requirements necessary to achieve a land use specified in an approved reclamation plan …*". In any case, the main test is that the reclamation plan must demonstrate compliance with the uniform statewide reclamation standards, given in ch. NR 135, in achieving an approved post-mining land use. These performance based standards emphasize the "… stabilization of soil conditions, (and) grading the nonmetallic mining site…" (toward the end of achieving that land use). Also, the outcomes of safety and stability in achieving the approved post-mining land use are underscored.

6. COMMENT: In s. NR 135.19 (4) (j), the material in the note is substantive and should be moved into the text of the rule. This problem also occurs in ss. NR 135.20 (3) (c) and 135.21 (2). The entire rule should be reviewed for this problem.

SOURCE: Wisconsin Legislative Council Rules Clearinghouse

RESPONSE: The Department appreciates the comment and its intent in ensuring that substantive requirements are not inappropriately placed in notes. The Department disagrees that this has in fact occurred in each of the instances cited. The intention of the Department and its external advisors on the Nonmetallic Mining Reclamation Committee was to provide examples of options to enhance stability that might be employed. It is important to realize that first, there is no prescriptive requirement to employ any measure at all, that decision is made on a case-by-case basis. The note merely provides a short-list of examples for the sake of clarity. Second, even if some safety and stability measure is called for there is a wide array of options and it would be a disservice to imply, by virtue of moving to the rule text, that creative solutions might be limited to any particular list of options. The same can be said about the other notes cited. These are only a few of the many issues that would be inappropriate to consider at a reclamation hearing. The notes are provided to educate and clarify not to require or prohibit.

7. COMMENT: "NR 135.10 (3) I don't understand what this paragraph is supposed to mean. I understand that the old code says there will be a 3:1 slope around the whole structure. That was good for safety sake as there were no steep drop-offs from the edge of the entire structure. The way I read the amendment, a 3:1 slope would only be required in designated places. Unsafe. There is also a strong potential for erosion if 3:1 slopes are not used on the entire edge of the structure as it usually takes a long time for vegetation to start growing to stop erosion on the banks of the pond/lake.

SOURCE: Taylor County

RESPONSE: The revision to the grading and regrading standard does nothing to reduce or compromise the standard for reclamation. Its intent is to make the standard more clear. In the current language there is potential and in fact, have been misinterpretations as to when and what slopes are required to be 3:1. This is the only prescriptive standard in the rule. It applies specifically in two instances.1) when topsoil will be applied to a slope it cannot exceed 3:1 without a showing that soil loss and site stability will be maintained. The other place where the prescriptive requirement of a 3:1 slope comes into play is when ensuring that a safe exit is provided when the approved post-mining land use is a lake.

Revegetation and site stabilization

8. COMMENT: Revegetation and site stabilization. NR 135.12. Add the statement: "Field plot demonstrations approved as part of than approved reclamation plan are highly recommended prior to implementation of final revegetation and site stabilization."

SOURCE: Door County

RESPONSE: The Department agrees with the concept of field plot demonstrations as appropriate. In Door County suggestion the word "recommendation" is used. First, a recommendation cannot have the effect of being legally enforceable. Beyond that, not all reclamation plans and on-site conditions situations lend themselves to or justify test plots. The Department will add the language suggested by Door County in the form of a note.

Permit Application

9. COMMENT: The word "application" should be struck from NR 135.18 (1) (a). This section should read "The operator of any nonmetallic mine shall apply for and obtain a reclamation permit before beginning operations."

SOURCE: Justin Cavey Marathon County

RESPONSE: The Department agrees and has made the recommended change.

10. COMMENT: NR135.19 (2) (a) - Change the last sentence to read: "In specific instances where the existing hydro-geologic information is insufficient for the purposes of the reclamation plan, the regulatory authority may require the applicant to supplement such information with factual data and as interpretation by a licensed professional geologist or a licensed professional hydrologist."

SOURCE: Door County

RESPONSE: The Department appreciates the comment and believes that sufficient discretion already exists in the current rule. The Department believes that a Regulatory Authority (RA) may require additional information when necessary on a case-by-case basis. It is incumbent on the regulatory authority, in approving a post-mining land use and the reclamation plan designed to meet that land use, to ensure compliance with the uniform reclamation standards, including safety, while achieving the target post-mining land use. When, in the judgment of the RA, more specific information is necessary to make that compliance determination, it may require that additional information be provided in the reclamation plan.

The Department is, therefore, not in agreement that there is a need to change the rule as proposed by Door County. Rather, the Department believes that the current rule language allows for the necessary discretion while maintaining true to the current approach that is integral to the NR 135 rule and program in being performance based and non-prescriptive but still providing the necessary discretion for RAs.

11. COMMENT: NR 135.21 (2) NOTE: I understand concerns about regulating noise, traffic, blasting, etc. However, Taylor County has no comprehensive zoning so the only way we can get new pits approved is by having some conditions attached. This assists in getting pits approved for opening by the public.

SOURCE: Taylor County

RESPONSE: The Department disagrees with the assertion that non-reclamation issues ought to be addressed in the process of approving a Reclamation Plan under the NR 135 program. From the very beginning of the rule-writing process the Technical Advisory Committee (TAC) and those involved have insisted upon a clear bright line between zoning and reclamation. The Taylor County issues appears to be

a zoning issue and thus was determined in there early days of rule-writing to be not appropriate to reclamation.

Fees

12. COMMENT: Why does DNR need any fees at all? We do all the work at the local level and are required to submit fees to the DNR. Where should be no DNR fee, let alone an increase. We do all the work on the mandated program. Why does the agency that does nothing get a percentage of our fees?

SOURCE: Taylor County

RESPONSE: Current state law contains a legislative mandate that lays out the funding structure and methods of obtaining funds. It also mandates the roles of the County and the Department of Natural Resources (DNR). Because the legislature and stakeholders were interested in ensuring a level playing field, the mechanism of technical support from the Department with performance audits was put in place to ensure the desired consistency was maintained among regulatory programs statewide. Both of these functions have administrative costs. Since the legislature desired the reclamation program to be self-funding, it was required that a portion of the fees paid by operators and assessed on unreclaimed acres be collected by the RA and forwarded to the DNR to cover its costs. The costs were estimated in 1998 and it was decided that an increase to reflect inflation (although only for the period from 2000 to 2005) should be figured in. Codes are not revised often and it makes sense to put that increase in there now.

13. COMMENT: WTBA is extremely concerned that fees to pay for the regulatory oversight of non-metallic mining are fair and truly represent actual costs. In the current rule, if proposed fees exceed the fees that the Department would charge if it were the regulatory authority, a justification must be provided before they can be adopted. This key provision (found in s. NR 135.39 (4) (c)) allows operators to review the justification, and provide timely comments before the fee revisions are actually adopted. Without this justification, operators cannot provide comments based on facts and data. We believe that the Advisory Council recommended that this language be retained, and that DNR had concurred in that recommendation. Therefore, we ask that the proposed deletion of the phrase "prior to adopting them" be rejected and the current language retained.

SOURCE: WTBA

RESPONSE: The Department agrees and the existing language in s. NR 135.39 (4) (b) 2 has been preserved.

14. COMMENT: Don't have a fee table (Table 2) at all. When NR 135 was originally developed, the Department believed that in some cases, no county or municipality would come forward as the regulatory agency. For that reason, it included in the rule a Table listing fees it would charge if it were the regulatory agency. The proposed draft revision increases those fees across-the-board. As it happens the Department has never had to come forward as the regulatory agency, and we do not believe it likely that the need will occur in the future. The problem we see is that in many cases, these fees have become the de facto starting point for county or municipal fees. We are also concerned that the proposed increases will be added to existing county or municipal fees, with little analysis, the opposite of what the rule intends. Furthermore, we believe that experienced local governments dealing with multiple sites may be able to perform their responsibilities at a lower cost than DNR could, considering the travel and new training required. We believe that the best solution is to remove Table 2 and its relevant rule text completely. It is highly unlikely it will be needed in the near future. Over the long term, the Table 2 fees that would be out-of-date and require a rule change if the need arose in any case. In the rare event that DNR regulatory oversight is required, the Department can at that time propose an emergency rule to meet its obligations.

SOURCE: WTBA

RESPONSE: The Department disagrees with removing Table 2 from the rule for two reasons. First, the Department must always be in a position to act rapidly if it is required to administer a county nonmetallic mining reclamation program. In that eventuality, the Department must become the RA as required by s. 295.18 (4), Stats. When noncompliance of a county is determined based on an audit and after a "Noncompliance Hearing", the Department " … shall administer the nonmetallic mining reclamation program in that county, including the collection of fees, review and approval of plans …". A major need for Table 2 was and continues to be to define the fees that the Department would collect in order to administer the program as required by s. 295.18 (4), Stats. The current codified fee table both provides transparency and ensures that the Department has the necessary resources available to assume a county program in a timely manner and is thus integral to the goal of maintaining a "level playing field."

Secondly, it should be noted the concept of using Table 2 in s. NR 135.39 (4) (c) as a de facto fee ceiling on fees assessed by RAs, as was mentioned in a previous comment, is still needed. Thus, it is necessary that Table 2 (with reasonable increases to reflect current economic conditions) appear in the rule. Table 2 both provides a benchmark as well as an important tool for operators who wish to consider objections to the adoption of fees proposed by the RA. In such a case it would be a main factor used to support an operator's objection to the fee increase based upon "facts and data".

Report to NRB on Reasonableness of Fees - NR 135.39 (5)

15. COMMENT: As noted above, WTBA members are committed to paying the fair cost for regulatory oversight. However, we also believe that in this era of tight local budgets, we need a mechanism to periodically review and compare fees, and evaluate their reasonableness. We also believe that as local governments become fully trained and more proficient in their responsibilities, savings might accrue. We do not believe that 10-year audits will be effective in addressing this concern. The time span is too long, and the focus is internal, rather than on comparative costs. Therefore, we are recommending that the Department include a provision that assures a regular evaluation of fee structures, to provide confidence that the fees are fair and appropriate.

SOURCE: WTBA

RESPONSE: Please see response to comment number 17.

16. COMMENT: In addition, by codifying a future report on fees and expenditures, the department will also be required to provide cost justification for its fees. Given the roughly 16% increase in department fees contained in the proposed rule; we feel that requiring such a report is reasonable.

SOURCE: APW

RESPONSE: Please see response to comment number 17.

17. COMMENT: NR 135.39 (7) Report to Natural Resources Board. We are requesting that the Department make the following change to NR 135: Within 36 months after the effective date of this rule (revisor inserts date), and within each 5 year period thereafter, the department shall submit to the natural resources board a report on whether the non-metallic mining reclamation revenue, expenditures and fees established by this section and by other regulatory authorities are reasonable. The report shall be prepared in consultation with the nonmetallic mining advisory committee established under NR 131.51.

SOURCE: WTBA & APW

RESPONSE: The Department agrees and will amend the existing language as suggested rather than repeal it. The request that there be a process whereby a fee report to the Natural Resource Board (NRB) would occur at least once every 5 years so as to provide confidence that fees are fair and appropriate seems reasonable. A previous report to the NRB in 2003 was done and was of benefit to all stakeholders. Although Department resources will be required, the benefit of having a regular and open reporting process is clear. A regular report to the NRB will help to facilitate state-wide consistency and

will serve to bolster the peace of mind of stakeholders. Since preparing the report would involve working with the Nonmetallic Mining Advisory Committee (who represent basically all the major stakeholders) it will serve to keep the fee assessment matter transparent and would support accountability for all involved.

Dispute Resolution NR 135.52

18. COMMENT: DNR doesn't need to be involved if there are issues that need to be resolved between the operator and the County administering agency. The matter is now forwarded to the Zoning Committee and if there is no resolution, the matter is handled under s. 68.11 Stats. If DNR wants the county to administer program, let them do so. We don't need another step in the process that will add more time and work.

SOURCE: Taylor County

RESPONSE: The dispute resolution is in the current consensus based code and continues to be favored by most stakeholders. In fact, the Department has been advised by the Nonmetallic Mining Advisory Committee to further develop the dispute resolution process and that advice is reflected in current proposed rule language. Still at issue is industry's contention that the proposed revision does not go far enough. Industry has expressed its desire that the DNR be in a position of rendering a binding opinion as opposed to an advisory opinion (see APW and WTBA comments to follow).

19. COMMENT: Door County supports the proposed changes to dispute resolution.

SOURCE: Door County

RESPONSE: The Department appreciates the comment.

20. COMMENT: So as to ensure consistency among RAs in statewide administration of NR 135 program there needs to be ability for the DNR to render binding opinions as opposed to advisory opinions on dispute resolution pursuant to NR 135.52. The current reclamation program does not have an effective dispute resolution mechanism for dealing with disputes between a regulatory authority and a nonmetallic mine operator. Currently, the department may audit and ultimately take over administration of the reclamation program if it determines that a county is not complying with Chapter NR 135. However, this is too large a club and too cumbersome a process to effectively address code interpretation issues. Such issues are inevitable in a program that relies on multiple regulatory authorities to administer what is supposed to be a uniform statewide program. The department simply needs a better tool to enforce consistency and compliance issues. The remedy, in our view, is to incorporate a mechanism that either party can use to have the department effectively arbitrate specific instances of dispute. WTBA strongly believes that a final dispute resolution is imperative. The Department is responsible to enforce consistency and compliance. (To provide a better dispute resolution process) the department proposes to repeal and recreate NR 135.52 in partial recognition of the issue. While those changes represent an improvement over the current code - the provision falls short of an effective dispute resolution process. As proposed, the department's opinion is advisory only, has no real weight, and does little to ultimately resolve a dispute. The department is responsible for ensuring uniform administration of the program; it should not shirk that responsibility through a process that allows it's technical or administrative opinion to be ignored.

While WTBA appreciates the positive steps incorporated in a recreated NR 135.52. However, it is still true that the Department's opinion is only advisory. From our viewpoint, this key concern remains unresolved.

SOURCE: APW & WTBA

RESPONSE: Please see response to comment number 22.

21. COMMENT: We understand that the department has taken the position that it lacks statutory authority to implement binding dispute resolution through rulemaking. We don't necessarily agree with that conclusion but recognize that additional policy direction may be needed in order to have this matter addressed. Toward that end, we encourage the Natural Resources Board and the standing committees of the Legislature to independently review the merits of the issue and the question of statutory authority to provide policy direction on how best to provide a workable dispute resolution mechanism in the reclamation program.

SOURCE: APW

RESPONSE: Please see response to comment number 22.

22. COMMENT: So as to ensure consistency among RAs in statewide administration of NR 135 program there needs to be an ability for the DNR to render binding opinions as opposed to advisory opinions on dispute resolution pursuant to NR 135.52. Therefore, we are asking that the following provision be added: NR 135.52 (4) The opinion rendered under sub. (2)(c) shall be a binding decision on the regulatory authority and mine operator involved inn the dispute and shall constitute an order of the department.

SOURCE: WTBA and APW. The same rule language is proposed by both organizations.

RESPONSE: The Department appreciates the spirit behind WTBA's and APW's suggestions, namely to allow for speedy resolution of disputes. However, after a legal analysis we conclude that the suggested addition is not authorized by, and runs counter to, Wisconsin law. The Legislature has required in s. 295.12(3)(d), Stats., that NR 135 include a provision for disputes between mine operators and regulatory authorities to be reviewable under "a contested case hearing under s. 68.11 on the issuance, modification or denial of a contested hearing under s. 68.11 [Stats] . . . "

Establishing a separate review process and binding Department decision is entirely different from, and counter to, this statutorily-defined dispute resolution process. Review under ch. 227 is also counter to the review process under s. 68.11 set out in s. 295.13(2) (d), Stats. Therefore, the Department believes that creating the proposed rule subdivision would violate the Legislature's direction in s. 227.10(2), Stats., that "No agency may promulgate a rule that conflicts with state law."

Further, the Department believes that the proposed dispute resolution process reflects the agreements and principles that the original Technical Advisory Committee and the Governor's Nonmetallic Mining Council. These bodies worked with the Department from 1994 to 2000 in crafting a consensus based reclamation rule. The Department believes that proposed revision is in keeping with the philosophy and advice of stakeholders involved in the original rule making process and generally represents the advice of the current Nonmetallic Mining Advisory Committee (NMAC). In fact, the Department was asked by the NMAC and advised by the NMAC in the process of the proposed revision to the dispute resolution process and that advice is reflected in current proposed rule language.

The Department would be remiss if it did not acknowledge that there are philosophical and pragmatic arguments that demonstrate that a binding resolution is not compatible with either the principles that support the existing regulatory framework or what we believe to be the original Legislative intent, that is to clearly favor local control in the administration of nonmetallic mining reclamation programs. A binding resolution and Department Order would certainly be perceived by counties as undercutting their authority would likely contribute to a more adversarial atmosphere at the expense of the current relationship based upon partnership. For these reasons the Department is concerned that the binding resolution approach, while not without certain advantages, would be a too great a departure from the current philosophical underpinnings of the program.

The Department appreciates the concerns expressed by WTBA and APW and understands the desire to have a clear decision both in terms of timeliness in the approval processes and in terms of consistent programs administration. The Department remains committed to working towards an optimum balance

between consistency and flexibility in the administration of programs across the state. The Department believes that the revised process dispute resolution will a major tool in striking that balance and provides a much improved dispute resolution process.

23. COMMENT: To assure a full evaluation of this issue, we are requesting that the Board approve this provision and forward it to the Legislature. This will trigger an independent evaluation of this important issue and, If necessary, define the required statutory change to enable it.

SOURCE: WTBA

RESPONSE: The Department acknowledges WTBA's comment.

24. COMMENT: "… we encourage the Natural Resources Board and the standing committees of the Legislature to independently review the merits of the issue and the question of statutory authority and provide policy direction on how best to provide a workable dispute resolution mechanism in the reclamation program."

SOURCE: APW

RESPONSE: The Department acknowledges APW's comment.

25. COMMENT: WTBA is also requesting that the proposed Note under NR 135.52 be deleted and replaced with a Note that the Department's decision may be appealed by either party under the standard administrative appeals process.

SOURCE: WTBA

RESPONSE: The current note supports the proposed revision. Should the Department proceed with rule changes where a "binding resolution" is to be put in place the comment would be accepted.

Financial Assurance - (Language to harmonize ch. NR 340, Nonmetallic Mining and Reclamation Associated with Navigable Waterways and Adjacent Areas with ch. NR 135

26. COMMENT: APW expresses: "… support inclusion of changes to NR 340 relating to financial assurance to update the current code so that it is consistent with current statutes."

SOURCE: APW

RESPONSE: The Department appreciates the comment and believes that operators will be well served by this revision.

27. COMMENT: In s. NR 340.005 (3) (e), it is unclear how operators will be able to determine the amount of financial assurance "based on 1989 dollars." Can the department provide information in the rule?

SOURCE: Wisconsin Legislative Council Rules Clearinghouse

RESPONSE: The Department has included a note in s. NR 340 (3) (e). The source of the note is the Waterway and Wetland Handbook, Chapter 105, "NONMETALLIC MINERAL MINING AND RECLAMATION." The note reads as follows:

Note: The base of 1989 dollars requires that the bonding level must be adjusted to reflect inflation or the cost of living increases. For 1992, the inflation of 4.6 % for 1989, 6.1% for 1990 and 3.1% for 1991, or a total of 14% (1.046 x 1.061 x 1.031 = 1.144) must be added to the listed rates resulting in amounts of $ 2280 per acre or $ 0.285 per cubic yard. For permits issued after 1992, remember to correct for cost of living adjustments for all years back to 1989.